Law Society Appeal Panel File No.: LAP 09-13

LAW SOCIETY APPEAL PANEL
(ON APPEAL FROM THE HEARING PANEL)

B E T W E E N:

THE LAW SOCIETY OF UPPER CANADA

Applicant (Respondent)

-and-

JOSEPH PETER PAUL GROIA

Respondent (Appellant)

FACTUM OF THE ADVOCATES' SOCIETY
NON-PARTY PARTICIPANT

August 30, 2013

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TABLE OF CONTENTS

I. INTRODUCTION

1. This year The Advocates' Society ("**TAS**") celebrates its 50th year as a professional association for advocates in Ontario, currently representing over 5,000 trial, appellate, and administrative lawyers in all areas of private and government practice. One of TAS' principal goals is the promotion of civility and professionalism in the legal profession. It is this interest that underlies TAS' participation in this appeal.

2. The issues raised in this appeal are of particular significance to TAS' members as they concern:

(i) the nature and extent of advocates' obligations to conduct themselves with civility and professionalism before courts and administrative tribunals while maintaining the duty of zealous representation owed to their clients; and

(ii) the scope of evidence that can be adduced at a disciplinary hearing concerning allegations that an advocate has acted without the requisite civility or professionalism, particularly with respect to prior proceedings in which the advocate was not a party.

3. TAS takes no position on the ultimate outcome of the Law Society of Upper Canada's prosecution of Mr. Groia. Rather, its interest lies in the principles that inform the Law Society's *Rules of Professional Conduct* and in certain findings made by the Panel below in respect of questions of civility, professionalism, and the admission of evidence in disciplinary proceedings – issues that affect advocates across this Province.

II. SUMMARY OF FACTS

4. TAS will focus on the specific facts that relate to its submissions on this appeal.

The OSC's Application for Judicial Review

5. It is not controversial that the issue before the Superior Court of Justice on the application for judicial review brought by the Ontario Securities Commission ("**OSC**") at the conclusion of 'Phase I' of the Felderhof trial was whether Justice Hryn had lost jurisdiction over the trial. The OSC asserted that the trial judge had made jurisdictional errors that, cumulatively, were so serious as to require his removal in the middle of the trial.[1]

6. The OSC cited four alleged errors, only one of which related to the conduct of Mr. Groia: that Justice Hryn had wrongly failed to restrain uncivil conduct by Mr. Groia, thus producing an unfair trial and creating a reasonable apprehension of bias in the judge.[2]

7. In addition to Mr. Groia, Brian Greenspan represented Mr. Felderhof in both the Superior Court and Court of Appeal. He argued the issue of loss of jurisdiction due to the trial judge's failure to control the process.[3] Mr. Greenspan testified that his focus was on the issue of loss of jurisdiction and that the issue of Mr. Groia's conduct was secondary.[4] The Panel concluded that, as a matter of substance, Mr. Groia was a party to the proceedings and "mooted" the civility issue.[5]

8. In considering the conduct of Mr. Groia during Phase I of the trial, Campbell J. confirmed that the proper focus of the court on the application was not whether Mr. Groia's

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[1] *R. v. Felderhof*, [2002] O.J. No. 4103 (S.C.J., A. Campbell J.) at para. 3 ["*Felderhof*"].
[2] *Felderhof, ibid.* at para. 5.
[3] *Law Society of Upper Canada v. Groia*, [2012] L.S.D.D. No. 92 at para. 39 ["Panel Decision"].
[4] Panel Decision, *ibid.* at para. 39.
[5] Panel Decision, *supra*, at para. 92.

misstatements as to the role of a prosecutor coupled with his "unrestrained invective against [OSC counsel]" had disrupted the trial, but rather whether Mr. Groia's conduct *deprived the judge of jurisdiction to continue with the ongoing trial*. That was the issue before the Superior Court.[6]

9. In reviewing the trial transcripts Campbell J. was indeed critical of the conduct of both Mr. Groia and of counsel for the OSC, noting that neither side had a monopoly over incivility or rhetorical excess. Nevertheless, Campbell J. concluded that Mr. Groia had a right to make allegations of abuse of process and prosecutorial misconduct, though it was unnecessary for him to couch those submissions in a "repetitive stream of invective against [counsel for the OSC's] professional integrity". Again, however, Campbell J. cautioned that it was "not the task of the court on this motion to pass judgment on Mr. Groia's litigation style unless it affect[ed] the jurisdiction of the trial judge."[7]

10. In dismissing the application and remitting the trial to continue before Justice Hryn, Campbell J. found, *inter alia*, that despite the "difficulties caused by Mr. Groia's sometimes uncivil advocacy" and the "overreaction" of OSC counsel to Mr. Groia's provocation, Justice Hryn did not lose jurisdiction or display bias in his management of the courtroom. Rather, the trial judge's conduct of the proceedings demonstrated a "patient and even-handed resolve to proceed with a difficult and hard-fought trial". Further, it could not be said that Justice Hryn's "patient refusal to descend into the arena or to depart from his established position of judicial neutrality above the fray" represented an error of law, let alone a jurisdictional error.[8]

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[6] *Felderhof, supra* at paras. 34 and 92.
[7] *Felderhof, supra* at paras. 264, 271 and 273.
[8] *Felderhof, supra* at paras. 9-10 and 286.

