S.C.C. Court File No.:

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

APPLICANT
(Appellant)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, JOSEPH PETER PAUL GROIA

(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985. c. S-26 as am. 1990, c. 8 and Rule 25 of the *Rules of the Supreme Court of Canada*)

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"An advocate in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion"[1]

A. INTRODUCTION AND OVERVIEW

1. The Applicant saved his client John Bernard Felderhof from lengthy incarceration by successfully defending him from quasi-criminal charges arising out of the collapse of Bre-X Minerals Ltd. As matters turned out, he did so at great "hazards and costs" to himself and to all defence lawyers in Canada. In *Doré v. Barreau du Québec*,[2] this Court considered the scope of a lawyer's obligation to act in a civil manner outside of a courtroom. This case considers the issue of civility inside a courtroom and in doing so addresses the roles of judges, lawyers, law societies and the rights of accused persons. The Applicant has been found guilty of professional misconduct for acting in an uncivil manner in certain of his submissions to the court in the course of defending Mr. Felderhof in a criminal case. It is noteworthy that the Applicant was never criticised by the presiding trial judge, whose direction he invariably followed. The issues on this proposed appeal engage the intersection of the duty of civility with judicial independence, freedom of expression for lawyers (and their clients) while acting in court, and the right of all accused persons to make full answer and defence through a fearless and zealous advocate. Put succinctly, if the judgments of the courts below stand, can it still be said that lawyers in Canada "must go on reckless of consequences" even though that means that they may be convicted of professional misconduct?

2. At the heart of this proposed appeal are three matters of critical importance to the administration of justice in Canada:

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[1] Lord Henry Brougham, *The Trial of Queen Caroline*, Ed. J. Nightingale (London: J. Robins & Co., Albion Press 1820-1821) vol. 2, p. 8, as cited in David Luban, "The Adversary System Excuse." *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, Ed. David Luban (Totowa, New Jersey: Rowman & Allenheld, 1984), at p. 86 [Application Record, Vol. II, Tab 21]

[2] 2012 SCC 12, [2012] 1 S.C.R. 395 ["*Doré*"]

(i) Is it constitutionally permissible for a law society, or a court reviewing a law society's decision on appeal, to discipline a lawyer for in court conduct that is not faulted by the trial judge? This is an issue of public and national importance. It is of fundamental significance to the administration of justice in Canada. Any law society review of a lawyer's conduct in open court will inevitably impair the ability of Canadian judges to conduct proceedings without interference.

(ii) What limits, if any, should be placed on a lawyer's freedom of expression when defending a client in a court of law (in this case from a serious criminal charge)? The determination of whether and when a lawyer's courtroom conduct is subject to law society regulation is an issue that affects the legal profession, the judicial system and the public. It is also an issue of public and national importance.

(iii) What is the boundary line that divides passionate, aggressive and zealous advocacy from professional misconduct? How can defence lawyers fulfil their duty to criticise prosecutors and the state when, in their view, such criticism is justified? Can a rule of professional misconduct that weighs heavily on the shoulders of defence lawyers withstand *Charter* scrutiny?

3. Joseph Peter Paul Groia (the "**Applicant**") seeks leave to appeal to this Court from a split decision of the Court of Appeal for Ontario (the "**ONCA**") dated June 14, 2016.[3] The majority affirmed (on materially different grounds) the decision of the Ontario Divisional Court dated February 2, 2015.[4] These two decisions affirmed the decisions of a Law Society of Upper Canada (the "**LSUC**") Appeal Panel dated November 28, 2013 and March 21, 2014, in which the Applicant was found guilty of professional misconduct. The LSUC Appeal Panel imposed a one month suspension and ordered that the Applicant pay costs in the amount of $200,000 to the LSUC.[5] The LSUC Appeal Panel's decision disregarded the findings of professional misconduct

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[3] *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 ["*ONCA Reasons*"] [Application Record, Vol. II, Tab 14]

[4] *Groia v. The Law Society of Upper Canada*, 2015 ONSC 686 ["*Divisional Court Reasons*"] [Application Record, Vol. I, Tab 10]

[5] *Groia v. The Law Society of Upper Canada*, 2013 ONLSAP 41 ["*LSUC Appeal Panel Reasons*"] [Application Record, Vol. I, Tab 6]; *Groia v. The Law Society of Upper Canada*, 2014 ONLSTA 11 [Application Record, Vol. I, Tab 8]

made against the Applicant by the LSUC Hearing Panel and conducted a hearing *de novo*. It overturned the Hearing Panel's two month suspension and costs award.[6] That at each stage of this proceeding the prior decisions have been criticised or overturned by a reviewing court or panel illustrates the uncertainty and confusion surrounding this area of the law. Clarity is needed.

