

And Now the End is Near:

The Future of Civility in the Legal Profession

By Joseph Groia & Brendan Monahan

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JOSEPH GROIA

Joseph Groia is a principal of Groia & Company Professional Corporation. He practices securities litigation, acting as counsel in a wide range of civil, quasi-criminal, criminal and administrative cases. During his career as a securities litigator, Mr. Groia has acted as counsel in many of Canada's most important securities cases, including: Asbestos, Bre-X, Canadian Tire, Cinar, Hollinger, Torstar/Southam, Phillip Services and YBM. He has been ranked as one of Canada's 500 Leading Lawyers (Lexpert) since 2000 and named as one of Canada's 25 Most Influential Lawyers in 2013 (Canadian Lawyer Magazine). Mr. Groia's most noteworthy professional accomplishment is his leadership of the team which successfully defended Mr. John Felderhof in the 10-year prosecution of charges arising out of the collapse of Bre-X Minerals Ltd. In May 2015, Mr. Groia was elected by the Bar to serve as Bencher at the Law Society of Upper Canada.

BRENDAN MONAHAN

Brendan Monahan is a student-at-law at Groia & Company Professional Corporation. He is a graduate of the combined JD/MBA program at Osgoode Hall Law School and the Schulich School of Business. While in law school, Brendan served as president of the JD/MBA student government. He also represented Osgoode at a national moot, where he took home the award for best factum. Prior to completing the JD/MBA program, Brendan obtained an Honours B.A. in film and political studies from Queen's University.

AUTHORS' NOTE

The views expressed in this paper are those of the authors alone. They do not reflect the views of the Law Society of Upper Canada (LSUC), or the Benchers thereof and are expressed in the authors' personal capacity only. Indeed it is safe to assume that at least some members of the LSUC would disagree with much of what is said herein. And that is what free speech is all about.

“I would rather lose in a cause that will someday win, than win in a cause that will someday lose.”

Woodrow Wilson

I. Introduction

These are perilous times for all Canadian legal professionals and their clients. The legal profession faces unprecedented challenges and an unpredictable future. There are widespread public concerns about access to justice, unemployed lawyers and paralegals, failing law firms, wrongful convictions and the inadequate regulation of dishonest legal professionals. We believe that the profession’s preoccupation with civility, which has become a central element of self-regulation in the last 15 years, is decidedly out of touch with the needs of legal professionals and the public.

This short paper considers the effects of the civility movement¹ on the legal profession as a whole and tries to forecast its future. In the debate around civility, the stakes for paralegals are just as high as they are for lawyers. Indeed the need to be “civil” is enshrined in section 2 of the *Paralegal Rules of Conduct*.² To the extent that we refer to “lawyers” or “legal professionals” in the following pages, paralegals are an important part of that discussion.

I come to this debate with 16 years of history. The criticisms by the reviewing courts of my conduct in *R. v. Felderhof*,³ rendered during the Ontario Securities Commission’s (OSC) application, when I was unable and unwilling to defend myself as part of my duty to my client, John Felderhof, were devastating to me. For the LSUC to charge me with professional misconduct without bothering to read the transcripts from the *Felderhof* trial was alarming. That three benchers would say that it was an abuse of process for me to even try to defend myself from allegations of misconduct was unfathomable. For five benchers to overturn that bizarre

¹ When we refer to the civility movement, we refer to the numerous studies, papers, articles and cases on this issue, many of which contain exhortatory comments about the importance of civility in the legal community. Prosecutions for alleged incivility are a by-product of the civility movement. The movement as we describe it seems to have begun at the end of the last century and continues to be a significant part of the regulatory programme for the Law Society of Upper Canada (“LSUC”) and other law societies in 2016.

² Rule 2.01(3) provides: “A paralegal shall be courteous and civil, and shall act in good faith with all persons with whom he or she has dealings in the course of his or her practice.”