The Costs Decision

11. Mr. Groia's conduct was more directly at issue on the costs motion brought by the defence following the OSC's unsuccessful application to remove the trial judge. Nevertheless, the issue to be determined by Campbell J. on that motion was not the appropriateness of Mr. Groia's conduct itself, but rather whether in light of such conduct the defence was entitled to its costs of the unsuccessful application.

12. In his reasons issued on the costs motion, Campbell J. noted that this was a remarkable case; that it was "unprecedented" for the prosecution to seek to remove a judge in the middle of a trial. The relevant question on the motion, as framed by Campbell J., was whether Mr. Groia's "unfortunate behaviour" went so far beyond the range of responsible conduct that it was reasonable for the prosecution to take such an unusual step.[9]

13. Campbell J. noted that it had been unnecessary on the application to pass judgment on Mr. Groia's "litigation style" because it did not affect the jurisdiction of the trial judge (being the issue before the court on the application). On the costs motion, however, he considered the nature and impact of Mr. Groia's conduct was relevant to the extent that such conduct triggered the application.[10]

14. Campbell J. described Mr. Groia's conduct at times during the trial as "appallingly unrestrained and on occasion unprofessional". In the light of this conduct, Campbell J. concluded the OSC's application, although unsuccessful, was reasonable. To award costs to the

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[9] *R. v. Felderhof*, [2003] O.J. No. 393 (S.C.J., A. Campbell J.) at paras. 15-16 ["*Felderhof* Costs Decision"].
[10] *Felderhof* Costs Decision, *supraibid.* at para. 18.

defence would carry the "wrong message" by rewarding Mr. Groia for the consequences of his "unacceptable conduct". Accordingly, the defence request for costs was denied.[11]

The Appeal

15. On appeal, the Court of Appeal agreed with Campbell J.'s conclusion that Mr. Groia's conduct did not cause the trial judge to lose jurisdiction.[12]

16. On the subject of Mr. Groia's conduct, Rosenberg J.A., writing for the Court, found that while Mr. Groia's manner in making some of his submissions was "unseemly and unhelpful", he accepted the finding of Campbell J. that this did not deprive the prosecution of a fair trial so as to cause the trial judge to lose jurisdiction over the proceedings: "Even if counsel's litigation style, as alleged by the prosecution, is abusive and sometimes personally nasty, *the judge does not lose jurisdiction unless it prevents a fair trial.*"[13] [Emphasis in original.]

17. Having concluded that the prosecution was not deprived of a fair trial and that the application judge was correct in his ultimate conclusion that the trial judge did not lose jurisdiction in this case, Rosenberg J.A. went on to comment on specific points made by the OSC and the interveners on the subject of civility and the duty of the trial judge to manage courtroom conduct. Rosenberg J.A. remarked that it is a very serious matter to make allegations of improper motives or bad faith against any counsel and that such allegations must only be made where there is some foundation for them and they are not to be made simply as part of the normal discourse in submissions over the admissibility of evidence or the conduct of the trial.[14]

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[11] *Felderhof* Costs Decision, *supra* at paras. 21 and 26.
[12] *R. v. Felderhof*, [2003] O.J. No. 4819 (C.A.) at para. 2 ["*Felderhof* CA"].
[13] *Felderhof* CA, *supraibid.* at paras. 13 and 80-81.
[14] *Felderhof* CA, *supra* at paras. 87 and 93.

The Panel's Decision

18. The proceeding was brought pursuant to ss. 33 and 34 of the *Law Society Act*, R.S.O. 1990, c. L.8, which state:

> Prohibited conduct
>
> 33. A licensee shall not engage in professional misconduct or conduct unbecoming a licensee.
>
> Conduct application
>
> 34. (1) With the authorization of the Proceedings Authorization Committee, the Society may apply to the Hearing Panel for a determination of whether a licensee has contravened section 33.

