S.C.C. Court 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

APPLICANT
(Appellant)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

REPLY OF THE APPLICANT, JOSEPH PETER PAUL GROIA

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

"*Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.*" Justice Ian Binnie[1]

A. THIS APPEAL RAISES ISSUES OF NATIONAL IMPORTANCE

1. In its responding materials, the respondent makes the bare assertion that there are no issues of national importance raised on this proposed appeal. Its own submissions demonstrate the contrary. For example, the respondent acknowledges that it "serves the public interest and preserves and enhances the regulation of the legal profession in the public interest" - a role that it recognizes is complementary to the function of the courts in controlling their own processes.[2] The respondent also highlights "the importance of the duty of civility to the public interest."[3] In a proposed appeal that squarely engages the respondent's role as regulator, and the duty of civility, the respondent's submissions underscore the national importance of these issues.

(i) The proposed issues on appeal are not fact-specific.

2. The respondent argues that the findings of the courts below were "necessarily context and fact-specific" and that "further judicial consideration of the particular facts of this case is not a matter of national or public importance."[4] This is wrong. The facts of this case provide the context for determining the issues raised. The issues are broader than the facts. The ONCA majority decision turned largely on the appropriate test for professional misconduct and the level of deference that should be given to decisions of law societies in discipline cases where the lawyer's impugned conduct takes place in a courtroom before a judge. The ONCA majority disagreed with the test proposed by the Divisional Court. Justice Brown disagreed with the majority.

3. These issues are broader because they transcend the facts and the interests of the parties.

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[1] *R v. Neil*, 2002 SCC 70, at para. 12
[2] Respondent's Memorandum of Argument, para. 5
[3] Respondent's Memorandum of Argument, para. 15
[4] Respondent's Memorandum of Argument, para. 2

They impact both how lawyers fulfill their duties to the public they serve and the role the judiciary plays in the proper administration of justice. That the alleged misconduct in this case took place in a courtroom while the lawyer was following the directions of the trial judge raises an issue upon which there is no jurisprudence in this Court and highlights the national importance of the issues raised.

(ii) This Court has not previously determined the proposed issues.

4. The respondent claims that this Court has already decided the issues raised on the proposed appeal, but it has not. In none of *Law Society of New Brunswick v. Ryan*,[5] *Doré v. Barreau du Québec*,[6] and *Dunsmuir v. New Brunswick*,[7] did this Court deal with the unique issues of national importance raised on this application - particularly the appropriate role and scope of a law society reviewing, and then disciplining, in-court conduct that occurs before a judge, and the freedom of speech of a lawyer speaking in a courtroom on behalf of a client.

5. In *Ryan*, a lawyer challenged a disciplinary decision of the Law Society of New Brunswick arising from his failure to advance his clients' claims and then blatantly lying to them about the actions he had taken. There was no consideration of the role law societies should play when dealing with in-court conduct before a judge, nor any consideration of the standard of review that would apply to such a situation.

6. In *Doré*, a lawyer challenged a disciplinary decision of the Barreau du Québec arising from a letter he had sent to a judge containing vitriolic and personal attacks against the character and competence of the judge. The letter was provided to the Barreau du Québec by the Chief Justice and disciplinary action was taken against the lawyer. Again, there was no consideration of the role law societies should play when dealing with in-court conduct before a judge (there was no in-court conduct at issue), nor any consideration of the standard of review that would apply in such circumstances.

7. This Court's decision in *Dunsmuir* set out a new framework to apply to the judicial review of administrative decisions in Canada; beyond that, it has nothing to do with the standards to be

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[5] 2003 SCC 20 ["*Ryan*"]
[6] 2012 SCC 12 ["*Doré*"]
[7] 2008 SCC 9 ["*Dunsmuir*"]

applied to lawyers. This proposed appeal does not seek to revisit the *Dunsmuir* framework; rather, it will consider whether, within the *Dunsmuir* framework, the review of a law society's decision to discipline a lawyer's conduct during proceedings in court, before a judge who found no fault with the lawyer's conduct, justifies a correctness standard of review. This is an issue of first impression.