³ 2007 ONCJ 345. [*Felderhof*].

decision, but to then find me guilty of misconduct, while ignoring almost all of the evidence called at my hearing was, to say the least, disappointing.⁴

Where do I now stand? After two further appeals—first to the Divisional Court,⁵ and then to the Ontario Court of Appeal with one dissent⁶—I have sought leave to appeal my case to the Supreme Court of Canada. My defence of Mr. Felderhof (mostly without pay), and my defence of the LSUC charges (mostly without hesitation), have left me financially drained and professionally wounded. Being elected a Bencher of the LSUC in May 2015 has helped to restore my faith in the legal profession. This has become a defining case for me, and the misuse of civility has become my cause. I am not afraid to tell you the story of my journey, and I do not fear another judgment by the profession when my case comes to an end this year or next.

While my case informs my perspective on the topic of civility, this paper examines the civility movement as a whole and what the future might hold. In particular, we will argue that the civility movement affects the public and hurts the profession in at least three important ways: first, it diverts resources away from more important goals such as access to justice; second, it has introduced new rules for the way we conduct trials and has had a chilling effect on the ability to raise concerns about prosecutorial misconduct; and third, it has caused legal professionals to become more worried about their style of speech than the substance of their arguments for fear of becoming the next “Joe Groia.” Each of these three points is discussed in greater detail below.

As a final point, we will consider what the future may have in store. In so doing, we will need to recognize that civility is often used as a means to help maintain the status quo by discouraging full, frank, and if necessary, harsh criticism. To be clear, it is not that there is no need for the regulation of lawyers when their conduct outside of a courtroom involves violent, sexist, racist, vulgar and otherwise offensive and disgraceful actions, speech, or communications (extreme conduct). Rather, the problem, in our view, is that the civility movement has gone far beyond these reasonable and widely-accepted goals. An undue emphasis on civility promotes mediocrity and discourages excellence. As long as legal professionals stay away from extreme comments or conduct, we should be encouraging, not discouraging, what the LSUC, and now the courts in Ontario, have condemned as “incivility” in my case.

⁴ See, *Law Society of Upper Canada v Groia*, 2012 ONLSHP 94, rev'd in part 2013 ONLSAP 41 [*Groia*].

⁵ 2015 ONSC 686.

⁶ 2016 ONCA 471.

II. How Does the Civility Movement Harm the Legal Profession?

In our view, it does so in at least three ways:

1. The civility movement diverts resources and time away from more important goals such as access to justice, an inadequate number of positions, and unemployment.

As University of Ottawa Law Professor Adam Dodek has noted, too much time and money is spent on matters that are less important (civility) at the expense of issues that warrant immediate attention. In 2013, the CBA referred to the state of access to justice as “abysmal.”⁷ The following year, the Supreme Court had this to say in their first sentences of *Hryniak*:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.⁸ [Emphasis added.]

I have already spent well over \$1,000,000 in legal fees and lost time defending this prosecution. At the original hearing alone, the LSUC claimed (in their costs submissions) over 1,100 hours of billable work. We have now gone through *three* additional appeals and have sought leave to the Supreme Court of Canada. How many more people could have been served had the skilled lawyers involved in my case been engaged in *pro bono* work, particularly at a time when access to justice is a fundamental concern of our society? How many more scholarship opportunities could have been made available at a time when the cost of law school is soaring?

The fact that new legal professionals are, and will continue to be, increasingly concerned with paying back their student debts means fewer can afford to work in public interest jobs, and fewer are able to provide their services at more accessible rates. What if the LSUC’s *Groia* resources had been put towards providing articling jobs? I believe that the resources used to

⁷ The Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 6.

⁸ *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-2, 453 NR 51 [*Hryniak*].

prosecute incivility matters – such as in *Groia* – are unquestionably put to better use in these areas. Further, I believe that the “culture shift” that is “necessary” to ensure access to justice will be hindered while we remain committed to the civility movement.

In 2014, the *Toronto Star* ran a series of articles accusing LSUC of being lax when it comes to dishonest lawyers.⁹ LSUC responded with its own “For the Record”¹⁰ statements on its website.¹¹ Whoever is right, there is no doubt that many members of the public must be troubled to see that one of the LSUC’s most important prosecutorial initiatives over the last seven years has been to prosecute a lawyer who acted almost entirely for free, while he secured an acquittal for an innocent client, and about whom they received no formal complaint; all happening at the same time that the LSUC is being accused of ignoring or mishandling complaints about dishonest lawyers.