19. The evidence relied upon included correspondence between Mr. Groia and the OSC, transcripts from the Felderhof trial, and the reasons for decision of Campbell J. and Rosenberg J.A.[15]

20. The Panel concluded that the reasons for decision of the Superior Court and the Court of Appeal could be admitted as evidence pursuant to Rule 24.08(1) of the *Rules of Practice and Procedure* and that such evidence could be considered in the context of other evidence introduced at the hearing. In this case, the Panel concluded that while the reasons of Campbell J. and Rosenberg J.A. were not binding on it as a matter of law and practice, they were admissible and could be considered by the Panel for their persuasive value.[16]

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[15] Panel Decision, *supra* at para 26.
[16] Panel Decision, *supra* at paras. 82 and 85.

21. The Panel acknowledged that Mr. Groia was not, "as a matter of form", a party to the proceedings before the Superior Court and Court of Appeal and that the central question in those proceedings was whether Justice Hryn should be removed due to jurisdictional errors.[17]

22. Nevertheless, the Panel rejected Mr. Groia's submission that his conduct was deliberately not defended on the application before Campbell J. and that Campbell J.'s comments in respect of Mr. Groia's conduct were merely *obiter*. Rather, the Panel concluded that Mr. Groia was in substance a party and his conduct was a "live issue" before both courts. The Panel also found that while it was not bound by the Courts' reasons for decision, to "permit their re-litigation" would amount to an abuse of process.[18]

23. The Panel appears to have placed particular emphasis on the comments of Campbell J. in reviewing Mr. Groia's "attacks" on the conduct of counsel for the OSC, finding that Mr. Groia's repeated accusations of prosecutorial misconduct were "misguided as a matter of law".[19]

24. The Panel further relied on Rosenberg J.A.'s comments in confirming Campbell J.'s finding that Mr. Groia's "improper rhetoric" was grounded in a misapprehension of the role of the prosecutor and how the prosecutor should introduce documents.[20]

25. With respect to the admission of evidence, the Panel concluded that in long and complex proceedings involving thousands of documents, such as the Felderhof trial, counsel are obliged to co-operate in ways that may not be necessary in other cases.[21]

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[17] Panel Decision, *supra* at para. 91-92.
[18] Panel Decision, *supra* at paras. 92-93 and 96.
[19] Panel Decision, *supra* at paras. 178 and 184-185.
[20] Panel Decision, *supra* at para. 187.
[21] Panel Decision, *supra* at para. 137.

26. The Panel concluded that Mr. Groia knew or ought to have known that his "persistent allegations of prosecutorial misconduct" were wrong in law and the positions he took on documents were not well-founded in the law of evidence, such that his attacks constituted conduct that fell below the standards required by the *Rules of Professional Conduct*.[22]

III. STATEMENT OF ISSUES

27. TAS intends to address the following issues and make the following submissions on this appeal:

(i) TAS's *Principles of Civility and Professionalism for Advocates* represent an informed view of what constitutes civil or uncivil conduct and are an important tool against which conduct can be measured. The importance of civility in the courtroom cannot and does not diminish the essential and time-honoured duty of the litigator to be a zealous advocate. Uncivil conduct should only be subject to disciplinary action where it is egregious or continuous and serves to threaten or undermine the integrity of the administration of justice.

(ii) Except in rare circumstances, it is not an abuse of process in a professional misconduct hearing for a lawyer to defend his or her behaviour in a prior proceeding, even where the adjudicator in that prior proceeding made comments about the lawyer's conduct.

(iii) It is not improper for an advocate to forcefully advance a submission of law or fact in good faith, no matter how tenuous, where such submission is made in an appropriately civil manner. Nor is it improper to insist on compliance with the rules of evidence.

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[22] Panel Decision, *supra* at paras. 189-190.

IV. LAW AND ARGUMENT

1. TAS' Principles of Civility Inform the Standard Under the Rules

28. TAS published its *Principles of Civility for Advocates* in 2001 and in 2009 TAS published its *Principles of Professionalism for Advocates* (together, the "*Principles*"). The *Principles* set out a list of guidelines for those who practise advocacy before the courts, administrative tribunals, and other fora. TAS believes it is of the utmost importance to the administration of justice and the public's confidence in the profession that advocates adopt the *Principles* in their day-to-day practice.

29. Two of the guidelines articulated in the *Principles*, which TAS submits are central to this appeal, are:

> Advocates should pursue the interests of their clients resolutely, within the bounds of the law and the rules of professional conduct, and to the best of their abilities. Advocates must "raise fearlessly every issue, advance every argument, and ask every question." At all times, however, they must represent their clients responsibly and with civility and integrity. The duty of zealous representation must be balanced with duties to the court, to opposing counsel and to the administration of justice.[23]
>
> The proper administration of justice requires the orderly and civil conduct of proceedings. Advocates should, at all times, act with civility in accordance with the *Principles of Civility for Advocates*. They should engage with opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement.[24]

30. The *Principles* represent a considered view of what constitutes civil or uncivil conduct and are an important tool against which conduct can be measured. They have been used by the

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[23] *Principles of Professionalism for Advocates*, #1 under "An Advocate's Duty to Clients and Witnesses" [*Principles of Professionalism*].
[24] *Principles of Professionalism, ibid,* #1 under "An Advocate's Duty to Opposing Counsel".

judiciary to inform the standard of conduct expected of advocates appearing before the courts. As a set of guidelines, the *Principles* represent an admissible and appropriate standard in terms of how advocates should conduct themselves.

