A Backgrounder on the *Groia* Case: Implications for lawyers, judges, and the future of professional self-regulation in Canada

By: Joseph Groia[1] & Brendan Monahan[2]

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

- *Woodrow Wilson*

I. Introduction

The events that have given rise to the continuing story of *Groia v. LSUC* date back to 1993, in the headwaters of the Busang River in the jungle of Borneo, with one of the biggest deposits of gold ever reported and, eventually, one of the largest frauds in the capital markets ever uncovered. When thousands of gold samples were found to have been tampered with, the stock price of Bre-X Minerals Ltd. (Bre-X)—the Calgary-based junior mining company that owned the Busang property—collapsed, and investors lost billions. The first half of the story ended in 2007 with the acquittal of Mr. John Felderhof, a Bre-X executive, in a 157-day trial lasting nearly seven years.

The second half of the story began in 2009, when, two years after *R. v. Felderhof* [3] was decided, the Law Society of Upper Canada (LSUC) initiated disciplinary proceedings against me, alleging that I had engaged in professional misconduct by acting uncivilly during my defence of Mr. Felderhof. After hundreds of hours of hearing and appeal time, four decisions by Ontario's courts, and an application for leave to appeal to the Supreme Court of Canada, that part of the story has yet to conclude.

What we hope for this brief backgrounder note is not to persuade you that the LSUC and the majority of the Ontario Court of Appeal got it wrong. Of course it goes without saying (with all due respect) that I believe that to be the case. Rather, our intention is to lay out the events in a somewhat balanced way so that you can consider the issues in a broader context and come to

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[3] 2007 ONCJ 345 [*Felderhof*].

your own conclusions. What, if anything, have we learned from the many inconsistent and contradictory rulings and judgments issued thus far by legal regulators and the courts? What significance do they hold for the future of the 'civility' movement within the legal profession? What role should governing bodies like the LSUC play in regulating conduct inside the courtroom? We believe that it is critically important that we continue to ask these questions, regardless of the ultimate outcome of my case.

II. The *Groia* Saga: A 'Who's Who'

Bre-X Minerals Ltd. – a junior mining company based in Calgary, Alberta. In early 1997, on the basis of internal drilling samples, analysts began estimating that there could be as much as 80 million ounces of gold located on a Bre-X-owned property in Indonesia. The once penny stock hit a pre-split high of $280.00.[4] But when independent testing revealed insignificant amounts of gold, the company's stock price crashed and investors lost billions. The Ontario Securities Commission (OSC) would later argue in its prosecution of Mr. Felderhof that, according to an expert witness, "25,000 or 30,000 samples were tampered with over a three and one half year period that was unprecedented in the history of mining."[5]

John B. Felderhof – a former vice president of Bre-X, who was charged by the Ontario Securities Commission (OSC) in connection with false claims by Bre-X regarding test results at a gold mine in Indonesia. The Bre-X fraud resulted in losses of $6 billion to Canadian and other investors. Felderhof was acquitted of all charges in 2007.

Jay Naster – an experienced criminal prosecutor who led the OSC prosecution team in the Felderhof trial from October 2000 until April 2001.

Michael Code (now Justice Code) – an experienced litigator and former Assistant Deputy Attorney General in Ontario, who was retained by the OSC to argue its judicial review application in 2001. The Superior Court of Justice and the Court of Appeal would go on to rule against the OSC on that application. Mr. Justice Code is now a judge sitting in Toronto on the Ontario Superior Court of Justice.

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[4] "Bre-X timeline: From boom to bust," *CBC News*, July 31, 2007.
[5] *Felderhof* at para 144.

Justice Peter Hryn – a justice of the Ontario Court of Justice who presided over the Felderhof trial, and who was the subject of a motion by the government prosecutors for removal on grounds that he had lost jurisdiction over the trial. The motion was dismissed by the Superior Court and the Ontario Court of Appeal and Hryn presided over the trial until its conclusion in 2007, acquitting Felderhof of all charges.

