THUNDER BAY LAW ASSOCIATION

2016 Fall Conference – Criminal Law Program

27 October 2016, Victoria Inn, Thunder Bay

(LSUC approved, under above name, for 1 hour of professionalism CPD, 1:45 substantive CPD)

TALKING ABOUT
WHAT NOBODY WANTS TO TALK ABOUT

Sex Offences Against Minors and Child Pornography

Sure, life’s a game ... Some game. If you get on the side where all the hot-shots are, and you win all the time, then it’s a game, all right – I’ll admit that. But if you get on the other side, where there aren’t any hot-shots, and you’re always losing, then what’s a game about it?

-J.D. Salinger, The Catcher in the Rye

9:00-10:30: What Nobody Wants to Talk About – Sexual offences against minors and child pornography: understanding your client and the rehabilitative prospects. Featuring forensic psychiatrist Dr. Robert Sheppard.

10:45-11:45: The June 2016 Groia decision from the Ont. C.A. (upholding the LSUC disciplinary finding of “incivility” respecting his scrappy advocacy) – Rude vs. Mean vs. Vicious vs. Uncivil, and how to apply its lessons to your own practice (and is it headed for SCC?)

11:45-12:00: “The Round-Up” – Your need-to-know review of the year’s high-points in criminal law
INDEX TO MATERIALS

1. What Nobody Wants to Talk About – Materials on Sex Offences Against Minors


3. The Round Up – Top 10 Cases of the Past Year

SPECIAL GUEST

Dr. Robert Sheppard, M.D., F.R.C.P. (C.) is the Chief of Psychiatry, and the Director of Forensic Mental Health Services (and clinical director of the Sexual Behaviours Program), at Thunder Bay Regional Health Sciences Centre, and was director of Forensics at the L.P.H. He is a member of the provincial Review Boards for both Ontario and Nunavut, and is an assistant professor at the Northern Ontario School of Medicine. We are all familiar with his extensive involvement in our city’s criminal justice system over the years. He is a graduate of the University of Toronto, and was a resident at the Clarke Institute of Psychiatry.

PANELISTS

The Honourable Mr. Justice Dino DiGioseppi (LLB 1978 University of Windsor, LLM 1999 (Alternative Dispute Resolution) Osgoode Hall) was called to the Ontario Bar in 1980, and practised in Thunder Bay. He served on the Executive of the County and District Law Presidents’ Association 1992-97, and became an Elected Bencher of the Law Society of Upper Canada in 1999. He was appointed a Justice of the Ontario Court of Justice in 2000, respecting which he was sent a congratulatory letter from the Detroit Red Wings, followed closely by a fervent “playing-catch-up” letter by the Toronto Maple Leafs, both of which have been seen hanging on the wall in his chambers.
George Joseph was born in India, and emigrated to Canada in 1967. In 1994, he worked as a provincial offences prosecutor. He then attended the University of Saskatchewan Faculty of Law, graduating in 1998 and receiving the Gabe Burkhart Memorial Award for outstanding achievement in criminal law. He joined Patrone Hornak Garofalo Mauro as an articling student and has remained there ever since, becoming a partner in 2009. He has practiced in civil litigation, administrative law, and real estate, but the main focus of his practice is criminal litigation. He is a member of the Criminal Lawyers Association, a Council Member for the Ontario Bar Association, a Director of the TBLA, and serves on the Executive for William W Creighton Youth Services. He has cheated death by running with the bulls in Pamplona, Spain.

Kate Brindley (B.A. Hons. 2005, University of British Columbia; J.D. 2009 University of Toronto) articled at Ontario’s Crown Law Office – Criminal (720 Bay Street) in Toronto, and was called to the Ontario bar in June 2010. Participation in community clinics brought her into the criminal courts, and her articles saw her working on complex criminal cases at all levels of court (including the Supreme Court of Canada). Now back in her home-town of Thunder Bay, she defends criminal cases at Atwood Labine LLP. Notwithstanding having two little kids, Kate was this year found toiling at the office on the morning of mother’s day. Awesome.

Ryan Green was born and raised in Thunder Bay and grew up in the East End. He earned a Human Resources Management diploma at Confederation College, an undergraduate degree majoring in history at Lakehead University and recently graduated as a member of the charter class at the Bora Laskin Faculty of Law. He entered private practice, and in October 2016, hung out his shingle and opened Thunder Bay’s newest criminal defence practice, Ryan Green Law Office, on Victoria Avenue. He also teaches Business Law & Ethics at Confederation College and continues to support student success at his alma mater. Ryan notes that he will soon be upgrading from a shingle to a good solid polymer sign.
**David Pierce** was born and raised in Fort Frances. He attended the University of Ottawa and received an undergraduate degree in Human Kinetics, then a Master's degree in Public Health from Lakehead University. He worked as a health policy analyst for Nishnawbe Aski Nation until September 2013, when he became part of the charter class at the Bora Laskin Faculty of Law. After entering law school with the hopes of becoming a Crown Attorney, David has been employed by the defence firm PM Law Offices since his first semester of law school, and continues to practice there as an associate following his September 2016 call to the bar. David joined PM, as he could not afford a shingle.

**Neil McCartney** (B.A. Hons 1999, LL.B. 2003, Queen's University; M.Phil 2000, University of Cambridge U.K.) is the Chair of this year’s Criminal Law Program. He articled at the Ottawa Crown Attorney’s Office 2003-2004, and was called to the Ontario bar in 2004. He returned to Thunder Bay to practice with the firm of Atwood Shaw Labine, and is now a partner at Atwood Labine LLP, where he defends criminal cases. Has two little kids and a wife whose hours are worse than his, so he doesn’t do too much else.
In case you don’t think it’s serious business to be charged with the offences we’re discussing today, here in 2016:

s. 163.1 possess child pornography: **minimum** 6 months (sum) or 1 year (indict)
s. 163.1(4.1) accessing child pornography: **same minimums** as possession
s. 163.1(2) making, (3) distributing: straight indictable, **minimum** 1 year
s. 151 sexual interference: **minimum** 90 days (sum) or 1 year (indict)
s. 152 invitation, and s. 153 exploitation: **same minimums** as interference
s. 271 sex assault: if victim under 16, **minimum** 6 months (sum) or 1 year (indict)

Mostly arising from: **Tougher Penalties for Child Predators Act**

S.C. 2015, c. 23 Assented to 2015-06-18

An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts

**SUMMARY:** This enactment amends the *Criminal Code* to

- (a) increase mandatory minimum penalties and maximum penalties for certain sexual offences against children;
- (b) increase maximum penalties for violations of prohibition orders, probation orders and peace bonds;
- (c) clarify and codify the rules regarding the imposition of consecutive and concurrent sentences;
- (d) require courts to impose, in certain cases, consecutive sentences on offenders who commit sexual offences against children; and
- (e) ensure that a court that imposes a sentence must take into consideration evidence that the offence in question was committed while the offender was subject to a conditional sentence order or released on parole, statutory release or unescorted temporary absence.

It amends the *Canada Evidence Act* to ensure that spouses of the accused are competent and compellable witnesses for the prosecution in child pornography cases.

It also amends the *Sex Offender Information Registration Act* to increase the reporting obligations of sex offenders who travel outside Canada.

It enacts the *High Risk Child Sex Offender Database Act* to establish a publicly accessible database that contains information — that a police service or other public authority has previously made accessible to the public — with respect to persons who are found guilty of sexual offences against children and who pose a high risk of committing crimes of a sexual nature. Finally, it makes consequential amendments to other Acts.
CBC Radio – “Ideas,” Thursday September 04, 2014, 9:00 – 10:00 p.m.  
(Just google it, to listen to it).

**Born That Way?**

![Brain images]

Pedophilia: the word alone conjures up the most unspeakable crimes. But what is it: a psychiatric disorder that can be treated? Some new research indicates it may actually be innate and unchangeable -- an orientation. We speak with ex-offenders and doctors on both sides of the debate. This episode was researched and prepared by documentary filmmaker Andrew Munger.

Is pedophilia - as various researchers are now saying - simply the way some people are wired?

Almost all of the existing evidence points very, very strongly that it's - if I can forgive the term - it's a sexual orientation.

*Dr. James Cantor*

Or, is pedophilia a condition -- a kind of illness -- that we can treat and maybe even cure? Is it actually possible to change a pedophile into a non-pedophile?

In treatment, people can not only lose recurrent, intense sexually arousing fantasies involving children, but can also replace that fantasy with sexual thoughts and behaviours involving adults.

Dr. James Cantor is an Associate Professor of Psychiatry at the University of Toronto Faculty of Medicine, and works at the Centre for Addiction and Mental Health (CAMH) in Toronto.
He explains the MRI image at the top of the page:

The coloured portions of these "glass brains" reflect the brain regions in which men sexually interested in children significantly differ from control men (who committed non-sexual offences). The teal portions show the differences in brain's left hemisphere, and magenta, the right. All of the affected areas appear to be in the white matter of the brain, which wires the brain together into a cohesive network. It is hypothesized that differences in cabling yield a "cross-wiring" in which two human social instincts---parental/nurturing instincts and sexual instincts---are crossed or partially crossed.

Related Websites:

If you have questions about the nature of pedophilia and treatments for it, you may want to contact these institutions:

- CAMH
- Sexual Behaviors Clinic at the Royal Ottawa Mental Health Centre

Other questions:

- Can you be "abused into" this kind of behavior, i.e. are people who were themselves sexually abused as children, at greater risk to turn into abusers in adulthood? – or is it purely a function of the kind of brain you're born with?

- the Sexual Behaviours Program at Forensics at our hospital – who’s allowed in (i.e. do you need to be Court ordered somehow?), what is it, how long does it last, what can/must/does it disclose to police or anyone else?

- are there instances known to forensics, of people being “cured” of sexual interest in children, or at least, successfully treated such that it can be said that they no longer pose a danger
Child Pornography Law: All Punishment, No Prevention

Neil J. McCartney (Prepared for Lawyers Weekly, September 2014)

Whenever somebody is convicted of possessing, sharing, or making child pornography, it’s too late. The damage has been done, at least to the children involved in that particular offence. Nobody would dispute that effective police investigation of these offences, and vigorous prosecution of those charged, are essential elements of any effort to reign in (largely by deterrence) the evil of child sexual exploitation. But no matter how good the policing and the prosecuting, it doesn’t undo the damage. And no matter how severe the penalty we impose on the offender, no matter how we thunder from the legislative pulpit about more severe penalties yet to come, it’s still too late. Including for the children who will be the victims of future crimes. And there will be future crimes.

But if that convicted somebody, earlier on in life, had been aware of, and could access, some kind of medical or therapeutic intervention respecting his criminal sexual preferences – instead of going underground in the face of the consistent message that anybody like him is pure evil and better watch out if we find you – maybe the criminal court would not be the first to hear of his tastes. And then maybe it would not be too late for those children.

During sentence hearings in child pornography cases, one submission that’s persistently occurred to me is this: good for you, Judge, and me, and the prosecutor, that our brains respond to these images with intense revulsion, as do the vast majority of human brains. The fact that we’re not committing these offences has a lot more to do with this natural revulsion, than it does with our laudable self-restraint. But did the offender choose to be among the handful of people who find these images not revolting, but sexually arousing? Or does his sexuality simply have a screw loose, not of his own making?

I once defended a man in his 40s, charged with possessing and printing child pornography. The Crown had proceeded by indictment, so he faced a minimum term of imprisonment of one year upon conviction, despite his lack of any kind of prior record. Before I broke that news to him, what he expressed can best be described as relief. It was a great weight off him, that this was now out in the open. And he wanted to do something about it.

He intended to plead guilty, so it also seemed like a legally advisable step to get some rehabilitative programming started ahead of sentencing. Maybe the Crown could be approached, once we had reports from therapists in hand, about changing their election to summary conviction proceedings, such that the minimum would be six months – or they might even accept a guilty plea to an alternative offence that does not carry mandatory imprisonment, such that we could at least argue for a non-prison sentence.
So we called around. But we found nothing. Except the persistent suggestion to “just get him sentenced; they have programming for those guys in the penitentiary, or once they’re on parole.” And I couldn’t help thinking that my client would’ve found about the same thing, if he’d tried calling around some time before he had broken the law, say when he was sixteen.

It’s not that there’s nothing available. If you live in the right place, and have the necessary well-connected sophistication to make your way along the medical steps to a very finely-pointed area of forensic psychiatry, then great. Though even at that stage, you will likely encounter the debate about whether sexual interest in children is “treatable” or not, a debate examined recently in a one-hour radio piece that should be required listening for anybody connected with these cases, “Born That Way?” on CBC Radio’s Ideas. This program also touched on some of the non-prison-system programming that can be sought out (while also mentioning that such programming is overwhelmingly unavailable for non-offenders), and featured forensic and neuro-psychiatrist Dr. Paul Fedoroff, Director of the Sexual Behaviours Clinic at the Royal Ottawa Hospital. Even my small city’s hospital has a Sexual Behaviours Program in its forensics unit; and a hospital forensics program will probably be the best place to start. At least then you’d be talking to professionals about what to do, instead of victimizing, or creating a market for the victimization, of children.

But in the present regime, if you’re Joe Average, living far from a research hospital, and you were born with a brain like this, then we’ll probably just see you in court. After you’ve done the damage.

It’s true that all crimes involve some kind of blameworthy loss of self-control, over your temper, or greed, or addiction, or desires. We all understand that. But attraction to child pornography is different from all this, in kind, not degree; it’s such a clear case of a bent mental state, that it only makes sense to direct resources toward making help available, raising awareness of that help, and identifying dangerous urges early on.

Serious punishment is a must in this arena, especially where the conduct escalates from watching videos, to assaulting children. But if we want to stop it before it happens – and we all agree on that – then we should cease looking only at punishment, and look at prevention as well. In introducing a new round of tough sentencing reforms surrounding sexual exploitation of children, Stephen Harper recently commented, “sadly, there are truly evil people out there. The fact is we don’t understand them and we don’t particularly care to.” But what if the key to preventing the evil, is understanding it in the first place?
Groia v. The Law Society of Upper Canada, 2016 ONCA 471 (CanLII) [Dissent at paragraph 244]

131 O.R. (3d) 1

Date: 2016-06-14

Docket: C60520

2016 ONCA 471 (CanLII)

MacPherson, Cronk and Brown J.J.A.

Earl A. Cherniak, Q.C. and Jasmine T. Akbarali, for the appellant Joseph Peter Paul Groia

J. Thomas Curry, Jaan E. Lilles and Andrew Porter, for the respondent Law Society of Upper Canada

Susan Reid and James Cornish, for the Intervener, Attorney General for Ontario

Paul J.J. Cavalluzzo and Nadia Lambek, for the Intervener, Ontario Crown Attorneys’ Association

Terrence J. O’Sullivan, Matthew R. Law and Deborah Templer, for the Intervener, The Advocates’ Society

Cara Faith Zwibel, for the Intervener, Canadian Civil Liberties Association

John A. Olah and Eugene Meehan, Q.C., for the Intervener, Canadian Defence Lawyers Association

Allan Rouben, Derek Nicholson and Darcy Romaine, for the Intervener, Ontario Trial Lawyers Association

Robin Parker and Angela Chaisson, for the Intervener, Criminal Lawyers’ Association

Heard: December 14, 15 and 16, 2015

On appeal from the order of the Divisional Court (Justices Sachs, Nordheimer and Harvison Young), dated February 2, 2015, with reasons reported at 2015 ONSC 686 (CanLII), affirming decisions of the Law Society Appeal Panel, dated November 28, 2013 and March 21, 2014, with reasons reported at 2013 ONSLAP 0041 and 2014 ONSLTA 11 (CanLII), 2014 ONSLTA 0011; and from the costs order of the Divisional Court, dated March 16, 2015, with reasons reported at 2015 ONSC 1680 (CanLII).

Cronk J.A.:

I. Introduction

[1] For almost 220 years, the Law Society of Upper Canada has governed the legal profession in the public interest under statutory authority granted to it by the legislature of Ontario. For close to a century, in the exercise of its statutory mandate, the Law Society has formed a body of rules governing the professional conduct and ethical obligations of lawyers, both inside and outside the courtroom. Lawyers who fail to meet the standards of practice established by these rules are subject to the Law Society’s complaints and discipline processes. In Ontario, as elsewhere in Canada, it is a privilege to practise law, not a right.

[2] The Law Society’s rules seek to ensure that the public of Ontario is provided with competent and professional legal services. The competency and professionalism of lawyers is the bedrock on which self-regulation of the legal profession rests.

[3] The Law Society’s rules require, as a condition of the privilege of practising law, that lawyers’ conduct be characterized by courtesy, civility and good faith in dealing with the courts and all participants in the justice system, including fellow lawyers. For advocates, they also affirm counsel’s duty to resolutely and honourably advance the client’s cause, without fear of professional jeopardy. These twin duties lay at the core of our
adversarial system of justice and the advocate's professional and ethical responsibilities. They are also a mainstay of public confidence in the administration of justice.

[4] This appeal brings the interplay between these foundational duties into sharp focus. It 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.

[5] The trigger for these inquiries is the appellant Joseph Peter Paul Groia's challenge to the Law Society Appeal Panel's findings of professional misconduct against him in relation to his in-court conduct towards opposing counsel, together with the associated penalty and adverse costs award imposed by the Appeal Panel in light of those findings. The Divisional Court upheld the Appeal Panel's decisions and costs award. Mr. Groia now appeals to this court.

[6] For the reasons that follow, I would dismiss the appeal. The Appeal Panel's formulation of the test for incivility in this case was reasonable. So, too, was its conclusion that Mr. Groia engaged in professional misconduct and its determination of an appropriate sanction for that misconduct, including its costs award. I also see no basis on which to interfere with the Divisional Court's discretionary costs ruling.

II. Legislative and Regulatory Framework in Brief

[7] The Law Society was founded in 1797[1] as the first regulator of the legal profession anywhere in Canada. Its authority to regulate the legal profession is currently governed by the Law Society Act, R.S.O. 1990, c. L.8 (the "Act"), and it licenses and regulates all barristers and solicitors in Ontario.

[8] Section 4.1 of the Act establishes the Law Society's functions. They include the obligation to ensure that all persons who practise law or provide legal services in Ontario "meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide": s. 4.1(a). In carrying out its statutory responsibilities, the Law Society is required to maintain and advance the cause of justice and the rule of law (s. 4.2.1) and to protect the public interest (s. 4.2.3).

[9] Every barrister and solicitor licensed to practise law in Ontario is an officer of the court: s. 29 of the Act. Further, by operation of s. 33, every advocate practising law in Ontario is prohibited from engaging in professional misconduct or conduct unbecoming a licensee. The Law Society has the discretion pursuant to s. 49.3 to investigate a licensee's conduct if it receives information suggesting that the licensee may have breached s. 33.

[10] The Law Society is authorized to make rules of practice and procedure regarding proceedings before its disciplinary Hearing and Appeal Panels: s. 61.2(1) of the Act.[2] It is empowered to make by-laws providing for additional powers, duties and functions of these tribunals, and for a code of professional conduct and ethics: ss. 52(0.1).10 and 62(0.1).46. The Appeal Panel is authorized to hear appeals from a final decision or order, or any costs order, made by a Hearing Panel: O. Reg. 167/07, s. 5.

[11] The term “professional misconduct” is not defined under the Act. However, the Law Society’s various conduct rules have defined the term and set out the requirements for professional conduct by lawyers, together with extensive commentaries regarding those requirements. Relevant to this case are two different iterations of the Law Society’s conduct rules: the Law Society’s Professional Conduct Handbook, 1998, 2nd ed. (the “1998 Handbook”) (effective January 30, 1987 to October 31, 2000) and its Rules of Professional Conduct introduced in 2000 (the “2000 Rules”) (collectively, the “Conduct Rules”).[3]

[12] The 2000 Rules require that lawyers, when acting as advocates, must “represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect” (r. 4.01(1)). Further, lawyers must be "courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation" (r. 4.01(6)). Rule 6.03(1) sets out an identical
requirement for all persons with whom the lawyer has dealings in the course of his or her practice. The Conduct Rules relevant to the issues on appeal are set out in Schedule “A” to these reasons.

[13] These requirements mirror those set out in rr. 5.1-5 and 7.2-1 of the Model Code of Professional Conduct developed by the Federation of Law Societies of Canada in 2009 and the 2001 Principles of Civility for Advocates and the 2009 Principles of Professionalism for Advocates published by the Advocates’ Society (the “Principles”). They reflect the collective wisdom of the leadership of the bar in Canada that the practice of law be characterized by professionalism, including, specifically, by the core attributes of courtesy, civility and good faith.

III. History of Proceedings

[14] Mr. Groia is a barrister and solicitor licensed by the Law Society to practise law in Ontario. An experienced securities litigation counsel, he defended John Bernard Felderhof, a senior officer and director of Bre-X Minerals Ltd., on eight charges of violating the Securities Act, R.S.O. 1990, c. S.5 brought in 1999 by the Ontario Securities Commission (the “OSC”). The charges arose out of the collapse of Bre-X as a result of fraudulent claims that it had discovered lucrative gold deposits in Borneo. Following a lengthy trial, Mr. Felderhof was acquitted of all charges. In November 2009, after the trial had concluded, the Law Society initiated disciplinary proceedings against Mr. Groia alleging that he had engaged in professional misconduct during his defence of Mr. Felderhof.

(1) OSC Prosecution and Felderhof Trial

[15] To say that the OSC prosecution against Mr. Felderhof was complex, protracted and exceptionally acrimonious significantly understates the time-consuming, stressful and confrontational climate that rapidly infected the proceeding.

[16] Almost from the outset, disputes between counsel arose concerning the OSC prosecutors’ compliance with their disclosure obligations under R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 and the propriety of their approach to the case, leading to multiple disclosure applications before the trial judge and the postponement of the original March 20, 2000 trial date. The escalation of these disputes produced a barrage of allegations by Mr. Groia of serious prosecutorial misconduct by the OSC prosecutors. These allegations, which the OSC prosecutors vigorously denied, precipitated numerous motions and submissions before the trial judge and consumed many days of court time. The nature and gravity of these allegations is a central issue on this appeal.

[17] The first phase of the trial began on October 16, 2000 before Hryn J. of the Ontario Court of Justice and lasted 70 days. As the events during these 70 days were the focus of the Law Society disciplinary proceedings, it is helpful to set them out in brief:

Days 1-16 – The defence challenged the constitutionality of s. 122 of the Securities Act and moved to stay the prosecution on the ground that the OSC prosecutors had breached their Stinchcombe disclosure obligations. On day 11, Mr. Groia conceded that the defence could not meet the high test for a stay. The trial judge denied the stay motion and made a general order for the OSC to comply with its disclosure obligations;

Days 16-25 – Counsel made opening statements. The prosecution’s opening lasted eight days, while Mr. Groia opened for the defence over two days;

Days 26-38 – The first stage of the examination-in-chief of the OSC’s first witness, Rolando Francisco;

Days 39-42 – Disputes about evidence started to dominate the trial. Counsel presented lengthy submissions regarding an OSC motion to admit extensive contested documentary evidence on an omnibus basis;

Days 43-52 – Mr. Francisco’s direct examination continued;

Days 52-65 – Mr. Francisco’s cross-examination started. During the cross-examination, numerous heated and acrimonious disputes arose about the admissibility of documents. In total, Mr. Francisco was examined-in-chief for 20 trial days and cross-examined for 10 days. On day 65, before his cross-examination concluded, he fell ill;
Days 66-68 – The OSC renewed its omnibus document motion. As described below, day 67 was the “critical day” for the OSC’s decision to seek judicial review mid-trial;

Days 69-70 – At the court’s direction, due to Mr. Francisco’s illness, the examination-in-chief of the OSC’s second witness, Dr. Paul Kavanagh, commenced.

[18] After 70 days of trial, the evidence of the first OSC witness had yet to be completed. The proceeding was frequently interrupted by protracted disputes about the admissibility of documents. By day 70, the toxic nature of the dealings between Mr. Groia and the OSC prosecutors was sufficiently pervasive as to overtake the orderly and normal progress of the trial. So much so, that, on April 17, 2001, the OSC applied for judicial review in the Superior Court of Justice, seeking orders prohibiting the continuation of the trial before the trial judge, quashing rulings he had made, and directing that the trial begin anew before a different Ontario Court judge (the “JR Application”).

[19] The OSC argued that the trial judge had made several serious errors that deprived him of jurisdiction and undermined the OSC’s right to a fair trial. Of particular relevance to this appeal, the OSC maintained that Mr. Groia had engaged repeatedly in uncivil conduct in violation of the Conduct Rules and that, by failing to control this unacceptable conduct, the trial judge had lost jurisdiction.

[20] By judgment dated October 31, 2002, the application judge, Archie G. Campbell J., dismissed the JR Application and remitted the matter back to the trial judge for the continuation of the trial: R. v. Felderhof, [2002] O.T.C. 829 (S.C.I.). He held that the trial judge had not lost jurisdiction, that there had been “a degree of excess on each side” and that “neither side in this case has any monopoly over incivility or rhetorical excess”: at paras. 257, 261 and 264.

[21] The OSC appealed to this court. Mr. Felderhof cross-appealed on the issue of costs. For unanimous reasons written by Rosenberg J.A., this court dismissed the appeal and cross-appeal, concluding that Mr. Groia’s impugned conduct had not impaired trial fairness or prevented the OSC from presenting its case and that, as a result, the trial judge had not lost jurisdiction to proceed with the trial: R. v. Felderhof (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481 (“Felderhof”).

[22] In their reasons, both the application judge and this court commented on Mr. Groia’s conduct during the trial. The application judge found that, on numerous occasions during the trial, Mr. Groia’s conduct had been “improper”, “appallingly unrestrained”, “unprofessional”, “inappropriate” and “extreme”. In his costs reasons, he held that Mr. Groia’s conduct justified the bringing of the JR Application and that to award Mr. Felderhof his costs would “carry the wrong message by rewarding [Mr. Groia] for the consequences of his unacceptable conduct”: R. v. Felderhof, 2003 CanLII 41569 (ON SC), 2003 CanLII 41569 (Ont. S.C.J.), at para. 21.