31. The importance of civility in the courtroom cannot and does not diminish the essential role of the litigator as zealous advocate and the duty to "raise fearlessly every issue, advance every argument, and ask every question." At the same time, advocates "should engage with opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement." The imperative of zealous advocacy on the one hand and the importance of civility on the other are not incompatible. On the contrary, the highest level of effective advocacy exhibits forceful persuasion made in a courteous and dignified manner.

32. As a matter of practice, however, there may be times when an advocate finds that fearless and zealous representation of a client involves pushing up against the boundaries of civility. Additionally, advocates are human beings whose patience and judgment may occasionally falter. In such circumstances, the advocate should not feel unduly constrained by the threat of prosecution for incivility. With this in mind, TAS submits that there must be an allowable margin of error and that disciplinary action is only appropriate where there exists egregious or continuous conduct that serves to threaten or undermine the integrity of the administration of justice.

33. In the course of a hearing, an adjudicator may opine that a lawyer's conduct was appropriate or inappropriate. Of course, such comments are largely dependent on the context of that particular proceeding. By contrast, in determining whether a lawyer has breached the *Rules of Professional Conduct*, a disciplinary panel must judge the lawyer's conduct objectively by reference to principles of civility that have been developed independently of specific facts and

circumstances. A lawyer's professional obligations must not be determined solely by the context of the proceeding—where the standard apparently used by the adjudicator may possibly be too harsh or too lenient—but rather by the *Rules of Professional Conduct* as informed by accepted standards of civility, such as those found in the *Principles*. A disciplinary panel should treat with caution the comments of a judge in the course of a hearing.

2. Abuse of Process

34. At paragraph 96 of the Panel's Decision, the Panel concluded:

> While the panel is not bound by [the findings of Campbell J. and Rosenberg J.A.], to permit their re-litigation in the circumstances would, in our opinion, amount to an abuse of process.

35. The doctrine of abuse of process arises in several different contexts, including abusive treatment of an accused by the Crown and undue delay in criminal proceedings.[25] For the purposes of this case, abuse of process concerns arise:

> ...where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.[26]

36. As the Supreme Court of Canada made clear in *Toronto (City) v. Canadian Union of Public Employees*[27] (**"*CUPE*"**), the doctrine of abuse of process is a version of the doctrines of *res judicata* and issue estoppel that can apply when the strict requirements of those doctrines are not satisfied:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing

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[25] *Toronto (City) v. Canadian Union of Public Employees*, 2003 SCC 63 at para. 36 [*CUPE* (SCC)].
[26] *Toronto (City) v. Canadian Union of Public Employees*, [2001] O.J. No. 3239 (CA) at para. 56 per Goudge J.A. [*CUPE* (OCA)]; quoted by Arbour J. in *CUPE* (SCC) at para. 37.
[27] *CUPE* (SCC), *supra,*

> the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.[28]

37. These passages from the decisions of Goudge J.A. and Arbour J. make clear that the doctrine of abuse of process is concerned with consistency and finality in the administration of justice. It only applies in circumstances where there has been a prior judicial determination of the issue a litigant seeks to have adjudicated. Without such a determination, concerns over relitigation, consistency, and finality do not arise.

38. Even in circumstances where there has been a prior judicial determination, the court retains a residual discretion to allow relitigation where it will enhance, rather than impeach, the administration of justice and the integrity of the judicial system. This includes situations in which "fairness dictates that the original result should not be binding in the new context."[29] Unfairness may arise where the stakes in the two proceedings are very different, or where there was inadequate incentive to defend the initial proceeding.[30]

Application to This Case

39. As discussed above, the Panel found (in a manner somewhat inconsistent with how the hearing proceeded) that it was an abuse of process for Mr. Groia to relitigate the findings of Campbell J. and Rosenberg J.A. (the "**Prior Reasons**"). This conclusion, it is submitted, is incorrect for two reasons: first, neither judge made a final determination of the issue before the Panel, namely whether Mr. Groia's conduct breached the Law Society's *Rules of Professional*

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[28] *CUPE* (SCC)), *supra* at para. 37.
[29] *CUPE* (SCC)), *supra* at para. 52.
[30] *CUPE* (SCC)), *supra* at para. 53. See also: *Penner v. Niagara (Regional police Services Board)*, 2013 SCC 19 at 45 [*Penner*], (the court should exercise its discretion not to apply issue estoppel because the stakes for the plaintiff were very different as between the present civil action against a police officer and the prior Board review of the officer's conduct in which he participated); *Shah v. Becamon*, 2009 ONCA 113 (it is not an abuse of process, in the context of an action against an insurer, to defend the issue of whether conduct was unlawful, despite previous guilty pleas to *Highway Traffic Act* offences).