Law Society of Upper Canada – the body responsible for regulating the professional conduct of lawyers in Ontario, pursuant to the *Law Society Act*. In 2012, a Hearing Panel of the Law Society found that I had engaged in an abuse of process for trying to defend myself from charges of professional misconduct for my allegedly uncivil and unprofessional courtroom submissions during the Felderhof trial. The Hearing Panel convicted me on all counts. That decision was overturned by a LSUC Appeal Panel, who then re-convicted me on some counts.

Ontario Divisional Court – a branch of the Ontario Superior Court of Justice that hears statutory appeals from administrative tribunals. In 2015, it heard my appeal of the LSUC Appeal Panel decision. While the court dismissed the appeal, notably, it over-turned the Appeal Panel's test for incivility by adding a requirement that in-court incivility must "undermine, or have the realistic prospect of undermining, the proper administration of justice."

Ontario Court of Appeal – in 2003 it dismissed an OSC appeal from the OSC's motion seeking removal of Justice Hryn in the Felderhof trial. However, in the course of its reasons it made highly critical comments regarding my conduct. The Court of Appeal eventually heard my appeal from the Divisional Court's decision of the LSUC disciplinary rulings and, in June of 2016, dismissed the appeal by a 2-1 majority.

III. The Felderhof Trial

After the fall of Bre-X and the loss of billions of dollars, many wanted to hold the perceived perpetrators of the fraud accountable. When Bre-X founder David Walsh of Calgary died unexpectedly in June 1998, the OSC chose to pursue only Mr. Felderhof. Eight counts of violating the *Ontario Securities Act* (the Act) were laid against Mr. Felderhof: four counts of alleged insider trading, and four counts of allegedly authorizing misleading press releases. If found guilty, Mr. Felderhof faced penalties ranging from fines of up to $8 million, plus additional financial penalties of up to three times any profits from alleged insider trading (he was

alleged to have sold nearly $84 million in Bre-X shares in breach of the insider trading provisions of the Act) and possible jail time of up to 16 years. A discussion of the substance of these allegations is beyond the scope of this note. However, from the very outset and through the conclusion of the trial, my goal was always to provide my client (whose liberty, fortune and reputation were at stake) with the vigorous, zealous, and whole-hearted legal defence that he was entitled to under the law.

The First Seventy Days

The trial of Mr. Felderhof commenced on October 16, 2000 before Justice Hryn. Though the trial would last 157 days over several years, the critical time frame with respect to the future LSUC proceedings against me were the first 70 days of the trial between October 2000 and April 2001. A majority of the Ontario Court of Appeal in *Groia* summarized the first 70 days of the trial this way:

> 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;
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> Days 16-25 – Counsel made opening statements. The prosecution's opening lasted eight days, while Mr. Groia opened for the defence over two days;
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> Days 26-38 – The first stage of the examination-in-chief of the OSC's first witness, Rolando Francisco;
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> Days 39-42 – Disputes about the evidence started to dominate the trial. Counsel presented lengthy submissions regarding an OSC motion to admit extensive contested documentary evidence on an omnibus basis;
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> Days 43-52 – Mr. Francisco's direct examination continued;
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> Days 52-65 – Mr. Francisco's cross examination started. During the cross-examination, numerous heat 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 cross-examination concluded, he fell ill;
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> 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;
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> Days 69-70 – At the court's discretion, due to Mr. Francisco's illness, the examination-in-chief of the OSC's second witness, Dr. Paul Kavanaugh, commenced.[6]

It is also worth mentioning the following points, which form important parts of the record:

[6] *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at para 17.