2. The civility movement has introduced new rules for the conduct of trials and prosecutorial misconduct.

The most alarming consequence of the *Groia* decision is that it has caused a far-reaching and long-lasting chill on zealous advocacy. While regulators and some judges deny that this is the effect of the decision, there is no doubt that there have been serious and adverse consequences as a result. If it can now be considered part of a professional misconduct charge to call the OSC “the government,”¹² what form of speech, colourful or otherwise, will escape the scrutiny of the civility regulators?

This chill has also damaged the likelihood that the profession will be allowed to continue to self-regulate. Professor Adam Dodek recently had this to say on the topic of self-regulation and the *Groia* prosecution:

Law Societies should be asked – and should be asking themselves – how their actions in a particular area or in any case protect people or protect consumers ... In *Groia*, the Law Society of Upper Canada has spent a decade prosecuting a lawyer for conduct in the courtroom that had no impact on the public or on clients. The costs to the Law Society in

⁹ Kenyon Wallace, Rachel Mendleson & Dale Brazao, “Two Faces of Justice” *The Toronto Star* (online at: <http://projects.thestar.com/broken-trust/index.html>)

¹⁰ The Law Society of Upper Canada, “For the Record: Toronto Star Coverage” (2014) (online at: <http://www.lsuc.on.ca/with.aspx?id=2147498667>)

¹¹ Ironically, “For the Record” seems to have been started by the Law Society to respond to public criticisms of its prosecution in *Groia*.

¹² *Groia*, *supra* note 4 at para 123.

terms of staff time, bench time and legal fees must be enormous; the opportunity cost of what could have been done in its stead staggering.¹³

The public expects lawyers to be fearless in their representation and self-critical about the failures of their profession. Sanctioning incivility causes lawyers to be reluctant to criticize each other, even when circumstances demand it. They do so to protect themselves from the consequences of the allegations of incivility (what Professor Alice Wooley has dubbed “professional protectionism”).¹⁴ Knowing the difficulty of defending an allegation of professional misconduct and the consequences that flow from the charges alone causes lawyers to be reluctant to take any risk.

Kip Daeschel had the following comment on the *Groia* prosecution by the LSUC, saying that it sent:

[A] chilling message to Ontario lawyers that, before vigorously advancing an aggressive argument on behalf of their clients, they must first consider their own personal need to avoid offending third parties who are not in the room.¹⁵

His comment was also supported by the fact that neither the trial judge nor the opposing counsel referred my conduct to the LSUC; rather, the LSUC intervened on its own accord.

In our view, the paramount duty of all legal professionals remains as set out in *Rondel v. Workley*:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he [or she] thinks will help his client’s case.¹⁶

The very core of our duties is in fundamental tension with the notion of civility; casting doubt on the integrity of the prosecution and questioning their motives must fall under the duty of raising every possible defence. By imposing new limits of civility on that core duty (indeed the Hearing Panel in *Groia* said lawyers have an “overriding duty” to ensure that trials proceeded

¹³ Adam Dodek, “Taking Self-Regulation for Granted?”, *SLAW*, July 28, 2016. Online: <<http://www.slaw.ca/2016/07/28/taking-self-regulation-for-granted/>> . [Dodek].

¹⁴ Alice Woolley, “Does Civility Matter?” (2008) 46 *Osgoode Hall LJ* 175 at 177.

¹⁵ Kip Daeschel, “LSUC pursuing civility at the expense of justice” *The Law Times* (29 August 2011), online: *The Law Times* <<http://www.lawtimesnews.com/201108292537/commentary/lruc-pursuing-civility-at-expense-of-justice>>, referring to the original *Groia* prosecution and hearing.

¹⁶ *Rondel v Workley*, [1969] 1 AC 191 (HL) at para 227.

“efficiently” in an “atmosphere of calm”),¹⁷ the LSUC has hampered the ability of advocates to pursue some of these less pleasant avenues of defending the accused, and introduced hesitancy into the “fearless” presentation of a zealous defence for their worry about personal sanctions.

One way to limit some of these problems would be for LSUC to step back from its interference with the jurisdiction of courts to control the cases before them. Every trial has its own dynamic, and a lawyer who goes outside the boundaries of what a judge will accept does so at her peril. At the same time, disciplining a lawyer for conduct that is accepted or encouraged, or at the very least not criticized by a judge, is extremely troubling. As the unanimous Supreme Court in *McKercher* stated:

Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts’ purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers...

Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331. In exercising their respective powers, each may properly have regard for the other’s views.¹⁸

Unfortunately, the competing interests of zealous advocacy and civility often force legal professionals to sacrifice one ideal at the expense of the other. The pursuit of absolute civility is “fruitless and unattainable.”¹⁹ Defence counsel have an especially difficult set of issues in this regard, as they are required to balance their duties to their clients, to the court and to the administration of justice. When the tension between these duties forces advocates to choose one or more of them at the expense of the others, interference by a regulator not only usurps the courts’ supervisory role, it also damages the administration of justice. Neither Justice Hryn, nor

¹⁷ *Groia*, *supra* note 4 at para 137.

¹⁸ *Canadian National Railway Co v McKercher LLP* 2013 SCC 39 at paras 13 & 16 [*McKercher*].

¹⁹ Yamri Taddese, “Trial Judges Better Suited to Regulating Civility: Panel” *Law Times* (17 December 2012) as quoting Professor Alice Woolley. Online: Law Times < <http://www.lawtimesnews.com/201212172119/headline-news/trial-judges-better-suited-to-regulating-civility-panel> > [Taddese].

Mr. Felderhof, had any complaint about my conduct in *Felderhof*, nor was there a formal complaint by the prosecutors to the LSUC.

3. The civility movement has led lawyers to be worried more about the style of their speech rather than the substance of their arguments for fear of becoming the next Joe Groia.

The intersection between zealous advocacy and incivility is precarious and largely undefined, requiring careful navigation. The problem with not precisely defining this intersection is that legal professionals are left unsure of where to draw the line for their own conduct, and are left to doubt their own strategies in the courtroom, potentially abandoning avenues of defence which may have otherwise been available to their client. There does not seem to be any margin of error. Any legal professional who carefully reads the *Groia* and *Laarakker*²⁰ decisions, and sees those punitive sanctions, will either decline to represent clients in more acrimonious cases, or present their clients with less than the wholehearted defence they deserve.²¹ This presents particularly significant problems for criminal lawyers and their clients, as these cases are often high-stakes and involve some of the most marginalized individuals in society; cases where it is especially important for advocates to be able to present any defence available, without fear of crossing into uncivil territory and professional misconduct prosecutions.

Professor Woolley writes that:

It is more important that the client's legal rights be protected from the unfair incursions of counsel than that the lawyer attempting to do so be chided for incivility because of the manner in which he expressed himself. Otherwise, the lawyer may become more, and perhaps excessively, concerned with the selection of his words rather than with the rights of his clients.²²

In the real world, the interests of legal professionals often conflict with those of their clients.²³ The existence of conflicting interests in itself is not the primary issue. We are all expected to always put our client's interests ahead of our own. That is what a fiduciary does. The issue arises when the legal professional's interests increasingly incentivize them to act in a way that may be

²⁰ *Law Society of British Columbia v Laarakker*, 2011 LSBC 29, [2011] LSDD No 175 [*Laarakker*].

²¹ Taddese, *supra* note 19.

²² Wooley, *supra* note 14 at para 15.

²³ We are, after all, being paid by our clients. Decisions to go to trial, for example, mean further income for the lawyer at the expense of the client.

detrimental to their client. In discussing conflicts of interest, Chief Justice McLachlin said in *McKercher*:

The second main concern, which arises with respect to current clients, is that the lawyer be an effective representative — that he serve as a zealous advocate for the interests of his client. The lawyer must refrain “from being in a position where it will be systematically unclear whether he performed his fiduciary duty to act in what he perceived to be the best interests” of his client: D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters’ Law of Trusts in Canada* (4th ed. 2012), at p. 968. As the oft-cited Lord Brougham said, “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client”: *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part I, at p. 8.