Conduct; second, even if there had been such a determination, the principles of fairness articulated by the Supreme Court of Canada in *CUPE* compel the conclusion that Mr. Groia should be permitted to relitigate that determination.

a) No Final Determination of Issues Before the Panel in the Court Proceedings

40. At issue in the Prior Reasons was whether the trial judge had lost jurisdiction over the Felderhof trial. This involved addressing, among other things, whether the manner in which the trial judge dealt with Mr. Groia's conduct gave rise to a reasonable apprehension of bias and whether Mr. Groia's conducted interfered with a fair trial.

41. The Prior Reasons did not decide or even address the issue before the Panel – whether Mr. Groia's conduct during the Felderhof trial breached the Law Society's *Rules of Professional Conduct*. As a result, there has been no prior judicial determination that Mr. Groia seeks to relitigate and the doctrine of abuse of process cannot apply.

42. In some circumstances, the doctrine of abuse of process may prevent a party from relitigating not only the final decision in a prior action, but also the essential findings of fact necessary to that decision.[31] As discussed in more detail below, the Prior Reasons do not contain any findings of fact concerning whether Mr. Groia's conduct did or did not breach the *Rules of Professional Conduct*. An observation regarding counsel's civility does not and cannot constitute a finding of professional misconduct.

43. The Panel, it is submitted, erred in concluding that it would be an abuse of process for Mr. Groia to relitigate issues decided by the Prior Reasons. Those reasons did not address the issue before the Panel.

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[31] *Caci v. MacArthur*, 2008 ONCA 750 at para. 15.

b) Mr. Groia Not a Party to the Prior Court Proceedings

44. A lawyer representing a client in judicial proceedings is not himself or herself a party to those proceedings. At paragraph 92 of its decision, the Panel concluded:

> Perhaps, as a matter of form, Mr. Groia was not a party to the proceeding and did not participate in the mooting of the civility issue, but as a matter of substance, the evidence does not support this conclusion.[32]

45. To the extent the Panel concluded Mr. Groia was in substance a party to the proceedings before Campbell J. or the Court of Appeal, TAS submits the Panel erred. In contrast, for example, to a motion under Rule 57.07 of the *Rules of Civil Procedure* for costs against a solicitor personally, Mr. Groia did not have an opportunity to lead evidence, was not afforded the procedural safeguards enjoyed by a party, and had no right of appeal.

46. It is also crucially important that Mr. Groia's overriding duty before both Campbell J. and the Court of Appeal was to represent the interests of his client, Mr. Felderhof. If a judge's comments during a hearing or in his or her reasons were treated as conclusive findings by a subsequent disciplinary panel, then those comments would put the lawyer in an immediate conflict of interest. The client's interest may well be for the lawyer to focus on the merits of the case, rather than on the judge's comments, but the lawyer's own interest would lie in defending his or her conduct. This conflict would force a lawyer to immediately withdraw from representing a client whenever a judge, in the course of a hearing or in his or her reasons, criticises the lawyer's conduct.

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[32] Panel Decision, *supra* at para. 92.

47. TAS submits that the Panel's finding that an advocate can be a party to a proceeding as a matter of "substance" places all advocates in an untenable position and undermines the proper administration of justice and the right of litigants to be represented by counsel of their choosing.

c) Fairness Requires Litigation of Issues of Conduct Before the Panel

48. A court does not have jurisdiction under the *Law Society Act* to determine issues of professional misconduct under the Law Society's *Rules of Professional Conduct*, but even if the Prior Reasons purported to determine the issue before the Panel, or had made essential findings of fact dispositive of that issue, principles of fairness dictate that the Panel should not have precluded Mr. Groia from relitigating those findings or determinations. The principles of fairness and concern over the integrity of the administration of justice, as discussed by Arbour J. in *CUPE*, dictate that Mr. Groia be permitted to litigate the question of whether he breached the Law Society's *Rules of Professional Conduct* before a disciplinary tribunal.