i. The OSC's insufficient documentary disclosure

Those on Mr. Felderhof's defence team, myself included, had serious concerns regarding the OSC's approach to documentary disclosure. These concerns would prove to be well founded. It did not help that the then-OSC Director of Communications Frank Switzer, in remarks to the media on the steps of Old City Hall on first day of the trial, said improperly that the OSC's goal "was simply to seek a conviction on the charges that [they] have laid."[7] As the first phase of the trial continued, it appeared to us that the OSC had provided inadequate disclosure, in violation of their disclosure obligations under *Stinchcombe.*[8] Because of these concerns, we brought a motion for further disclosure, vigorously defended by the OSC, wherein Justice Hryn ultimately ruled in our favour. As it turned out, there were key exculpatory documents that the OSC only gave to us because we resolutely pushed for the disclosure to which Mr. Felderhof was entitled. Those documents were crucial to his acquittal on all of the charges.

ii. Subsequent rulings by Justice Hryn

In addition to ruling that the OSC had not met its disclosure obligations (see above), Justice Hryn made several key rulings in favour of the defence during the first 70 days: namely, that an 'omnibus' motion regarding the admission of documentary evidence should be deferred until later in the trial, and that the parties should exchange lists of the documents they intended to introduce through each witness in advance to determine what could go in on consent. It was these rulings, among other things, that led the OSC to believe that Justice Hryn was biased against them. The OSC eventually tried to have Justice Hryn removed, as described below.

The OSC Applies for Judicial Review

In April, 2001, the OSC applied for judicial review seeking to have Justice Hryn removed for alleged bias against the OSC. They retained Michael Code to lead this argument. In essence, the OSC argued, *inter alia*, that I had engaged in uncivil conduct in violation of the Rules of Professional Conduct (during, for instance, my successful motion for documentary disclosure) and that, by failing to control this unacceptable conduct, the trial judge had lost jurisdiction.

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[7] Richard Blackwell, "OSC's Bre-X conduct under fire," *The Globe and Mail*, October 19, 2000. This violates one of the basic ethical rules for prosecutors that their goal is not "simply to seek a conviction."

[8] See, *R. v. Stinchcombe*, [1991] 3 SCR 326. Mr. Justice Sopinka, in unanimous reasons, held: "The Crown as a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure justice is done."

After a lengthy hearing, Mr. Justice Archie Campbell of the Ontario Superior Court of Justice ruled that there was no reasonable apprehension of bias and that Justice Hryn should continue to try the case. In addition, in response to comments by Mr. Code calling me a "bald-faced liar" and comparing me to a terrorist—two months after 9/11—Justice Campbell stated: "[n]either side in this case has any monopoly over incivility or rhetorical excess."

Justice Campbell in his reasons expressed praise for Justice Hryn's handling of the trial, noting his "patient and even-handed resolve." The interplay between the OSC prosecutors, myself, and Justice Hryn was described further by Mr. Justice Brown in his dissenting reasons in *Groia* at the Ontario Court of Appeal:

> [T]he trial judge adopted a … trial management technique, issuing a series of rulings directing how the defence could place those allegations [of prosecutorial misconduct] before the court … 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 … 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.[9] [Emphasis added].

The OSC appealed Justice Campbell's ruling to the Ontario Court of Appeal. In late 2003, that court upheld Justice Campbell's decision, finding 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."[10]

The Remainder of the Trial

After the Ontario Court of Appeal ruled on judicial review, the remainder of the trial proceeded without incident. This part of the trial is summarized by Madame Justice Cronk in her majority reasons in *Groia:*

> The second phase of the trial began on March 30, 2004 before the same 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 (Ont. CJ). By the end, the trial had consumed 160 days of court hearing time, spanning almost seven

[9] *Groia, supra,* at para 396-7 [Justice Brown's dissenting reasons].
[10] *R. v. Felderhof* (2003), 68 OR (3d) 481 (Ont. CA).

> years, including the time devoted to the JR [Judicial Review] Application and the related appeal to this court.[11]

Justice Cronk did not point out that we acted without pay for the second phase of the trial, and thereafter when Mr. Felderhof ran out of money.