Effective representation may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client: the lawyer’s own interests, those of a current client, of a former client, or of a third person: *Neil*, at para. 31.²⁴

The question we ask is: why demand the notions of civility set out in *Groia* when legal arguments often require harsh rhetoric to meet legal standards, and those arguments are intended to produce harsh results? The very nature of our legal system is characterized by the zealous pursuit by each side (represented by their advocates) of their own case as being more legitimate than that which is presented by the opposition. The person who ‘wins’ does so at the expense of the other party, whether it be through imprisonment, the forfeiture of money or property, or losing custody of children. Nothing about these outcomes is ‘civil,’ yet some still believe that the process for reaching these conclusions must always be free of emotion and “in an atmosphere of calm.”

III. The Future

It is, of course, impossible to predict what the future holds. Nevertheless we will try. In our view, if the current trend towards the predominance of civility continues, the following outcomes are likely to occur;

²⁴ *McKercher*, *supra* note 18 at paras 25-26.

i. *LSUC is putting its ‘right’ to self-regulate Ontario’s legal profession at risk*

At a time when public confidence in the legal profession is arguably lower than ever,²⁵ LSUC’s fixation with civility is, at best, puzzling and, at worst, troubling. Conrad Black recently had this to say about the civility debate in a column in the *National Post*:

The underlying problem is that the secondary and often arbitrary or even spurious criterion of ‘civility,’ after many centuries of judicial precedent have left the conduct of trials to presiding judges, is now being invoked by anonymous tinkers in the bar bureaucracy to ignore and repeal the powers of judges and capriciously dictate the conduct of barristers. There is no precedent for such an intrusion, no legally authoritative mandate for it, no semblance of professional or legislative consultation. It is an outright usurpation, a *coup d’etat judicare*.²⁶

In a recent column in *SLAW*, Professor Adam Dodek went even further than Lord Black, comparing the current state of affairs at LSUC to the “crisis of confidence” that led the British Columbia government to take over regulation of the real estate industry in that province (the industry had previously been self-regulated by the Real Estate Council of British Columbia).²⁷ When B.C. Premier Christy Clark announced the change, she said, “[self-regulation] is not a right. [It] is very much a privilege.” Professor Dodek’s response: “Law Societies would be wise to remember Premier Clark’s words or they may end up finding themselves listening to a similar lecture from another premier one day.”²⁸

ii. *Clients will not have confidence they are getting the zealous advocates they deserve*

For LSUC, a self-regulatory body mandated to serve clients and the public, the issues are bigger than my case. When undue restraint is placed on advocates’ ability to voice concerns in the courtroom, it is the public’s loss. When judges’ role as the arbiter of what happens in their courtroom is usurped (instead giving this ability to a panel of Benchers who were not there and were never complained to), it is the public’s loss. Indeed, LSUC may not only lose its right to self-govern the profession, but it could very well inflict substantial harm on clients’ access to effective and zealous representation.

²⁵ See, “Broken Trust,” *Toronto Star*. Online: <<http://projects.thestar.com/broken-trust/>> .

²⁶ Conrad Black, “A judicial coup d’etat,” *National Post*, January 31, 2015. Online: <<http://news.nationalpost.com/full-comment/conrad-black-a-judicial-coup-detat>>.

²⁷ Dodek, *supra* note 13.

²⁸ *Ibid.*

- iii. *Important issues like access to justice and lack of jobs in the legal profession will be neglected*

While LSUC wages war on apparent “incivility,” the real issues plaguing legal professionals, clients, and the public at large remain. Many of these issues have been discussed above in this paper. Needless to say, so long as LSUC continues to be preoccupied with civility, these issues will remain unaddressed. For a body that is and should be accountable to the public, such a state of affairs, in our view, is regrettable.

IV. Conclusion

The crisis in the legal profession is not because we are viewed as too passionate, too unruly, or too zealous. Even when clients can afford professional advice, the public worries about whether or not their advocate is more concerned about his or her own interests instead of theirs. We fear that the civility movement has forced all legal professionals to place civility above their fundamental duties of loyalty, zealous advocacy and integrity. While the Courts in my case see no conflict, we respectfully disagree. It may be that the years of struggle and the enormous cost of my case will cause the LSUC to pause before it brings the next civility prosecution. It may be that the Supreme Court will take a very different view of the issues in my case than has been taken so far. If that happens, we may start to see the pendulum swing away from the dogged pursuit of civility and back towards the primacy of zealous advocacy. If it does, then there is still some hope that legal professionals will start to regain the public trust that has been so tragically lost.

Toronto, Canada
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