49. In *CUPE*, Arbour J. identified several circumstances in which it would be unfair to apply the doctrine of abuse of process. These included where the stakes in the two proceedings were very different, or where there was an inadequate incentive for the party to defend the original proceeding.[33]

50. This was echoed by the Supreme Court of Canada's decision in *Penner v. Niagara (Regional Police Services Board)*[34] ("***Penner***"). In that case, the plaintiff had filed a complaint against two police officers alleging unlawful arrest and unnecessary use of force, and also started a civil action against them. The complaint was dismissed and the question was whether that

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[33] *CUPE* (SCC)), *supra* at para. 53.
[34] *Penner, supra.*

decision precluded the plaintiff from relitigating the issue of whether his arrest had been unlawful and involved excessive force.

51. Citing its previous decision in *CUPE*, the Supreme Court concluded that while the preconditions for issue estoppel had been made out—the hearing was fair, the plaintiff had participated in a meaningful way, and the parties were the same—it would be unjust to apply the doctrine in that case. Having regard to the differing purposes of the two proceedings and that little was at stake for the plaintiff personally in the complaint procedure, it would be unfair to prevent him from litigating the issue in his civil case. Such an outcome was not within the reasonable expectations of the parties.

52. The circumstances in which it may be unfair to apply the abuse of process doctrine were further expanded on by the Ontario Court of Appeal in *Polgrain Estate v. Toronto East General Hospital*[35] (“***Polgrain***”). In that case, a nurse had been acquitted of sexually assaulting patients under his care and the trial judge found not only that the nurse was not guilty, but in fact that the evidence established his innocence. The issue was whether, in a subsequent civil action brought by the families of the alleged victims, it was an abuse of process for the plaintiffs to relitigate the issue of whether the nurse had committed the assaults.

53. Rosenberg J.A., writing for the Court, concluded that it was not. He cited two fairness concerns that permitted relitigation in that case. First, there was no right of appeal against the reasons for a verdict, only the verdict itself, and hence no way to review the finding of innocence.[36] The plaintiffs clearly had no right of appeal from the prior decision, nor could the

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[35] 2008 ONCA 427 [*Polgrain*].
[36] *Polgrain, ibid.* at para. 31.

Crown have appealed solely on the basis of the trial judge's finding of innocence. Rosenberg J.A. reasoned:

> One of the core principles underlying the abuse of process doctrine in the relitigation context is that judicial findings are final and binding and conclusive unless set aside on appeal or lawfully quashed. *It is therefore significant that there may be no way for any of the parties to appeal additional findings* made by a trial judge in a criminal matter.[37] [Emphasis added.]

54. The second concern was that the factual findings of the trial judge did not form an essential part of his decision. When a defendant is acquitted, the relevant judicial finding is that the Crown's case has not been proved beyond a reasonable doubt.[38] The finding of innocence did not raise relitigation concerns because:

> ...where the accused is acquitted, the only essential finding is simply that the case was not proved beyond a reasonable doubt. ... To give full legal significance for abuse of process purposes to matters that were not essential to the decision would confuse the roles of the criminal and civil courts.[39]

55. Finally, Rosenberg J.A. was concerned that application of the abuse of process doctrine in the manner suggested by the defendant would interfere with judges' discretion to express their reasons in the manner they see fit. In particular, judges "ought to be able to call the facts as they see them and express their reasons in a way that may give the parties solace, satisfaction or even vindication."[40] They must be able to do so without fear that such comments will have unintended legal consequences down the road.

56. Concerns similar to those expressed in *CUPE*, *Penner*, and *Polgrain* arise in this case. Mr. Groia was not a party to the proceedings before Campbell J. and Rosenberg J.A. He had no

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[37] *Polgrain, supra* at para. 32.
[38] *Polgrain, supra* at paras. 34-36.
[39] *Polgrain, supra* at para. 36.
[40] *Polgrain* at para. 37.

right of appeal from those decisions, nor could his client have appealed on the basis of the judges' criticisms of Mr. Groia's conduct (not least because his client was wholly successful in both courts). In any event, Mr. Groia's duty was to his client and it would not have been in his client's interest to seek to appeal a judgment in which the client had been successful.

57. The Prior Reasons also did not address the right of Mr. Groia to practise law. By contrast, the proceeding before the Panel dealt directly with such matters, which are unquestionably of significant personal concern to Mr. Groia. The nature of the proceedings was different and Mr. Groia's ability to fully defend his conduct was not only diminished by his lack of standing as a party, but was also circumscribed by his duty to act in the best interests of his client.

58. Apart from the fact that neither decision amounts to a judicial determination of the issue before the Panel, as discussed above, TAS submits that it was in any event unfair for Mr. Groia to be bound by criticisms made in circumstances where he was not a party, had no right of appeal, and where neither his license to practice law nor censure by the Law Society were at stake. The principle of fairness must be a priority when the proceeding involves the discipline of counsel, his or her reputation, and indeed his or her livelihood.

d) Prior Appellate Reasons Not Admissible on Issue of Misconduct

59. If the Prior Reasons do not give rise to relitigation concerns such that the doctrine of abuse of process applies, the Panel must then determine whether they are admissible as evidence.