4. This proposed appeal raises several critical matters: first, when, if ever, can a law society discipline a lawyer for professional misconduct arising out of that lawyer's conduct while acting as an advocate in court for a client in a criminal or civil case? This matter addresses the right of the public to an independent judiciary that has the ultimate say in how to control and conduct proceedings in its courtrooms. The ONCA majority decision allows the LSUC to meddle with the independence mandated to superior courts by s. 96 of the *Constitution Act*,[7] and favours the provincial legislature's delegated decision-maker. It raises significant concerns for judicial independence and the right of the public to an independent adjudication of their cases. It engages the duty and ability of trial judges to conduct and control proceedings in their courtrooms and the lawyer's right to follow and rely upon the rulings of the court, without either the judge or the lawyer being "second-guessed" by a law society after the fact.

5. The second matter involves the right of clients and their lawyers to freedom of expression in a courtroom. This freedom is an essential part of the right to make full answer and defence in a criminal case. Accused persons will ultimately suffer if counsel's speech is restricted by the spectre of an after the fact vague civility test which fails to give proper consideration to the role of the trial judge and the manner in which he or she conducts the trial.

6. Third, clients have the right to demand the duties of loyalty and zealous advocacy from their lawyers; duties that are essential to the proper functioning of Canadian justice. The ONCA majority decision falls well short of protecting zealous advocacy, by allowing law societies to interfere with and second-guess a lawyer's representation of his or her client, without regard for the critical role of the trial judge in the trial process and without setting out a clear test for the boundaries of zealous advocacy. Lawyers must be allowed to engage in zealous advocacy in

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[6] *Groia v. The Law Society of Upper Canada*, 2012 ONLSHP 94 ["*LSUC Hearing Panel Reasons*"] [Application Record, Vol. I, Tab 3]; *Groia v. The Law Society of Upper Canada*, 2013 ONLSHP 59 [Application Record, Vol. I, Tab 4]

[7] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [the "*Constitution Act*"]

Canadian courtrooms free of the chilling effects of after the fact interference by a law society. Any limits on that advocacy should come directly or indirectly from the trial judge; not years later by a regulator trying to assess what transpired in a courtroom from a paper record.

7. Finally, this proposed appeal will consider whether it was constitutionally permissible for the ONCA majority to defer to a LSUC panel decision regarding professional misconduct for in court conduct, when the trial judge before whom the conduct occurred found no fault with it. This issue engages the balancing of the role of trial judges to supervise and discipline lawyers as officers of the court with law society regulation of the legal profession. The only constitutionally permissible standard of review applicable to a judicial review of this type of law society panel decision is correctness. Only a correctness standard will fairly recognize the independence of the judiciary and will ensure that judges before whom counsel appear remain in the best position to judge the appropriateness of counsel's trial conduct.

8. These issues are of fundamental importance to all Canadians. They are also of first instance in this Court.

B. BACKGROUND

The Felderhof Trial

9. The collapse of Bre-X Minerals Ltd. was the result of one of the largest frauds ever perpetrated in the Canadian capital markets. Canadians and other investors lost over $6 billion. John Bernard Felderhof ("**Mr. Felderhof**") was the only person to ever be charged in connection with this fraud.[8] The Ontario Securities Commission (the "**OSC**") charged him with eight counts of violating the Ontario *Securities Act*. He faced a lengthy period of incarceration if convicted.

10. Mr. Felderhof retained the Applicant because he wanted an aggressive lawyer and someone who could understand geological data; Mr. Felderhof knew his prosecution would be a complicated one and that his liberty, fortune and reputation were all at stake.[9] After a 160 day "hard fought"[10] trial before Justice Peter Hryn of the Ontario Court of Justice, Mr. Felderhof was

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[8] *Divisional Court Reasons*, at para 5 [Application Record, Vol. I, Tab 10]
[9] *LSUC Hearing Panel Reasons*, at para 31 [Application Record, Vol. I, Tab 3]
[10] *LSUC Appeal Panel Reasons*, at para 15 [Application Record, Vol. I, Tab 6]

acquitted on the merits, on all counts.[11] The Applicant's successful defence of Mr. Felderhof led to the LSUC's unprecedented and relentless prosecution of him – despite the LSUC never having received a complaint about his behaviour from anyone; not the trial judge, the prosecutors, the reviewing courts or the OSC.