[23] This court agreed, describing Mr. Groia’s conduct as improper, inappropriate and misconceived in law in many instances. The court held that Mr. Groia was not entitled to advance his allegations of prosecutorial misconduct unless and until he was prepared to bring a motion for abuse of process. Mr. Groia’s failure to bring a formal motion, instead purporting to put the prosecution repeatedly on notice of what he said the defence intended to eventually argue, “prolonged the proceedings and provided a further platform for [his] excessive and often ill-considered remarks”: Felderhof, at para. 76.

[24] The second phase of the trial began on March 30, 2004 before the same trial judge, but with different prosecutors. It concluded on July 31, 2007, without further incident, with the acquittal of Mr. Felderhof on all charges: R. v. Felderhof, 2007 ONCJ 345 (CanLII). By the end, the trial had consumed 160 days of court hearing time, spanning almost seven years, including the time devoted to the JR Application and the related appeal to this court.

(2) Law Society Proceedings

[25] On November 18, 2009, the Law Society commenced a discipline proceeding on its own initiative[5] against Mr. Groia under the Act. In doing so, it relied in significant part on Campbell J.’s comments about Mr. Groia in his
reasons on the JR Application and those of this court in Felderhof (collectively, the “Reviewing Courts’ Reasons”). At no time did the trial judge or the OSC prosecutors complain to the Law Society about Mr. Groia’s conduct.

[26] The particulars of Mr. Groia’s alleged misconduct, as set out in the Law Society’s Notice of Application, focused on events during the 70 days leading up to the JR Application – the first phase of the trial. The Law Society alleged that Mr. Groia had engaged in multiple acts of professional misconduct in his dealings both with the court and the OSC prosecutors during the trial. In summary, the Law Society alleged that Mr. Groia:

(1) failed to treat the court with courtesy and respect because of his consistent pattern of rude, improper or disruptive conduct;

(2) failed to act in good faith, and failed to conduct himself in a fair, courteous, respectful and civil manner to the court;

(3) undermined the integrity of the profession by communicating with the OSC prosecutors, at various times, in a manner that was abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer, contrary to the Conduct Rules; and

(4) failed to act with courtesy and good faith through engaging in ill-considered or uninformed criticism of the conduct of the OSC prosecutors at specified times, contrary to the Conduct Rules.

(i) Hearing Panel Decisions

[27] The proceeding before the Hearing Panel took place over 19 days between August 2011 and April 2012. Mr. Groia testified and called seven other witnesses, most of whom had been involved in the OSC prosecution or Bre-X-generated civil litigation. The Law Society called no witnesses, instead relying on the Reviewing Courts’ Reasons to establish that Mr. Groia’s alleged conduct constituted professional misconduct. The Hearing Panel held that it would amount to an abuse of process to re-litigate the findings of the Reviewing Courts. It ruled that, while it was not bound by the Reviewing Courts’ Reasons, they were admissible before it and could be considered as evidence of misconduct by Mr. Groia.

[28] The Hearing Panel found that Mr. Groia’s attacks on the OSC prosecutors were unjustified and constituted conduct falling below the standards of civility, courtesy and good faith required under the Conduct Rules. It also held that Mr. Groia’s allegations of prosecutorial misconduct were “wrong in law” and that 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” (at para. 190).

[29] Further, in the Hearing Panel’s view, Mr. Groia did not act in good faith in advancing his allegations of prosecutorial misconduct. Rather, he was motivated “to disrupt the orderly proceeding of the trial by provoking the prosecution and creating the conditions for the trial to collapse under its own weight” (at para. 135).


(ii) Appeal Panel Decisions

[31] Mr. Groia appealed to the Appeal Panel. The Appeal Panel allowed his appeal in part. It affirmed the Hearing Panel’s findings of professional misconduct relating to Mr. Groia’s dealings with the OSC prosecutors (the “Conduct Decision”). However, it varied the length of his licence suspension from two months to one month (the “Penalty Decision”): Law Society of Upper Canada v. Groia, 2013 ONLSAP 41 (CanLII), 2013 ONLSAP 0041. It also reduced the Law Society’s costs award from $246,960.53 to $200,000: Law Society of Upper Canada v. Groia, 2014 ONLSTA 11 (CanLII), 2014 ONLSTA 0011. It awarded no costs of the appeal hearing.
[32] The Appeal Panel made four important rulings that framed its review of the propriety of Mr. Groia’s conduct, two of which are challenged by Mr. Groia on this appeal.

[33] First, the Appeal Panel concluded that the Hearing Panel had erred by applying the doctrine of abuse of process in respect of the Reviewing Courts’ Reasons, thereby assigning undue weight to them and effectively foreclosing Mr. Groia’s defence. As a result, the Hearing Panel’s factual findings attracted no deference and, as urged by the parties, the Appeal Panel’s own review of the record was required (at paras. 200-201 and 237).

[34] Second, in a related holding, the Appeal Panel concluded that the Hearing Panel’s misapplication of the abuse of process doctrine had tainted its adverse findings about Mr. Groia’s motivation in advancing his allegations of prosecutorial misconduct. The Appeal Panel elected to evaluate Mr. Groia’s conduct on the basis that he had acted in good faith and that he had held an honest belief in his allegations of prosecutorial misconduct throughout the OSC prosecution (at paras. 238 and 332).

[35] Third, Mr. Groia argued before the Appeal Panel that the oversight of an advocate’s in-court conduct is properly within the exclusive domain of the presiding judge, save in specific, limited circumstances. The Appeal Panel disagreed. It held that this argument was unsupported by the Act, the Conduct Rules and the applicable jurisprudence (at paras. 222-25).

[36] Fourth, the parties agreed before the Appeal Panel that allegations of prosecutorial misconduct impugning the integrity of opposing counsel should not be made unless they are advanced in good faith and on a reasonable basis (at para. 234). They also agreed on the appropriate test for assessing when making allegations of prosecutorial misconduct or that impugn the integrity of opposing counsel can violate an advocate’s duty to be courteous, civil, and act in good faith, constituting professional misconduct. The Appeal Panel accepted that the parties’ agreed test was appropriate in this case, describing it at paras. 235-36:

In our view, it is professional misconduct to make allegations of prosecutorial misconduct or 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; it gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions of opposing counsel.

In addition, even when a lawyer honestly and reasonably believes that opposing counsel is engaging in prosecutorial misconduct or professional misconduct more generally, she must avoid use of invective to raise the issue. That is, it is unprofessional to make submissions about opposing counsel’s improper conduct, to paraphrase Justice Campbell, in a ‘repetitive stream of invective’ that attacks that counsel’s professional integrity. [Citations omitted.]

[37] Before this court, Mr. Groia attacks the Appeal Panel’s ruling on the Law Society’s authority to discipline an advocate for uncivil conduct in court and its formulation and application of its test for incivility.

[38] In accordance with the parties’ joint request, the Appeal Panel conducted its own extensive review of the record. In carrying out this review, it identified the main issue for determination as “the extent to which zealous defence counsel may impugn the integrity of opposing counsel, and make allegations of prosecutorial misconduct” (at para. 234).

[39] Given the timing of the acts of misconduct alleged, the Appeal Panel’s assessment of Mr. Groia’s conduct focused on key events during the first 70 days of the Felderhof trial, described above. The Appeal Panel reviewed the evidence relating to these events, and Mr. Groia’s conduct in relation to each, at length. It concluded that Mr. Groia had engaged in professional misconduct in his dealings with the OSC prosecutors in the manner alleged by the Law Society.[7]

[40] Specifically, the Appeal Panel held that, although Mr. Groia’s pre-trial conduct was “aggressive”, it did not constitute professional misconduct (at para. 252). Taken alone, Mr. Groia’s conduct during days 1-16 (including the Stinchcombe motion) and during days 39-41 (the OSC’s omnibus document motion) also did not amount to
professional misconduct (at paras. 270 and 274). However, the Appeal Panel held that, starting on day 52 (the first
day of Mr. Groia’s cross-examination of Mr. Francisco), Mr. Groia repeatedly attacked the personal integrity of OSC
prosecutors, made allegations of prosecutorial misconduct without a reasonable basis to do so, and accused the

[41] In the Appeal Panel’s view, taken as a whole, Mr. Groia’s submissions regarding the OSC prosecutors
constituted “a relentless personal attack on the integrity and the bona fides of the prosecutors”, which included
unfounded, repeated allegations of deliberate prosecutorial misconduct, none of which had a reasonable basis (at
paras. 318-24).

[42] Critically, the Appeal Panel also rejected Mr. Groia’s claim that his admitted statements about the OSC
prosecutors could be justified by reason of his duty of zealous advocacy towards Mr. Felderhof. This duty, the
Appeal Panel held, did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct nor did it
justify his attacks on the integrity of opposing counsel (at paras. 327-28).

[43] Finally, the Appeal Panel concluded that Mr. Groia’s misconduct had a serious adverse impact on the
Felderhof trial: i) by causing numerous delays in the evidence of the first witness at trial; ii) by distracting the OSC
prosecutors from the presentation of the evidence; and iii) by forcing the trial judge to become involved in many
unnecessary disputes (at para. 332).

(3) Divisional Court Decision

[44] Mr. Groia appealed the Appeal Panel’s Conduct and Penalty Decisions and its costs award to the Divisional
Court. The Law Society cross-appealed, asking that the penalty and costs award imposed by the Hearing Panel be
restored. Neither party challenged the Appeal Panel’s ruling awarding no costs of the appeal hearing.

[45] The Divisional Court dismissed both the appeal and the cross-appeal: Groia v. The Law Society of Upper
Canada, 2015 ONSC 586 (CanLII) (the “Divisional Court Decision”). Like the Appeal Panel, it rejected Mr. Groia’s
contention that, save in limited circumstances, only the courts can and should oversee an advocate’s conduct in
court, including the proposition that there are preconditions to the Law Society’s exercise of its disciplinary powers
regarding uncivil, in-court conduct by an advocate. It upheld the Appeal Panel’s conclusion that there was no
reasonable basis for Mr. Groia’s persistent pattern of personalized attacks on the OSC prosecutors and their
integrity.

[46] Importantly, in reaching these conclusions, the Divisional Court held that the Appeal Panel’s test for
incivility did not “go far enough to protect the importance of zealous advocacy’ (at para. 72). Consequently, the
court restated the test by adding the requirement that, in order for in-court incivility to constitute professional
misconduct, it must be established that the conduct at issue is both uncivil and that it “undermined, or ... [had] the
realistic prospect of undermining, the proper administration of justice” (at paras. 75-76).

[47] The Divisional Court went on to conclude that the constituent elements of its restated test were not
materially different than those employed by the Appeal Panel. Further, the Appeal Panel’s analysis of the
propriety of Mr. Groia’s conduct took all necessary factors into account, including the requirement that the
relevant conduct “might bring the administration of justice into disrepute” (at paras. 78, 80 and 96). Because the
Appeal Panel had “applied the correct test”, the court had “no hesitation” in concluding that the Conduct Decision,
and the Appeal Panel’s reasons in support of it, were reasonable. The court further concluded that the Appeal
Panel’s Penalty Decision and costs award were also reasonable in the circumstances.

IV. Issues

[48] As framed by the parties, there are five issues on appeal:

(1) What standards of review apply in this case?

(2) Did the Divisional Court err by upholding the Appeal Panel’s Conduct Decision?
(3) Did the Divisional Court err in its treatment of the Reviewing Courts’ Reasons?

(4) Did the Divisional Court err by upholding the Appeal Panel’s Penalty Decision and its costs award in favour of the Law Society?

(5) Did the Divisional Court err by awarding costs of the appeal in that court to the Law Society?

V. Analysis

(1) Applicable Standards of Review

   (i) Appellate Standard of Review

[49] The standard of review on an appeal to this court from an appeal to a reviewing court of an administrative decision is uncontroversial. As described by Deschamps J. in Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23, at para. 247, this court “step[s] into the shoes of the lower court” and focuses on the administrative decision. In this case, the question is simply to ask whether the Divisional Court identified the correct standard of review and applied it properly: see Agricola v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, at paras. 45-47.

[50] The Divisional Court held that the correctness standard applied to review of the Appeal Panel’s formulation of the test for incivility in this case and that the reasonableness standard applied to its application of the test to the facts as it found them and to its Penalty Decision and costs award.

[51] Mr. Grola concedes that the Penalty Decision and the Appeal Panel’s costs award are reviewable on the standard of reasonableness. However, he argues that these rulings are unreasonable. In contrast, Mr. Grola submits that the correctness standard applies to the Appeal Panel’s: i) formulation of the test for incivility in this case; ii) findings of professional misconduct; and iii) approach to the respective roles of the trial judge and the Law Society concerning oversight of an advocate’s uncivil conduct in court.

[52] The Law Society disagrees. It maintains that the reasonableness standard applies to all the Appeal Panel’s decisions.

[53] For reasons I will explain, I agree with the Law Society. With respect, in my view, the Divisional Court erred by applying the correctness standard of review to the Appeal Panel’s formulation of the appropriate test for incivility. The Supreme Court of Canada’s jurisprudence on judicial review of administrative action clearly establishes that the standard of review applicable to the questions at issue on this appeal is the deferential standard of reasonableness.

(ii) Appropriate Standard of Review

[54] To begin, where, as here, a statute provides for an appeal from a decision of a specialized administrative tribunal, the applicable standards of review are the ones that apply on judicial review, not on appeal: Mouvement lalique québécois v. Sagueneay (City), 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at paras. 29, 37-38 and 43. Consequently, the appropriate standards of review in such cases are dictated by administrative law principles related to judicial review of administrative action, as articulated by the Supreme Court in Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190.

[55] Dunsmuir emphasizes, at para. 54, that on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling or ‘home’ statute, the standard of review is presumptively that of reasonableness:

Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative
tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context. [Citations omitted.]


[57] Dunsmuir also remains the leading case on the meaning of reasonableness. Justices Bastarache and LeBel explained this standard, at para. 47, in this fashion:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[58] The presumption of reasonableness review applies in this case. The questions at issue here concern the Appeal Panel’s determination whether Mr. Groia’s impugned conduct constituted professional misconduct within the meaning of the Act – the Law Society’s ‘home’ statute – and the Conduct Rules, and whether the Appeal Panel erred in fashioning an appropriate penalty and costs award. The scope of the Law Society’s jurisdiction to discipline lawyers for in-court incivility involves an interpretation of the Act and the Conduct Rules. These matters squarely within the Appeal Panel’s specialized expertise and the Law Society’s regulatory mandate under the Act.

[59] Moreover, existing Supreme Court jurisprudence confirms that the presumption of reasonableness applies to decisions of specialized, professional disciplinary bodies like the Appeal Panel. Dunsmuir holds, at para. 57, that where existing caselaw establishes the applicable standard of review for particular administrative action, an exhaustive standard of review analysis is not required.

[60] In the pre-Dunsmuir case, Law Society of New Brunswick v. Ryan, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, the Supreme Court held that a provincial law society’s penalty disposition in a disciplinary case was entitled to deference. Justice Iacobucci concluded, at para. 42, that the legislator intended that the discipline committee of a provincial law society “be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline”. Accordingly, a more deferential standard of review than correctness was mandated.

[61] More recently, the Supreme Court reiterated that reasonableness remains the applicable standard of review for decisions of professional disciplinary panels. This is so even where interests under the Charter of Rights and Freedoms are engaged: Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, at paras. 44 and 45. I note that, also post-Dunsmuir, the British Columbia Court of Appeal applied Ryan in a case, like this one, involving a provincial law society’s discipline of an advocate for unprofessional, in-court conduct. As in Ryan, the court held that the reasonableness standard applies to review of the disciplinary decisions of a professional regulator: Goldberg v. Law Society of British Columbia, 2009 BCCA 147 (CanLII), 97 Admin. L. R. (4th) 15.

[62] Thus, Ryan, Doré and Goldberg all reinforce the application of the presumption of reasonableness for judicial review of a decision of a specialized disciplinary body like the Appeal Panel. Although Ryan and Doré did not involve in-court conduct, nothing turns on this point. Goldberg did involve an advocate’s conduct in court.
[63] I do not accept the argument that, in order to properly recognize the judiciary’s constitutional responsibility to control what takes place in a courtroom, the correctness standard must apply where a discipline regulator deals with allegations of professional misconduct involving an advocate’s conduct in a courtroom before a presiding judge.

[64] Doré and Ryan explicitly hold that regulating a lawyer’s conduct is squarely within the expertise of provincial law societies, attracting the reasonableness standard of review. And, as Goldberg recognizes, nothing in the Doré or Ryan courts’ holdings confines this principle to only those situations where a lawyer’s alleged misconduct occurs outside a courtroom.

[65] This principle is not new. More than a decade before Ryan, the Supreme Court instructed in Pearlman v. Manitoba Law Society Judicial Committee, 1991 CanLII 26 (SCC), [1991] 2 S.C.R. 869 that provincial law societies are best-positioned to determine issues of lawyer misconduct and incompetence, that “[n]o one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body” and that this role is integral to effective self-governance of the legal profession: Pearlman, at pp. 880, 886-87 and 890 (citations omitted).

[66] 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. As in Ryan, Doré, Goldberg and Pearlman, the issue on this appeal is whether a lawyer’s conduct met the standard of professional conduct required under the relevant statute and professional conduct rules. Regardless of where the lawyer’s conduct took place, this interpretation of a disciplinary body’s home statute is entitled to deference. The same standards of professionalism apply whether a lawyer is in a courtroom or outside of one. Nothing in Dunsmuir or its progeny deviates from this principle.

[67] Finally, as I explain later in these reasons, the application of the reasonableness standard of review in cases like this one in no way intrudes on a presiding judge’s authority to control the process in his or her courtroom. If anything, recognition of the complementary but differing roles of the courts and the Law Society regarding oversight of an advocate’s in-court conduct frees the trial judge to focus on his or her central role – the determination of the issues before the court and the management of the trial.

[68] Contrary to Mr. Grolia’s contention, there is also no basis to conclude that the questions at issue in this case come within the recognized exceptional categories of cases warranting correctness review.

[69] Dunsmuir, at paras. 58-61, identifies a narrow class of questions for which correctness remains the applicable standard. Only two are at issue here: true questions of jurisdiction or vires and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.

[70] Turning first to the “true question of jurisdiction” exception, the questions on this appeal do not come within this exception as it is contemplated under the applicable authorities. First, this exception has a limited reach. At para. 59 of its reasons, the Dunsmuir court indicated that “jurisdiction” within the meaning of this exception is intended in the narrow sense of whether or not the tribunal at issue had the authority to decide a particular matter. In such cases, the tribunal must interpret its grant of authority correctly or “its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction”.

[71] Second, recent Supreme Court jurisprudence instructs that the requirement to interpret true questions of jurisdiction narrowly has particular significance when the tribunal is interpreting its own home statute. In Alberta Teachers, at para. 34, the Supreme Court indicated:

[72] Unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by the tribunal of its own statute or statutes closely connected to its function, with which it will have particular familiarity should be presumed to be a question of statutory interpretation subject to deference on judicial review.
Third, the Supreme Court has also expressed serious reservations about whether "true questions of jurisdiction" can even be distinguished as a separate category of questions of law: see for example, Mclean v. British Columbia (Securities Commission), 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 25, per Moldaver J., citing Alberta Teachers, at para. 37.

In this case, as I will elaborate further in these reasons, I think it untenable to suggest that the Law Society possesses only limited jurisdiction to discipline one of its licensees for incivility in court. The disciplinary authority afforded to the Law Society under the Act – oversight of the professionalism of licensees – is the foundation for self-regulation of the legal profession in Ontario. The Act casts the Law Society’s obligation to ensure that lawyers meet appropriate standards of professional conduct as an affirmative duty for the protection of the public. It does not differentiate between a lawyer’s conduct inside a courtroom and his or her conduct elsewhere.

Similarly, in my view, it cannot be said that the questions on appeal meet the test for the “questions of central importance to the legal system” exception to reasonableness review. This exception relates to questions of general law that are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (emphasis added): Dunsmuir, at para. 60, citing Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, at para. 62. As explained by LeBel and Cromwell JJ. in Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471, at para. 22, correctness review for such questions is required “in order to safeguard a basic consistency in the fundamental legal order of our country”. See also Saguenay, at para. 47, citing McLean, at para. 27.

I accept that 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. For example, a majority of the Supreme Court has recently held that a lawyer’s duty of loyalty to the client’s cause is “an enduring principle that is essential to the integrity of the administration of justice”: Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7 (CanLII), [2015] 1 S.C.R. 401, at para. 96.

But this does not mean that defining the scope of the advocate’s professional duties and disciplining advocates is outside the Appeal Panel’s specialized area of expertise. To the contrary, these questions required the Appeal Panel to interpret and apply the Law Society’s home statute and its Conduct Rules, thereby engaging the Appeal Panel’s core function and expertise. See for example, DeMaria v. Law Society of Saskatchewan, 2015 SKCA 106 (CanLII), 465 Sask. R. 290, at paras. 12-16, leave to appeal refused, [2015] S.C.C.A. No. 493. As a result, even accepting that some of the contested issues regarding the Conduct Decision are of central importance to the fair administration of justice, there is no question of law that falls outside the Appeal Panel’s specialized expertise.

I also do not accept Mr. Grola’s contention that the Appeal Panel’s application of its test for incivility involved questions of law. Findings of professional misconduct, which are fundamentally fact-dependent and discretionary in nature, are findings of fact or of mixed fact and law. In this case, they are rooted in the particular factual matrix and contextual circumstances of the OSC prosecution.

As I have said, it is my opinion that the Divisional Court erred in holding that the Appeal Panel’s formulation of its test for incivility was a question of law, reviewable on the correctness standard. The starting point for the Divisional Court’s analysis should have been the recognition that the Appeal Panel’s interpretation of the Act and the Conduct Rules, including of the behaviour that constitutes professional misconduct and the test to be applied in that inquiry, were presumptively entitled to deference on judicial review. It was then necessary for the Divisional Court to determine whether this presumption had been rebutted. It has not been. Determinations whether a lawyer has engaged in professional misconduct are at the core of the Appeal Panel’s functions and squarely within its specialized expertise.

Finally, Mr. Grola’s invocation of the correctness standard rests on the mistaken premise that: “there is no body more aptly suited to determine when uncivil conduct has occurred in a courtroom than the judiciary itself,” save in very limited circumstances, described later in these reasons. This novel proposition is premised on an
unduly constrained view of the expertise of the Law Society’s disciplinary tribunals and runs contrary to established jurisprudence. For reasons I will explain, it must be soundly rejected.

[80] I therefore conclude that the deferential standard of reasonableness applies to judicial review of the Conduct Decision.

(2) Reasonableness of Conduct Decision

[81] Ryan furnishes a clear description of the reasonableness standard and explains how it should be applied. At paras. 51 and 55-56, Iacobucci J. said:

There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was unreasonable.

... A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, at para. 79).

This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole. [Emphasis added.]

I approach Mr. Groia’s challenge to the Conduct Decision with these principles in mind.

[82] Mr. Groia challenges the Divisional Court’s affirmation of the Conduct Decision on numerous grounds. His central contentions are captured succinctly in the following passage from his factum:

If [the Conduct Decision] is allowed to stand, trial judges will no longer truly control the proceedings before them, lawyers can no longer rely on how trial judges choose to conduct a criminal trial, and clients can no longer rely on their lawyers to speak their minds freely in open court, for fear that they too will be prosecuted by their regulator. Respect for judges, lawyers and the dynamics of a criminal trial will have given way to the [Law Society’s] ultimate control of the trial process.

[83] Mr. Groia makes three broad submissions in support of these claims. First, he argues that the Divisional Court and the Appeal Panel erred in their approach to the respective roles of the courts and the Law Society regarding oversight of an advocate’s uncivil conduct in court. He submits that, in most instances, the views of a presiding trial judge on the propriety of an advocate’s in-court conduct control whether the Law Society can and should exercise its disciplinary powers in respect of such conduct.
Second, he submits that the Appeal Panel and, to a lesser extent, the Divisional Court erred in fashioning their tests for incivility in this case. He submits that the Appeal Panel erred in articulating its test by failing to properly consider the advocate’s duties of zealous advocacy and commitment to the client’s cause. He also says that both the Appeal Panel and the Divisional Court erred by failing to consider, adequately or at all, Charter-protected expressive freedoms and, further, by adopting tests that fail to provide sufficient guidance to the profession regarding the dividing line between zealous advocacy and professional misconduct.

Third, and in any event, Mr. Groia contends that the Appeal Panel erred by misapplying its own test and the Divisional Court erred by concluding that the Conduct Decision was reasonable.

I will address these arguments in turn.

(i) Oversight of In-court Incivility

Mr. Groia maintains that trial judges, rather than the Law Society, are best positioned to address in-court incivility by lawyers. He argues that the Law Society cannot, and should not, discipline advocates for their uncivil conduct in court except in three limited situations: i) the advocate has been subject to a contempt finding; ii) both the trial judge’s and the advocate’s conduct are subject to disciplinary review; or iii) the trial judge has severely criticized the advocate’s conduct or complained about it to the Law Society. Notably, none of the many interveners before this court supports this position.

The Appeal Panel and the Divisional Court considered and rejected this argument. They were right to do so. I have no hesitation in concluding that Mr. Groia’s narrow construction of the Law Society’s statutory authority to discipline lawyers for professional misconduct is unsupportable, both in law and in principle.

First, this argument ignores the plain language of the Act and the Law Society’s undisputed statutory obligation to govern the legal profession in the public interest. No limiting language, express or implied, qualifies the Law Society’s duties under ss. 4.1(a) and 4.2.3 of the Act, described above, to ensure that practising lawyers in Ontario meet the professional conduct standards appropriate for the legal services they provide and to protect the public interest.

The Act also prohibits any Law Society licensee from engaging in professional misconduct or conduct unbecoming a licensee (s. 33) and, as I have said, empowers the Law Society to conduct an investigation into a licensee’s potential professional misconduct (s. 49.3). As the Divisional Court aptly noted, at para. 30, neither provision contains any language restricting the Law Society’s oversight authority to only the advocate’s conduct outside the courtroom, or to any of the three limited circumstances posited by Mr. Groia.