60. The Courts' decisions form part of the record of the proceedings that gave rise to the disciplinary action against Mr. Groia and TAS submits that, accordingly, they are properly before the Panel as part of that record. However, the question is whether and to what extent the

Prior Reasons are admissible as evidence going to the issues of professional misconduct raised in the disciplinary proceeding. The fact that the Prior Reasons are properly before the Panel for one purpose does not mean they are admissible for all purposes.[41]

61. Rule 24.08(2) of the Law Society's *Rules of Practice and Procedure* states:

> At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence.

62. This Rule is permissive (using the word "may"), but does not indicate the circumstances in which it should be applied or the purposes for which reasons may be admissible.

63. Judicial reasons typically contain findings of fact and legal conclusions. If something in the reasons is neither a finding of fact nor a legal conclusion, then it amounts to no more than the judge's comment on the evidence or the proceedings.

No Findings of Fact Relevant to Misconduct Hearing

64. Section 33 of the *Law Society Act* provides:

> A licensee shall not engage in professional misconduct or conduct unbecoming a licensee.

65. The Prior Reasons relied upon contained neither findings of fact nor conclusions of law concerning whether Mr. Groia's engaged in professional misconduct, although Campbell J. did describe Mr. Groia's conduct during the trial as at times "appallingly unrestrained and on occasion unprofessional".[42]

66. While such comments might well form a basis for the Law Society to commence an investigation, they do not constitute findings of fact regarding whether Mr. Groia breached the

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[41] Alan W. Bryant et al., *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 3d ed. (LexisNexis: 2009) at s. 2.83, p. 74 [Sopinka].
[42] *Felderhof* Costs Decision, *supra* at paras. 21 and 26.

Law Society's *Rules of Professional Conduct*, as that issue was not before Campbell J. Such comments were also made without the benefit of evidence from Mr. Groia.

67. In order to be admissible, evidence must be relevant to a fact at issue in the proceeding or be expert evidence.[43] Witnesses may only testify to matters within their knowledge, observation, or experience,[44] because it is the role of the trier of fact to draw inferences from proven facts.[45] With the exception of expert opinions, evidence is not admissible unless it is evidence of facts.

68. In this regard, there is an important distinction to be drawn between the comments of a judge in the course of a hearing and the comments of appellate judges reviewing a paper record. A judge is a witness to the events in his or her courtroom and is therefore in a position to describe them in a way not available to the disciplinary panel, or to an appellate court. When a judge does make comments about the events in his or her courtroom, this may be admissible factual evidence that the disciplinary tribunal can consider in making its findings of fact. Indeed, this may be necessary to avoid judges being required to give evidence. However, similar comments from an appellate judge, in TAS' submission, would not be admissible factual evidence because that judge was not in the courtroom and is in no better a position than the Law Society tribunal to make findings on the basis of the paper record.

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[43] Sopinka, *supra* at s. 2.36.
[44] Sopinka, *supra* at s. 12.2. The exception to this rule is opinion evidence, which is not an issue in this case.
[45] Sopinka, *supra* at s. 12.2.

69. The 'factual' nature of evidence, and that it is in turn only admissible to prove facts, is reflected in a commonly accepted definition of relevance (a precondition to admissibility):

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other.[46]

70. In this case, the Panel had to decide two issues:

(i) What did Mr. Groia say or do during the Felderhof trial – that is, what was his conduct?

(ii) Did Mr. Groia's conduct breach the Law Society's *Rules of Professional Conduct*?

71. Issue (i) requires findings of fact and evidence is not only admissible but required for the Panel to make its determination. Issue (ii) requires a legal conclusion and no evidence can be relevant or admissible regarding it. It is the role of the Panel to make factual and legal conclusions on the proven facts and applicable *Rules of Professional Conduct*.[47]

72. Insofar as they concern Mr. Groia's conduct, the Prior Reasons do not contain any findings of fact, only judges' comments. Because Justices Campbell and Rosenberg were not present during the Felderhoff proceedings, their comments cannot be evidence of what happened in the courtroom. They therefore cannot be used as evidence of Mr. Groia's conduct to support a finding of professional misconduct.

73. While a judge's comments are in one sense "facts"—it is a fact that the comments were made—they are not facts that can be probative of either of the issues before the Panel. They do not assist the Panel in determining what Mr. Groia said or did, and as has already been discussed,

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[46] Sopinka, *supra* at s. 2.35, citing *Cross on Evidence*.
[47] Sopinka, *supra* at s. 12.2.

no evidence is admissible on the legal question of whether Mr. Groia's conduct breached the Law Society's *Rules of Professional Conduct*.