11. The circumstances of the trial and the trial record in this case clearly illustrate three critical points: (1) the importance of zealous advocacy when defending a client's liberty; (2) that all of the Applicant's alleged incivility arose entirely in the course of submissions he made to the trial judge; and (3) that Justice Hryn was not a passive trial judge. Rather, he regularly used his powers to control the courtroom and to guide the behaviour of counsel, so as to ensure a fair trial.

12. The admissibility of documents was a contentious issue throughout the trial. Before and during the trial, Mr. Felderhof's defence team had a growing concern that counsel for the OSC were not meeting their *Stinchcombe* prosecutorial obligations of full and fair disclosure. Concerned for his client's liberty and reputation, and in light of his objectively reasonable concerns, in the course of the trial the Applicant raised the possibility that he might move for a stay based upon prosecutorial misconduct. After raising the concern a number of times, he then followed Justice Hryn's direction that he should raise a "standard objection" on which Justice Hryn would later rule.[12] He assiduously followed the trial judge's direction.

The Judicial Review Application

13. On April 17, 2001, after seventy days of trial, the OSC brought an application for prohibition and *certiorari* seeking the removal of Justice Hryn for, among other things, an alleged failure to control the uncivil conduct of the Applicant.[13] The application in the Superior Court was heard by Justice Archibald Campbell. He dismissed the OSC application on October 31, 2002 and found that Justice Hryn had not lost jurisdiction.[14] He said that neither side in the

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[11] *Divisional Court Reasons*, at para 6 [Application Record, Vol. I, Tab 10]; *LSUC Appeal Panel Reasons*, at para 19 [Application Record, Vol. I, Tab 6]

[12] *LSUC Appeal Panel Reasons*, at para 77 [Application Record, Vol. I, Tab 6]

[13] *LSUC Appeal Panel Reasons*, at para 107 [Application Record, Vol. I, Tab 6]

[14] Reasons for Decision of Campbell J, dated October 31, 2002 ["*Reasons of Campbell J.*"], at para 7 [Application Record, Vol. II, Tab 17]

case had "any monopoly over incivility or rhetorical excess."[15]

14. The ONCA dismissed the OSC appeal from Justice Campbell's decision on December 10, 2003. The ONCA held that Justice Hryn had not lost jurisdiction and that the OSC had not lost its right to a fair trial.

15. The judges of both reviewing courts made *obiter dicta* comments that were critical of the Applicant's conduct (and of conduct of OSC counsel) during the Felderhof trial. The Applicant and Mr. Brian Greenspan, co-counsel for Mr. Felderhof on the judicial review application, both testified that they did not mount a defence to the OSC's allegations against the Applicant because it was not in Mr. Felderhof's interest to do so.[16]

16. Following the reviewing courts' decisions, the Felderhof trial continued for another ninety days without further incident, ultimately resulting in Mr. Felderhof's acquittal. Justice Hryn complimented the Applicant and the new OSC prosecutor at the end of the case saying that their work was of a "high industry standard".[17]

The LSUC Hearing

17. Following the ONCA decision in February 2003, the LSUC began its investigation of the Applicant based on a newspaper report of the reasons. However, no investigation was ever carried out into the merits of the Applicant's conduct. The LSUC interviewed no one involved in Phase 1 of the trial, not even the prosecutors. LSUC counsel monitored the Applicant's conduct when the Felderhof trial resumed on December 6, 2004. Despite knowing that he faced possible professional disciplinary proceedings by the LSUC, the Applicant continued his zealous defence of Mr. Felderhof. When Mr. Felderhof could no longer pay for that defence, the Applicant and the defence team continued their representation of him for several years without being paid.

18. In late 2009, the LSUC commenced a prosecution against the Applicant. The hearing lasted for 19 days over the course of nine months between August 2011 and April 2012. The LSUC called no witnesses. It relied only on the trial transcripts and the judicial review

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[15] *Reasons of Campbell J.*, at para. 264 [Application Record, Vol. II, Tab 17]
[16] *LSUC Appeal Panel Reasons*, at para. 198 [Application Record, Vol. I, Tab 6]
[17] *Final Oral Decision of Hryn J. of July 31, 2007*, p. 2 ln. 13-24 [Application Record, Vol. II, Tab 20]

proceedings. It maintained, as it did up to and during the Divisional Court hearing, that it was an abuse of process for the Applicant to even try to defend himself. Its position was that he had essentially been found guilty of professional misconduct by the reviewing courts (in proceedings to which he was not a party) and all that remained was for the LSUC to rubber stamp his conviction and sentence him.[18] The Applicant testified for many days and called seven witnesses to support his defence.