Mr. Groia’s limited jurisdiction argument also conflicts with the Conduct Rules, which expressly identify the duties of advocates in their dealings with all participants in the justice system, the courts and opposing counsel alike. There is no suggestion that the Law Society lacks jurisdiction to form such rules. Nor could there be. Law Society rules governing the conduct of advocates are not new. They have existed for almost a century. And they have included express requirements for professionalism, including courtesy and civility, for many years. Indeed, as the Attorney General for Ontario and other interveners point out, incivility on the part of lawyers is subject to discipline by provincial regulatory bodies throughout Canada. Nothing in the Conduct Rules confines their application to the limited situations identified by Mr. Groia.

Nor, in my opinion, is the notion of such constraints on the Law Society’s oversight powers defensible as a matter of principle. In Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (2000), 2000 CanLII 16946 (ON CA), 51 O.R. (3d) 97, leave to appeal refused, [2001] S.C.C.A. No. 66, which involved uncivil conduct by an advocate towards opposing counsel in the course of a trial, this court unequivocally stated, at para. 141: “The unprofessional conduct of counsel is a matter for the Law Society of Upper Canada.” To the same effect is the holding of the British Columbia Court of Appeal in Goldberg, at para. 52, that the advocate in that case was “answerable to [his] Law Society for his [in-court] behaviour in the conduct of the appeals” in question (emphasis in original).
Moreover, the Supreme Court also recognized the role of administrative disciplinary bodies in ensuring civility in the legal profession in Doré, at paras. 50-66. Ryan is even more explicit, confirming, at para. 42, that self-regulating disciplinary bodies have primary responsibility to oversee professional discipline and, where necessary, select appropriate sanctions. See also Pearlman, at pp. 880, 886-87 and 890.

Mr. Groia relies on the Supreme Court’s recent decision in Federation of Law Societies, released after the Divisonal Court’s decision in this case, to argue that the state, including the Law Society as a “state actor”, cannot impose duties on lawyers that interfere with their duty of commitment to advancing their client’s cause. This, Mr. Groia says, supports the conclusion that, save in the three exceptional circumstances described above, the Law Society cannot discipline an advocate for in-court zealous defence of the client’s legitimate interests.

I disagree. In Federation of Law Societies, a majority of the Supreme Court recognized the lawyer’s duty of commitment to the client’s cause as a principle of fundamental justice under s. 7 of the Charter. But nothing in Federation of Law Societies countenances a lawyer’s breach of his or her professional obligations of courtesy, civility and good faith. Nor does it contemplate that chosen regulators of the legal profession can cede to the courts their statutory responsibility for identifying those obligations or enforcing compliance with them on breach. Indeed, as I discuss below, in addressing another Charter value — freedom of expression — the Supreme Court has specifically held that a lawyer’s expressive freedoms do not furnish unbridled licence to engage in uncivil conduct: Doré, at para. 65. Similarly, even the important right to cross-examine, which is protected by ss. 7 and 11(d) of the Charter, must be exercised in a manner consistent with the advocate’s role as an officer of the court and his or her other professional obligations: R. v. Lyttle, 2004 SCC 5 (CanLII), [2004] 1 S.C.R. 193, at paras. 43-44 and 48.

There is an additional, critical flaw in Mr. Groia’s argument. It rests on a misconception of the functions and responsibilities of trial judges and those of the Law Society as regulator of the legal profession in Ontario.

In a judge-alone trial, the trial judge is responsible for the determination of the issues raised and the management of the trial. The Law Society is responsible to ensure that all lawyers adhere to the professional standards of practice that condition their licence to practise law. In these differing, but complementary roles, both the courts and the Law Society seek to protect and enhance the administration of justice. Although they are allied in this salutary objective, each contributes to its achievement in different ways. As the Marchand court put it, at para. 148:

Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is a shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves.[8]

The Divisional Court recognized the shared, but differing, responsibilities of the judiciary and the Law Society with respect to incivility in court, stating, at paras. 34-35:

There is no doubt that judges have a responsibility to address issues of incivility engaged in by lawyers who appear before them. Indeed, it cannot be expected that the profession, by itself, can deal with problems of incivility if judges do not undertake their fair share of the task.

However, the obligations of judges and the obligations of the [Law Society], as regulator of the profession, are different. [Footnotes omitted.]

I agree. The primary role of trial judges is to decide the contested issues and, in so doing, to safeguard the fairness of the trial, including the dignity and decorum of the proceeding, in order to strive to ensure a just result. In this, as in other aspects of the conduct of a trial, trial judges have a broad discretion “to ensure fairness and to see that justice is done — and seen to be done”: Lyttle, at para. 45. In contrast, in the context with which we are concerned, the primary role of the Law Society is to ensure the professionalism of its licensees, measured against
the standards of practice that apply to the entire profession. These are different roles and different inquiries, requiring different expertise and experience.

[100] I do not suggest that trial judges have no authority to control uncivil conduct in their courtrooms. Quite the contrary. Trial judges are entitled to manage a trial as part of their trial management power, founded on the court’s inherent jurisdiction to control its own processes, in order to ensure that the trial is run effectively: Felderhof, at para. 43. This trial management power extends to the careful exercise of judicial supervision over the tactical and other conduct of litigants and counsel before the court: Krieger v. Law Society of Alberta, 2002 SCC 65 (CanLII), [2002] 3 S.C.R. 374, per Iacobucci and Major JJ., for the court, at para. 47. It follows, in my view, that a presiding trial judge, in the exercise of his or her discretion, is empowered to take those lawful and reasonable steps that he or she concludes are necessary to control uncivil or other unacceptable conduct by all participants in open court, including advocates.

[101] But it is a far different thing to argue, as Mr. Groia does, that a trial judge’s authority to supervise and control the progress of the trial and the conduct of its participants constrains the Law Society’s exercise of its statutory jurisdiction to regulate a lawyer’s in-court conduct in the public interest. This unprecedented argument, if accepted, would sanction the abrogation by the Law Society of its responsibilities to the public and the legal profession, as expressly vested in it by the legislature.

[102] First, as a matter of law, the Law Society’s disciplinary authority under the Act is unqualified. And for good reason. The Law Society is charged with the responsibility, acting in the public interest, to ensure the professionalism of all those whom it licenses to practise law. To carry out this mandate, it must be equipped to respond to evolving and case-specific instances of unprofessionalism by lawyers.

[103] Second, the notion that the courts must have the last or final word in assessing an advocate’s conduct in court rests on a flawed premise: that regulating in-court conduct by advocates risks interfering with a trial judge’s authority to control the trial process. The Law Society’s mandate to ensure that lawyers conduct themselves professionally in and out of the courtroom, does not in any way conflict with or erode a trial judge’s trial management power or the independent authority of the courts. As I have indicated, the trial judge’s authority and that of the regulator exist in tandem but are focused on different inquiries and are exercised for different purposes.

[104] And this gives rise to a third, important consideration. The remedies available to the courts and the Law Society to address uncivil in-court conduct by an advocate differ according to their respective functions. A finding that the Law Society cannot review an advocate’s in-court conduct, but must defer to the views of the presiding trial judge, would mean that an advocate who engaged in professional misconduct in court cannot be disciplined for such conduct by his or her regulator save at the request – direct or indirect – of the presiding trial judge. This, in effect, would render trial judges the arbiters of whether the licences of such advocates should remain unaffected. There is simply no basis for such immunity to review of unethical behaviour by the Law Society. See for example, Krieger, at paras. 50-52.

[105] I also do not accept the argument that criticism or complaint by a presiding trial judge regarding an advocate’s uncivil in-court conduct is a necessary prerequisite to the Law Society’s exercise of its disciplinary powers. I agree that the views of the presiding trial judge regarding the propriety of an advocate’s in-court conduct can and should attract considerable weight by a reviewing disciplinary body. However, they are not dispositive of whether the advocate has engaged in professional misconduct. Indeed, they may not even address this issue, which is a question for the regulator, not the courts.

[106] Nor does a trial judge’s decision not to complain about uncivil conduct in court operate, as a matter of law, to displace or alter the Law Society’s statutory power to enforce standards of professional conduct consistent with its duty to regulate its licensees in the public interest. The Law Society’s exercise of its jurisdiction over an advocate’s in-court conduct is not an after-the-fact review of a trial judge’s decisions about how to manage his or her courtroom. Rather, it is a review squarely focused on the advocate’s conduct and whether that conduct falls below the minimum standards of professionalism for advocates as set by the Law Society. As the Law Society put
it during oral argument, an advocate’s professional obligations “do not bend” with the level or intensity of a particular presiding trial judge’s response to incivility.

[107] To conclude otherwise would render the regulation of professional conduct by lawyers subject to idiosyncratic variation, with attendant uncertainty and unpredictability. This would advance neither the public interest nor the interests of the legal profession. An advocate is not freed from the obligation to comply with the conditions of his or her licence to practise law by the simple act of donning his or her gown and entering the fray of a courtroom.

[108] I note also, as both the Divisional Court and the Appeal Panel recognized, that there are many reasons why a trial judge may elect not to criticize or complain about an advocate’s uncivil conduct in court, including the simple reality that refraining from such action in a given case may permit the proceeding to advance more efficiently. Further, some judges are reluctant to intervene because intervention might interfere with the appearance of judicial impartiality. The important point is that, just as a presiding judge’s affirmative criticism or complaint — before or after trial — is not a precondition to the Law Society’s exercise of its disciplinary authority, neither is a presiding judge’s inaction in the face of an advocate’s uncivil in-court conduct an approval of such conduct.

[109] Accordingly, I would reject this ground of appeal. The Appeal Panel’s ruling that the views of a presiding trial judge about the propriety of an advocate’s in-court conduct do not control the exercise of the Law Society’s disciplinary powers was reasonable. It was also correct.

(ii) Appeal Panel’s Test for Incivility

[110] Mr. Groia argues that the Appeal Panel erred in fashioning its test for incivility: i) by failing to properly balance the advocate’s duty of zealous advocacy with his or her duties of courtesy and civility; ii) by failing to take proper account of constitutionally-protected expressive freedoms; and iii) by creating a test that results in uncertainty and a lack of meaningful guidance for the profession.

[111] Mr. Groia defends the Divisional Court’s holding that, for disciplinary purposes, uncivil conduct must be conduct that “will also bring the administration of justice into disrepute”, but submits that the Divisional Court’s restated test is itself flawed to the extent that it also provides that uncivil conduct “having the tendency” to bring the administration of justice into disrepute is sufficient to constitute professional misconduct.

[112] For the reasons that follow, I cannot accede to these arguments. In particular, I conclude that the Appeal Panel’s formulation of the test for incivility in this case was reasonable. In my view, it appropriately balanced the importance of zealous advocacy with the requirement for courtesy and civility. Further, in fashioning its test, the Appeal Panel properly considered Charter-protected expressive freedoms. Finally, the test provides meaningful guidance to the profession and, critically, reflects the need to maintain public confidence in the repute of the administration of justice.

[113] Before addressing Mr. Groia’s specific arguments, it is helpful to first consider the duty of courtesy and civility.

(a) Duty of Courtesy and Civility

[114] It is common ground that the concept of “civility”, as it applies to lawyers, is not easily defined. While the meaning of civility for lawyers may be difficult to articulate with specificity, its significance to the proper functioning of our judicial system is beyond doubt. In Felderhof, at para. 83, this court confirmed its importance to the legal profession, the public and the administration of justice:

It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. … Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. …
Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

[115] This court's decision in Marchand is similarly instructive. In Marchand, the court held, at para. 148, that the trial judge's failure to satisfactorily discharge his responsibility to ensure civility in the courtroom "tarnished the reputation of the administration of justice" and that the facts of that case "underline[d] the importance being given by leaders of the bench and bar to improving civility in the courtroom." Doré, too, endorses the need for civility by lawyers, describing it, at paras. 65 and 69, as part of the public's reasonable and legitimate expectations of a lawyer's professionalism. None of Felderhof, Marchand or Doré restricts this duty to only in-court conduct.

[116] I pause here to address two troubling aspects of the debate before this court about the duty of civility. First, contrary to the tenor of some submissions during oral argument, it is wrong to diminish the force of the Felderhof court's comments about civility, quoted in part above, on the basis that they are 'merely obiter'. In Felderhof, at para. 83, the court sought to provide guidance on professionalism, for counsel and trial judges alike, in particular, about the need for civility "both inside and outside the courtroom" and the obligation of advocates to conduct themselves professionally "as part of their duty to the court, to the administration of justice generally and to their clients". The court's warning about the need for civility forms an integral part of the foundation for its decision. It is a mistake to discount it.

[117] Second, the requirement for civility by advocates has been referred to before this court by some as the product of the "civility movement". To the extent that this was intended to indicate that the increased emphasis in the profession on civility reflects the evolution in contemporary understanding about the meaning of professionalism for lawyers, it is unobjectionable.

[118] But recognition of the need for civility by lawyers and its importance to our justice system is not simply a trend or a passing reform. Nor should it be regarded as such. As the commentary to r. 4.01(1) of the 2000 Rules notes, it is also not an empty formality because, unless order in the courtroom is maintained through dignity, decorum and courtesy, "rights cannot be protected". For this and other reasons, a lawyer's obligations under the Conduct Rules include the avoidance of "ill-considered or uninformed criticism of the competence [and] conduct ... of other lawyers": 2000 Rules, commentary to r. 6.03(1).

[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.

[120] In Doré, the Supreme Court, at para. 61, citing Michael Code in "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 Can. Crim. L. Rev. 97, at p. 101, endorsed this definition of incivility: "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy".

[121] Echoing Doré, the Appeal Panel noted, at para. 209, that while 'civility' is a useful short form, the concept of civility "captures many forms of unprofessional communications that go well beyond rudeness or lack of courtesy". Given the range of conduct that is captured under the rubric of civility, various courts and senior members of the litigation bar have attempted to provide clarity to the term and guidance as to the type of behaviour that will constitute uncivil conduct by advocates. It was for this very purpose that the Advocates' Society developed the Principles, referenced above. The Law Society's commentaries to the Conduct Rules also seek to achieve the same ends.

[122] The Divisional Court also attempted to provide guidance on this issue by providing non-exhaustive examples of uncivil conduct, at para. 75:
It is conduct that risks bringing the administration of justice into disrepute because it is conduct that strikes at the very qualities of what the justice system represents. It is conduct that would make an impartial outside observer question the central tenets upon which the justice system is based. It is the difference between impassioned, but reasoned, disagreements and... uninformed, nasty, personal tirades....

[123] The Appeal Panel did not attempt to provide a comprehensive definition of uncivil conduct. It concluded, at para. 232, that “determining when uncivil courtroom communication ‘crosses the line’ is ... fundamentally contextual and fact-specific”. I agree and would add that the same observation applies to uncivil conduct outside the courtroom.

[124] And it is because the question whether an advocate’s impugned conduct constitutes uncivil conduct warranting disciplinary review is a contextual and fact-specific inquiry that a precise definition of incivility is elusive and undesirable. What constitutes uncivil conduct for this purpose will vary with the circumstances in any given case. Incivility must be given a flexible definition, capable of encompassing diverse situations and different contexts. What these will have in common is that they will meet the Dore definition of incivility: “potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy”.

[125] The highly contextual and fact-specific nature of incivility necessarily requires affording the disciplinary body leeway in fashioning a test that is appropriate in the circumstances of the particular case. The test in a given case will generally be reasonable if it focuses on the specific nature of the conduct at issue and explains why that conduct requires scrutiny in the context and circumstances in which it occurred. At the end of the day, the relevant question is whether the type of proven conduct at issue, in the applicable context and factual circumstances, may reasonably and, hence, objectively be said to fall below the standard of conduct for advocates that the public and the profession at large have a right to expect.

[126] I turn now to Mr. Groia’s challenge of the Appeal Panel’s formulation of the test in this case.

(b) Duties of Zealous Advocacy and

Loyalty to the Client’s Cause

[127] Mr. Groia, supported by some interveners, asserts that disciplinary action against him for his in-court submissions during the Felderhof trial, absent any complaint or criticism about his conduct by the trial judge, risks chilling the zealous advocacy to which advocates are professionally-bound and poses a threat to the independence of the bar, to the detriment of the public. I would reject these assertions.

[128] First, the duty of zealous advocacy. This duty, like the duty of courtesy and civility, forms part of the advocate’s larger duty of professionalism. It is a codified obligation under the Conduct Rules and a defining element of the advocacy tradition in Canada. As the commentaries to r. 4.01(1) of the 2000 Rules explain, it requires that an advocate: “raise fearlessly every issue, advance every argument, and ask every question, however distasteful” that the advocate thinks “will help the client’s case”. It also requires that an advocate “endeavour to obtain for the client the benefit of every remedy and defence authorized by law”.

[129] The courts have unreservedly acknowledged that zealous advocacy is fundamental to the advocate’s role. In Felderhof, at para. 84, Rosenberg J.A. stated: “Zealous advocacy on behalf of a client, to advance the client’s case and protect that client’s rights, is a cornerstone of our adversary system.” Quoting G. Arthur Martin, “The Practice of Criminal Law as a Career” in Professionalism: A Century of Perspectives (Toronto: Law Society of Upper Canada 2002), at p. 93, he added: “The existence of a strong, vigorous and responsible Defence Bar is essential in a free Society” (emphasis in original).

[130] Mr. Groia’s position on this appeal, at heart, is that when the advocate’s duty of zealous advocacy conflicts with his or her duty of courtesy and civility, the public interest demands that the former must prevail. The
Divisional Court appears, at least implicitly, to have accepted this proposition. Its approach to its restated test for incivility was driven by its view of the need to enlarge the protections afforded to the duty of zealous advocacy.

[131] 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. This premise misconceives the advocate's duty of professionalism.

[132] The duty of zealous advocacy must be jealously protected and broadly construed. But it is not absolute and must not be abused. Nor do the Conduct Rules assign it paramountcy. The Conduct Rules provide for a constellation of obligations that together make up the overarching duty of professionalism that conditions the privilege of practising law in Ontario.

[133] The advocate's duty of professionalism encompasses both the duty of zealous advocacy and the duty of courtesy and civility. Lord Reid's famous statement in Rondel v. Worsley, [1969] 1 A.C. 191, at pp. 227, captures this principle well:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession... [Emphasis added.]

[134] It bears emphasis that these obligations are owed by all advocates and due to all participants in the justice system. As the Supreme Court affirmed in Lyttle, at para. 66, citing Lord Reid's above-quoted comments in Rondel, an advocate's duties are owed not only to the client, but also to the public and, hence, to the justice system itself and all its participants. See also Doré, at para. 58.

[135] The Advocates' Society's Principles afford helpful guidance to the profession on this issue. They provide in part:

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.

... 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. [Footnotes omitted.]

As this court has done on other occasions,[9] I endorse these comments. The Principles usefully inform the standard of conduct required and expected of advocates.

[136] That the duties of zealous advocacy and courtesy and civility are intended to apply in tandem is evident from the language of the 1998 Handbook and the 2000 Rules. Under both, the duty of zealous advocacy is coupled with the stipulation that it must be discharged by the lawyer while treating the tribunal with "courtesy and respect" (1998 Handbook, commentary to r. 10) or with "candour, fairness, courtesy and respect" (2000 Rules, r. 4.01(1)). Thus, the duty of zealous advocacy is coextensive with the advocate's duty to act with courtesy, civility and in good faith. Both duties are imperatives of true professionalism by advocates.

[137] And it is here that Mr. Groia's attack on the Appeal Panel's test for incivility on the ground that his duty of zealous advocacy is overarching founders. In Felderhof, at para. 83, this court explicitly rejected the premise of an inherent divide between the advocate's duty of zealous advocacy and the companion duty of courtesy and civility
in the conduct of litigation, stating that: "Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client." The court continued, at para. 94, with respect particularly to the duties of defence counsel:

But, as officers of the court and as barristers and solicitors, defence counsel also have responsibilities to the court and to other counsel and they have a duty to uphold the standards of the profession. As I have said, defence counsel's obligation to his or her client to fearlessly raise every legitimate issue is not incompatible with these duties to the court, to fellow counsel and to the profession.

[138] Felderhof makes the point, at para. 93, that counsel who are the target of professional vilification by their opponents are not obliged to simply 'deal with it'. The often misused adage that "a hard fought trial is not a tea party" does not license abusive and unprofessional behaviour towards opposing counsel.

[139] The crucial point is that all participants in litigation and the public have a legitimate right to expect that the advocate's duty of zealous advocacy will be tempered by the overriding duty to adhere to all the standards of the profession, including the duty to act with courtesy and civility and in good faith. This case affords an apt example. An advocate's duty to his or her client does not permit the advocate to act unprofessionally. Nor does it absolve an advocate from "heeding his duty to the Court and to his fellow solicitors": R. v. Elliott (1975), 28 C.C.C. (2d) 546 (Ont. C.A.), at p. 549; Goldberg, at para. 45; Doré, at para. 65.

[140] I acknowledge that, on occasion, the fearless and forceful representation of a client may, as the Advocates' Society put it in its factum, "[push] up against the boundaries of civility". Further, and importantly:

Advocates are only human and their patience and judgment may occasionally falter. The same is true for judges, who may occasionally misapprehend or overreact to the conduct of counsel in their courtrooms. Neither advocates nor judges should feel unduly constrained by the threat of subsequent disciplinary proceedings against counsel.

[141] For this reason, the advocate's isolated lapse of judgment or occasional disparaging comment about another participant in litigation generally should not be viewed as triggering disciplinary action. But that is not this case. The Law Society disciplinary panels were concerned here with an advocate's alleged pattern of making unfounded, personalized attacks on the integrity of opposing counsel and baseless allegations of prosecutorial misconduct. The Appeal Panel's test was specifically designed to address the serious and repetitive nature and manner of expression of these allegations. It is thus essential that the nature of the conduct at issue be closely and carefully scrutinized before the test for incivility is said to have been met.

[142] The Appeal Panel's reasons reveal that it was alert to Mr. Groia's duty of zealous advocacy and to the need to factor it into the formulation of its test for incivility and its conduct analysis. It confirmed, at para. 7, that by undertaking a contextual analysis of all the relevant circumstances surrounding Mr. Groia's impugned comments at the Felderhof trial, "including the important public interest that lawyers vigorously and courageously advocate for their clients", it sought to ensure "that the challenges that confront courtroom advocates are fairly taken into account and do not create a chilling effect on zealous advocacy".

[143] The Appeal Panel referred at length to the principles set out by this court in Felderhof and Marchand and to the Supreme Court's holdings in Doré about zealous advocacy and civility, among other authorities. It also considered the Conduct Rules, the commentaries to those rules and the Principles.

[144] It went on to caution, at para. 211, that "civility should not be used to discourage fearless advocacy manifested by passionate, brave and bold language". It then made the key point that the misconduct alleged here transcended "mere rudeness", "excess rhetoric" or "sarcastic remarks" and, instead, involved unfounded, direct attacks on the integrity of opposing counsel. It was only after undertaking this analysis that the Appeal Panel accepted the parties' agreed test. This approach was reasonable and, as I will explain, amply justified by the record in this case.
Mr. Groia relies on Re Clark, 1995 CanLII 1628 (ON LST), 1995 CanLII 1628 (Ont. L.S.T.), a decision of the Benchers of the Law Society, sitting in Convocation, for its comments about the importance of protecting the independence of the bar and its statement that, to the extent that the duty of zealous advocacy comes into conflict with the duty to treat the court with courtesy and respect, the Law Society should be reluctant to find that overzealousness constitutes professional misconduct. In my view, Clark does not assist Mr. Groia in the circumstances of this case.

Convocation’s decision in Clark, like the Appeal Panel’s fashioning of its test for incivility, was highly contextual and fact-specific. As in Clark, the Appeal Panel balanced the duty of zealous advocacy with the duty of courtesy and civility in light of the facts established on the record. I have already concluded that the Appeal Panel carefully considered the importance of the duty of zealous advocacy in crafting its test to ensure that the ability of an advocate to resolutely advance his or her client’s cause would not be undermined. Its formulation of that test is entitled to deference. Nothing in Clark compels me to a different conclusion.

It is also important to note that Clark was decided more than 20 years ago. Since Clark, the legal discourse on professional misconduct arising from incivility has evolved. This court’s discussion in Marchand exemplifies that evolution. In my view, the particular context of Clark makes it unsuitable as a benchmark for incivility. It does not reflect the contemporary appreciation of the advocate’s duty of professionalism.

In all the circumstances that I have described, I see no basis on which to fault the Appeal Panel for its balancing of Mr. Groia’s duty to zealously advocate on Mr. Felderhof’s behalf with his related duty of courtesy and civility, or for its appreciation of the need to craft a test for incivility that took proper account of both in the context of this case.

One further aspect of Mr. Groia’s argument on this issue requires mention. Mr. Groia, relying on Federation of Law Societies, also argues that the Appeal Panel’s test for incivility interferes with the advocate’s duty of commitment to the client’s cause. Again, I disagree.

Federation of Law Societies does not hold that the duty of commitment to a client’s cause is absolute or open-ended. To the contrary, at para. 93 of its reasons, the Supreme Court said:

Committed representation does not, for example, permit a lawyer to assert claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client commit a crime. The duty is perfectly consistent with the lawyer taking appropriate steps with a view to ensuring that his or her services are not being used for improper ends. [Emphasis added.]

These comments apply with equal force to the advocate’s duty of courtesy and civility. To paraphrase the Supreme Court’s words, the lawyer’s duty of committed representation does not permit, let alone require, a lawyer to breach his or her duty of courtesy and civility. Nor does it preclude the regulator’s establishment and enforcement of that duty. Rather, the duty of committed representation “is perfectly consistent with the lawyer taking appropriate steps” to ensure that his or her advocacy does not breach his or her professional obligations.

