S.C.C. FILE NO. 37112

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 -

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

INTERVENERS

FACTUM OF THE INTERVENERS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. This appeal raises questions involving the proper scope of the disciplinary authority of a law society in dealing with counsel's in-court submissions and behaviour. While the facts of this case involve counsel arguing in the courts of Ontario and a disciplinary decision by the Law Society of Upper Canada, the issues it raises have national application. This Honourable Court's decision will have an effect whenever and wherever counsel go into court to argue on behalf of clients, particularly for those who represent vulnerable, socially-marginalized, difficult or unpopular clients. The British Columbia Civil Liberties Association and the Independent Criminal Defence Advocacy Society (together, the "**Interveners**") therefore intervene to provide a perspective from British Columbia counsel and litigants on the proper standard of review and the test applicable to professional misconduct for allegedly uncivil behaviour by counsel in the courtroom.

2. The Interveners have two submissions that arise out of concerns about the potential implications of this appeal. First, they submit that the national scope of the Canadian legal system requires a uniform standard for the definition of professional misconduct as it pertains to incivility arising from in-court behaviour. Such a standard is only available if the judiciary, and ultimately this Honourable Court, have the final say on what qualifies as incivility deserving of disciplinary action. The Interveners say that this is a contextual factor which favours the application of a correctness standard of review to the decision at issue.

3. Second, the Interveners say that the test for professional misconduct for incivility arising from counsel's submissions and behaviour in the courtroom should adopt principles from the common law of defamation and malicious prosecution, so that disciplinary action would only lie where it is shown that the statement is motivated by actual or express malice. This formulation would permit oversight by the law societies while still providing fulsome protection for freedom of expression and counsel's ability to fearlessly advance positions on behalf of their clients and to fulfill the duty of zealous advocacy.

4. The Interveners rely upon the facts as stated by the Appellant in his factum.

PART II: POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

5. The Interveners restrict their submissions to the following questions in issue:

a. What is the standard of review to be applied when reviewing a decision of a law society regarding whether or not the conduct of a lawyer in open court constitutes professional misconduct?

b. In what circumstances can a law society discipline a lawyer for professional misconduct based on allegedly uncivil behaviour arising out of a lawyer's actions in open court while acting for a client?

PART III: STATEMENT OF ARGUMENT

A. The context of this case requires review for correctness

6. Although lawyers are called to the bar in individual provinces and territories, each governed by their own law societies, the court system in Canada has a national character. Lawyers enjoy interjurisdictional mobility between the common law jurisdictions; the Federal Courts provide a national system in which counsel may argue regardless of their home jurisdiction; and this Honourable Court acts as the final court of appeal for decisions made in all the provinces and territories.

7. Given this structure, the definition of professional misconduct arising from in-court behavior should not vary from jurisdiction to jurisdiction. Lawyers who regularly practice in British Columbia should be confident that behavior which would not attract disciplinary sanctions in their home jurisdiction will not attract sanctions if they appear in court in Ontario or elsewhere in Canada. This would not be the effect, however, if the formulation of the test is assessed on a reasonableness standard, as each law society could produce its own test for incivility for in-court behaviour, and each of those varied tests could be upheld as reasonable.

8. In order to maintain uniformity, the judiciary – and in this case, this Court – must have the final say on what qualifies as incivility for in-court behaviour. Accordingly, the Interveners submit that the correctness standard of review should apply to the formulation of the test for professional misconduct arising from in-court behaviour. While a decision-maker's interpretation of its home statute normally attracts review for reasonableness, the context of a

decision may rebut the presumption of reasonableness review.[1] In this case, the relevant context is found in the need for uniformity.

B. A malice-based test for professional misconduct arising out of submissions in open court balances the need for discipline and counsel's duty of zealous advocacy

9. The Interveners submit that the test for professional misconduct arising from counsel's submissions and behaviour during court proceedings should adopt principles from the common law of defamation and malicious prosecution. In particular, the Interveners say that disciplinary sanction should only lie for submissions made in court where it is shown that counsel's statement or behaviour is motivated by actual or express malice. While proceedings in these areas of law are not a perfect analogy to law society disciplinary hearings, the underlying rationale for the imposition of a malice-based standard is equally applicable in these circumstances.