19. The LSUC Hearing Panel found the Applicant guilty of incivility and professional misconduct. The Hearing Panel relied almost exclusively on the comments of the reviewing courts for the findings upon which it convicted the Applicant. It accepted the LSUC submission that it was an abuse of process for him to defend himself in the face of those comments.[19] It suspended his licence for two months and ordered him to pay the LSUC nearly $250,000 in costs.

The LSUC Appeal Panel

20. The Applicant appealed the decision and penalty to a LSUC Appeal Panel. It concluded that the Hearing Panel had made fundamental errors and that no deference was owed to its findings. The Appeal Panel nevertheless upheld the conviction for different reasons.[20] It reduced the Applicant's penalty to a one month suspension and arbitrarily decreased the costs award to $200,000, without providing meaningful reasons.

21. The Appeal Panel reviewed the Applicant's conduct throughout various stages of the trial and made findings as to whether particular submissions he made to the trial judge were uncivil or improper in themselves, whether certain submissions became uncivil in a given context, and whether they constituted professional misconduct. However, as later recognized by the Divisional Court,[21] the Appeal Panel failed to formulate and apply a test that went far enough to protect the importance of zealous advocacy. More importantly, as noted by Brown J.A. in dissent in the ONCA, it failed to take into account the trial judge's actions with respect to the conduct of

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[18] *LSUC Appeal Panel Reasons*, at paras. 200-201 [Application Record, Vol. I, Tab 6]
[19] *LSUC Hearing Panel Reasons*, at para 137 [Application Record, Vol. I, Tab 6]
[20] *LSUC Appeal Panel Reasons*, at para 10 [Application Record, Vol. I, Tab 6]
[21] *Divisional Court Reasons*, at para 72 [Application Record, Vol. I, Tab 10]

the Applicant and his response to the trial judge's direction.[22]

22. While the Appeal Panel corrected many of the most egregious errors in the Hearing Panel's reasons, it continued to ignore or disregard important evidence, including that the Applicant had a reasonable basis for his submissions on prosecutorial misconduct (though it proceeded on the assumption that he had an honest belief in them),[23] that he at all times acted in accordance with the direction of the trial judge and that all the impugned conduct occurred in the course of submissions made to the trial judge.

The Divisional Court Decision

23. The Applicant appealed the decision of the Appeal Panel to the Divisional Court. The LSUC brought a cross-appeal as to whether the reasons of the reviewing courts were admissible as evidence of the Applicant's professional misconduct, and whether the penalty and costs sanctions imposed by the Hearing Panel should be restored.

24. On February 2, 2015, Nordheimer J. released the decision of the Divisional Court on the appeal and on the cross-appeal. The Divisional Court found that the Appeal Panel's test for when incivility becomes professional misconduct did not go far enough to protect zealous advocacy, and formulated a new test as described below. Nevertheless, it said the application of the more rigorous test would not have made any difference in this case and upheld the decision of the Appeal Panel.[24] It also dismissed the cross-appeal.[25] The Divisional Court awarded the LSUC costs of $30,000.

25. The Divisional Court recognized the public importance of the issues in the appeal when it noted that "the issues raised in the proceedings involving the appellant have raised matters of significant concern to the profession, including the obligation of lawyers to fearlessly represent

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[22] *ONCA Reasons*, at paras. 360-368 [Application Record, Vol. II, Tab 14]

[23] The LSUC Appeal Panel agreed that allegations of prosecutorial misconduct do not rise to the level of professional misconduct if they are made in good faith and have a reasonable basis and it proceeded on the assumption that the Applicant had an honest belief in those allegations (*LSUC Appeal Panel Reasons*, at paras. 235 and 238 [Application Record, Vol. I, Tab 6])

[24] *Divisional Court Reasons*, at para 72 [Application Record, Vol. I, Tab 10]

[25] *Divisional Court Reasons*, at para. 120-141 [Application Record, Vol. I, Tab 10]

their clients."[26] The Divisional Court observed that when the interests of zealous advocacy and civility conflict "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."[27]

26. The Divisional Court established a new test for when uncivil conduct would amount to professional misconduct. It held that the test would be met when the conduct "calls the administration of justice into disrepute."[28] Nordheimer J. wrote that "[o]f special concern is any such conduct that could ultimately result in a decision that would amount to a miscarriage of justice."[29]

27. The Divisional Court held that the standard of review of the test formulated by the Appeal Panel was correctness, but that the standard of review for its application of that test was reasonableness. The Divisional Court undertook no analysis of whether the standard of review should be different when considering conduct that occurs in open court as opposed to conduct outside of a courtroom.