IV. The LSUC "Investigation"

In early 2003, a LSUC investigator contacted me after reading a newspaper article reporting on the decision of Justice Campbell on the OSC's judicial review application. At that time, I was advised that the LSUC was "monitoring this matter," but that it "is not actively investigating [my] conduct at this time." I sent LSUC the factums filed by Mr. Felderhof in the hearing before Justice Campbell and for the upcoming hearing at the Court of Appeal. I heard nothing further. Then, upon the release of the judicial review decision of the Court of Appeal in February 2004, I was contacted again by the LSUC, and was informed that LSUC was "now actively investigating this matter." We exchanged some correspondence over the next several months. I then heard nothing from the LSUC for nearly four years.

Then, in August 2008—over a year after the Felderhof trial had concluded—the LSUC advised me that it "continued to review this matter." In November 2008, I was told that the LSUC investigator had "completed her review" of the matter and had concluded that there remained "professional conduct issues" that required my response. The LSUC then went on to list certain "findings" of Justice Campbell and the Ontario Court of Appeal that, in her view, could be characterized as "findings of professional misconduct." I was surprised by this position, not only because the issue of my conduct was not before either Justice Campbell or the Court of Appeal (the issue on judicial review was Justice Hryn's jurisdiction, as described above), but also because I was not a party to those proceedings, I never had the opportunity to mount a defence, and no "findings" against me had been made.[12]

I would later learn that the LSUC was reluctant to pay the $6,000 fee to obtain the transcripts of the trial proceedings until after the Notice of Application had been issued against me in 2009.

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[11] *Groia, supra,* at para 24.

[12] My decision to remain a non-party on the OSC's judicial review application was, in large part, a result of my belief (at that of Brian Greenspan's) that responding to the specific allegations about my conduct during the trial would not be in Mr. Felderhof's best interests and would detract from the proper defence of the application. In coming to that decision, I consulted extensively with Mr. Greenspan who I had retained separately to advise me on the matter.

In my view, when making allegations of in-court professional misconduct, it goes without saying that the trial transcripts are essential reading. It is disappointing that the investigation into my conduct concluded without the benefit of the transcript records.

V. The LSUC Hearing Panel

The proceeding before the Hearing Panel took place over 19 days between August 2011 and April 2012. The LSUC called no witnesses, relying instead on the judicial review proceedings as the basis for its findings. Indeed, LSUC's view was that I had already been found guilty of professional misconduct by the reviewing courts (in proceedings to which I was not a party), and that all that remained was for the LSUC to essentially rubber stamp the conviction and sentence me. The LSUC went as far as to characterize my attempts to defend myself as an abuse of process (since, in their view, the matter had already been decided). In the result, I was found guilty of incivility and professional misconduct. My license to practice law was ordered suspended for two months and I was ordered to pay the LSUC nearly $250,000 in costs.

VI. The LSUC Appeal Panel

I appealed the decision and penalty to a LSUC Appeal Panel. It concluded that the Hearing Panel had made fundamental errors and that no deference was owed to its findings. The Appeal Panel nevertheless upheld the conviction for different reasons. It reduced my penalty to a one-month suspension and decreased the costs award to $200,000.

The Appeal Panel reviewed my conduct throughout the various stages of the trial and made findings as to whether particular submissions I made to the trial judge were uncivil or improper in themselves, whether certain submissions became uncivil in a given context, and whether they constituted professional misconduct. While the Appeal Panel corrected many of the most egregious errors in the Hearing Panel's reasons, it was later recognized by the Divisional Court that the Appeal Panel failed to formulate and apply a test for incivility that went far enough to protect the importance of zealous advocacy.[13] More importantly, as would eventually be noted by Mr. Justice Brown in dissent at the Ontario Court of Appeal, the Appeal Panel failed to take

[13] *Divisional Court Reasons* at para 72.

into account the trial judge's actions with respect to my conduct and my response to the trial judge's direction.[14]

VII. The Ontario Divisional Court

I appealed the Appeal Panel decision to the Divisional Court. The LSUC brought a cross-appeal as to whether the reasons of the courts were admissible as evidence of professional misconduct, and whether the penalty and costs sanctions imposed by the Hearing Panel should be restored.