10. All participants in judicial proceedings, including counsel, are protected from suit by the doctrine of absolute privilege for statements made during the course of those proceedings, no matter how defamatory.[2] As stated in *Hamouth v. Edwards & Angell*,[3] granting absolute privilege to lawyers "when they act in the course of their duties to their clients is for the public benefit. It frees lawyers from fear that in advocating for their client's cause they will be sued if what they say on behalf of a client is found not to be true." Counsel have a duty to pursue their client's interests to the fullest extent possible – the duty of zealous advocacy – and the courts have recognized that this would be rendered impossible absent the immunity:

> Counsel have a professional duty to pursue their client's interests, within the law, to the fullest extent possible. At times, a lawyer finds himself or herself advocating unpopular causes. Our system of justice depends upon courageous lawyers undertaking cases that may be distasteful to the public at large, and to the lawyer personally. Nonetheless, the Bar does so, often without thanks from society that does not appreciate the importance of this task. But it is this professional responsibility to argue the law that ensures our democratic freedoms continue. Our system of law would be rendered ineffectual if counsel was

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[1] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶¶15-16
[2] *Hung v. Gardiner*, 2003 BCCA 257, ¶¶34-36
[3] *Hamouth v. Edwards & Angell*, 2005 BCCA 172, ¶37

> required to look behind them for fear of a lawsuit as a result of presenting his client's case. This is the mischief that the [absolute] privilege seeks to prevent.[4]

11. The policy reason for protecting statements made by counsel in the course of judicial proceedings is "to permit a free adversarial atmosphere to flourish, which is essential to our system of justice."[5] In other words, the public interest in protecting the lawyer's right to advocate on behalf of his or her client transcends the interest of the individual's reputation, notwithstanding the importance that the law places on protecting one's reputation. The privilege serves the public interest in the proper administration of justice.

12. While much of this rationale applies in the context of disciplinary proceedings, some appellate courts have held that absolute privilege does not confer immunity from disciplinary action by professional regulatory bodies.[6] To the extent that the issue of counsel's civility and professional conduct in court engages a competing public interest in the protection of the public perception of the administration of justice, thus necessitating some discretion to discipline for in-court behaviour, the Interveners say that an immunity similar to that available on occasions of qualified privilege ought to apply.

13. Accordingly, disciplinary action would only lie for in-court statements or behaviour where it is shown to be motivated by actual or express malice. As defined in *Hill v. Church of Scientology of Toronto*,[7] malice for the purpose of qualified privilege includes "spite or ill-will", speaking dishonestly or in knowing or reckless disregard for the truth, or the making of a statement for "any indirect motive or ulterior purpose" that conflicts with the sense of duty that gives rise to the occasion of qualified privilege. Importing that definition into this context, counsel could only be disciplined for submissions or actions in court which are dishonest (either expressly or through a reckless disregard for the truth), or which are motivated by or made for an improper purpose. It is in those circumstances that counsel's behaviour will have an adverse impact on the administration of justice. However, so long as counsel's submissions and conduct

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[4] *Big Pond Communications 2000 Inc. v. Kennedy* (2004), 236 D.L.R. (4th) 727 (ONSC), ¶19 [***Big Pond***]
[5] *Peak Innovations Inc. v. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034, ¶26
[6] *Goldberg v. Law Society of British Columbia*, 2009 BCCA 147, ¶¶46-52
[7] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, ¶145

are subjectively reasonable and flow from an effort to fulfill counsel's duty to their client, they would be protected.

14. The rationale for qualified privilege is that "certain occasions and situations invoke an overriding public interest in permitting individuals to speak freely. The critical assessment is that in the particular circumstances the public interest in free and unrestricted speech out-balances the risk of the infliction of private injury."[8] In the case of a lawyer making submissions in court, the public interest in free speech – and in providing the freedom necessary for a lawyer to fulfill their duty of zealous advocacy – out-balances the risk of any adverse effect on the administration of justice that may flow from intemperate speech, sarcasm or inaccurate submissions. It is only where counsel steps outside their role as an officer of the court or strays from their duty to their client and makes submissions that are motivated by malice that the balance swings in favour of permitting disciplinary action. This standard would protect counsel acting for vulnerable persons or socially-marginalized groups – some of whom, particularly in criminal cases, require their counsel to take difficult or unpopular positions – from disciplinary action where their submissions and actions are genuinely taken with the intent of promoting their clients' interests.