(c) Freedom of Expression

Mr. Groia next argues that the issue of his expressive freedoms under s. 2(b) of the Charter and those of Mr. Felderhof, embodied in Mr. Felderhof’s constitutional right to make full answer and defence to the OSC charges, are engaged in this case. He submits that, as a result, the Appeal Panel was required to address whether his allegations of prosecutorial misconduct constituted constitutionally-protected speech and to factor this consideration into its determination of the proper test for incivility. Mr. Groia says that, having failed to do so, the Appeal Panel erred.

I do not accept this argument. In my view, the Appeal Panel reasonably addressed s. 2(b) Charter values under the rubric of its consideration of the duty of zealous advocacy.
Doré confirms, at paras. 24 and 28, that administrative decision-makers, like the Appeal Panel, must act consistently “with the values underlying [their] grant of discretion, including Charter values” (citations omitted). It also holds, at paras. 36 and 54, that a disciplinary body’s balancing of freedom of speech with a lawyer’s professional obligations attracts deference.

Doré further instructs, at para. 66, that a disciplinary tribunal’s balancing of the competing interests in play—freedom of expression and the need to ensure civility in the legal profession—is a “fact-dependent and discretionary exercise”. Partially for this reason, a high degree of deference is owed by a reviewing court to a disciplinary tribunal’s balancing of these interests.

Accordingly, where an administrative decision-maker’s treatment of expressive rights is at issue, as here, the relevant question is whether the administrative decision-maker has “disproportionately, and therefore unreasonably, limited [the s. 2(b)] Charter right”: Doré, at paras. 6 and 57. If, in exercising its statutory discretion, the administrative decision-maker has properly balanced the s. 2(b) Charter value with the decision-maker’s statutory objectives, its decision will be reasonable: Doré, at para. 58. See also Loyola High School v. Quebec (Attorney General), 2015 SCC 12 (CanLII), [2015] 1 S.C.R. 613, at paras. 3-4, 32 and 37-42.

The Appeal Panel did not ignore or discount expressive rights. It twice referred in its reasons to the relevance of expressive rights and the need to strike a balance between those rights and a lawyer’s professional obligations to his client, the court, and other counsel and parties (at paras. 212 and 214). It expressly considered Doré and, at para. 214, quoted from the Supreme Court’s instructions that freedom of speech must be balanced “with the need to ensure civility in the profession”: Doré, at para. 66.

In its careful and detailed assessment of Mr. Groia’s conduct, the Appeal Panel balanced the expressive rights at issue in this case with Mr. Groia’s professional obligations. It concluded, at para. 328:

“Zealous advocacy did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct. Zealous advocacy did not require Mr. Groia to frequently resort to impugn the integrity of his opponents. Zealous advocacy was not to be used to do so”. However, in fulfilling that duty, advocates “are constrained by their profession to do so with dignified restraint”. These comments are apposite here.

These holdings are consistent with the principles outlined in Doré. Doré recognizes, at para. 65, that expressive freedoms are not incompatible with professional conduct obligations, including the duty of civility:

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. ... This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.

See also Goldberg, at paras. 57-59.

The Appeal Panel might have said more on this issue. Nonetheless, when its reasons are read as a whole, as they must be, I am satisfied that it reasonably balanced Mr. Groia’s expressive rights and those of Mr. Felderhof with the key objective under the Act and the Conduct Rules of ensuring professionalism by advocates, including courtesy, civility and zealous advocacy, in the public interest. As the Supreme Court held in Doré, at para. 68, lawyers “not only have a right to speak their minds freely, they arguably have a duty to do so”. However, in fulfilling that duty, advocates “are constrained by their profession to do so with dignified restraint”. These comments are apposite here.

I therefore conclude that the Appeal Panel’s test reflects a reasonable and proportionate limit on both the advocate’s expressive freedoms and those of the client.

(d) Vagueness Claims

Mr. Groia’s vagueness claims focus, although not exclusively, on the Divisional Court’s restated test. In his factum, Mr. Groia argued that the restated test is vague and ill-defined and that it creates “an unreviewable prosecutorial discretion” for the Law Society. However, at the appeal hearing, his position on the restated test
narrowed somewhat. During oral argument, he challenged only the second part of the restated test, that is, the Divisional Court’s holding that the Law Society’s disciplinary process may be triggered if the conduct at issue “would have the tendency” to bring the administration of justice into disrepute. Several interveners also attack the restated test, in whole or in part, on similar grounds.

[163] Apart from any complaints about lack of clarity, there are several difficulties with the Divisional Court’s development of a restated test for incivility. First, for the reasons already given, it was not open to the Divisional Court to substitute its own view of the appropriate test because it disagreed with the Appeal Panel’s balancing of the advocate’s professional duties. I again emphasize that the requisite inquiry was whether the Appeal Panel’s test was reasonable. Having found that the appropriate standard of review was correctness, the Divisional Court did not address this issue.

[164] Second, based on the Appeal Panel’s reasons, the parties before the Appeal Panel agreed to the test ultimately adopted by the Appeal Panel. In these circumstances, I have difficulty accepting that it is now open to Mr. Groia to assert that the Appeal Panel’s formulation of the test was unreasonable or that the test itself is otherwise deficient.

[165] This brings me to the merits of the Divisional Court’s restated test. Simply put, the test articulated by the Appeal Panel is a reasonable and functional one that accounts for the contextual and fact-driven nature of a professional conduct inquiry regarding uncivil conduct in court. Its test was owed deference by the Divisional Court.

[166] The Appeal Panel’s test provides that it is professional misconduct to make allegations of prosecutor misconduct or that impugn the integrity of opposing counsel, unless the allegations are made in good faith and with a reasonable basis. In fashioning this test, the Appeal Panel expressly balanced the advocate’s duty of zealous advocacy with his or her duty of courtesy and civility. It also took account of the need to consider the context for an inquiry regarding allegedly uncivil conduct, including: i) the “dynamics, complexity and particular burdens and stakes of the trial” at issue; ii) the nature of the misconduct alleged; and iii) “the important public interest that lawyers vigorously and courageously advocate for their clients” (at para. 7). These were proper and necessary considerations. They were adequately, indeed fully, addressed by the Appeal Panel.

[167] In short, the Appeal Panel’s test was crafted to account for the facts of this case, and the interests of all parties to the OSC prosecution, including the public interest in the proper functioning of the administration of justice. In my view, it is not vague or ill-defined. It balances numerous factors and interests and provides for a contextual, fact-driven analysis, on a case-specific basis, as to whether uncivil conduct of a specified type (unfounded allegations of prosecutorial misconduct or that impugn the integrity of opposing counsel), constitutes professional misconduct.

[168] The test recognizes that, while advocates may be required to use strong and forceful language to advance the client’s interests, there are limits on what an advocate can say. It recognizes the interests of multiple participants in our justice system, including those who are the targets of uncivil comments. It satisfies the Supreme Court’s definition of incivility, quoted above, which contemplates “potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy” (emphasis added): Doré, at para. 61.

[169] In contrast, respectfully, I regard the Divisional Court’s restated test as both unnecessary and unduly restrictive. It is unnecessary because the impact of uncivil conduct on the administration of justice is encompassed by the Appeal Panel’s test and was expressly considered by it.

[170] Consider, for example, the Appeal Panel’s statements, at para. 211, that “mandating ‘civility’ protects and enhances the administration of justice” and, at para. 228, that the risk of harm arising from courtroom incivility to “either a particular proceeding or the justice system as a whole” is “real”. Later, the Appeal Panel added, at para. 230:
The harm to the administration of justice [from in court incivility] is even clearer when the unprofessional courtroom communications take the form of attacks on the integrity of one’s opponent by unjustified and unfair allegations of bad faith or a lack of candour or honesty. Holding lawyers accountable for such communications does not simply protect opponents from hurt feelings, it avoids disrupting a trial.

[171] These comments accord with this court’s observations in Felderhof, at para. 83. Those observations bear repetition:

Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public’s respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

[172] The Appeal Panel considered that, under its test for Incivility, its evaluation of the propriety of Mr. Groia’s conduct contemplated an assessment of the harm to the administration of justice, if any, caused or threatened by the uncivil conduct at issue. It carried out its conduct analysis accordingly.

[173] The Divisional Court’s restated test equates harm to the administration of justice with trial unfairness. I reject this unduly restrictive approach. A requirement for a showing of trial unfairness sets the bar too high for a professional misconduct inquiry. Uncivil conduct that falls short of fatally compromising the fairness of a trial may nonetheless impede the efficient and orderly progress of the trial, tarnishing public respect for and confidence in our justice system in the process. This court effectively said so in Felderhof, at para. 83, quoted above. As Michel Proulx and David Layton put it in Ethics and Canadian Criminal Law (Toronto: Irwin Law, 2001), at p. 657: “an egregious breach of ethics may in some cases have no appreciable effect on the fairness of the trial, when appropriate remedies can cure any harm suffered by the accused.”

[174] The restatement of the Appeal Panel’s test necessarily implies that, to constitute professional misconduct, something more is required when an advocate knowingly and deliberately makes unfounded or bad faith comments about participants in the justice system. I would also reject this proposition. Our justice system cannot and should not tolerate such conduct. Comments that are made in bad faith or without a reasonable basis, including those that impugn the integrity of opposing counsel, inevitably stain the administration of justice.

[175] For the same reasons, I reject Mr. Groia’s claim that the Appeal Panel’s test is deficient because it fails to accord proper weight to the Felderhof court’s ruling that Mr. Groia’s conduct did not result in an unfair trial or prevent the OSC prosecutors from presenting their case at trial.

[176] Damage to the administration of justice includes, but is not limited to, compromised trial fairness. Consider, for example, the facts in Doré. Doré did not involve any issue of hearing or trial unfairness. But it certainly identifies concerns about an advocate’s duty to avoid erosion of public confidence in the administration of justice arising from the advocate’s unfounded or inappropriate criticisms of a trial judge. Our jurisprudence is replete with other examples of where the courts have found that an advocate’s conduct, or that of the state or another participant in litigation, risked undermining the integrity and repute of the administration of justice without compromising trial fairness.[10]

[177] And, contrary to Mr. Groia’s contention, this court made no finding in Felderhof that his uncivil conduct had no adverse impact on the administration of justice. Rather, it held that, despite what it found was Mr. Groia’s improper rhetoric and inappropriate conduct, the prosecution in the Felderhof case was not prevented from having a fair trial. In other words, the exacting test for the loss of jurisdiction by the trial judge was not met: Felderhof, at paras. 79-82, 90, and 99. It is one thing to conclude that a court has not lost jurisdiction due to trial unfairness. It is another thing to infer from that conclusion that no damage to the administration of justice has occurred.

(e) Conclusion
[178] I conclude that the Appeal Panel’s test for incivility struck a reasonable balance among the many relevant considerations engaged in respect of Mr. Groia’s conduct. Its test contemplated the Doré definition of incivility. It identified the nature of the conduct at issue based on the particular misconduct alleged in this case (allegations of prosecutorial misconduct and allegations that impugned the integrity of opposing counsel). It recognized that the impugned conduct took place in-court, during the course of a lengthy and hard-fought criminal trial. It also explained why the allegations in question warranted scrutiny: to determine whether, in the context and circumstances in which they occurred, the allegations were made in good faith and with a reasonable basis.

[179] Moreover, the Appeal Panel’s reasons for adopting its test for incivility are clear, cogent and intelligible. They amply justify the adoption of the test, which squarely falls within a range of possible, acceptable outcomes that are defensible on the law and the facts for the delineation of an appropriate test for incivility applicable in this case. To the extent that the Divisional Court held to the contrary, it erred.

(iii) Reasonableness of Application of Test for Incivility

[180] Mr. Groia argues that the Appeal Panel erred by misapplying its test for incivility to the facts of this case. He makes four main arguments.

[181] First, he submits that the Appeal Panel erred by failing to adequately account for the reality that “[t]here is a natural tension between zealous advocacy and incivility”. Second, he renewes his submission that the Appeal Panel and the Divisional Court erred by failing to recognize that trial judges are best equipped to “police” the line between zealous advocacy and incivility in court and that, as a result, the Law Society cannot, and should not, exercise its disciplinary authority in respect of such conduct save in limited circumstances. Third, he relies on his assertion that the Divisional Court and the Appeal Panel failed to properly consider the s. 2(b) Charter issues implicated in this case.

[182] I have already considered, and rejected, these submissions when addressing the reasonableness of the Appeal Panel’s test for incivility.

[183] Finally, Mr. Groia submits that the Appeal Panel’s findings of professional misconduct are incorrect, unreasonable and not supported by the evidence. He further says that, in making these findings, the Appeal Panel ignored relevant evidence and read the record selectively. Consequently, the Divisional Court erred by upholding the Appeal Panel’s flawed findings.

[184] In considering these submissions, it must be remembered that there are two branches to the Appeal Panel’s test for incivility in this case. Under the test, professional misconduct is established on proof of allegations of prosecutorial misconduct or allegations that impugn the integrity of opposing counsel, unless they are: i) made in good faith, and ii) have a reasonable basis. The Appeal Panel concluded that both branches of the test were satisfied in this case. However, if the Appeal Panel’s findings under either branch of the test are reasonable, professional misconduct is made out.

[185] In my opinion, the Appeal Panel’s findings under both branches of the test are amply supported by the record before it. Further, the Appeal Panel cannot be faulted for its scrutiny of the record. It follows that its findings of professional misconduct against Mr. Groia are reasonable. Accordingly, there is no basis for appellate intervention.

[186] It is unnecessary to detail in these reasons the extensive review of the record undertaken by the Appeal Panel to demonstrate support for these opinions. The following will suffice.

[187] As I have said, the Appeal Panel necessarily was concerned with events that occurred during the first phase of the Felderhof trial. This included a review of the submissions of counsel at the pre-trial disclosure motion on December 22, 1999, the Stinchcombe motion during days 1 to 16 of the trial, and the OSC motion on days 39 to 42 for the admission of documents on an omnibus basis. The Appeal Panel held that, viewed individually, Mr. Groia’s conduct in the course of these motions, although problematic in some respects, did not amount to professional
misconduct. In other words, standing alone, his conduct did not cross the line from zealous, and sometimes aggressive and intemperate, advocacy into professional misconduct. The reasonableness of this holding is not challenged on this appeal.

[188] However, commencing on day 52 of the trial, this changed. To appreciate the significance of Mr. Groia’s conduct on day 52 and following, together with the Appeal Panel’s associated findings, it is important to understand certain of the preceding events and the nature of Mr. Groia’s complaints regarding the OSC prosecutors as developed to that date.

[189] To briefly recap, prior to the beginning of the trial, Mr. Groia claimed that the OSC prosecutors had failed to discharge their Stinchcombe disclosure obligations. This included suggestions by him that the OSC prosecutors were reneging on specific disclosure commitments made to the defence. This theme of alleged failure by the OSC prosecutors to disclose relevant documents continued during the 16 day-long Stinchcombe motion. Once the trial began, disputes about the admissibility of documents dominated the trial. Mr. Groia put the OSC prosecutors to strict proof of all documents while conversely taking the position that the defence was able to admit, without the requirement of strict proof, any document that the OSC prosecutors had earlier described as relevant and authentic during their submissions to the court on the Stinchcombe motion. Also relevant is the fact that, on the first day of trial, an OSC spokesperson had said that the OSC’s goal was “simply to seek a conviction”, a statement to which Mr. Groia repeatedly returned throughout his submissions before the trial judge.

[190] By day 52 of the trial, Mr. Groia’s complaints regarding the OSC prosecutors’ approach to its disclosure obligations, the admissibility of documents and Mr. Felderhof’s right to make full answer and defence had undeniably matured into blunt accusations of deliberate prosecutorial misconduct.

[191] The Appeal Panel considered Mr. Groia’s submissions before the trial judge on these issues in the context in which they were made and in light of the various motions that had been argued during the first 50 days of trial. It held, at para. 280, that Mr. Groia had used his submissions regarding the admissibility of documents “as a platform to attack the prosecutors, and in particular to impugn their integrity, without a reasonable basis to do so”.

[192] As I see it, these findings were firmly anchored in the record of the Felderhof trial. The record reveals that, on day 52, a dispute emerged regarding Mr. Groia’s entitlement to cross-examine Mr. Francisco on a document that the witness could not identify – a letter between two senior officers of a third party, Placer Dome. Mr. Groia argued that, as the letter had been part of documents that the OSC prosecutors had earlier identified as relevant and necessary to its case, he was entitled to cross-examine Mr. Francisco on the letter without first establishing its relevance and undertaking to call a witness to identify the document.

[193] In his submissions on this issue, Mr. Groia said, among other things:

Now suddenly when it suits the defence’s purpose the Crown suddenly has a whole new view of life. There has been an epiphany that’s taken place.

...[The OSC prosecutors] told us it was probative. They told us it was relevant. They told us that met the Stinchcombe requirements and now they are telling us, “Well, forget what we said then. We’re kind of upset that you didn’t agree to do it our way, so forget all of the things we told you about these being relevant and probative. Don’t believe a word we said.” [Emphasis added.]

[194] Viewed in context, the import of these remarks is clear. Mr. Groia was arguing to the court that the OSC prosecutors could not be relied upon to honour their assurances and that they were failing to live up to their prior representations regarding the relevance and admissibility of documents. In effect, Mr. Groia maintained that the prosecutors were seeking to employ one standard of admissibility and relevance for documents useful to the prosecution and another, more onerous and shifting standard in respect of documents useful to the defence.
[195] The situation worsened the next day. It must be remembered that by then—day 53 of the trial—Mr. Francisco, the OSC’s first witness, was still in the witness box and his cross-examination had only just begun. His testimony had been frequently stalled or interrupted while counsel ’locked horns’ before the trial judge on the admissibility and relevance of various documents. The trial was not progressing efficiently. To the contrary, it had become deeply bogged down and the difficulties in the relations between counsel, by now, were pronounced and extraordinarily acrimonious.

[196] On day 53, Mr. Groia again sought to introduce through Mr. Francisco a document that the witness had never seen and could not identify. In the course of his submissions that day, Mr. Groia said, among other things:

Only if this court is prepared to say that the word of the Government is meaningless, that the representations of the Government are meaningless, that the statements of the Government on the record are meaningless, that you can’t rely on anything the Government says anymore, is there any basis for my friend to make the submissions that he’s making.

...

[One of the OSC prosecutors] got 231 exhibits in without a lot of fuss and muss, in my submission, about those kinds of issues. He’s not happy about it, because it’s hard work. Well, that’s too bad, Your Honour. Prosecutions are supposed to be hard work and they are supposed to be done in a manner that accords with the rules of law...

...

And if the Government now is suddenly saying, “You can’t rely on our word anymore, that you can’t rely on the fact that we’ve given you these documents as part of our Stinchcombe obligation and we only gave them to you because we got them from Placer Dome— so we’re going to have to consider, now that Mr. Groia is being a bad boy, we’re going to have to consider whether that’s still going to be the basis of proceeding,” then Your Honour, I’ve got to tell you, I don’t know how I can proceed, because I thought I could count on what I was being told.

...

You can’t do anything in this case as the defence, Your Honour, without the Government wanting to take some other advantage or get some other document in.

[197] The Appeal Panel found, at para. 285, that these remarks, among others, directly attacked the integrity of the OSC prosecutors by alleging that they could not be relied upon to keep their word and that they were “lazy and incompetent.” In the Appeal Panel’s view, these statements harkened back to Mr. Groia’s earlier allegations of prosecutorial misconduct and had no factual foundation.

[198] Further, Mr. Groia’s quoted comments cast the OSC as the “Government” and sought to persuade the trial judge that the OSC prosecutors could not be trusted (at para. 286). The Appeal Panel concluded in this regard: “We see nothing wrong with the use of [the] word ["Government"] standing alone to describe the OSC; we see everything wrong with its use as a way of casting aspersions on opposing counsel without a reasonable basis” (at para. 286).

[199] In my view, this interpretation of the sting of Mr. Groia’s statements is eminently reasonable. The Appeal Panel’s findings were rooted in the words admittedly spoken by Mr. Groia on day 53 and in the evidence of events to that point in the trial. However, Mr. Groia argued before the Appeal Panel, as he does before this court, that the OSC prosecutors’ conduct and their positions concerning the admissibility of documents furnished a legal and ethical basis for his attacks on them.

[200] This argument cannot stand. Mr. Groia fundamentally misunderstood the role of the OSC prosecutors and advanced positions on the admissibility of documents that were wrong in law and contrary to the rules of evidence, as described by this court in Felderhof, at para. 73:
Defence counsel is wrong to assert that because the prosecution concedes a document is relevant and authentic he is entitled to tender it to any witness without regard to whether the witness knows anything about the document. A document may be relevant and authentic but counsel seeking to question a witness on the contents of the document must be able to demonstrate, if challenged, the admissibility of the witness's answer. Further, simply because a document is relevant and authentic does not mean it is admissible without regard to the rules of evidence, especially the hearsay rule.

[201] The court continued, at para. 79:

[T]he prosecution is not duty bound to introduce all possible documents in examination of its witness and is not acting improperly in objecting to the admission of inadmissible evidence. ... As the application judge said (at para. 33), "it is inappropriate to attack a prosecutor for seeking a conviction. To do so, demonstrates a misunderstanding of the vital distinction between a prosecutor who improperly seeks nothing but a conviction and a prosecutor who properly seeks a conviction within the appropriate limits of fairness".

[202] There can be no doubt, in my opinion, that Mr. Groia’s remarks on day 53 exceeded the boundaries of zealous advocacy and met the test for incivility. The content and tenor of his words directly impugned the honesty of the OSC prosecutors, their even-handedness and integrity as officers of the court, and their commitment to their fundamental duties, as ‘ministers of justice’, to trial fairness and impartiality. The Appeal Panel’s findings regarding Mr. Groia’s conduct on day 53 are far from unreasonable.

[203] Unfortunately, the matter did not end there. Mr. Groia’s attacks on the integrity and trustworthiness of the OSC prosecutors continued, unabated. On days 55-57, his submissions to the trial judge included the following pointed, and disparaging, comments about the OSC prosecutors:

So you are now hearing the Government say we have changed our mind. Mr. Groia doesn’t want to play by our rules, so we’re going to take our ball and go home. And so essentially I can’t prove this document because the Government isn’t prepared to stand by its representations to this Court.

...

Well, the Government’s promises aren’t worth the transcript that they appear to be written on.

...

Since they don’t live up to their promises, then I don’t think I have a basis to tender the document.

...

When is the Crown going to accept the fact that they are prosecuting a case? Why do they stand before this Court and continually whine about how unfair it is that the law in this country says if you want to prosecute Mr. Felderhof you must do so in accordance with certain fundamental rules. ... They didn’t care about those rules when they stood in front of this court house and said they were simply here to seek a conviction. [Emphasis added.]

[204] Then, on day 58 Mr. Groia said: “I am heartened to see that Your Honour is no more able to get a straight answer out of the prosecutor than the defence has been.” And, on day 66:

I mean, it’s just—it’s the most nonsensical proposal from a Government prosecutor that one could imagine. ... What do you make of that? What kind of proposal is that from a prosecutor who claims at least that he wants to conduct this trial in a responsible fashion? [Emphasis added.]

[205] These statements were improper and offensive. They involved allegations of serious prosecutorial misconduct. They are capable of only one interpretation: Mr. Groia was alleging that the OSC prosecutors were reneging on their promises to counsel and their representations to the court, that they were attempting to
improperly circumvent the applicable rules of evidence, that they were not being candid with the court, and that they were not to be trusted.

[206] I again emphasize that all this was occurring while the OSC’s first witness, Mr. Francisco, was still under cross-examination. By day 65, he had been in the witness box for more than 31 days. The time consumed by counsels’ disputes and Mr. Groia’s unrelenting assaults on the propriety of the OSC prosecutors’ conduct kept a witness waiting interminably to complete his testimony.

[207] This was not without consequence. Counsel for Mr. Francisco described the adverse impact on his client of the continuing delay and disruptions to the trial on day 58:

My client over the break has advised me that he is not feeling well. The stress of this case is taking its toll on him. The constant in and outs of the court room and the uncertainty of when this is all going to be completed. He had visited his physician yesterday and had his blood pressure taken. He has a high blood pressure condition... He is under great stress again this morning with what transpired this morning and he is not well enough to continue today.

[208] The adverse impact on Mr. Francisco did not stop after day 58. Counsel for Mr. Francisco again described this impact in eloquent and moving terms in his submissions to the court on day 65:

Mr. Francisco has been here for some 31 days giving evidence. He has done his very best to assist the Court with his recollection of the events that are in issue in this case. He would like to finish his evidence and is hoping to be available tomorrow and, as of the moment, that is certainly his intention. I will advise my friends at the end of the day as to whether or not his condition remains such that he can testify tomorrow. ... I know he has been here many days where there has been a lot of debates about admissibility of documents or admissibility of evidence and I would ask Your Honour and counsel to consider ways and means of doing that without the necessity of Mr. Francisco to be in the witness box, either by resolving these matters as best you can today with the time available. ... But the concern I have is that the cross-examination has now been on for two weeks. Before that the examination-in-chief went over a month. And Mr. Francisco, his health is suffering. Counsel have to represent their own client’s interests. It’s the Court that protects the witness and I ask Your Honour to consider the interests of Mr. Francisco and devise with counsel a way and a means of finishing this witness’s evidence in the time allotted it would because if it – I really am asking to speak to you on this because I am concerned about his health and I want the Court to be aware of it and I would ask the Court to protect him, to protect his interests because in my submission, I don’t feel that he is being accorded the kind of consideration that ought to be given to him. He has testified at length. He is being used as a means of putting documents in by both counsel that normally would not happen in the way it has happened and as a result he has to sit in the box and read documents that he hasn’t even authored, or in some instances even received, with a view to adducing evidence or not adducing evidence. I would ask then the Court to please protect my client’s interests...

[209] The Appeal Panel was alert to this important issue, stating at para. 313:

Finally, we note that on Day 58 counsel for Mr. Francisco raised concerns about whether he could be excused for the day while the submissions regarding evidentiary matters continued. This came in the context of the witness asking Mr. Groia when he could return and receiving the response, “Next week I would suggest, Mr. Francisco. ...We will be a while.” Over the next few days it was apparent that the lengthy hearing, and frequent delays, were in fact taking a toll on the health of this witness, who was unable to testify for periods of time.

