Criminal

Groia case highlights tension between a lawyer's duty to both client and court | Julius Melnitzer

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A hint of what awaits Joe Groia could very well be gleaned from the Supreme Court of Canada's treatment of Quebec criminal lawyer Robert Jodoin, against whom the court upheld a personal costs award for bringing "unfounded and frivolous" motions alleging bias against a Quebec Superior Court judge.

It's worth a thought, for nothing less than the limits of passionate advocacy in our adversarial system are at stake in Groia's case, tentatively scheduled to be heard by the Supreme Court in the fall. If the high court upholds the law society's and the lower courts' findings of professional misconduct against Groia, the adversarial system will become a tea party masquerading as a trial. The propriety ordained by the elite will shackle lawyers with that tiny, self-questioning hesitancy that can spell the difference between sink or swim for their clients.

Groia was the Toronto lawyer who successfully defended John Felderhof, a senior officer and director of Bre-X, the mining company that fraudulently claimed to have discovered gold in Indonesia in the 1990s. Prosecutors brought securities charges against Felderhof, which were dismissed after 160 days of trial over seven years. To say merely that no love was lost between Groia and the prosecution is to demonstrate only that civility still has relevance in this publication.

Civility, however, is not what Groia is made of — or at least not in this trial and at least not in his defence of his client. A reading of the trial transcript, or even of the judgments that followed on Groia's subsequently being charged with professional misconduct, suggest that Felderhof had Godzilla's ferociousness at work for him. But as Godzilla saved San Francisco, Groia saved Felderhof. That can't, and should not be, forgotten by those sitting in judgment on the lawyer.

So what did Groia do wrong? For almost three weeks, he made unyielding allegations of prosecutorial misconduct, impugning the integrity of opposing counsel Jay Naster in the process. His beef: that Ontario Securities Commission counsel had gone back on earlier positions that certain documents were both relevant and authentic. Groia certainly railed on, but he did so in good faith: he believed, mistakenly, that any witness could be questioned on any document disclosed by the prosecution.

The prosecution got so frustrated with evidentiary rulings by the trial judge and his failure to keep Groia's "uncivil attacks" in check that it applied for a halt to the prosecution and a recommencement of the trial before a new judge. I can't remember any disinterested party suggesting that this attack on the judge amounted to professional misconduct.

In any event, the motions failed, partly because the Ontario Court of Appeal ruled that Justice Peter Hryn had made no jurisdictional error regarding the “incivility of defence counsel” and defence counsel’s “wrong views about what constituted improper prosecutorial misconduct.” Properly admonished, Groia reined in his invective and the trial proceeded without further incident.

But that wasn’t the end of it. The Law Society of Upper Canada, somehow moved to proactivity, charged and convicted Groia of professional misconduct. There had been no complaints from anyone. An appeal panel upheld the decision but reduced the initial penalty to a one-month suspension and payment of $200,000 in costs.

The Divisional Court upheld the ruling and so did the Court of Appeal. But it agonized: the split decision covered 444 paragraphs. The majority ruled that professional misconduct occurred when a lawyer made allegations of prosecutorial misconduct or impugned the integrity of opposing counsel unless she made the allegations in good faith and on a reasonable basis. In dissent, Justice David Brown focused on the judiciary’s responsibility for controlling the courtroom. He articulated an in-court test for professional conduct to include consideration of the conduct itself, the judge’s reaction, how the lawyer responded, and whether the conduct threatened to undermine the fairness of the court proceedings.

Brown, in my view, got it right. His decision recognized the ebb and flow of a heated courtroom and the impossibility of articulating a bright-line standard. Ultimately, his decision says this: human nature in an adversarial proceeding, especially a long one, can be volcanic. But it’s only when a lawyer ignores a judge’s direction to put a cap on the lava flow that professional standards are in danger. This test is perfect, because it leaves the judge and respect for his rulings in control of the courtroom.

Here, Justice Hryn was in control of his courtroom. That’s why the prosecution motion to restart the trial failed. Groia’s sin was his language — the allegations against him don’t include abusing the process by deliberately delaying or otherwise sidetracking the proceedings. Groia stayed true to himself and his client until Justice Hryn took control and the Court of Appeal criticized the lawyer’s behaviour. There was no undermining of the court’s authority, abuse of process or obstruction of justice. The case against Groia should have stopped there.

Hopefully, the *Jodoin* decision is a sign that Groia’s ordeal will finally be over and lawyers will be able to return to the courtroom unfettered by the threat of sanctions for their vigorous — if sometimes misguided and impolite, even uncivil — representation of their clients.

To be sure, the SCC, although it split 7-2, upheld the personal costs award against Jodoin. But this was a case where the lawyer ultimately conceded that he had committed an error of judgment in bringing prohibition motions based on judicial bias after being refused an adjournment.

Still, the majority called its test for imposing personal costs a “high” threshold for punishment that should be “rarely exercised.”

“An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer’s acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice,” Justice Clément Gascon held. “This high threshold is met where a court has

before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate."

None of that applies to Groia. To be sure, *Jodoin* involved a judge's power to award personal costs, not a tribunal's finding of professional misconduct. But that shouldn't matter here, because both cases deal with the boundaries that circumscribe a lawyer's duties to the court in the courtroom.

That boundaries must exist is axiomatic. That they must not interfere with good faith representation that may occasionally nudge over these boundaries is sacrosanct. Ultimately, both lawyers and appellate courts must recognize that trial judges must rule.

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