The ONCA Decision

28. The Applicant was granted leave to appeal the decision of the Divisional Court by the Court of Appeal. The appeal was heard over three days in December 2015. There were seven intervenors. The Court of Appeal released its split decision on June 14, 2016. Cronk J.A., writing for the majority, dismissed the appeal and awarded no costs. Brown J.A. wrote a lengthy dissent, in which he would have allowed the appeal, dismissed the complaints against the Applicant, and awarded him some costs.

29. In dismissing the appeal, there were several important statements, both by the majority and the dissent, indicating the significant public importance of the issues before it. For example, Cronk J.A. stated:

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[26] *Divisional Court Reasons*, at para. 61 [Application Record, Vol. I, Tab 10]
[27] *Divisional Court Reasons*, at para 71 [Application Record, Vol. I, Tab 10]
[28] *Divisional Court Reasons*, at para 75 [Application Record, Vol. I, Tab 10]
[29] *Divisional Court Reasons*, at para 76 [Application Record, Vol. I, Tab 10]

> [this appeal] raises important issues about the requirements for professionalism in the conduct of litigation, the test for establishing professional misconduct for uncivil behaviour, and the roles of the Law Society and the courts in addressing an advocate's uncivil conduct in court towards opposing counsel.[30]
>
> ...
>
> this appeal engaged issues of significant importance to the legal profession and the public. In my view, guidance from this court on the issues raised was both necessary and appropriate.[31]
>
> ...
>
> the nature and scope of an advocate's professional duties in relation to in-court conduct have a significant impact on our adversarial system of justice and that the advocate's ability to properly discharge those duties plays an essential role in fostering public confidence in the administration of justice.[32]

30. Brown J.A. agreed with Cronk J.A. regarding the public importance of the issues raised:

> This is a dissent, so my task is to identify where I disagree with my colleague's analysis and why. However, before explaining the where and the why, I wish to stress that I agree, unreservedly, with her description of the role civility plays in our litigation system. Specifically, I agree with the view she expresses at para. 119:
>
> > Civility is not merely aspirational. It is a codified duty of professional conduct enshrined in the Conduct Rules and, as repeatedly confirmed by the courts, an essential pillar of the effective functioning of the administration of justice. In Ontario, at least, its necessity and importance in our legal system is now settled law.
>
> Our disagreement, therefore, lies not in the continued importance of civility to the health of Ontario's legal system. Our disagreement lies in how to determine when a barrister's in-court conduct amounts to professional misconduct because it is uncivil.[33]

31. The majority disagreed with the new test formulated by the Divisional Court and restored the vague test of the Appeal Panel. It found that a deferential standard of reasonableness applies to a review of a decision by a law society panel with respect to professional misconduct, regardless of whether the alleged misconduct took place in open court or outside the courtroom.

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[30] *ONCA Reasons*, para. 4 [Application Record, Vol. II, Tab 14]
[31] *ONCA Reasons*, para. 242 [Application Record, Vol. II, Tab 14]
[32] *ONCA Reasons*, para. 75 [Application Record, Vol. II, Tab 14]
[33] *ONCA Reasons*, paras. 254-255 [Application Record, Vol. II, Tab 14]

It upheld the one month suspension and the $200,000 + $30,000 in costs that the Applicant was ordered to pay.

32. Brown J.A. dissented. He held that a correctness standard of review should apply where a law society panel deals with allegations of professional misconduct involving a lawyer's conduct in a courtroom before a presiding judge. Importantly, he noted that the context of the issues raised "engages the contours of the constitutional relationship between the courts and government regulators."[34] He found that the Appeal Panel's decision could not survive review on either a correctness or reasonableness standard, because it failed to give any meaningful consideration to the rulings of the trial judge and the Applicant's response to those rulings in determining that the Applicant had engaged in professional misconduct.

33. Brown J.A. formulated a three part test to be applied to an allegation of professional misconduct before a court:

> [A]ny inquiry into whether a barrister's in-court conduct amounts to professional misconduct takes into account three main factors:
>
> (a) What the barrister did;
>
> (b) What the presiding judge did about the barrister's conduct and how the barrister responded to the directions of the presiding judge; and
>
> (c) What effect the conduct complained of had on the fairness of the in-court proceeding, including the ability of the opposing side to present its case.[35]

34. The Applicant's one month suspension and the costs awards against him have been stayed by the ONCA pending the application for leave to appeal to this Court.