[210] It is against this backdrop that the Appeal Panel concluded, at paras. 318-22, 324 and 332:

Taken as a whole, the submissions we have excerpted can best be described as a relentless personal attack on the integrity and the bona fides of the prosecutors. It is important to emphasize that the examples we have selected
provide some flavour, but it is difficult to convey the cumulative effect of the unabated repetition over the course of 10 hearing days of Mr. Groia’s vehement and very lengthy attacks on the prosecutors.

These attacks were personal in nature. ... Taken together, in context, over the course of this lengthy trial, it is very clear that they were decidedly personal.

These attacks were aimed at the integrity of the prosecutors, by repeatedly asserting that they had broken their ‘promises’ and could not be relied on to do what they represented to the court and were, in a word, untrustworthy.

These attacks also included numerous allegations of deliberate prosecutorial misconduct: that the prosecutors intended to ‘win at all costs’, that their conduct offended the ethical principle that the duty of the Crown is not to seek a conviction, that they were deliberately putting the evidence though a ‘conviction filter’, and, most troubling, that they were intentionally acting so as to ensure that Mr. Felderhof did not obtain a fair trial.

Nothing the prosecutors did justified this onslaught. These attacks on their integrity and bona fides did not have a reasonable basis.

...

Likewise, we conclude that Mr. Groia had no reasonable basis on which to attack either the integrity of the prosecutors or their motives. The prosecutors had not promised that they would introduce all relevant documents, regardless of the rules of evidence. They were under no obligation to call evidence favourable to the defence. They had not resiled from their promises. Their positions on evidentiary issues were not improper and were often correct.

...

[Accepting that Mr. Groia was not deliberately misrepresenting the law and was not ill-motivated, we are nevertheless satisfied that Mr. Groia’s misconduct had a serious adverse impact on the trial, by causing numerous delays in the evidence of the trial’s first witness, by distracting the prosecutors from the presentation of the evidence, and by forcing the trial judge to become involved in many unnecessary disputes.

[211] Having reviewed the relevant parts of the record, described in part above, I conclude that these critical findings were amply justified. Mr. Groia’s remarks on the days in question, quoted above, were uncivil and discourteous and exceeded even the most broadly defined reasonable boundaries of zealously advocacy. They struck, without a reasonable basis, at the heart of the OSC prosecutors’ duties to the court, to opposing counsel and to the administration of justice – in short, at their most basic duties as ‘ministers of justice’ and officers of the court. They also affected the orderly progression of the trial and the dignity of the proceedings and contributed to the delays in the completion of the testimony of the first witness at trial.

[212] Trials are not just about the resolution of the immediate dispute between the parties. They are also about the trial judge, the witnesses, court staff, the appropriate use of court resources, and the public. And courtrooms are not just places where advocates and judges come to work. They are the community’s chosen forum for public dispute resolution and the administration of the criminal law. In short, trials in our courtrooms engage the public interest in its multiple dimensions. Advocates have responsibilities to the court, their client and the administration of justice. The propriety of an advocate’s in-court conduct must be assessed under the Act and the Conduct Rules with this consideration at the forefront. I have no doubt that what occurred in this case, if viewed by an informed and objective member of the public, could only have diminished public confidence in the administration of justice.

[213] As I have attempted to emphasize, Mr. Groia began making allegations of deliberate prosecutorial misconduct on the first day of the trial. He repeatedly returned to these allegations throughout the proceeding. When he began his cross-examination of Mr. Francisco, on day 52, he forcefully renewed his attacks on the integrity of the OSC prosecutors. Nothing the trial judge did or said stopped Mr. Groia from repeatedly making
unfounded allegations of prosecutorial misconduct or comments that impugned the integrity of the OSC
prosecutors.

[214] Consider that, on day 61, the trial judge told Mr. Groia to refrain from making allegations unless they were
based on a different factual foundation. On day 65, he intervened when Mr. Groia again began to allege
prosecutorial misconduct. But even this did not deter Mr. Groia from making inappropriate and offensive remarks
on day 66, set out above. By then, regrettably, the pattern had been set.

[215] I note that Mr. Groia submits that, in assessing the propriety of his submissions about the OSC prosecutors,
the Appeal Panel ignored evidence from the trial transcripts and from the participants in the proceeding before the
Hearing Panel, including the testimony of Brian Greenspan and Nicholas Richter.

[216] I am unable to accept this submission. The Appeal Panel made clear that it had reviewed the trial
transcripts from the first phase of the Felderhof trial, and the defence evidence led at the hearing before the
Hearing Panel. It stated, at para. 238: “we have conducted our own assessment of Mr. Groia’s submissions during
the [Felderhof] proceedings in light of their context, including his explanations and those of his witnesses”
(emphasis added).

[217] The Appeal Panel’s conduct analysis supports this statement. In its reasons, the Appeal Panel summarized
Mr. Groia’s explanations for his conduct and outlined, at length, his submissions before the trial judge during pre-
trial motions and phase one of the Felderhof trial. The Appeal Panel indicated, at para. 241:

Our summary [of Mr. Groia’s submissions] follows our own comprehensive review of the transcripts, together with
summaries prepared by the parties to these proceedings. We have reviewed Mr. Groia’s remarks in their context,
only by relying on Mr. Groia’s own explanations in the course of the hearing panel proceeding.

[218] I see no basis on which to conclude that the Appeal Panel did not do precisely what it said it had done.

[219] Mr. Groia’s real complaint on this issue is that the Appeal Panel did not accept, and discuss in detail in its
reasons, his explanations for his conduct and the testimony of his witnesses before the Hearing Panel relating to
those explanations. This is not a basis for concluding that the Conduct Decision is unreasonable. There can be no
serious suggestion that the Appeal Panel’s reasons fail to meet the sufficiency of reasons standard set out in
Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII),
S.C.R. 817 and related cases.

[220] The Appeal Panel had considerable latitude to determine how much of the trial record and of the record
before the Hearing Panel had to be reviewed in its reasons to support its professional misconduct findings. Those
findings, in the end, flowed directly from Mr. Groia’s admitted submissions before the trial judge. It was his own
words, in the context and circumstances in which they were uttered, that established his professional misconduct.
Having reviewed the evidence led by Mr. Groia before the Hearing Panel, I see nothing in the testimony of his
witnesses that endorses or approves the type of remarks made and the rhetoric used by him in his above-quoted
submissions at the Felderhof trial.

[221] I therefore reject Mr. Groia’s contention that the Appeal Panel misapplied its test for incivility and erred in
its review of the record. To the contrary, its review was comprehensive, its findings were tied directly to the
events reflected in the record, and its Conduct Decision was reasonable.

(3) Reviewing Courts’ Reasons

[222] The parties and several interveners put in issue the proper use of the Reviewing Courts’ Reasons by the Law
Society disciplinary panels.

[223] Mr. Groia, supported by some interveners, argues that the Reviewing Courts’ Reasons were not admissible
before the Hearing and Appeal Panels for proof of professional misconduct. In the alternative, Mr. Groia submits
that even if the Reviewing Courts' Reasons were admissible, the Appeal Panel erred by attaching undue weight to them and by treating certain of the statements contained in them regarding his conduct as dispositive of the allegations of professional misconduct made against him.

[224] The Law Society disagrees. It submits that the Reviewing Courts' Reasons were admissible before the Hearing and Appeal Panels under both the normal rules of evidence and the Law Society's Rules of Practice and Procedure. It contends that the Reviewing Courts' Reasons were highly relevant evidence that were admissible, not simply for narrative value, but as proof that: i) Mr. Groia's positions at the Felderhof trial regarding the role of the OSC prosecutors and the admissibility of documents were wrong in law; and ii) there was no reasonable basis for Mr. Groia's personal attacks on the OSC prosecutors.

[225] As I mentioned earlier, the Appeal Panel concluded that the Hearing Panel had erred by holding that it would be an abuse of process to allow Mr. Groia to re litigate the Reviewing Courts' findings. It held, for reasons it explained, that the Reviewing Courts' Reasons, although admissible, should be given limited weight in the circumstances of this case.

[226] The Divisional Court agreed. In its view, the Reviewing Courts' Reasons were admissible before the Appeal Panel under r. 24.08 of the Law Society’s Rules of Practice and Procedure and under the traditional rules of evidence as part of the narrative of the case. Further, the Reviewing Courts' Reasons were entitled to "limited weight" because Mr. Groia had not been a party to the JR Application and because neither Reviewing Court had addressed whether Mr. Groia's conduct amounted to professional misconduct.

[227] It is unnecessary for the disposition of this appeal to resolve the issue of the permissible use of the Reviewing Courts' Reasons. The Appeal Panel expressly held that they were to be afforded little weight and that they were not dispositive of professional misconduct allegations made against Mr. Groia. The Appeal Panel's reasons confirm that, in fact, it did not treat the Reviewing Courts' Reasons as dispositive of the issues before it. Instead, the Appeal Panel conducted an independent review of the record, outlined above, and drew its own conclusions regarding the propriety of Mr. Groia's conduct in light of the Act and the Conduct Rules.

[228] Nor, contrary to Mr. Groia's contention, did the Appeal Panel assign undue or improper weight to the Reviewing Courts' Reasons in assessing whether Mr. Groia's conduct constituted professional misconduct under the Act and the Conduct Rules. The Appeal Panel's references in its conduct analysis to the Reviewing Courts' Reasons were limited to statements of law and/or policy relating to Mr. Groia's legal errors on the issues of admissibility of documents (at paras. 277-79 and 310), and prosecutorial misconduct and the role of the OSC prosecutors (at paras. 290-94). The Appeal Panel specifically noted, at para. 280, that these legal errors, on their own, could not form the basis of a finding of professional misconduct.

(4) Appeal Panel's Penalty Decision and Costs Award

[229] Mr. Groia argues that the Divisional Court erred in holding that the Appeal Panel's imposition of a one-month licence suspension was reasonable. He argues that the Appeal Panel's Penalty Decision was arbitrary and based on unsupported findings of fact: that Mr. Groia's conduct amounted to professional misconduct; that his conduct had a serious adverse impact on the Felderhof trial; and that his conduct was the impetus for the JR Application.

[230] These factual findings, as I have already concluded, were open to the Appeal Panel on the record. They established that Mr. Groia's conduct was neither trivial nor spontaneous. To the contrary, it was serious and persistent. Further, on the Appeal Panel's findings, it had a significant negative impact on the progress of the Felderhof trial, opposing counsel and Mr. Francisco.

[231] The Appeal Panel also took mitigating factors into account when crafting an appropriate penalty. It stressed, in particular, that Mr. Groia had no prior discipline history, that he had not engaged in similar misconduct since the Felderhof trial, and his acknowledgement that he would "do it differently" and "choose different words"
if he had a chance. It also considered those cases relied upon by Mr. Groia to support his claim that a fit penalty was a reprimand.

[232] In my view, the Appeal Panel engaged in a balanced and fair assessment of Mr. Groia’s circumstances and those surrounding his conduct when fashioning an appropriate penalty. Its Penalty Decision is entitled to considerable deference on the reasonableness standard: see Ryan, at para. 42. On the Appeal Panel’s findings, I agree with the Divisional Court that the imposition of a brief licence suspension cannot be said to be unreasonable or unjustified. Consequently, there is no basis for appellate interference with the licence suspension imposed by the Appeal Panel.

[233] Mr. Groia also argues that the Appeal Panel’s varied award of the costs of the proceeding before the Hearing Panel amounted to an additional and unwarranted penalty. As I have explained, the Appeal Panel reduced the costs awarded to the Law Society by the Hearing Panel from $246,960.53 to $200,000. Mr. Groia says that this reduction was arbitrary and that, given the novel and public importance of the issues raised before the Hearing Panel, no costs should have been awarded.

[234] I disagree. No error in principle in the challenged costs award has been demonstrated, nor has any reason to depart from the general rule that the reasonable costs of investigating and conducting a disciplinary proceeding should not be borne by the profession as a whole where a determination adverse to the defending lawyer has been made.

[235] Moreover, the Appeal Panel’s discretionary costs reduction was based on Mr. Groia’s success before the Appeal Panel in arguing, among other matters, that the abuse of process doctrine did not apply and that the Hearing Panel had erred in holding to the contrary. The reduction in costs ordered by the Appeal Panel clearly operated to Mr. Groia’s benefit.

[236] The Appeal Panel’s ruling on costs is also entitled to deference. Like the Divisional Court, I conclude that the reduced costs of the Hearing Panel proceeding awarded by the Appeal Panel were reasonable. In these circumstances, appellate intervention is precluded.

(5) Divisional Court’s Costs Award

[237] Mr. Groia also challenges the Divisional Court’s $30,000 award of costs to the Law Society. He renews his submission, made before the Divisional Court, that the novel and public interest issues raised in this case militated in favour of awarding no costs of the proceedings before the Divisional Court.

[238] The Divisional Court considered this argument. It accepted that some measure of public interest was engaged, but concluded that this alone did not distinguish this case “from any number of other appeals that raise important legal issues:” Groia v. The Law Society of Upper Canada, 2015 ONSC 1680 (CanLII), at para. 5.

[239] This discretionary costs ruling cannot be set aside unless it is tainted by an error in principle or was plainly wrong: Hamilton v. Open Window Bakery Ltd., 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, at para. 27. The Divisional Court considered Mr. Groia’s argument that costs should not be awarded because of the public interest and novel issues raised, and rejected it. It did not err in principle in doing so. Nor can I say that its costs award was plainly wrong.

[240] Accordingly, I would uphold the Divisional Court’s costs award.

VI. Disposition

[241] The requirement of professionalism for lawyers, both inside and outside a courtroom, including zealous advocacy accompanied by courtesy, civility and good faith dealings, secures the nobility of the profession in which lawyers in this province are privileged to practise. The Appeal Panel concluded that this requirement was breached in this case. This conclusion, in my opinion, was both reasonable and correct. I would dismiss the appeal.
[242] Given the different standards of review and tests for incivility applied by the Appeal Panel and Divisional Court, 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. In the circumstances, I would make no order as to the costs of this appeal.

[243] I do not wish to conclude these reasons without expressing the court’s appreciation to all counsel. The court was greatly assisted by the thorough and thoughtful submissions advanced by counsel.

Released:

“JM”

“E.A. Cronk J.A.”

“JUN 14 2016”

“I agree J.C. MacPherson J.A.”

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**Brown J.A. (dissenting):**

1. **Introduction**

[244] This is a singular case. The Felderhof trial lasted several years, split into two phases. Phase One lasted 70 days; Phase Two, 90 days. Neither during nor after the trial did anyone involved in the trial complain to the Law Society of Upper Canada about Mr. Groia’s conduct: not the prosecutors; not the trial judge; not the clients; nor any witness. No one.

[245] The prosecution, the Ontario Securities Commission (“OSC”), did complain about Mr. Groia’s conduct, but not to the Law Society. The OSC complained to the courts. The prosecution first complained to the trial judge about Mr. Groia’s conduct. The trial judge made several rulings.

[246] The rulings did not satisfy the prosecution, so it applied to the Superior Court of Justice arguing, in part, that Mr. Groia’s conduct, and what they saw as the trial judge’s failure to restrain it, were resulting in an unfair trial. The prosecution wanted the trial stopped, and a new trial judge appointed. The application judge of the Superior Court of Justice refused to remove the trial judge.

[247] The OSC appealed to this court. The appeal was dismissed.

[248] So, the trial continued to its conclusion – an acquittal of Mr. Felderhof.

[249] The senior courts to which the prosecutors complained were not silent about Mr. Groia’s conduct. Quite the contrary. In no uncertain terms they expressed their very strong displeasure. In the language of earlier times, they administered a public shaming to Mr. Groia. They told Mr. Groia to cut it out and smarten up. He listened, and he did. Phase Two continued without incident.

[250] Neither the application judge nor any of the members of this court in R. v. Felderhof (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481, complained to the Law Society. That option was open to them. That is what the British Columbia Court of Appeal did in R. v. Dunbar, Pollard, Leiding and Kravit, 2003 BCCA 667 (CanLII), 191 B.C.A.C. 223. But that is not what the courts did in this case. A public shaming was administered; directions for the remainder of the trial were given; the courts moved on.

[251] But not the Law Society. In 2003, a staff member read an article about the Felderhof trial. A file was opened. In 2009, after the trial had ended, the Law Society commenced professional misconduct proceedings against Mr. Groia, acting as its own complainant.
[252] The Law Society Hearing Panel and Appeal Panel found that Mr. Groia had engaged in professional misconduct for his uncivil and unprofessional courtroom submissions and statements during the Felderhof trial. The Divisional Court dismissed Mr. Groia’s appeal from the Appeal Panel’s findings of misconduct, penalty and costs.

[253] My colleague would uphold those results. I must respectfully disagree with much of her analysis and with her result. I would grant Mr. Groia’s appeal.

[254] 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.

[255] 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.

[256] I would allow the appeal for two reasons. First, in my view, the correctness standard of review applies where a discipline regulator deals with allegations of professional misconduct involving what a barrister did in a courtroom before a presiding judge.

[257] Second, the Appeal Panel’s Conduct Decision cannot survive review on either a correctness or reasonableness standard. Although the Appeal Panel stated, at paras. 225 and 233, that it would assess the member’s conduct in the context of “the dynamics, complexity and particular burdens and stakes of the trial,” including the reaction of the trial judge to the member’s conduct, the analysis actually conducted by the Appeal Panel failed to take into account, in any meaningful way, how the trial judge ruled on the complaints by the OSC about Mr. Groia’s conduct and how Mr. Groia responded to the trial judge’s rulings on those complaints. In brief, the Appeal Panel examined Mr. Groia’s conduct as if only two people were present in the courtroom — Mr. Groia and the prosecutor. The Appeal Panel ignored the third person — the trial judge — and failed to give any meaningful consideration to his rulings about Mr. Groia’s conduct in its assessment of whether that conduct amounted to professional misconduct. That, in my view, rendered the Conduct Decision both incorrect and unreasonable.

II. The Structure of this Dissent

[258] Let me set out the sequence my analysis will follow. First, I will review the general principles governing standard of review analysis. Second, I will apply those principles to the present appeal and explain why a correctness standard applies.

[259] Third, I will articulate the correct test for a professional discipline inquiry into the in-court conduct of a barrister, and then assess the test actually formulated by the Appeal Panel against that standard.

[260] In my view, the Appeal Panel failed to give any meaningful consideration to how the trial judge ruled on the complaints by the OSC about Mr. Groia’s conduct and how Mr. Groia responded to the trial judge’s rulings on those complaints. Accordingly, I will spend some time reviewing the record of the Felderhof trial from Day 52 to Day 70 to examine the rulings of the trial judge and Mr. Groia’s response to them.

[261] Next, I will examine the Conduct Decision, on both correctness and reasonableness standards, concluding that the appeal should be allowed, and the allegations against Mr. Groia dismissed.

[262] I will end by briefly addressing the issue of the use the Appeal Panel could make of the Reviewing Courts’ Reasons, on which I agree with my colleague’s analysis, and the issue of costs.
III. Standard of Review: The General Principles


[264] With respect, I could not disagree more. In my view, everything turns on this point. In the words of the old real estate saw, what drives the analysis in this case – both on the standard of review and the elements of the test for misconduct – is “location, location, location.”

[265] Mr. Groia captured the essence of the question that lies at the heart of this case in the opening sentences of his factum:

Whose responsibility is it to run a trial in a Canadian court – the trial judge or the Law Society of Upper Canada? Who determines the boundaries of acceptable courtroom behavior – judges or regulators?

[266] Those are the key questions to ask. The factor that drives the analysis in this case is the location of the impugned conduct – a courtroom.

[267] In my view, the finding that Mr. Groia had committed professional misconduct for statements he made in court should be reviewed on the correctness standard. My proposition is a simple one. Under our Constitution it is the independent judiciary that controls what takes place in a courtroom. In the context of a regulator’s inquiry into a barrister’s in-court conduct, that principle translates into the application of a correctness standard of review. By employing a correctness standard, the judiciary maintains its ultimate control over the courtroom by having the “last word”, so to speak, on whether a barrister’s in-court conduct merits professional misconduct sanction.

(1) The Standard Applied by the Divisional Court

[268] The question for this court is whether the Divisional Court, as the reviewing court, identified the appropriate standard of review and applied it properly: Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61 (CanLII), [2015] 3 S.C.R. 909, at para. 42. As my colleague notes, the Divisional Court applied the correctness standard to review the Appeal Panel’s formulation of the test for professional misconduct and the reasonableness standard to the Appeal Panel’s application of the test to the facts. In my view, because the barrister’s conduct at issue took place during a court proceeding, the correctness standard applies to both the review of the test and to its application.

(2) The Importance of Context for the Standard of Review Analysis

[269] As the Supreme Court of Canada repeatedly has emphasized, the relationship between tribunals and courts is context-specific. The degree of deference courts should give to tribunals is shaped by the factual context of the matter, as well as by the questions considered and determined by the tribunal.

[270] The standard of review describes the dynamics of one facet of the political relationship between the courts, on the one hand, and the legislature, the executive and their delegated agencies, on the other. Standard of review analysis operates as a form of self-restraint by the judiciary on its ability to interfere with decision-making by such delegated authorities.

[272] Identifying the degree of deference typically turns on ascertaining the intention of the legislature respecting the work allocated to its delegated decision-maker because the notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers": Canada (Attorney General) v. Mossop, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, per L’Heureux-Dubé J., dissenting. As put by the Supreme Court in Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 29: "[W]hen a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter." In Doré, the Supreme Court stated, at para. 30: "[J]udicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state".

[273] The judicial task of understanding legislative intent "is done within the context of the courts’ constitutional duty to ensure that public authorities do not overreach their lawful powers": Dunsmuir, at para. 29. In conducting a judicial review analysis, "[t]he judge is on the outside of the administration looking in": Dunsmuir, at para. 123, per Binnie J., concurring.

[274] A distinctive feature of this appeal is that while the reviewing courts may well be standing "on the outside of the administration[s] [regulator] looking in", here, the regulator was inquiring into conduct that took place within a courtroom, the preserve of an independent branch of our government — the judiciary: Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52 (CanLII), [2001] 2 S.C.R. 781, at paras. 23 and 30. Here, the regulator was not considering where a pipeline should run, or whether entitlement to social benefits had been established. Instead, the regulator was examining conduct that occurred within the daily workplace of the judiciary.

[275] That distinctive context of this case forces us to recall that limits do exist on the ability of legislatures to allocate the power to decide an issue or matter to entities other than the courts. As Binnie J. notes in Dunsmuir, at paras. 126-27:

It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

Firstly, the Constitution restricts the legislator’s ability to allocate issues to administrative bodies which s. 96 of the Constitution Act, 1867 has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

[276] Mr. Groia points to such limits to argue that the Law Society lacks the jurisdiction to review what barristers do in courtrooms, except where (i) the barrister has been subject to a contempt finding, (ii) both the trial judge’s and barrister’s conduct are subject to disciplinary review, or (iii) the trial judge has severely criticized the barrister’s conduct or complained about it to the Law Society.

[277] I do not accept his argument, put that way. The Law Society Act proscribes a licensee from engaging in professional misconduct. The Act gives the Law Society the power to determine whether a licensee has breached that proscription: ss. 33, 34 and 49.3. Some licensees practise as barristers. Part of their professional work occurs in the courtroom. On the face of the statute, the Law Society has the jurisdiction to investigate a barrister’s in-court conduct, and Mr. Groia has not challenged the constitutionality of that statutory scheme.

[278] 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.

[279] Instead, the standard of review analysis must be alive to the constitutional implications of where the subject-matter of the regulator's inquiry took place. Just because the legislature intends to give authority to a tribunal does not mean that courts must give unlimited effect to that intention where the legislature enters an arena into which it, and its delegates, must go with a deferential, subordinate attitude – the workplace of the judiciary. The courts' constitutional independence casts a strong shadow over how judicial review is to be conducted in this case, particularly in respect of the degree of deference the court should accord to the Law Society's decision as the statutory regulator of a barrister's in-court conduct.

[280] In practical terms, deciding whether a correctness or a reasonableness standard applies will determine which branch of government has the final say on the questions at issue. 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": Dunsmuir, at para. 50. By contrast, where the reasonableness standard applies, under the Dunsmuir paradigm it is very difficult – although not impossible – for a court to interfere with an administrative decision.

[281] At issue, then, in this case is the question of who has the last word in deciding whether Mr. Grola's conduct before the trial judge justifies professional sanction: the court, or a tribunal exercising powers delegated by the legislature?

IV. Standard of Review: The Principles Applied

(1) The Two-Step Analysis

[282] The standard of review analysis involves two steps. First, a court must "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review": Dunsmuir, at para. 62.

(2) The Existing Jurisprudence

[283] In my view, the existing jurisprudence has not already determined, in a satisfactory manner, the degree of deference to be accorded to decisions involving the particular category of question raised by this appeal – whether the conduct of counsel in a courtroom in the presence of a judge amounts to professional misconduct.

[284] The seminal case concerning the standard of review applicable to legal disciplinary panels is Ryan, in which the Supreme Court adopted a reasonableness standard to review a sanction imposed for professional misconduct. Although Ryan was decided in the pre-Dunsmuir era, its approach was followed in Doré where the court stated, at para. 45: "It seems to me that applying the Dunsmuir principles results in reasonableness remaining the applicable review standard for disciplinary panels."

[285] Neither Ryan nor Doré examined what impact would result on the standard of review analysis from the fact that the conduct of the lawyer took place before a judge in open court. The conduct at issue in Ryan was the lawyer's failure to carry out services for his client and then lying to his clients to cover-up his failure. Also, in Ryan the lawyer admitted his misconduct, so the case only considered the appropriate sanction.

[286] Doré did involve the conduct of a lawyer towards a judge, but not in open court. Following a court appearance, the lawyer had written a highly critical letter to the judge. Significantly, the judge passed the letter along to his chief justice who, in turn, sent the letter to the Syndic du Barreau, leading the Syndic to file the complaint against its member: Doré, at paras. 11-13.