(iii)The respondent mischaracterizes the findings of the courts below.

8. In its submissions, the respondent recasts numerous aspects of the underlying decisions, arguing that they are correct, while ignoring the national importance of the underlying issues in those decisions.

9. For example, the respondent argues that the Divisional Court concluded that Mr. Groia's misconduct brought the administration of justice into disrepute.[8] This is not accurate.

10. The Divisional Court found that to establish professional misconduct, the conduct in question, among other things, must have brought the administration of justice into disrepute, or would tend to do so.[9] The Divisional Court then found that although the LSUC Appeal Panel applied a different test to the applicant's conduct than that set out by the Divisional Court, the Appeal Panel had adequately addressed this new test in its decision - before the test was articulated.[10] The Divisional Court also found that the Appeal Panel's decision fell within the range of reasonable outcomes; however, it made no independent finding that the applicant's conduct brought the administration of justice into disrepute nor impacted the fairness of the trial.[11] Additionally, neither Justice Campbell nor the ONCA made such a finding on the judicial review application.

11. The respondent also mischaracterizes Brown J.A.'s dissenting reasons to suggest that he has attempted to "insulate in-court conduct" from review by law societies.[12] In his reasons, Brown J.A. found that law societies have the jurisdiction to regulate the conduct of lawyers that occurs in

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[8] Respondent's Memorandum of Argument, at para. 10
[9] *Groia v. The Law Society of Upper Canada*, 2015 ONSC 686 ["*Divisional Court Reasons*"], at para. 75 [Application Record, Vol. I, Tab 10]
[10] *Divisional Court Reasons*, at para. 96 [Application Record, Vol. I, Tab 10]
[11] *Divisional Court Reasons*, at para. 96 [Application Record, Vol. I, Tab 10]
[12] Respondent's Memorandum of Argument, at para. 56

a courtroom.[13] Where he departs from the findings of the ONCA majority, and the position taken by the respondent, is in the importance he places on the location of the conduct. He wrote:

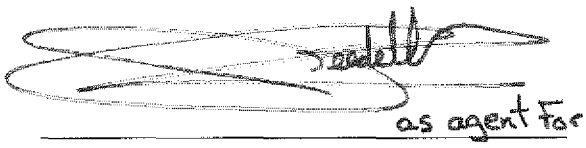
> But, to acknowledge the statutory jurisdiction of the Law Society to inquire into a barrister's in-court conduct does not lessen the significance of the location of that conduct. A barrister's in-court conduct is conduct that occurs in the workplace of an independent judiciary. That distinctive fact means the standard of review analysis in the present case cannot be driven by the typical quest to ascertain the legislature's intent regarding the Law Society's disciplinary powers.[14]

This is not an attempt to "insulate" in-court conduct of lawyers from the review of law societies. Rather, it is a judicial recognition of an approach to the regulation of in-court conduct that is in harmony with the constitutional delegation of powers mandated by s. 96 of the *Constitution Act*. This raises an issue of national importance that requires guidance from this Court.

B. CONCLUSION

12. As recognized by both the ONCA and the Divisional Court (and the seven interveners in the ONCA), issues concerning law society regulation of in-court conduct by lawyers are of national and public importance. The impact of the regulation of this conduct on the duty of loyalty, zealous advocacy, and judicial independence demands clarity in the scope and application of that regulation. A decision from this Court will benefit all participants in the Canadian judicial system. It will also provide clarity to all members of the Canadian public who rely on that system to fairly and properly adjudicate their rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9 day of September, 2016.



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[13] *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 ["*ONCA Reasons*"], at para. 277 [Application Record, Vol. II, Tab 14]
[14] *ONCA Reasons*, at para. 278 [Application Record, Vol. II, Tab 14]

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