In February, 2015, Mr. Justice Nordheimer released the decision of the Divisional Court on the appeal and on the cross-appeal. The Divisional Court found that the Appeal Panel's test for when incivility becomes professional misconduct did not go far enough to protect zealous advocacy, and formulated a new test that would be met when the conduct "calls the administration of justice into disrepute."[15] Remarkably, the Court said that the application of the more rigorous test would not have made a difference in this case and upheld the decision of the Appeal Panel.[16]

The Divisional Court held that the standard of review of the test formulated by the Appeal Panel was correctness, but that the standard of review for its application of that test was reasonableness. The Court undertook no analysis of whether the standard of review should be different when considering conduct that occurs in open court as opposed to conduct outside of a courtroom.

VIII. The Ontario Court of Appeal

I was granted leave to appeal the decision of the Divisional Court by the Court of Appeal. The appeal was heard over three days in December 2015. There were seven intervenors. The Court of Appeal released its split decision on June 14, 2016. Madame Justice Cronk, writing for the majority, dismissed the appeal and awarded no costs. Mr. Justice Brown wrote a lengthy dissent, in which he would have allowed the appeal, dismissed the complaints against me, and awarded costs in my favour.

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[14] *Court of Appeal Reasons* at paras 360-368.
[15] *Divisional Court Reasons* at para 75.
[16] *Divisional Court Reasons* at para 72.

The majority disagreed with the new test formulated by the Divisional Court and restored the vague test of the Appeal Panel. It found that a deferential standard of reasonableness applies to a review of a decision by a law society panel with respect to professional misconduct, regardless of whether the alleged misconduct took place in open court or outside the courtroom. It upheld the one-month suspension and the $200,000 + $30,000 in costs that I was ordered to pay.

Justice Brown dissented. He held that a correctness standard of review should apply where a law society panel deals with allegations of professional misconduct involving a lawyer's conduct in a courtroom before a presiding judge. Importantly, he noted that the context of the issues raised "engages the contours of the constitutional relationship between the courts and government regulators."[17] He found that the Appeal Panel's decision could not survive review on either a correctness or reasonableness standard, because it failed to give any meaningful consideration to the rulings of the trial judge and my response to those rulings in determining that I had engaged in professional misconduct.

Justice Brown formulated a three-part test to be applied to an allegation of professional misconduct before a court:

> Any inquiry into whether a barrister's in-court conduct amounts to professional misconduct takes into account three main factors:
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> (a) What the barrister did;
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> (b) What the presiding judge did about the barrister's conduct and how the barrister responded to the directions of the presiding judge; and
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> (c) 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.[18]

IX. What's Next?

Where do I now stand? After four appeals and a split decision from Ontario's highest court, I have sought leave to appeal my case to the Supreme Court of Canada. The one-month suspension and cost awards against me have been stayed on consent by the Court of Appeal pending the outcome of that leave application.

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[17] *Court of Appeal Reasons* at para 312.
[18] *Court of Appeal Reasons* at para 319.

What I do know is that my case raises issues of great public importance to lawyers, judges, and law students alike. In her majority reasons for the Court of Appeal, Justice Cronk stated:

> [this appeal] 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.[19]

Justice Brown agreed with Justice Cronk regarding the public importance of the issues raised:

> 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:
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> > *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.*
>
> 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.[20]

Is it constitutionally permissible for a law society, or a court reviewing a law society's decision on appeal, to discipline a lawyer for in-court conduct that is not faulted by the trial judge? What limits, if any, should be placed on a lawyer's freedom of expression when defending a client in a court of law on serious criminal charges? What is the boundary line that divides passionate, aggressive and zealous advocacy from professional misconduct? Regardless of the ultimate outcome of my case, I urge you to continue to ask these questions.

Toronto, Canada
September 21, 2016

[19] *Court of Appeal Reasons* at para 4.
[20] *Court of Appeal Reasons* at paras 254-255.