[287] Counsel referred us to two Divisional Court cases which applied the Ryan reasonableness standard, but both involved out-of-court conduct, specifically sexual misconduct: Law Society of Upper Canada v. Evans (2008), 2008
Finally, in Goldberg v. Law Society of British Columbia, 2009 BCCA 147 (CanLII), 92 B.C.L.R. (4th) 18, the British Columbia Court of Appeal applied the reasonableness standard to its review of the law society's finding of professional misconduct based on the lawyer's in-court conduct during an earlier appeal in Dunbar. During the course of four appeals heard together, the lawyer had alleged that the appellants' former counsel had failed to provide them with effective representation at their trials. The appeal court in Dunbar rejected those allegations, condemning them as groundless and irresponsible. Significantly, the court referred the lawyer's conduct to the law society, stating, at para. 343:

We would ask counsel for the Crown, Mr. Sweeney, to draw these reasons to the attention of the Law Society of British Columbia, the Legal Services Society, or any other body who might reasonably have an interest in controlling and preventing the conduct we have described.

In Goldberg, the British Columbia Court of Appeal followed Ryan and Dunsmuir concluding, at para. 37, that reasonableness was "the appropriate test for this case", without further analysis.

In neither Doré nor Goldberg did the courts advert to the unique inter-institutional considerations that arise when a state regulator reviews conduct which takes place in a courtroom, the workplace of the independent judiciary. I think the reason they did not is clear: in both cases the courts had called upon the state regulator to conduct an inquiry into the lawyer's conduct. In this case, no judge invited the Law Society to conduct an inquiry into Mr. Groila's conduct.

The circumstances of this case differ markedly from those in Ryan, Doré and Goldberg, necessitating an examination from first principles of how the inter-institutional relationship between an independent judiciary and a government regulator affects the selection of the appropriate standard of review.

(3) Examining the Standard of Review Factors

(i) The Existence of a Privative Clause

The first factor in a standard of review analysis involves ascertaining whether the legislature has limited the scope of review of a tribunal's decision through the inclusion of a privative clause in the tribunal's home statute. A privative clause may evidence "a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized": Dunsmuir, at para. 52.

But, the analysis is not symmetrical. The absence of a privative clause may carry less weight than the presence of one. In Ryan, the Supreme Court discounted the absence of a privative clause in the New Brunswick Law Society's home statute because "[t]he specialization of duties intended by the legislature may warrant deference notwithstanding the absence of a privative clause": at para. 29.

The privative clause in the Law Society Act is a hybrid one — any party other than the Law Society may appeal a decision of the Appeal Division "on any grounds," but the Law Society may appeal only on a question that is not a question of fact alone, except in the case of a cost order: ss. 49.39(1)-(2). Although this privative clause suggests a low standard of deference to the decisions of the Law Society, Ryan compels the consideration of other factors which may suggest a higher degree of deference.

(ii) Comparative Institutional Expertise

The existence of a discrete and special administrative regime in which the decision-maker has special expertise may indicate that courts should defer to the tribunal's decisions: Dunsmuir, at para. 55. This factor requires measuring the expertise of the tribunal relative to that of the reviewing court on the issue in question: Ryan, at para. 27.
The policy reasons underlying the need for an examination of comparative institutional expertise were explained in Dunsmuir, at para. 49:

As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93.

Building on Professor Mullan's analysis, the Supreme Court in Doré, at paras. 47 and 54, flagged the attributes of administrative tribunals relevant to the issue of comparative expertise: their "skills, expertise and knowledge in a particular area"; "their privileged situation as regards the appreciation of the relevant facts"; and their "proximity to the facts of the case." In the Dunsmuir paradigm, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers because of reasons of superior institutional expertise and different institutional roles within the Canadian constitutional system.

(a) Limits Placed on Legislative Choice when Dealing with What Takes Place in a Courtroom

In his concurring reasons in Dunsmuir, Binnie J. cautioned that our constitutional system places limits on the choices legislatures can make vis-à-vis the courts. Legislatures cannot strip s. 96 courts of their subject-matter jurisdiction. Nor, in my view, can legislatures remove from the courts — s. 96 or statutory — their primary responsibility for ensuring that counsel who appear before them act in an appropriate manner to ensure trial fairness. The legislative choice to leave some courtroom-related matters in the hands of administrative decision-makers must respect the different roles of the courts and administrative bodies within the Canadian constitutional system.

Courts — both s. 96 courts and provincial courts — bear the primary responsibility for managing the adjudicative processes and for monitoring how litigants and their counsel use them. That responsibility necessarily follows from the principle of judicial independence. As stated by the Supreme Court in R. v. Anderson, 2014 SCC 41 (CanLII), [2014] 2 S.C.R. 167, at para. 58:

Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: R. v. Cunningham, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331, at para. 18; Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43 (CanLII), [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that derive from the court's authority to control its own process: Cunningham, at para.18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.


In Anderson, the Supreme Court observed, at para. 59, that "deference is not owed to counsel who are behaving inappropriately in the courtroom...". And in Felderhof, this court stated, at para. 40:

Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please... It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.

Civility is one aspect of counsel's conduct in a courtroom. The obligation on judges to enforce civility was stressed by this court in Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham (2000),
2000 CanLII 16946 (ON CA), 51 O.R. (3d) 97, at para. 148: “Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is [a] shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves.”

[302] The Law Society submits that its mandate to govern lawyers in the public interest requires it to enforce standards for professional behaviour, including professional behaviour in the courtroom. I do not quarrel with that proposition. But, that is not what this appeal is about. As I mentioned earlier, at issue is not the jurisdiction of the Law Society to review how a barrister acts in a courtroom. Rather, the question is: when the Law Society does review a barrister’s courtroom conduct, what standard of review should a court apply to the regulator’s decision? The judiciary’s constitutional responsibility for what goes on in its courtrooms points to the application of a standard of correctness so that the judiciary retains the last word, so to speak, about what happens in its courtrooms.

(b) Comparative Institutional Skills

[303] On the issue of comparative institutional skills, one must ask the following question, using the words of Professor Mullan: As between the courts and the Law Society, which institution, through its “working day to day”, has developed the greater “field sensitivity to the imperatives and nuances” of what constitutes acceptable conduct in a courtroom?

[304] I think simply posing the question provides the answer. Although the hearing and appeal panels of the Law Society contain some members who are experienced – indeed, highly skilled – litigators, discipline panels do not “work day to day” to maintain in the courtrooms of our province appropriate standards of conduct by counsel. The judiciary does.

[305] Professor Alice Woolley offers some indirect empirical support for this conclusion. In a 2013 update to her earlier article, “Does Civility Matter?” (2008) 46 Osgoode Hall L.J. 175, Professor Woolley wrote that a review of the disciplinary record from the common law provinces from 2007 through 2012 disclosed only 10 disciplinary decisions addressing civility, to which must be added the Doré matter in Quebec: “Uncivil by Too Much Civility?: Critiquing Five More Years of Civility Regulation in Canada” (2013) 36 Dal. L.J. 239, at pp. 243-44. Against these 11 cases, one can only imagine the thousands of cases which passed through the courts during the same period of time, each requiring, in its own way, efforts by the presiding judge to manage the adjudicative process, including counsel’s conduct.

[306] I recognize that in Ryan the Supreme Court concluded the regulator’s discipline committee had greater expertise than courts in the choice of sanction for breaches of professional standards because law society discipline committee members “may be more intimately acquainted with the ways that these standards play out in the everyday practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity”: at para. 31. While that may be true of questions concerning a lawyer’s out-of-court conduct – the issue in Ryan – the same cannot be said of the question of appropriate standards for in-court conduct.

[307] I certainly recognize that some individual judges strive more vigorously than others to maintain appropriate standards of conduct in their courtrooms. However, when considering the selection of the appropriate standard of review, we are not concerned about how individual judges act, or how individual tribunal members act; we are concerned about comparative institutional expertise. In my view, the institution “working day to day” with the issue of counsel’s in-court conduct is the judiciary. This workplace reality gives courts greater comparative institutional expertise than law society regulators on the question of appropriate in-court conduct by barristers.

(iii) The Nature of the Question

[308] The questions before the Hearing and Appeal Panels were two-fold: (i) the interpretation of by-laws made under the Law Society Act to ascertain when uncivil in-court conduct amounts to professional misconduct; and (ii) the application of the resulting interpretation to the specific facts of the case to determine whether Mr. Groza had
breached the by-laws and engaged in professional misconduct. The first question is a question of law, calling for the interpretation of a provision in the tribunal's home statute or regulation. The second question is one of mixed fact and law.

[309] Current standard of review jurisprudence holds that the nature of both those questions attracts the deferential reasonableness standard. An administrative decision-maker's interpretation of its home or closely-connected statutes is "presumed to be a question of statutory interpretation subject to deference on judicial review": Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 34. Questions of mixed fact and law contain "fact-intensive elements" which suggest a high degree of deference: Ryan, at para. 41; Dunsmuir, at para. 164, per Deschamps J., concurring.

[310] But, presumptions can be rebutted, and exceptions always exist to any general rule. Certain categories of questions — even when they involve the interpretation of a home statute — warrant review on a correctness standard. These include questions of general law of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and true questions of jurisdiction: Dunsmuir, at paras. 59-60. But, those are not the exceptions at play in this appeal.


[312] In my view, the context of this case rebuts the general presumption and makes it one of the exceptional cases. Although this appeal involves the interpretation of the Rules of Professional Conduct — part of a home statute — and their application to Mr. Groia's conduct, what determines the standard of review analysis is the contextual reality that the member's impugned conduct took place in a courtroom, the workplace of the independent judiciary. Any interpretation and application of the home statute to Mr. Groia's conduct has implications about who has the ultimate say in what conduct by counsel before the courts is acceptable or not — the courts or the legislature's delegated decision-maker. Because the nature of those questions engages the contours of the constitutional relationship between the courts and government regulators, a correctness standard of review applies.

(4) Conclusion on the Standard of Review

[313] For those reasons, I conclude that the correctness standard applies to the judicial review (or appeal) of a decision of a legal discipline committee on the question of whether the conduct of a barrister in a courtroom before a presiding judge constitutes professional misconduct. Adopting the correctness standard of review for in-court conduct does not oust the jurisdiction of the Law Society to entertain and decide complaints about a member's in-court conduct. A correctness standard, however, gives the courts the final word on whether a barrister's in-court conduct amounts to professional misconduct. If the reviewing court disagrees with the discipline tribunal's conclusion, it would be free to substitute its own opinion. In other words, under the correctness standard, the courts remain the final umpires of the propriety of what barristers do in courtrooms.

V. Identifying the Test for In-Court Professional Misconduct

(1) The Challenges in Formulating a Test

[314] As the Divisional Court recognized, formulating a test to determine when uncivil conduct in the courtroom in the defence of an accused would amount to professional misconduct is a difficult task.

[315] First, as the Divisional Court noted, at para. 67, too many variables are involved in the activities that unfold in a courtroom to craft a standard possessing the exactitude of a scientific or mathematical formula. The Appeal
Panel also recognized, at para. 233, that the assessment of conduct by a barrister must be fact-specific: "In assessing the context of courtroom communications, it will be important to consider the dynamics, complexity and particular burdens and stakes of the trial."

[316] Second, the 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 power of the state is not a fanciful one; it is the living reality of the contemporary criminal trial courtroom. As described by the Divisional Court, at para. 51:

It is the role of criminal defence counsel, frequently a most difficult role, to fully and fervently represent those persons accused of criminal offences, recognizing that their efforts will often place them at odds with public sentiments, including a natural desire for retribution. As the intervener, The Criminal Lawyers’ Association, said in its factum:

Defence counsel run the risk of unpopularity or misunderstanding about their role more than any other lawyer in the Canadian justice system. One reason is the defence lawyer represents a person accused of distasteful acts. Those charged with crimes are frequently unpopular or outside the "mainstream": the poor, addicted, mentally ill, racial and ethnic minorities.

[317] 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.

[318] The challenges in articulating a test are matched by the challenges in applying any test to alleged misconduct. By its nature, a professional discipline proceeding is an exercise in the retrospective examination of counsel’s conduct by those who were not present when the conduct occurred and who lack the ability to re-create, with precision and certainty, exactly what took place. A discipline review is largely transcript-based, restricting the reviewer’s ability to understand the sense and nuance of the moment. Retrospective transcript-based reviews contain inherent limitations which can produce an artificial understanding of what took place in the courtroom, and which risk turning the review into an exercise in Monday-morning quarterbacking.

(2) The Key Elements of a General Test

[319] Those difficulties and challenges necessitate formulating and applying a test for in-court professional misconduct that robustly takes into consideration all the surrounding circumstances of what happened in the courtroom. That is accomplished, in my view, by ensuring that any inquiry into whether a barrister’s in-court conduct amounts to professional misconduct takes into account three main factors:

(i) What the barrister did;

(ii) What the presiding judge did about the barrister’s conduct and how the barrister responded to the directions of the presiding judge; and

(iii) 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.

(i) What the Barrister Did

[320] The first factor – what the barrister did – requires examining several matters: (i) the nature of the conduct complained about; (ii) where and when the conduct occurred; (iii) the duration of the conduct; and (iv) the reason for the conduct, including whether the barrister was reacting to provocation from the other side.

(ii) What the Presiding Judge Did

[321] The second factor – what the presiding judge did about the conduct in issue – requires asking several questions: (i) Did any participant in the hearing complain to the presiding judge about the barrister’s conduct? (ii)
Did the presiding judge issue any direction to the barrister to limit or cease the conduct complained of? (iii) Did the presiding judge impose any sanction on the barrister for the conduct? (iv) Did the barrister comply with any directions given or sanction imposed by the presiding judge?

[322] The importance of this factor rests on the simple proposition that under the constitutional principle of judicial independence, it is judges who are responsible for managing our nation’s courtrooms to ensure that the proceedings are fair and that justice is done in the particular case. At the core of the principle of judicial independence lies the power of the court to control its own process: MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at para. 33. As this court stated in Snow, at para. 24:

[A] trial judge is certainly entitled to control the proceedings and to intervene when counsel fail to follow the rules or abide by rulings. A trial judge is not a mere observer who must sit by passively allowing counsel to conduct the proceedings in any manner they choose. It is well recognized that a trial judge is entitled to manage the trial and control the procedure to ensure that the trial is effective, efficient and fair to both sides...

[323] Duties accompany authority. A presiding judge’s power to control and manage the trial or hearing spawns a corresponding duty on the judge to maintain civility in the courtroom. In Landolfi v. Fargione (2006), 2006 CanLII 9692 (ON CA), 79 O.R. (3d) 767, this court wrote, at para. 101, about the “trial judge’s responsibility to maintain civility in the courtroom and to intervene to avoid the risk of prejudice.” As this court has stated, “civility in the courtroom is not only the responsibility of counsel” but also “very much the responsibility of the trial judge”:
Felderhof, at para. 94; Marchand, at para. 148.

[324] The rationale for this duty of the trial judge was described by Molloy J. in Abdallah v. Snopek (2008), 2008 CanLII 6983 (ON SCDC), 89 O.R. (3d) 771 (Div. Ct.), at paras. 43 and 45:

There is also an important role to be played by the trial judge when counsel step beyond the bounds of acceptable conduct in the course of the trial...

[C]ourts have recognized that permitting counsel to engage in offensive conduct or make offensive statements in a trial is not simply a matter affecting the parties; it also reflects poorly on the courts and on the public perception of the fair administration of justice. Further, where conduct of this nature occurs, depending on its magnitude, there is a responsibility on the trial judge to step in.

[325] Mr. Groia submits that allowing a government regulator to review a barrister’s in-court conduct would impinge on the principle of judicial independence because it could result in an after-the-fact decision by the regulator about how the judge should have conducted the case, specifically with respect to controlling counsel’s conduct. I agree that such a risk exists. In my view, the way to prevent that risk from occurring is to require the regulator, as part of its examination of the barrister’s conduct during a professional discipline review, to take into account and to give great weight to how the presiding judge responded to the lawyer’s conduct. Let me explain.

[326] When called upon to review the in-court conduct of a barrister, the court and the regulator look at the same subject-matter – the barrister’s conduct. As well, the interests they seek to protect by their reviews of the barrister’s conduct largely overlap. Both monitor a barrister’s conduct in order to preserve the public’s respect for the court and for the administration of the criminal justice system, thereby maintaining the legitimacy of the results of the adjudication.

[327] Where the court and regulator part company is in what they can do about misconduct by a barrister. The range of tools and sanctions available to a court is limited to regulating the barrister’s continued participation in the court proceeding, with contempt as the ultimate sanction. Even then, a contempt finding by and large seeks to secure the barrister’s compliance with the directions given by the court for the remainder of the proceeding.

[328] By contrast, the regulator can limit the ability of the barrister to practise his or her profession, including the suspension or termination of his or her licence.
Stripped to its basics, whereas the sanctions a court applies for in-court misconduct are designed to ensure that the particular proceeding continues in a fair way, free from further misconduct by the barrister, the regulator can hit the barrister in the pocket book after the proceeding ends.

Due to the very significant overlap in what the court and the regulator look at when reviewing the in-court conduct of a barrister, as well as in the interests they seek to protect, a risk does exist that a regulator’s review of in-court conduct could end up second-guessing how the presiding judge responded to the barrister’s conduct. A regulatory discipline review that second-guesses how a judge managed a court proceeding would impermissibly step over the constitutional boundary between the legislature and the judiciary. Under our Constitution, any second-guessing of a hearing judge’s decision falls to an appellate court to perform, not to a government regulator.

To avoid such a risk coming to pass, and in order to respect the primacy of judicial control over what goes on in the courtroom, the Law Society, when considering whether a barrister’s in-court conduct falls to the level of professional misconduct, must pay careful attention to and give deference to any rulings the presiding judge made concerning the misconduct alleged, together with the barrister’s response to those judicial rulings.

Given the variety of in-court misconduct in which counsel can engage, it is difficult to set down precise guidelines about how a regulator should take into account the presiding judge’s rulings concerning counsel’s misconduct. That said, I cannot conceive how a regulator’s finding of in-court professional misconduct could meet either the correctness or reasonableness standards if the regulator failed to meaningfully take into account the presiding judge’s rulings.

There are two other reasons why the Law Society must consider how the presiding judge responds to the barrister’s conduct. First, when a barrister walks into a courtroom, the barrister reasonably expects that he or she can look to the presiding judge for direction as to what conduct is on-side, and what is off-side. That expectation is a reasonable one. If a barrister complies with and satisfies the directions given by the presiding judge about how to act during a proceeding, a great unfairness could arise if, after the proceeding ends, the barrister is exposed to allegations of professional misconduct.

Second, given the realities of the courtroom dynamic and the great difficulty of recreating that dynamic after-the-fact, the presiding judge, as the representative of the public interest who is “on the scene”, stands in the best position to gauge the appropriateness of the conduct of those participating in the proceeding. The presiding judge is closest to the facts and best positioned to be alive to the context of, and nuances in, the unfolding human drama.

I acknowledge that the obligation of the Law Society to take into account, in a meaningful way, how the presiding judge deals with the barrister’s conduct will, as a practical matter, narrow the Law Society’s scope for review of in-court conduct by a member. For example, I have difficulty seeing how a regulator’s finding of misconduct could meet the correctness or reasonableness standard where it sanctions a barrister for conduct which was the subject of complaint to the presiding judge, on which the presiding judge ruled, and where the presiding judge was satisfied with counsel’s response to the ruling. Perhaps, if the trial judge’s ruling on the barrister’s conduct had resulted in an unfair trial, professional misconduct by the member would arise. But that would be a most exceptional case.

Such a practical limit on the Law Society’s exercise of its statutory disciplinary power over a barrister simply reflects the need for the legislature, and its delegated decision-maker, to respect the constitutional independence of the judiciary to control the proceedings in our province’s courts.

(iii) The Effect of the Conduct on Trial Fairness

The third and final factor – the effect of the barrister’s conduct on the fairness of the court proceeding – requires considering whether the barrister’s conduct undermined, or threatened to undermine, trial fairness.
A Discipline Tribunal Must Consider All Three Factors

[338] Any inquiry by a discipline tribunal into whether a barrister’s in-court conduct amounts to professional misconduct must take into account all three factors. To focus on one factor, such as what the barrister did, without taking into account the other two factors, would result in an artificial and partial consideration of the lawyer’s conduct, divorced from what was unfolding in real-time in the courtroom.

[339] As well, it would ignore the constitutional shadow cast over the Law Society’s exercise of its power to discipline a barrister for in-court conduct. The Law Society must abide by the principle that control over the conduct of any participant in a proceeding in a courtroom ultimately rests with the judiciary.

[340] Before moving on to consider the tests formulated by the Appeal Panel and Divisional Court, I wish to address a point made by my colleague. She writes, at para. 164, that the parties agreed to the test for in-court misconduct ultimately adopted by the Appeal Panel. Before this court, the Intervener, the Canadian Civil Liberties Association, submits there was no agreement on the appropriate test. The CCLA submits the Appeal Panel took an agreement amongst parties with respect to how counsel could properly advance allegations of prosecutorial misconduct, and then wrongly flipped, or re-characterized, that agreement into one governing the entire inquiry into whether professional misconduct had occurred.

[341] The Appeal Panel’s reasons support the CCLA’s submission. The parties certainly agreed on how to approach one issue — “the extent to which zealous defence counsel may impugn the integrity of opposing counsel, and make allegations of prosecutorial misconduct.” The Appeal Panel recorded, at para. 234, that the parties and interveners “agreed that it is wrong to make allegations of prosecutorial misconduct that impugn the integrity of opposing counsel unless those allegations are made in good faith and have a reasonable basis.”

[342] However, it is apparent from the Appeal Panel’s reasons that the parties disagreed on whether a finding of professional misconduct required the presence of other factors. For example, the Appeal Panel specifically rejected, at paras. 222 and 224, Mr. Groia’s submission that the Law Society should not discipline a lawyer for conduct in open court unless the lawyer had been found in contempt, the judge had referred the lawyer’s conduct to the Law Society, or the behaviour of the lawyer and judge is so egregious that both are subjected to discipline. The Appeal Panel also rejected, at paras. 227-28, the submission that disciplinary action was only appropriate where there existed “egregious or continuous conduct that serves to threaten or undermine the integrity of the administration of justice”, or is “reasonably likely to cause a miscarriage of justice.”

[343] So, while the parties may have agreed on one element of the test to determine whether in-court conduct amounts to professional misconduct, they disagreed on other elements.

[344] In any event, given the constitutional shadow within which the Law Society must operate when investigating a barrister’s in-court conduct, the appropriate test for in-court professional misconduct cannot be determined by agreement amongst the parties; it requires the concurrence of the courts.

(3) Assessing the Test Formulated and Applied Below

[345] Of the three factors identified above, the Appeal Panel’s test for in-court professional misconduct gave meaningful effect only to the first factor – what the barrister did. Otherwise, the Appeal Panel formulated a test that was partial and incomplete, and therefore incorrect. I now examine how the Appeal Panel dealt with each element.

(i) What the Barrister Did

[346] As to the first factor – what the barrister did – the Divisional Court formulated, at para. 74, the standard against which to measure the barrister’s conduct:

[The conduct that engages the incivility concern begins with conduct that it is rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality. It is conduct that attacks the personal integrity of opponents,
parties, witnesses or of the court, where there is an absence of a good faith basis for the attack, or the individual counsel has a good faith basis for the belief but that belief is not an objectively reasonable one. In addition, single instances of such conduct will be less likely to engage the misconduct concern as will repeated instances of the same conduct. In other words, a solitary instance of uncivil conduct will not, generally speaking, be sufficient to ground a complaint of professional misconduct, unless it is of a particularly egregious form.

[347] The Appeal Panel articulated this part of the test in very similar terms. I agree with it as a proper statement of the “what the barrister did” factor.

(ii) The Effect of the Barrister’s Conduct

[348] I will now skip ahead to consider the third factor – the effect of the barrister’s conduct on the fairness of the in-court proceeding. I will leave the examination of the second factor – what the judge did – to subsequent sections where I can deal together with both the law and the applicable evidence.

[349] As to the third factor, the Divisional Court stated, at paras. 75-76:

"There must be an additional element attached to the uncivil conduct, in order for it to rise to the level of professional misconduct. For uncivil conduct to rise to the level that would properly engage the disciplinary process, it must be conduct that, in addition to being uncivil, will also bring the administration of justice into disrepute, or would have the tendency to do so...

It is, therefore, ultimately necessary for a finding of professional misconduct for the uncivil conduct to have undermined, or to have had the realistic prospect of undermining, the proper administration of justice...

[350] I agree with the Divisional Court that the inquiry into a barrister’s in-court conduct must include a consideration of the effect of the impugned conduct on the proceeding in which it occurred. I disagree with the Divisional Court’s conclusion that the Appeal Panel, while not advertit to this factor, in fact included it in their analysis. (I will deal with that issue later in these reasons.)

[351] Here, I respectfully differ with my colleague who disagrees with the Divisional Court’s “add-on”.

[352] 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. In Doré, the Supreme Court emphasized, at para. 66: “Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer’s right to expression and the public’s interest in open discussion.”

[353] Assessing when advocacy crosses the line from permissible zeal to impermissible professional misconduct not only requires inquiring into the nature of the barrister’s conduct – what the barrister did – but also into its degree or, more precisely, its permissible degree of excess.

[354] 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”?

[355] The inquiry into professional in-court misconduct requires some measure for the degree of permissible excess to ensure that a regulator does not intrude unduly into the workings of the courtroom or on the independence of the barristers who are defending those accused by the government. In my view, that measure requires the regulator’s professional misconduct inquiry to include a consideration of the impact of the barrister’s conduct on the proceeding.
The intervener, the Criminal Lawyers’ Association, submits that the determination of when defence counsel may be disciplined by their regulator for indubility must be “clear and fair.” To that end, the Divisional Court framed the inquiry as one into whether the barrister’s uncivil conduct would bring the administration of justice into disrepute, or would have the tendency to do so. The Criminal Lawyers’ Association and The Advocates’ Society support the Divisional Court’s approach.