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[34] *ONCA Reasons*, para. 312 [Application Record, Vol. II, Tab 14]
[35] *ONCA Reasons*, para. 319 [Application Record, Vol. II, Tab 14]

PART II – STATEMENT OF ISSUES

35. This applicant seeks leave to appeal the following issues of public and national importance and of fundamental significance to the administration of justice in Canada:

ISSUE #1: When, if ever, can a law society discipline a lawyer for professional misconduct arising out of a lawyer's submissions to a judge in open court, while acting for a client?

ISSUE #2: Is it constitutionally permissible for a reviewing court to defer to a law society panel decision regarding professional misconduct in a courtroom when that conduct is not faulted or complained about by the presiding judge?

36. The issue of when, if ever, a law society can discipline a lawyer for professional misconduct arising out of that lawyer's submissions while acting as an advocate in court for a client should be addressed by this Court because:

(a) it engages the duty and ability of trial judges to conduct and control proceedings in their courtroom, without fear of being second-guessed by a law society;

(b) it engages the rights of clients and their lawyers to freedom of expression in a courtroom to make full answer and defence in a criminal case and to present their position in a civil case; and

(c) it engages the duty of zealous advocacy by lawyers, free of the chilling effects of after the fact interference by a law society.

37. The issue of whether it is constitutionally permissible for a reviewing court to defer to a law society decision regarding professional misconduct in a courtroom before a judge should be addressed by this Court because:

(a) it engages in the balancing of the role of trial judges to supervise and discipline lawyers as officers of the court with the regulation of the legal profession by law societies; and

(b) it has never been previously addressed by this Court.

PART III – STATEMENT OF ARGUMENT

ISSUE #1: When, if ever, can a law society discipline a lawyer for professional misconduct arising out of a lawyer's submissions to a judge in open court, while acting for a client?

38. Law societies and trial judges both play important roles in the proper functioning of the Canadian legal system. The issue on this proposed appeal is whether, when and how a trial judge's ability to conduct and control the proceedings before him or her can be second guessed by a law society through its power to regulate lawyers. This concern goes to the core of the legal system and is of vital national importance.

39. This Court has confirmed the constitutional requirement that prevents provincial legislators from delegating to regulators those issues which section 96 of the *Constitution Act* has given to the superior courts.[36] This constitutional requirement is essential to ensuring that litigants in Canada have the full protection of an independent judiciary.[37]

40. In its decision, the ONCA majority failed to adequately consider the constitutional underpinning of the issue before it. Its decision creates uncertainty as to the proper roles of the courts and administrative bodies within the Canadian constitution, to the detriment of the Canadian public. This Court should clarify that the power of trial judges to conduct and control proceedings in their courtrooms is not to be second-guessed by a regulator. This issue should be considered through a constitutional lens. A clear delineation of who has the ultimate say regarding the in-court conduct of a lawyer making submissions to a trial judge is essential to the administration of justice.

41. This proposed appeal also engages the freedom of expression of lawyers, and through their lawyers, of clients, to advocate their cases in court. This Court held in *Doré* that the severity of the conduct of counsel "must be interpreted in light of the expressive rights guaranteed under the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves."[38] When the constitutional guarantee of freedom of expression of clients through their counsel is added to the fundamental importance of counsel's duty of zealous representation,

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[36] *Dunsmuir v. New Brunswick*, 2008 SCC 9 ["*Dunsmuir*"], at para. 127
[37] *Dunsmuir*, at para. 128
[38] *Doré*, at para. 63

should there be any circumstance where a lawyer can face disciplinary hearings as a result of his or her submissions in open court, when he or she followed the court's direction?[39]

42. Justice Cory's exposition of the importance of s. 2 (b) of the *Charter* in *R. v. Kopyto*[40] emphasizes the importance of freedom of expression and is applicable to submissions made by advocates in open court:

> Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. [...] So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very life-blood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.[41]

43. The importance of these issues is accentuated where, as here, the Applicant performed his duty to his client to criticize what he honestly believed was the state's abuse of power against an accused who faced incarceration.[42] Such expression lies at the core of protected speech.[43] Brown J.A. said:

> [T]he interests at stake in a criminal trial are extraordinarily serious, with the conviction of the accused possibly resulting in the loss of his or her liberty. The image of defence counsel as standing between the accused individual and the

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[39] A trial judge has several available remedies to address any misconduct by counsel in the courtroom including giving directions to counsel in court or in chambers, making a finding of contempt and making a complaint to a law society.