15. The Law Society Appeal Panel in this case concluded that it was uncivil, and worthy of sanction, to make allegations that impugn the integrity of opposing counsel unless they are "both made in good faith and have a reasonable basis. A *bona fide* belief is insufficient."[9] In other words, under the test approved by the majority of the Ontario Court of Appeal, counsel is presumptively guilty of professional misconduct for raising the issue of counsel misconduct unless they can show that they have an objectively reasonable basis for making such submissions.[10] This test conflicts with the duty of zealous advocacy and unduly infringes upon counsel's freedom of speech. It will create the same drain upon the system of justice that the courts foresaw in upholding the absolute privilege against suit: "courageous lawyers" pursuing their professional duties will suddenly be "required to look behind" their own submissions to

[8] *Turco v. Dunlop*, 1998 CanLII 4608 (BCSC), ¶45; *Cusson v. Quan*, 2007 ONCA 771, ¶39
[9] *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2013 ONLSAP 0041, ¶235
[10] *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471, ¶184

assess the reasonableness of the position they intend to take.[11] Determining the objective reasonableness of a matter can be difficult, particularly during fast-paced, hard-fought litigation; even the best counsel may take a position that, assessed with hindsight, may be considered unreasonable.

16. Faced with the fear of disciplinary sanction, counsel's ability to fearlessly advance their client's position will be undermined. Although this particular case involves submissions impugning the integrity of opposing counsel, there is nothing in the formulation of the test in the courts below that suggests that such an approach would not apply to other submissions. As a result, an application to seek a mistrial, allege an apprehension of bias on the part of a judge, exclude evidence based on state misconduct, allege abuse of process on the part of Crown counsel, or any other submission that is naturally adversarial could be subjected to a standard of objective reasonableness in determining whether counsel has been "uncivil" and therefore crossed the line from zealous advocacy into professional misconduct. This approach is most likely to hamper advocacy by counsel who represent clients faced with the resources and long arm of the state: criminal defence counsel and those who seek to protect citizens from intrusions on their civil liberties. Defence counsel in particular may face a choice between advancing their client's constitutionally-protected right to a full answer and defence and administrative sanction. The negative effects of such a restraint go beyond the individual client and impinge upon the administration of justice by undermining the principle that trials should be decided based on the merits as advocated by counsel.

17. In contrast with the test approved by the Ontario Court of Appeal, a test based on the concepts of qualified privilege and malice would protect both the duty of zealous advocacy and freedom of speech to the fullest extent possible, while still acknowledging that lawyers, as officers of the court, have a duty to make submissions only for the purpose of honestly advancing their clients' interests. Further, unlike the test established by the court below, a test requiring proof of malice is consistent with the idea that misconduct should be proven, not presumed.

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[11] *Big Pond*, ¶19

18. A test for professional misconduct arising from in-court proceedings based on malice finds further support by analogy to a number of other areas of law. In particular, there is a close analogy to the law on claims for malicious prosecution. This Court has recognized that an absolute immunity for Crown counsel in the exercise of their prosecutorial discretion would not be suitable, as public confidence in the office of the public prosecutor would suffer if prosecutors were shielded from liability when they abuse the process through a malicious prosecution.[12] Despite this, there is a public interest in "setting the threshold for such liability very high, so as to deter all but the most serious claims,"[13] as safeguarding the discretion and decision-making authority vested in Crown counsel is necessary for the protection of the administration of justice. Prosecutors are therefore immune from suit for "errors in judgment or discretion or even professional negligence" unless an additional element, malice, can be proven. Only where there is proof of "an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve" can Crown counsel be called on to answer for their actions.[14] Put another way, it is only where a Crown prosecutor "*steps out of his or her role as* 'minister of justice' that immunity" from suit is no longer justified.[15]

19. This Court has previously concluded that a law society can only review an exercise of prosecutorial discretion for the purpose of disciplinary sanctions where it is done in bad faith or dishonestly.[16] In doing so, the Court harmonized the approach to prosecutorial misconduct, whether dealt with by way of lawsuit or by disciplinary sanction; in either case, prosecutors who lay charges "as a result of bribery or racism or revenge" or other reasons amounting to bad faith or dishonesty can be disciplined and are open to civil claims.[17]

20. While it may not be possible to harmonize the approach to defamation lawsuits for in-court submissions with disciplinary sanctions for the same by providing an absolute immunity on both fronts, harmony with the approach to malicious prosecution can be achieved. The same rationale that supports a malice-based approach in that case applies to disciplinary proceedings