The Canadian Defence Lawyers’ Association submits the Divisional Court’s test on this point is unclear. It argues that the test should be whether there was a breach of the public’s reasonable expectation of a lawyer’s professionalism. In my view, such a test would be far more unclear than one framed in terms of the conduct’s impact on the administration of justice.

This is a difficult issue. I am very sympathetic to Mr. Groia’s submission that the point where zealous representation becomes uncivil professional misconduct is not capable of a bright line definition. Yet, a prosecution for professional misconduct has the potential of stripping a lawyer of his or her ability to earn a livelihood. Some effort to articulate a clear test measuring the impact of a barrister’s conduct must be made, however elusive clarity might be.

In my view, the Divisional Court’s articulation of this element of the inquiry remains too vague. Notwithstanding the Charter-based pedigree of the phrase, “bring the administration of justice into disrepute,” I prefer to frame this factor of the inquiry in a way which focuses more clearly on the impact of the barrister’s conduct on the proceeding in which it occurred. I conclude that when inquiring into whether a barrister’s in-court conduct constitutes professional misconduct, a discipline tribunal must assess whether the conduct not only is uncivil, but also whether it undermined, or threatened to undermine, the fairness of the trial or other court proceeding in which it took place.

(iii) The Response of the Presiding Judge

Finally, the Appeal Panel erred in failing to include in its test, and to apply to the facts, the second factor: the need to give meaningful consideration to the rulings made by the trial judge concerning the misconduct alleged, and to examine the response of the barrister to those rulings.

It is true that the Appeal Panel acknowledged the relevance of what the trial judge did, stating, at para. 225: “[T]he reaction of the trial judge although relevant is not determinative.” But, having stated the point, the Appeal Panel promptly proceeded to ignore it in the analysis, save to refer in its chronology of events to some of the rulings made by the trial judge.

For its part, the Divisional Court adopted, at para. 36, the view of the Appeal Panel, but concluded that the Law Society “should not be constrained in its disciplinary duties by the action, or inaction, of a judge.” To the extent those comments were confined to the issue of the Law Society’s statutory jurisdiction to inquire into a barrister’s in-court conduct, I would not disagree. However, to the extent the Divisional Court thought that how the trial judge responded to the barrister’s conduct should not place any constraint on the Law Society’s exercise of its statutory powers, I strongly disagree. How a presiding judge handles complaints about a barrister’s in-court conduct may well limit the practical scope of subsequent review and action available to the Law Society in the specific circumstances of a case.

In sum, a critical flaw in the test formulated and applied by the Appeal Panel and the Divisional Court was that it ignored, in any meaningful way, how the trial judge dealt with the prosecution’s complaints about Mr. Groia’s conduct.

This incomplete approach appears to have resulted, in part, from the failure of the Appeal Panel (and the Divisional Court) to fully recognize the range of options available to a presiding judge to manage inappropriate conduct by a barrister. For example, the Divisional Court stated, at para. 38, that “the only remedies that a judge has to address the conduct of counsel are the power of contempt and, possibly, an adverse award of costs.” With great respect, that puts the matter far too narrowly.
[365] In Anderson, the Supreme Court of Canada observed, at para. 58: “Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.” As noted by Michael Code (now Justice Code of the Superior Court of Justice), when faced with counsel’s persistent incivility, a trial judge can draw on a broad range of remedial tools, including (i) immediate intervention by way of reprimand and injunction, expressly warning against any repetition of the misconduct, and (ii) repeated reprimands and injunctions: “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007) 11 Can. Crim. L. Rev. 97, at pp. 117 and 119.

[366] Soft tools often are sufficient to deal with counsel’s misconduct. As the Law Society’s Convocation observed in Law Society of Upper Canada v. Clark, [1995] L.S.D.D. No. 199, at para. 101: “The ability [of the court] to call a short adjournment is usually the only measure required.” A judge can simply require counsel to take a “time out” and, in appropriate cases, direct counsel to go have a coffee and “cool their jets” for a while before resuming the hearing.

[367] A trial judge’s power to control counsel’s conduct does not begin and end with the contempt power; it is limited only by the creativity of the presiding judge.

[368] As I will describe in the next section, the trial judge in this case used several trial management techniques to respond to the prosecution’s complaints about Mr. Groia’s allegations of prosecutorial misconduct. Yet, in its professional misconduct analysis, the Appeal Panel essentially ignored the trial judge’s interventions and, more importantly, how Mr. Groia responded to them.

VI. The Courts’ Responses to Mr. Groia’s Conduct

[369] The Appeal Panel found that Mr. Groia had engaged in professional misconduct because of what he said in court between Days 52 and 68 of the trial. As described by my colleague, during that part of the trial, a major dispute emerged between the parties about how the defence could use documents disclosed by the prosecution during its cross-examination of the first OSC witness, Rolando Fracisco.

[370] The language used by Mr. Groia in making submissions on that issue was the subject of comment by this court in Felderhof. This court described Mr. Groia’s rhetoric as “improper,” “inappropriate,” and misplaced, stating: “His rhetoric was, in many cases, tied to a view about what constitutes improper prosecutorial conduct that was simply wrong” at paras. 79, 80 and 100.

[371] The Appeal Panel concluded that Mr. Groia’s submissions to the trial judge during that portion of the trial contained unfounded allegations of prosecutorial misconduct using language which amounted to “a relentless personal attack on the integrity and the bona fides of the prosecutors”: at paras. 318, 324 and 328.

[372] However, whether that rhetoric and those submissions amounted to professional misconduct also required the Appeal Panel to consider, with great care and appropriate deference, how the trial judge dealt with the matter. The trial judge was not oblivious to the way in which Mr. Groia was making allegations of prosecutorial misconduct. On the contrary, the prosecution continuously complained to the trial judge about Mr. Groia’s allegations and asked the trial judge to rule on them; he responded.

[373] Between Days 52 and 68, the trial judge made several rulings on the issue, and he gave directions to defence counsel regarding his client’s allegations of prosecutorial misconduct. Although the Appeal Panel referred to some of those rulings in its reasons, in my view it effectively ignored how the trial judge handled the issue. Most significantly, the Appeal Panel ignored how Mr. Groia responded to those rulings. In so doing, the Appeal Panel failed to take into account and give proper weight to highly material factors, which led them to reach an incorrect and unreasonable result.

[374] How the trial judge and the Reviewing Courts dealt with Mr. Groia’s conduct is critical to the judicial review of the Appeal Panel’s decision. Accordingly, I intend to go over in detail the complaints made by the prosecution to the trial judge about Mr. Groia’s allegations, how the trial judge dealt with them, and how Mr. Groia responded to
the trial judge's directions. The prosecution was not satisfied with how the trial judge handled their complaints, so the OSC sought judicial review. I therefore will examine the response of this court to the prosecution's complaints. Finally, I will examine how the trial continued in light of the directions given by this court.

(1) How the Trial Judge Dealt with the Prosecution’s Complaints about Mr. Groia’s Conduct

[375] OSC counsel quickly reacted to Mr. Groia’s first allegation of prosecutorial misconduct. They repeatedly complained about it and asked the trial judge to rule on the defence’s allegation. The prosecution’s complaints started on Day 54, when Mr. Groia began raising the issue of prosecutorial misconduct. The prosecution made the following submission to the trial judge:

I have been accused of professional misconduct. Mr. Smith has been accused of professional misconduct. The prosecution has been alleged to have advanced a prosecution in violation of its responsibilities as a prosecutor and its duties of fairness to the accused.

We have been maligned throughout the proceedings to date as lazy, incompetent, hell-bent on convicting Mr. Felderhof.

Each day further comments are made maligning what it is we seek to do and the way we go about seeking to do it.

I have sat and I have listened. Sometimes I have got up, Your Honour, and tried to respond to these issues. What I will do is I will let the record speak for itself.

It is our respectful submission that we have done absolutely nothing improper, that we have conducted ourselves in a manner entirely in accord with our duties, that the examination in-chief of Mr. Francisco, as the record will reflect, and as Your Honour presiding over that cross-examination in-chief rather, was conducted in a manner entirely in accordance with law.

We obviously take fundamental objection to what Mr. Groia has to say. What we will do is let the record speak for itself. I'm quite happy to do that. But if Your Honour - if Your Honour should agree with what Mr. Groia has had to say, then I would invite you to stay these proceedings because, in my submission, there is no basis to proceed if the Crown is doing so in an abusive manner.

We fundamentally, fundamentally, resist any suggestion that anything that has been done with respect to the conduct of the Crown in this case has been inappropriate.

...

Well, it's something that's been brought in which allegations of prosecutorial misconduct have been brought to Your Honour's attention and I am asking that Your Honour rule on that, because if you are of the view that the Crown is proceeding in an abusive manner, then I invite you to stay these proceedings.

...

We fundamentally, fundamentally, are opposed to those accusations, fundamentally reject those accusations. I'm not going to respond. I'm not going to go and get into a personal attack on Mr. Groia and things of that nature, the way he has been personally attacking us. But if you think there is merit to what he is saying, Your Honour, there is little point in proceeding with this prosecution and, with the greatest of respect, in my respectful submission, Mr. Groia's submissions are neither founded in fact, nor founded in law and I ask that they be rejected and I ask that Your Honour suggest that we simply try to conduct the trial in a manner that accords with law and fairness.

[376] This was the first of many complaints by prosecution counsel to the trial judge about Mr. Groia’s allegations of prosecutorial misconduct, and the first of many requests that the trial judge rule on the allegations.
The trial judge’s response to the prosecution’s complaints evolved over the next number of trial days. Initially, the trial judge refused to make any ruling on the defence’s allegation of prosecutorial misconduct. On Day 54, the trial judge stated:

I take the defence submissions this morning as not being an application to stay the proceedings, but as notice that that application may come at the end of the day. There is no ruling to be made with respect to that matter.

When the prosecution pressed the trial judge to rule on the allegations, the trial judge stated: “I expect counsel to conduct themselves professionally and I fully expect that they will do that.”

On Day 56, the prosecution complained several times about the defence’s allegations and again requested a ruling. The trial judge deflected the request into a consideration of the merits of the defence’s position. The following illustrates the back and forth exchanges between prosecution counsel and the trial judge:

[OSC Prosecutor]: ... I haven’t resiled from anything and I take fundamental issue with that suggestion. And again, if he is going to keep making those submissions, Your Honour is either going to have to say, you are right, Mr. Groia, the Crown has done something wrong, or Your Honour is going to have to say, there is no purpose in making those submissions any longer, Mr. Groia, because they are not accurate.

The Court: Well I think the question is, if all these documents are authentic and relevant, if that’s the Crown’s position they are all authentic and relevant and Mr. Groia wants to put it in, then what else does he have to prove before he can put it in?

[OSC Prosecutor]: It’s simply not right for counsel to be standing up on a constant basis and making accusations against the prosecution in that manner. Not appropriate, in my respectful submission. If there is something to it, then we should address it. If there is nothing to it, then he should be told to stop making those submissions.

The Court: I’ll ask you the question. If the documents there are relevant and authentic ---

[OSC Prosecutor]: They are not admissible. That doesn’t make them admissible.

[OSC Prosecutor]: Okay. I am going to stop, Your Honour. I am just going to sit there and accept that he is going to malign us and to suggest that we are trying to mislead you. I was quite happy to put all of the trading of everyone involved in this company before Your Honour. And again, this is where we are headed. If we are going to be maligned in this way, I am not going to sit here and let my friend do that without taking fundamental objection to those submissions.

The Court: The line of cross examination is appropriate. Let’s have the morning recess. [Emphasis added.]

The trial judge made it quite clear why he was adopting that approach: “Well, I would like to get on with the cross-examination of Mr. Francisco.”

On the next day, Day 57, the trial judge repeated to prosecution counsel he was not going to make a ruling at that time on the defence’s abuse of process argument. During an exchange with prosecution counsel, the trial judge explained why:

[OSC Prosecutor]: Well but again, Your Honour, I need your help because either we are going to sit here on a daily basis and allow this man to get up and accuse us of abdicating our responsibilities to this Court, every day ---
The Court: Well but that’s his position. It’s not that I agree with it and he is going to make that application at the end of the case. [Emphasis added.]

[382] It was towards the end of Day 57 that the trial judge decided to give some directions to Mr. Groia about how he should raise the issue of prosecutorial misconduct in the future. The trial judge stated:

The Court: Maybe the way we can handle this. I don’t have an application before me and Mr. Groia says he is not applying now for me to make any ruling and that I don’t even have the evidentiary basis to do it and that at the end of the day he may never make the application. But if he has — Mr. Groia, perhaps if you think that we have come to a point where the Crown has done something which at the end of the day will be part of your argument to me that there has been prosecutorial misconduct you can just say here is another instance, Your Honour, and follow with one line and leave it at that. And you can stand up and you can say you object. But if —

Mr. Groia: Here is another instance Your Honour ---

The Court: And then you can have all the records. I am not being asked to resolve this at this time. Really I don’t think I should be hearing these arguments because there is a lot of repetition in the arguments that I am hearing. So I think we could narrow them down to just the way Mr. Groia would stand up when you were putting in a document and he would say “It’s the same objection”. I heard the objection and we just note it. [Emphasis added.]

[383] The prosecution was not satisfied with that direction by the trial judge. They continued to press the trial judge to rule on the defence’s allegations of prosecutorial misconduct:

[OSC Prosecutor]: I don’t understand, in my respectful submission, Your Honour, why we have to wait until the end of the trial for the Crown to find out that it should be tendering everything that could be remotely of any interest, even though the witness doesn’t have anything to do with the document —

The Court: Look, you have your tactical position to take and the defence takes their tactical decisions. I am not going to be ruling and explain to counsel how to run their cases. [Emphasis added.]

[384] By contrast, Mr. Groia said he would proceed as directed by the trial judge:

That’s fine. And from now on, Your Honour, to move matters along, I’ll come up with something equivalent to the same objection and we won’t need to bore you with repetitious arguments about prosecutorial misconduct and allegations of irresponsibility and the like. I think there are going to be important issues to deal with at the end of the case and I think we should leave it until then.

[385] The next day, Day 58, a dispute arose about whether Mr. Groia could mark as an exhibit a National Post article upon which he had questioned Mr. Francisco. During the course of his submissions, Mr. Groia made the comment about the court being unable “to get a straight answer out of the prosecutor” — a comment which the Appeal Panel found to be an instance of in civility amounting to professional misconduct: at para. 312. Mr. Groia’s remark elicited a complaint from the prosecution, resulting in the following exchange:

[OSC Prosecutor]: Just before we resume, again my friend has, for the record, indicated that I have declined to answer a question that Your Honour has put; has again suggested that the Crown is misleading the Court in some way, or in some way not being candid with the Court. I take fundamental objection to those submissions being made, those suggestions being made. He also during the course of his submissions alluded to the suggestion that the Court cannot rely on what the Crown has said and I guess this is an allusion to having reneged on something. And once again I invite my friend to specifically indicate what it is he claims that the Crown has reneged on. I again ask Your Honour to indicate to my friend that he has no basis and no right to be making submissions casting aspersions on the integrity of the officers that are appearing before you with respect to this matter in the absence of any foundation to do so. And if there is a foundation to do so, then we should be arguing that matter now.
Mr. Groia: Q. Mr. Francisco, would you turn to volume ---

The Court: I'm sorry. I have been asked something by Mr. Naster. I should respond. I don't take the submissions now that there is a complaint about the prosecution reneging on something. Mr. Groia's position is that he is not clear of what your objection is and you have put your objection on the record. I am not going to deal with exhibit F now. We are going to continue with the cross-examinatin of Mr. Francisco.

Mr. Groia: Thank you, Your Honour. That's what I propose we do. [Emphasis added.]

Later that day, the prosecution repeated its request for a ruling on the defence allegations of prosecutorial misconduct. At day's end, the trial judge gave further directions to Mr. Groia on that issue:

The Court: With respect to the defence position of prosecutorial misconduct and the Crown position that they categorically deny that and are asking me for a ruling, I think that's enough language to be put on the record, that you are making an allegation that prosecutorial misconduct is relevant to the admissibility of this document and that the defence position will be that they categorically deny it and if they want to they can ask me for a ruling. And it will take seconds to do as opposed to having Mr. Francisco leave the court room.

...

The Court: The prosecution has to be put on notice on each document if there is not an agreement that we can make a list. So if there is a document that you are tendering and you can't have it admissible on any other basis than you are relying on prosecutorial misconduct, if you can just say so that the defence is, the Securities Commission is put on notice, you can say that ---

Mr. Groia: How about the same submission, or the same complaint, or words to that effect?

The Court: Yes. Yes, something like that.

Mr. Groia: That's fine.

And addressing the prosecution, the trial judge clarified:

I am not putting any gag orders on anybody, but I would hope that your response would be as short, unless there is something substantially different that hasn't already been said in this court that needs to be added.

The trial judge's effort to move the trial along by directing defence counsel to make a "standard complaint" as the basis for the admissibility of a document broke down as soon as it was used. On Day 61, Mr. Groia invoked the "standard complaint" for the first time in respect of a document. The prosecution was not content with that approach, and again objected to the trial judge:

[OSC Prosecutor]: I also wanted to indicate again that to the extent that my friend's suggestion regarding the standard objection, the standard complaint as he describes it, is an allegation of prosecutorial misconduct and I ask that Your Honour rule upon that if he is seeking to tender this exhibit in any way, shape, or form, prefaced on an allegation of prosecutorial misconduct.

The Court: He may be at the end of the day, but he is not asking me to rule on that now, so he is not asking for me to mark it as an exhibit on that basis. In fact, he has indicated he hasn't been able to strictly prove this document so his suggestion is that it be marked as a document for future identification.

Before the morning break on Day 61, the trial judge reiterated his direction to the defence to use the usual or standard complaint approach. However, immediately following the morning break, the trial judge modified his approach, giving the following directions:
The Court: I am not asking for any submissions. I have some sympathy for Mr. Naster's position that, with respect to the usual complaint, Mr. Groia. I think most people would find that having that repeated when you believe that there is no basis to the allegations is somewhat upsetting. So you have put me on notice that you are going to bring this application at the end of the day and you have put Mr. Naster on notice. So unless there is a factual distinction between what your complaint is now and there may be some other basis for that complaint that you want to put us on notice on, it may be that we don't need to hear it.

Mr. Groia: That was a proposal I made to you last week, Your Honour, and I am perfectly happy to go forward on the basis that I can put them all in a basket and deal with them at the end of the trial. But I thought I stand to be corrected -- I thought the ---

The Court: I think I took that position that Mr. Naster had the right to have notice, but I think maybe we can just take it as a general notice.

Mr. Groia: And if that suits the Court, that's perfectly fine with us as long as I reserve that right to deal with them as a collective case. [Emphasis added.]

[390] The defence cross-examination of Mr. Francisco then proceeded without incident on Days 62 and 63. Mr. Francisco was unavailable for continued cross-examination on Day 64 because of health and family reasons. As a result of the witness's absence, Days 64 through 68 were consumed with further submissions on document issues.

[391] At one point during counsel's submissions on Day 65, Mr. Groia started to allude to the issue of prosecutorial misconduct, but the trial judge cut him off, restricted what Mr. Groia could say, and directed defence counsel to focus on the matter of concern to the court:

Mr. Groia: Your Honour, I just cannot allow the Government to make this every Bre-X document argument go in. I am trying to do this ---

The Court: Sorry. I am trying to get -- I don't actually want -- I am having problems two ways. Your suggestions of misconduct and your suggestion that if one document goes in that the million papers go in. I don't want to hear that argument. I am going to hear it at some point. I don't need to hear it on every document we are trying to put in. I would like to know what you want in, Mr. Groia, and what you are consenting to, Mr. Naster, for whatever reason. [Emphasis added.]

[392] On Day 66, the prosecution renewed its request for the trial judge to hear what was styled as an "omnibus documentary evidence application." Four months earlier, the trial judge had declined to entertain such an application. On Day 67, the trial judge again ruled he would not hear the application at that time.

[393] At the start of Day 68, the prosecution raised concerns about the trial judge's refusal to hear its omnibus application and requested an adjournment of the trial for about a month. The trial judge took issue with the prosecution's submissions, and rendered a ruling in which he described the Crown's comments as "inappropriate". OSC counsel immediately apologized. During the course of his ruling, the trial judge summarized how he had tried to manage the defence's allegations of prosecutorial misconduct in respect of the documents:

As conceded by the defence, there was no evidentiary basis for me to make findings of prosecutorial misconduct, and I have asked the defence to restrict their allegations. There have been no allegations against Mr. Hubley. The defence did not dispute Mr. Hubley's credibility in the disclosure application, but, in fact, relied on his evidence. In my ruling, I accepted his evidence. [Emphasis added.]

[394] Days 69 and 70 saw the start of the OSC's examination-in-chief of their second witness, Paul Kavanagh. At that point, the trial adjourned for a scheduled break, during which the OSC brought its application for judicial review.

[395] Several key facts emerge from the record for Days 52 through 70 of the trial.
[396] First, the trial judge did not ignore the prosecution’s complaints that Mr. Groia was making improper and unfounded allegations of prosecutorial misconduct. In its reasons the Appeal Panel stated, at para. 86: “At various points, [the OSC prosecutor] objected and asked for a ruling on the question of prosecutorial misconduct. Justice Hryn repeatedly declined to deal with that issue and instead attempted to address the admissibility issues.” With respect, that is not a fair statement of the matter. True, the trial judge did not accede to the prosecution’s request that he rule on the defence’s abuse of process allegations at that time; he deferred that issue until later in the trial. Instead, the trial judge adopted a different trial management technique, issuing a series of rulings directing how the defence could place those allegations before the court.

[397] Those rulings culminated in the trial judge’s direction on Day 61 that since Mr. Groia had put the prosecution and the court on notice about his intention to bring an abuse of process application, “unless there is a factual distinction between what your complaint is now and there may be some other basis for that complaint that you want to put us on notice on, it may be that we don’t need to hear it.” On Day 65, the trial judge stopped Mr. Groia when he started to revisit the allegation, stating: “I don’t want to hear that argument.” In his Day 68 ruling, the trial judge reminded the parties that he had “asked the defence to restrict their allegations.” In sum, the trial judge did deal with the prosecution’s complaints about Mr. Groia’s allegations, but in his own way.

[398] While other judges might well have handled the situation in a different fashion, restricting the manner and content of defence counsel’s submissions at a much earlier time, as this court observed in Felderhof, at paras. 77, 85 and 90:

[The trial judge’s] solution was not irrational or unfair. He was also not wrong to try and encourage counsel to meet and attempt to reach a consensus about certain documents. He was not wrong to attempt to move the case along, pending the abuse of process and omnibus document motions, by attempting to have counsel provide lists of documents that they wish to tender to upcoming witnesses.

... The application judge has catalogued the attempts that the trial judge did make to keep the trial and defence counsel on track. The prosecution says he did not do enough but I think it difficult at this stage to second-guess a trial judge who was faced with what would be a very long and difficult case.

...

I agree with the application judge that this is not a case where a trial judge did nothing. The trial judge did intervene on several occasions to attempt to limit the nature of defence counsel’s complaints. [Emphasis added.]

[399] Or, as put by the application judge, at para. 284, the trial judge chose neither the road of strong intervention, nor the path of complete non-intervention; he took the middle ground.

[400] Second, this was not a case where defence counsel ignored directions given by the trial judge. Quite the contrary. The trial record shows that Mr. Groia complied with the trial judge’s directions. This is a most material fact in the professional misconduct analysis.

[401] Third, although this court described Mr. Groia’s rhetoric as “improper” and “inappropriate”, not once did the trial judge call Mr. Groia to task for his choice of language. And the Felderhof trial was not a case in which the trial judge was unaware of the need for counsel to conduct themselves in a professional manner. On Day 54, in response to the prosecution’s request for a ruling on the allegations of prosecutorial misconduct, the trial judge stated: “I expect counsel to conduct themselves professionally and I fully expect that they will do that.”

[402] Moreover, the trial judge also reminded counsel to refrain from using sarcasm. On Day 58, during the course of submissions by the prosecution, the trial judge stated:

The Court: See, we are getting to -- you know, Mr. Naster, sarcasm is starting to come into this trial and I think we should stay away from that.
(2) How the Court of Appeal Dealt with the Prosecution's Complaints

[403] Unsatisfied with how the trial judge had dealt with their complaints, the prosecution applied for judicial review. When unsuccessful before the Superior Court of Justice, the prosecution appealed to this court. The appeal was dismissed, with this court holding that the trial judge had not committed any error that deprived him of jurisdiction.

[404] This court went further. In its reasons, this court, in effect, directed Mr. Groia to change the language used in making future submissions during the continuation of the trial, stating, at para. 96: “Even if Mr. Groia honestly believed that the prosecution tactics were excessive and could amount to an abuse of process, this did not give him licence for the kind of submissions he made in this case.”

[405] This court also held that some positions advanced by defence counsel before the trial judge were wrong at law. It gave specific directions to the trial judge about how to deal with certain defence arguments “in the unlikely event” Mr. Groia raised them during the remainder of the trial: at paras. 73, 76 and 88.

(3) Phase Two of the Felderhof Trial

[406] After the release of the decision of this court, the trial resumed. According to the Appeal Panel, “[I]t appears to be undisputed that Phase Two proceeded in a much more orderly fashion, with the parties reaching agreement on many of the evidentiary disputes that had marred Phase One and with little if any bickering or rancour between counsel”: at para. 117.

[407] Against that factual background, I turn to review the finding of the Appeal Panel that Mr. Groia was guilty of professional misconduct for incivility.

VII. Analysis of the Decision Below

(1) Application of the Correctness Standard

[408] Under the correctness standard, 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”: Dunsmuir, at para. 50. I propose to review the Conduct Decision by examining how it dealt with each of the three factors that make up the test for assessing whether a barrister’s in-court conduct amounts to professional misconduct. Although I will consider each factor under a separate heading, it is the Appeal Panel’s treatment of them as a whole that is the proper subject-matter of this appellate review.