[40] 1987 CanLII 176 (ON CA) ["*Kopyto*"]

[41] *Kopyto*, at para. 194

[42] The LSUC Appeal Panel agreed that allegations of prosecutorial misconduct do not rise to the level of professional misconduct if they are made in good faith and have a reasonable basis and it proceeded on the assumption that the Applicant had an honest belief in those allegations (*LSUC Appeal Panel Reasons*, at paras. 235 and 238 [Application Record, Vol. I, Tab 6])

[43] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 71-75; *Harper v. Canada*, 2004 SCC 33, at para. 10; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at paras. 28-30, 87, 90, 92, 94, 99, and 310

> power of the state is not a fanciful one; it is the living reality of the contemporary criminal trial courtroom...
>
> The task of identifying when zealous courtroom advocacy on behalf of an accused crosses the boundary into professional misconduct must never lose sight of what is at stake in a criminal proceeding.[44]

44. Denying counsel's right to free expression in a court of law in favour of a chilling definition or application of a vague "after the fact" civility rule fetters counsel's ability to engage in vigorous advocacy, in turn damaging the public interest, as well as infringing on the ability of an accused or client to make full answer and defence in a judicial proceeding.

45. The test for a finding of professional misconduct arising from alleged incivility in a court of law, as formulated by the Appeal Panel and upheld by the ONCA majority decision fails to consider how the presiding judge reviewed the lawyer's conduct and how the lawyer responded to the direction of the presiding judge. The majority's test unjustifiably interferes with free expression and the independence of the bar, to the detriment of the public that lawyers are duty-bound to serve. The interplay between the proposed issues on this appeal and freedom of expression of lawyers and the clients they represent is an issue of national importance that requires guidance from this Court.

46. In its decision, the ONCA majority also fails to recognize the important interplay between zealous advocacy and civility, and the chilling effect on counsel that the majority's decision will have. The Divisional Court correctly identified the importance of this issue and the need to favour zealous advocacy when those interests clash. The Divisional Court stated,

> The "zealous advocacy chill" is not a concern to be ignored or minimized. Indeed, where the interests clash, I would suggest that it is better that zealous advocacy be favoured over the desire for civility. Our justice system can tolerate

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[44] *ONCA Reasons*, at paras. 316-317 [Application Record, Vol. II, Tab 14]; In contrast, the LSUC Appeal Panel failed to properly consider the scope of a lawyer's freedom of expression in a criminal proceeding. Although the Appeal Panel makes a passing reference to the expressive rights of lawyers, it failed to actually consider and apply those rights to the case before it. It never once asked what expressive rights the Applicant had and how those rights were to be applied in the difficult circumstances that the Applicant faced in the Felderhof trial (see *LSUC Appeal Panel Reasons*, at paras. 210-215 [Application Record, Vol. I, Tab 6])

> uncomfortable and unpleasant exchanges in the courtroom much better than we can ever tolerate a wrongful result.[45]

47. The Divisional Court expressed a "serious concern" that the test formulated by the Appeal Panel did not go far enough to protect zealous advocacy. The ONCA majority disagreed with the Divisional Court's conclusion and refused to recognize the chilling effect on zealous advocacy occasioned by the fear of prosecution for professional misconduct. Cronk J.A. simply dismissed the issue when she stated, "I am unable to accept the premise of an inherent collision or competition between the duty of zealous advocacy and the duty of courtesy and civility."[46]

48. Brown J.A., correctly emphasised the importance of these issues. He took a reasoned approach to dealing with this inherent tension. He stated:

> All who have been called upon to review formally what took place in Phase One of the Felderhof trial have acknowledged **the important role played by counsel's zealous advocacy on behalf of accused persons**. Such advocacy ensures that those charged by the state with a crime receive a fair and public hearing by an independent and impartial tribunal...
>
> How does one measure that degree of excess, the tipping point at which zealous advocacy morphs into professional misconduct? Or, to pose the question in the way suggested by The Advocates' Society, how does one measure the "allowable margin of error so that advocates do not feel unduly constrained by the threat of prosecution for incivility"?[47] **[emphasis added]**

Brown J.A. also recognized the importance of the trial dynamic. The majority did not. Brown J.A. clearly addressed the need for trial counsel to be able to follow the directions of the trial judge – and that when counsel do so they should be immune from after the fact second guessing by a regulator. Unless this Court considers this proposed appeal and builds a strong fence around courtroom behaviour and the power of the trial judge to control his or her court, the dynamic of a criminal trial will become subject to an autopsy by a regulator, to the detriment of the accused person's right to a zealous defence.