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[12] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 [***Nelles***]
[13] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, ¶4
[14] *Nelles*, p. 199
[15] *Miazga v. Kvello Estate*, 2009 SCC 51, ¶7 (emphasis in original)
[16] *Krieger v. Law Society of Alberta*, 2002 SCC 65 [***Krieger***], ¶56
[17] *Krieger*, ¶52

against lawyers for in-court conduct: while absolute immunity could undermine public confidence in the legal system and in lawyers in particular by permitting counsel acting for an improper purpose to escape sanction, protection of counsel's role as an advocate and their pursuit of the duty of zealous advocacy requires a high threshold for sanction. Defence counsel, like Crown counsel exercising their prosecutorial discretion, are called on to make judgment calls in the heat of the moment. Those judgment calls include determining the proper response in circumstances where opposing counsel is engaging in conduct that appears disingenuous or designed to frustrate. The decision-making process must protect the ability of counsel to make these types of difficult, high-stakes decisions without fear of sanction by leaving some room for honest error. These similarities in the exercise of the professional discretion reinforce the suitability of a malice-based threshold for sanction; only where a lawyer steps out of her or his role as an officer of the court by making false submissions or making submissions for an improper purpose or motive should they be subject to disciplinary sanction.

21. A further analogy is found in the Court's recent decision in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin,*[18] where Justice Gascon for the majority held that an award of costs against a lawyer personally can be justified only where "a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate."[19] The focus was on deliberate conduct motivated by an improper purpose. The Court noted that such sanctions run in parallel with the power of law societies to sanction misconduct by members.[20] Given this parallel – and the fact that the Court acknowledged that an entry in a lawyer's disciplinary record generally has much more significant consequences than an order to pay costs[21] – the test for professional misconduct arising from in-court submissions or behaviour should be similar (if not more stringent). A focus on improper purposes and dishonest or otherwise malicious conduct in the test for incivility would harmonize these two tests.

22. Finally, support for the proposed test is found in the law's treatment of disciplinary action against judges, who are also protected by an absolute privilege from suit for statements made in

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[18] *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin,* 2017 SCC 26 [***Jodoin***]
[19] *Jodoin*, ¶29
[20] *Jodoin*, ¶20

court.[22] While disciplinary consequences may flow from a judge's actions and statements in the courtroom, courts and disciplinary bodies have recognized that the bar for action meriting discipline must be very high, so as to avoid the possibility that the threat of disciplinary proceedings may deter judges "from asking the hard questions and taking the difficult positions that are sometimes necessary to discharge their judicial responsibilities."[23] As a result, the standard for removal for comments made by a judge in the courtroom requires conduct that is "so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office."[24] In the recent decision by the Canadian Judicial Council to recommend the removal of Justice Camp from the bench, the Council commented that discipline was necessary because his comments "were not in the nature of legitimate legal inquiries or comment."[25] While the analogy is not exact, the very high threshold for discipline for judges supports the application of a similarly high threshold for discipline for lawyers for in-court conduct.

23. In the Divisional Court decision in this case, Nordheimer J. commented on the difficulty of establishing a "clear standard" for discerning "the difference between zealous advocacy and professional misconduct," noting that there are "simply too many variables involved to suggest that such exactitude can be accomplished through any enunciation of the desired standard."[26] A malice-based test, however, would provide just such a clear, well-articulated standard. It would permit for certainty and consistency in application due to the availability of jurisprudence on defamation and malicious prosecution, as the case law in those areas provides extensive commentary defining the concept of malice. Adopting the qualified privilege standard would provide helpful guidance for law society disciplinary bodies across the country in determining when a lawyer's submissions have crossed that line from zealous advocacy to professional misconduct.

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[21] *Jodoin*, ¶24
[22] *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716
[23] In the Matter of S. 63 of the *Judges Act*, R.S., c. J-1, Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp, Report to the Minister of Justice, 8 March 2017 ("***CJC Inquiry 2017***"), ¶35
[24] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, ¶12
[25] *CJC Inquiry 2017*, ¶36

PART IV: SUBMISSIONS CONCERNING COSTS

24. The Interveners do not seek costs and ask that no costs be awarded against them.

PART V: ORDER REQUESTED

25. The Interveners take no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 27, 2017

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[26] *Joseph Groia v. The Law Society of Upper Canada*, 2015 ONSC 686, ¶67

PART VI: TABLE OF AUTHORITIES

Paragraph(s)

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Secondary Sources