(i) What the Barrister Did

[409] The Appeal Panel acknowledged, at para. 280, that the making of incorrect legal submissions by a barrister cannot, in and of itself, constitute a basis for finding professional misconduct. The Appeal Panel concluded, however, that it was improper for Mr. Groia to use incorrect legal submissions as a “platform” to attack the prosecutors and impugn their integrity without a reasonable basis to do so. It found that Mr. Groia made allegations of deliberate prosecutorial misconduct that were unfounded and lacked a reasonable basis: at paras. 295 and 328. The Appeal Panel stated that during the course of making those allegations Mr. Groia impugned the integrity of prosecutors without any factual foundation, including by alleging that they could not be relied on to keep their word, were lazy and were incompetent: at para. 285.

[410] I agree with those conclusions of the Appeal Panel, with one exception. Having reviewed the transcripts from Day 52 to Day 70, I do not understand how the Appeal Panel could conclude, at para. 286, that Mr. Groia’s use of the term “Government” to describe the prosecution and the prosecutors amounted to the use of sarcasm to cast aspersions on opposing counsel. Mr. Groia did not resort to the term “Government” only occasionally; it was his term of choice for describing the prosecution. The trial judge once admonished the OSC prosecutor for the use of sarcasm, but Mr. Groia’s use of “Government” drew no admonition from the trial judge. Nor did it draw any objection from the prosecution. Moreover, the term “Government” accurately describes the status of the OSC as
prosecutor. I think the Appeal Panel’s conclusion on the use of the word “Government” illustrates the difficulties and dangers of after-the-fact transcript reviews of a barrister’s in-court conduct. In any event, this is a minor point.

[411] The primary reason why I agree with those conclusions of the Appeal Panel lies in the reasons of this court in Felderhof. A distinctive feature of this case is that partway through the trial, the prosecution sought relief from more senior courts to stop the trial and replace the trial judge, in part because of how the trial judge was responding to Mr. Groia’s conduct. Although the prosecution did not obtain a new trial, it did secure comments from this court about what had transpired to that point in the trial, as well as directions about how the trial should move forward.

[412] This court’s comments in Felderhof were not made in the context of assessing whether Mr. Groia’s in-court conduct amounted to professional misconduct. The comments did not amount to “findings of fact” made against Mr. Groia which might preclude or in some way limit his ability to defend a charge of professional misconduct. However, this court’s comments identified conduct that Mr. Groia should not continue during the balance of the trial. In effect, this court told Mr. Groia to “cut it out” and change his ways; he did. As well, this court gave specific directions to the trial judge about how to manage certain document-related issues around which disputes had arisen.

[413] As I stated in the opening of these reasons, in its decision in Felderhof this court administered a public shaming to Mr. Groia. This court’s comments and directions amounted to what Code described in his article, at p. 117, as an intervention “by way of reprimand and injunction” which could be read in no other way than a “warning against any repetition of the misconduct.”

[414] Consequently, I think the Appeal Panel was correct in concluding that during the course of his submissions about prosecutorial misconduct, Mr. Groia used inappropriate language and impugned the integrity of the prosecutors without foundation.

[415] That, however, does not conclude the inquiry into whether Mr. Groia’s in-court conduct constituted professional misconduct. It is only the beginning.

(ii) What the Courts Did about the Barrister’s Conduct

[416] In theory, trials involve the dispassionate application of reason to the observations by participants about events, in the hope that some understanding of what really transpired will emerge, and legal rights can be determined. In reality, trials generate considerable emotion, indeed passion, amongst their participants. The judicial office imposes on the presiding judge a duty not only to keep his or her emotions in check during a hearing, but also those of the participants, especially counsel. Charged as they are with the task of fearlessly defending or promoting the interests of their clients, counsel sometimes succumb to the adrenalin of the moment and engage in conduct which comes close to or crosses the line of propriety.

[417] Many decisions in this case have quoted the remarks made by Morden J.A. in his 2001 Address to the Call to the Bar: “Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work”: see Felderhof, at para. 83. These words are true and wise. But, courtrooms are not populated by saints; they are populated by flawed human beings who enter them each day to argue and adjudicate cases. As put by the intervener, The Advocates’ Society, “advocates are not infallible and may occasionally falter.” The same can be said about judges. To hold either counsel or judges to a standard of perfection is unreasonable, because it is unattainable. Judges and counsel are human beings, not machines.

[418] Part of the duty of the presiding judge is to maintain order in this arena of potential chaos. As a result, the trial judge is the person best placed to determine whether a barrister’s conduct is approaching or has crossed over the all-too-grey line that separates zealous advocacy from impermissible courtroom conduct. No person stands in a better position than the presiding judge to assess what a barrister says or does, the manner or tone in which it is said or done, its relevance to the dispute under adjudication, and the impact such conduct will have on the fairness
of the trial, including the fairness of the process to its other participants. Counsel look to the presiding judge to draw the lines of fair conduct and to police their observance.

[419] Consequently, any regulatory review of a barrister’s in-court conduct that fails to give meaningful consideration to how the trial judge reacts to a barrister’s conduct, and how the barrister responds to judicial direction, ignores a necessary and critical element of the context in which the analysis of the barrister’s conduct must take place.

[420] In the present case, the Appeal Panel ignored that necessary component of the analysis. It failed to factor into its analysis the rulings made by the trial judge in response to the prosecution’s complaints about Mr. Groia’s conduct and, more importantly, how Mr. Groia reacted to those rulings.

[421] The Appeal Panel stated, at para. 241, that in reviewing Mr. Groia’s conduct as recorded in the transcripts of Phase One, it “tried to look at the entire picture – not just one isolated set of events or submissions.” In Part II of its reasons, “The Facts”, the Appeal Panel identified some, but not all, of the rulings made by the trial judge in response to the prosecution’s complaints about Mr. Groia’s submissions. Significantly, the Appeal Panel omitted the trial judge’s ruling on Day 65 when Mr. Groia began to allude to the allegation of prosecutorial misconduct: the trial judge cut him off, and told Mr. Groia he did not need to hear that argument. Mr. Groia complied with the trial judge’s direction.

[422] Having acknowledged that the reaction of the trial judge was relevant to its inquiry, the Appeal Panel made no reference to the trial judge’s rulings in Part VII of its reasons, “Assessment of Mr. Groia’s Conduct during the Felderhof Trial,” with one exception: the prosecution’s efforts on Days 55 to 57 to secure a ruling from the trial judge about the allegations. Instead, the Appeal Panel undertook its analysis as if the trial judge was not part of the “entire picture,” and only what Mr. Groia and the prosecution did mattered. The Appeal Panel, for all intents and purposes, ignored the third person in the courtroom – the trial judge, who was the person in whom reposed the duty and the power to control the trial process, including counsel’s conduct.

[423] The Divisional Court did consider what weight, if any, should be given to the lack of complaint by the trial judge to the regulator, concluding that none should: at paras. 36-44. However, like the Appeal Panel, the Divisional Court did not consider the rulings made by trial judge, or Mr. Groia’s compliance with them, in assessing whether Mr. Groia had engaged in professional misconduct.

[424] When the trial judge’s rulings and Mr. Groia’s responses to them are brought into the analysis, what emerges is the picture of a trial judge who responded to the prosecution’s complaints about Mr. Groia’s conduct and attempted to deal with them. Over the course of six trial days, the trial judge went from the position that he would not interfere with counsel’s tactical decisions to ultimately ruling that Mr. Groia had given sufficient notice of his allegations of prosecutorial misconduct and was not to repeat them.

[425] What emerges, as well, is the picture of a defence counsel who listened to and abided by the trial judge’s rulings. When, on Day 57, the trial judge directed Mr. Groia to employ a standard form of complaint, Mr. Groia complied. When Mr. Groia first employed the standard complaint – eliciting a prosecution objection in response – he agreed to comply with the trial judge’s further direction that since defence counsel already had given sufficient notice of his allegation, it need not be repeated unless there was some other basis for the complaint. When, on Day 65, Mr. Groia began to backslide into making an allegation of prosecutorial misconduct, the trial judge cut him off, stating he did not need to hear that argument. Mr. Groia complied. And that was the end of the issue of prosecutorial misconduct in Phase One of the trial, which adjourned five days later.

[426] Not satisfied with that state of affairs, the prosecution sought a remedy from the senior courts. What the prosecution obtained from the senior courts were forceful rulings and directions to both the trial judge and Mr. Groia: Felderhof, at paras. 73, 76-77 and 93. Mr. Groia complied with those directions. Yet, as part of its assessment, the Appeal Panel did not take into account how Mr. Groia reacted to those directions. Instead, the Appeal Panel held, at para. 120, that “given our findings below, we have not considered it necessary to rely in any
way on the conduct of the parties in Phase Two or to draw any inferences adverse to Mr. Groia from his alleged change in position from his conduct of Phase One."

[427] In my view, the Appeal Panel erred in law in failing to take into account Mr. Groia’s responses to judicial directions. When assessing whether a barrister has engaged in professional misconduct during the course of a trial, it is incumbent upon the Law Society to take into account the entirety of the member’s conduct, not just what happened at a particular slice of time. A barrister who persists in improper conduct notwithstanding the admonition of the court stands in a radically different position than one who has been told by the court to cut it out, and complies with the court’s direction.

[428] In that respect, the present case differs markedly from the situation in Marchand, where the plaintiff complained that the trial judge had failed to restrain defence counsel’s repeated attacks on the integrity and competence of plaintiff’s counsel throughout the 165 days of trial: at para. 134. Here, in the context of a 160-day trial, the Appeal Panel focused on complaints about defence counsel’s conduct which spanned six days of trial time, by the end of which the trial judge had ruled that Mr. Groia was not to repeat the allegations, a direction reiterated by this court, and with which Mr. Groia complied.

(iii) The Effect of the Barrister’s Conduct

[429] I have accepted that for uncivil in-court conduct to fall to the level of professional misconduct, the Law Society must demonstrate that the barrister’s conduct would undermine, or would have the tendency to undermine, trial fairness. Although the Appeal Panel did not expressly include a similar factor in its analysis, the Divisional Court held, at para. 96, that the Appeal Panel really had taken it into account:

The Appeal Panel also determined that the conduct of the appellant had interfered with the proper progress of the trial, had interfered with the prosecutors’ ability to present their case, and had resulted in unfairness to the witnesses that had been called – principally the prosecution’s first witness. The Appeal Panel, therefore, addressed the requirement that I have identified of conduct that might bring the administration of justice into disrepute.

[430] I disagree. In my view, the Appeal Panel committed two errors in this area of its analysis. First, the Appeal Panel ignored the findings of this court on the issue of trial fairness. The prosecution had squarely placed the issue of trial fairness before this court. In Felderhof, this court found that: the trial judge had not made a jurisdictional error in failing to rule on the prosecution’s objections to the defence’s abuse of process allegations; the trial judge had not admitted inadmissible evidence; and the trial judge’s response to Mr. Groia’s rhetoric and litigation style did not prevent a fair trial: at paras. 72, 81 and 90.

[431] The Divisional Court erred in accepting, at para. 96, the Appeal Panel’s conclusion that Mr. Groia’s conduct “had interfered with the prosecutors’ ability to present their case”. In Felderhof, this court specifically stated, in the “Civility” section of its reasons at para. 82, that it agreed “with the conclusion of the very experienced application judge that the prosecution was not prevented from having a fair trial...”

[432] Whatever other use may be made of court findings in professional misconduct proceedings, at a minimum the regulator must defer to a finding of an appellate court that conduct which occurred during a trial or hearing, whether by the presiding judge or by counsel, did not prevent a fair trial or hearing. In my respectful view, it was impermissible second-guessing on the part of the Appeal Panel and the Divisional Court to disregard this court’s findings on the issue of trial fairness in Felderhof.

[433] The second error lies in the Appeal Panel’s finding, at para. 351, that Mr. Groia’s conduct caused “a serious adverse impact” to the prosecution’s first witness, Mr. Francisco. The trial record discloses that the prosecution’s examination-in-chief of Mr. Francisco consumed 20 days of trial time. By the time Phase One adjourned, the defence’s cross-examination of Mr. Francisco had taken about 10 days. No rule of criminal or civil procedure establishes some limit in the ratio between the times for cross-examination and examination-in-chief beyond which counsel cannot tread without fear of sanction for professional misconduct. If the Appeal Panel intended to
signal that when defence counsel’s cross-examination of a witness exceeds 50% of the length of the prosecution’s examination-in-chief counsel then is straying into the area of professional misconduct, that bright line is transgressed every week in the civil and criminal trial courts of this province. With respect, I think the Appeal Panel’s finding on this point was incorrect and unreasonable.

[434] Moreover, it is the job of the trial judge to ensure that witnesses are treated fairly. The transcripts of the trial disclose that the trial judge was alive to the need to ensure that Mr. Francisco was treated fairly by both counsel. From Day 52 to Day 68, the record shows that the trial judge was faced with opposing counsel who were incapable of making brief submissions on any point. His frustration with both counsel was palpable on the face of the transcripts. His frustration was based, in part, upon the effect that the incessant bickering by both counsel was having on the progress of the evidence. Ultimately, the trial judge made rulings which foreclosed further submissions on certain points by both counsel and required them to focus on calling evidence.

(2) Conclusion

[435] Taking into consideration all three elements of the test for determining whether a barrister’s in-court conduct amounts to professional misconduct, I conclude that the Appeal Panel erred in finding that Mr. Groia had engaged in professional misconduct.

[436] A hard-fought, high-profile criminal trial saw inappropriate submissions and allegations by Mr. Groia over the course of several days in Phase One. The trial judge responded to the prosecution’s complaints about that inappropriate conduct. He ultimately directed Mr. Groia to stop making allegations of prosecutorial misconduct. Mr. Groia complied with the trial judge’s rulings. This court then gave strong directions to both the trial judge and Mr. Groia about how to deal with the disputed evidentiary and abuse of process issues during the balance of the trial. This court found that the fairness of Phase One of the trial had not been compromised by Mr. Groia’s conduct and the prosecution was not prevented from having a fair trial. At the same time, this court administered a “public shaming” to Mr. Groia. He mended his ways during the balance of the trial. The remaining 90 days of the trial proceeded without incident.

[437] And, no one involved in the trial or the judicial reviews complained to the Law Society about Mr. Groia’s conduct.

[438] Great weight must be given to Mr. Groia’s compliance with the directions of the courts and to the fact that his conduct did not affect trial fairness. When that is done, and when the circumstances of the Felderhof trial are looked at in their entirety, I conclude that Mr. Groia did not engage in professional misconduct contrary to the Rules of Professional Conduct. Consequently, I conclude that the Appeal Panel erred in determining that he did.

(3) Application of the Reasonableness Standard

[439] My colleague concludes that a reasonableness standard of review applies. Even using that standard, I would grant the appeal.

[440] While the Appeal Panel’s decision-making process certainly was transparent and intelligible, I conclude its reasons lack the justification needed to meet the reasonableness standard. This results from its failure to take into account in the analysis two factors relevant to the contextual inquiry required in this case: Doré, at para. 54.

Specifically, the Appeal Panel failed to inquire into, in any meaningful way, two key factors: (i) what the courts did about the barrister’s conduct and how the barrister reacted to judicial direction; and (ii) the effect of the barrister’s conduct on trial fairness. Moreover, as already mentioned, the Appeal Panel acknowledged that the reaction of the trial judge was relevant to its inquiry but, in the result, it failed to take that factor into account in its analysis. The Appeal Panel’s failure to examine those two key factors in its contextual inquiry renders its decision unreasonable.

VIII. Use of the Reviewing Courts’ Reasons
I agree with the analysis of my colleague, at paras. 222-28, dealing with the Appeal Panel's use of the Reviewing Courts' Reasons.

IX. Disposition

For the reasons set out above, I conclude that the Appeal Panel was incorrect and unreasonable in finding Mr. Grinta had engaged in professional misconduct. I would allow the appeal, set aside the decision of the Appeal Panel, and dismiss the complaints against Mr. Grinta.

On the issue of costs, the record discloses that the parties came close to settling this matter before the initial discipline hearing. It is most unfortunate that they did not.

In my view, costs should follow the cause. I would award Mr. Grinta his costs of the appeal fixed in the amount of $50,000, all-in, together with his costs below, which I fix in the following amounts: before the Hearing Panel, $200,000; nothing for the hearing before the Appeal Panel since neither side sought costs; and $30,000 for the appeal before the Divisional Court.

I join my colleague in thanking all counsel for their most helpful submissions on the important issues raised by this appeal.

“David Brown J.A.”

Schedule A


10. When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law....

10.7 At all times the lawyer should be courteous and civil to the court and to those engaged on the other side. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

13. The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.

14. The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith....

14.8 The lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.


4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect....

6.03 (1) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation....

5. A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.


2.1 The lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions....
5.1.1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect....

5.1.5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings....

5.6.1 A lawyer shall encourage public respect for and try to improve the administration of justice....

7.2.1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice....

7.2.4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

[1] An Act for the better regulating the Practice of Law, S.U.C. 1797 [37 Geo. III], c. XIII.


[3] Effective October 1, 2014, the Law Society approved new Rules of Professional Conduct, modelled on the Federation of Law Societies of Canada’s Model Code of Professional Conduct. Because the current rules, which are virtually identical in material part to the relevant 2000 Rules, post-date Mr. Groia’s impugned conduct, they are inapplicable in this case.


[5] I note that the Law Society, like many other professional responsibility and oversight regulators, has clear statutory authority to proceed in this fashion. Once the Law Society receives information that suggests a lawyer has engaged in professional misconduct, it can start an investigation. The information need not come in the form of a third-party complaint: see s. 49.3 of the Act.

[6] During his reply submissions before this court, Mr. Groia maintained that the Appeal Panel misunderstood his position on the appropriate test and that he did not agree that the test described by the Appeal Panel was conclusive, one way or the other, on the matter of professional misconduct.

[7] As the evidence relevant to those acts of professional misconduct was the same as that relied on by the Law Society for its misconduct allegations regarding Mr. Groia’s communications with the court, the Appeal Panel ruled that it was unnecessary to address the latter allegations. This ruling is not challenged on appeal.

[8] This concept of joint enterprise or partnership between the bench and the bar is not new. It enjoys a well-established place in the traditions of our justice system. See for example, the Hon. John W. Morden, "The Partnership of Bench and Bar" (1982), 16 L. Soc. Gaz. 46.


THE ROUND UP – Top 10 Cases of the Past Year

RYAN GREEN’S HALF:


Parliament was *deliberately* vague in defining infanticide; "Disturbance" is part of the *actus reus* of infanticide, not the *mens rea*.

Infanticide is a form of culpable homicide and applies where (1) a mother, by a wilful act or omission, kills her newborn child and, (2) at the time of the act or omission, the mother's mind is "disturbed" either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation.

Disturbed mind can mean "mentally agitated", "mentally unstable" or "mental discomposure" and need not constitute a defined psychological condition or illness. The disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth.


The new framework for applying s. 11(b); *Morin* framework rejected, presumptive delay ceiling set at 18 & 30 months: 18 for OCJ trials & 30 for SCJ trials. Defence delay still applied in calculating respective threshold delay and the Crown can rebut the presumption with "exceptional" circumstances *i.e.*, (1) discrete events and (2) particularly complex cases that are unforeseen or unavoidable and could not be remedied at the time - if Crown fails to rebut the presumption, the remedy is a stay.

Onus on defence where delay falling short of ceiling; defence required to show that: (1) it took meaningful steps that demonstrated a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.


Insofar as s. 5(3)(a)(i)(D) of the CDSA required a one-year sentence of imprisonment, it violated the guarantee against cruel and unusual punishment and was not justified under s. 1. It was therefore of no force or effect under s. 52(1) of the Constitution Act.

Statutory court judges *e.g.*, an OCJ Justice, has jurisdiction to consider the constitutionality of a mandatory minimum provision in legislation that creates a criminal offence such as the CDSA. No one can be sentenced under an unconstitutional statute. However, only a court of inherent jurisdiction is competent to invalidate an offending provision under s. 52(1) of the Constitution Act.

One-year minimum ruled unconstitutional even with the "saving" provision within the CDSA *i.e.*, s. 10(5), as other reasonably foreseeable cases could be caught by the cruel and unusual punishment. SCC signals: mandatory minimums that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable.

Challenge to s. 719(3.1) which denied enhanced credit for pre-sentence custody; portion of s. 719(3.1) declared of no force and effect for being overbreadth.

Section 719(3.1) imposes limitations on when a court may grant enhanced credit. Denial of enhanced credit for pre-sentence custody to offenders who were denied bail primarily because of a prior conviction was overbroad because it caught people in ways that had nothing to do with enhancing public safety. The provision was also overbroad because the endorsement under s. 515(9.1) provided limited availability of judicial review, creating a danger that those wrongly censured under s. 515(9.1) without a remedy.

SCC states: the standard concerning sentencing and s. 7 is gross disproportionality, and not proportionality (as the ONCA would have it).


The "misconduct on release exclusion" under s. 515(9.1) is good law and may limit pre-sentence custody to 1:1 where bail not sought.

The "misconduct" exclusion is triggered where the accused committed an indictable offence or simply breached the conditions of his release, and is detained under s. 524(4) or (8).

The appellant’s prior form of release was cancelled under s. 524(8), and he was detained under s. 524(8). Therefore, appellant not entitled to enhanced credit because he was detained under s. 524(8) even though he effectively consented to his detention by not seeking a bail hearing.

Section 719(3.1) imposes limitations on when a court may grant 1.5 to 1 credit. S. 719(3.1) referred only to an accused who had been "detained in custody under" s. 524(8). It did not require that an accused be "ordered detained in custody under" s. 524(8). Because the appellant’s prior form of release was cancelled under s. 524(8), and he was detained as a result, he was detained under s. 524(8) and denied the 1.5:1 ratio.
6) R. v. Ellis – 2016 ONCA 598 – Accused leaves car in private driveway while being followed by police. He is detained a short distance away. He tells police that he has a warrant and is arrested. A search of his pockets revealed keys to the Acura, which police used in a subsequent search of the car. Loaded firearm located in the vehicle. Crown tried to justify search on two grounds. First, it was argued that the search of the vehicle was a valid search incident to arrest. This argument was rejected. Second, that the search was pursuant to s.221(1) of the HTA, which allows police to conduct an inventory of “apparently abandoned” vehicles. The trial court accepted this argument, and the Court of Appeal upheld it. The accused showed an intention to disassociate himself from the vehicle, apparently to avoid the discovery of his outstanding warrant. The vehicle could not simply be left in a private driveway, which would deprive the owners of the driveway of access to their property. The purpose of s.221(1) of the HTA is to catalogue and preserve apparently valuable property. This cannot be done without entering the vehicle that has been abandoned.

7) R. v. Dunkley – 2016 ONCA 597 – Companion case to Ellis. Two plain-clothes police officers in an unmarked car observed the accused and suspected he was casing a gas station in preparation for a robbery. Police learned accused on parole for robbery. Accused runs as police approach. Arrested a short time later. His car keys were found on the ground in the direction he ran. Police searched vehicle and located a handgun and taser, and charged the accused with unlawful possession. The trial judge held that the search was permitted incident to arrest and under s.221(1) of the HTA. Unlike Ellis, there was no indication that the accused intended to abandon the vehicle. The actions of the accused did not demonstrate that he parked the vehicle for the purpose of evading police. This was supported by the fact that the officers were in plain clothes and an unmarked vehicle.

8) R. v. Brar – 2016 ONCA 724 – Appellant convicted of various sexual offences, and three counts of child luring. Sentenced to six years and corollary orders under ss.161(1)(b), (c), and (d). The (d) order was a 20-year ban on internet use except while “at employment”, and also prohibited appellant from owning/using “any mobile device with internet capabilities.” Appellant sought relief pursuant s.687 of the Code, believing the order to be demonstrably unfit. Depriving an offender from internet access severs them from indispensable component of everyday life (R. v. K.R.J., 2016 SCC 31). Section 161 orders are meant to be flexible and discretionary and ought to be tailored to the nature and degree of risk an offender presents. Trial judge acknowledged the hardship the order would cause but imposed it despite nothing in the trial record that would justify an outright ban. Order varied to prohibit accessing content that violates the law, or using social media directly or indirectly. The (c) order already prohibited electronic contact with those under the age of 16.
9) R. v. Pino – 2016 ONCA 389 – Appellant convicted of possessing 50 marijuana plants. Trial judge found that manner of search was unreasonable, the Appellant was not properly informed of her right to counsel, and that the length of delay between her arrest and her access to counsel was unreasonable. Trial judge ruled marijuana plants admissible. The unreasonable search was not sufficient to justify excluding the evidence. The 10(b) breaches occurred after the search and therefore the evidence was not obtained in a manner that infringed the rights of the Appellant.

Conviction set aside, acquittal entered. Case law from the SCC and ONCA has developed guidelines for determining if evidence met the obtained in a manner test. 1) The approach taken is to be generous and consistent with the purpose of s.24(2). 2) Court must consider entire chain of events. 3) Test may be met where evidence and breach are part of same transaction. 4) Connection between evidence and breach may be causal, temporal, contextual, or any combination of the three. 5) Connection may not be too tenuous or remote. Prior jurisprudence do not rule out Charter breaches simply because they occurred after the evidence was obtained. All 3 breaches in Pino ought to have been considered at trial. Evidence excluded.

10) R. v. Fercan Developments Inc. – 2016 ONCA 269 – Application for costs against the Crown. Crown had sought forfeiture of properties where large, sophisticated marijuana grow operations were discovered. Several accused pleaded guilty. One accused was brother of the property owners. Neither property owner was ever charged in relation to the drug operation. Crown abandoned forfeiture application against credit union after 31 days of evidence. Crown had not demonstrated complicity or collusion. Application for costs brought by property owners and credit union. Trial judge awarded over $1 million in costs against crown.

Test for Crown misconduct is whether actions amount to a “marked and unacceptable depart from the reasonable standards expected of the prosecution. Crown commenced a meritless application, resisted providing disclosure to owners and credit union, and failed to take credit union up on it’s offer to provide information that might satisfy Crown concerns. Cost award upheld.