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[45] *Divisional Court Reasons*, at para. 71 [Application Record, Vol. I, Tab 10]
[46] *ONCA Reasons*, at para. 131 [Application Record, Vol. II, Tab 14]
[47] *ONCA Reasons*, at paras. 352 and 354 [Application Record, Vol. II, Tab 14]

ISSUE #2: Is it constitutionally permissible for a court to defer to a law society's decision regarding professional misconduct in a courtroom when that conduct is not faulted by the presiding judge?

49. The issue of who has the "final say" regarding allegations of professional misconduct in a courtroom engages the constitutional delegation of powers contained in section 96 of the *Constitution Act* and the standard of review to be applied when the conduct in question has not been faulted or complained about by the court.[48] It is clearly an issue of national importance affecting judges, lawyers and the public.

50. In practical terms, deciding whether the correctness or reasonableness standard applies when a court reviews the decision of a law society panel will determine which branch of government has the final say on these important issues. If a correctness standard applies, the court has the last word in answering the question because the court will "decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer."[49] However, if the majority is correct and a reasonableness standard applies under the *Dunsmuir* paradigm, it becomes almost impossible for a court to interfere with an administrative decision, notwithstanding that the issue is the conduct of counsel in a trial presided over by a s. 96 judge, where that judge directly (as in this case) or indirectly has addressed the conduct of counsel, and found no fault with it.

51. In its decision, the ONCA majority failed to consider this critical constitutional issue when it determined that a reasonableness standard applied to its review of a decision of a law society panel as to whether the conduct of a lawyer making submissions in a courtroom constitutes professional misconduct. The majority erred in failing to consider the important role of the rulings of the trial judge when it determined that the appropriate standard of review of the Appeal Panel decision was reasonableness. What was really at issue in this case was how the trial judge handled the trial, not the Appeal Panel's one-sided view of the Applicant's

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[48] By way of analogy, in *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII), para 32, this Court in relation to the quasi-judicial function of the Attorney General said that "...the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict."

[49] *Dunsmuir* at para. 50

submissions.

52. The ONCA majority also failed to take context into account. It explicitly rejected the important difference between in-court behaviour by an officer of the court and out-of-court behaviour of all types. Cronk J.A. said: "Nor do I see any principled reason for drawing a distinction between a lawyer's in-court and out-of-court conduct for the purpose of determining the appropriate standard of review."[50] The approach used by the majority creates an essentially unreviewable prosecutorial discretion for the LSUC to meddle in the conduct of trials, which is inconsistent with the principle of fundamental justice that a lawyer must be committed to his or her client's cause and that deference should be paid to the conduct of a trial by the trial judge.[51]

53. As stated by this Court, "a contextual analysis may 'rebut the presumption of reasonableness review for questions involving the interpretation of the home statute'."[52] Brown J.A. found that the context of this case rebuts the general presumption. The crucial context here is that the impugned conduct took place in the course of submissions to a trial judge in a courtroom, the domain of the independent judiciary. The interpretation and application of the LSUC home statute has implications as to whether the courts or administrative bodies have the ultimate say in what conduct by counsel before a court is acceptable. A correctness standard should apply here because it recognizes the power of the judiciary to maintain "its ultimate control over the courtroom by having the 'last word' on whether an advocate's in-court conduct merits professional misconduct sanction."[53]

54. This proposed appeal will allow this Court to delineate the proper roles of judges and law societies when evaluating the submissions of counsel in a courtroom. That clarification will benefit the legal profession, the judiciary and the public in Canada. These important constitutional issues have not been previously addressed by this Court.

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[50] *ONCA Reasons*, at para. 66 [Application Record, Vol. II, Tab 14]
[51] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 SCC 7, at para. 97
[52] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at para. 22
[53] *ONCA Reasons*, at para. 267 [Application Record, Vol. II, Tab 14]

PART IV – SUBMISSION ON COSTS

55. As the Applicant submits that he has raised issues of public and national importance, he asks for no costs and that no costs be awarded against him.

PART V – ORDER REQUESTED

56. The Applicant respectfully requests that leave to appeal be granted. He requests that no costs be awarded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July, 2016.

Hart A. Chemiak, Q.C.

Jasmine T. Akbarali

PART VI – TABLE OF AUTHORITIES

OTHER AUTHORITIES:

PART VII – STATUTORY PROVISIONS

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Loi Constitutionnelle de 1867 30 & 31 Victoria, ch. 3 (R.U.)

VII. JUDICATURE

Nomination des juges

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.