74. It is also important to note that the Panel had before it all of the evidence available to Justices Campbell and Rosenberg (the transcripts of the Felderhof trial), as well as additional evidence not available in the prior proceedings.

3. Submissions Made in Good Faith Do Not Breach the *Rules*

75. The Commentary to Rule 4.01(1) of the *Rules of Professional Conduct* states:

> The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

76. The only restrictions on this duty are that it must be discharged fairly, honourably, without illegality, and in a civil manner.[48]

77. In the Panel's Decision the Panel concluded that Mr. Groia:

> ...either knew or ought to have known that his persistent allegations of prosecutorial misconduct were wrong in law and the positions he took on documents were not well-founded in the law of evidence or in accord with usual practices in large document cases. We are therefore drawn to the conclusion that during the examination and cross-examination of Mr. Francisco, Groia's attacks on the prosecution were unjustified and therefore constituted conduct that fell below the standards of principles of civility, courtesy and good faith required by the *Rules of Professional Conduct*.[49]

78. If a lawyer believes in good faith that a submission he or she makes has an arguable basis in law and he or she makes that submission in the client's interest and in an appropriately civil manner, the lawyer's conduct is not only sanctioned by the *Rules*, it is required by them. A

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[48] Commentary to Rule 4.01(1).
[49] Panel Decision, *supra* at para. 190.

lawyer cannot be subject to disciplinary action for making submissions in good faith, even if they are, in fact, entirely without merit. To hold otherwise would place the lawyer in an impossible conflict with his or duty to the client, as set out in Rule 4.01(1).

No Obligation to Co-Operate in Admission of Evidence

79. At paragraph 137 of the Panel's Decision, the Panel concluded:

> Furthermore, in a trial of this nature, involving thousands of documents and complicated issues of proof, the concept of a "fair trial," demanded by the rule of law, obligates counsel for both sides to co-operate in ways that may not be necessary in other cases, which are not as complex or of such long duration.

80. The Panel did not explain the meaning of this additional obligation of co-operation, nor indicate its source. The passage appears to suggest that an advocate can be under an obligation not to insist on formal proof of documentary or other evidence in situations where this would consume considerable time or resources. That cannot be correct.

81. The applicable rules of evidence exist to ensure the fairness and integrity of the trial process. While parties may agree that some evidence can be admitted without strict compliance with those rules, there can be no doubt that every party has the legal right to insist that the rules of evidence be strictly followed.

82. An obligation such as the one created by the Panel would therefore amount to a requirement on an advocate to waive his or her client's rights without the client's consent, which is prohibited by Rule 4.01(1) of the *Rules of Professional Conduct*.[50] It is submitted that the Panel's conclusions in this regard are untenable and must be rejected.

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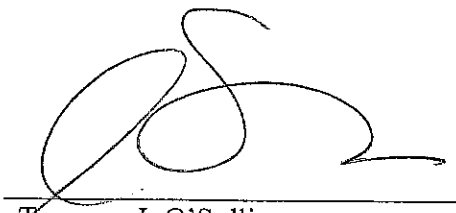
[50] Commentary to Rule 4.01(1).

V. ORDER REQUESTED

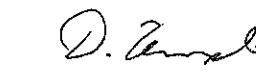
82. As a Non-Party Participant, TAS takes no position on what order should be made.

83. The issues on this appeal are of critical importance to all advocates in this Province. TAS respectfully requests an opportunity to make oral submissions at the hearing.

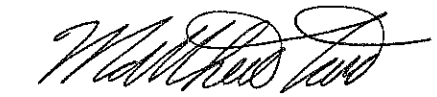
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2013.



Terrence J. O'Sullivan



Deborah Templer



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SCHEDULE "A"

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1. *R. v. Felderhof*, [2002] O.J. No. 4103 (S.C.J.)
2. *Law Society of Upper Canada v. Groia*, [2012] L.S.D.D. No. 92
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8. *Penner v. Niagara (Regional police Services Board)*, 2013 SCC 19
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10. *Caci v. MacArthur*, 2008 ONCA 750
11. *Polgrain Estate v. Toronto East General Hospital*, 2008 ONCA 427
12. Alan W. Bryant et al., *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 3d ed. (LexisNexis: 2009) at ss. 2.82-2.85
13. Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4

THE LAW SOCIETY OF UPPER CANADA -and- JOSEPH PETER PAUL GROIA

Applicant/Respondent

Respondent/Appellant

Law Society Appeal Panel File No.: LAP 09-13

LAW SOCIETY APPEAL PANEL
(ON APPEAL FROM THE HEARING PANEL)

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