



SUPREME COURT OF CANADA

CITATION: Groia v. Law Society of Upper Canada, 2018
SCC 27

APPEAL HEARD: November 6, 2017
JUDGMENT RENDERED: June 1, 2018
DOCKET: 37112

BETWEEN:

Joseph Peter Paul Groia
Appellant

and

Law Society of Upper Canada
Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Attorney General of Saskatchewan, Law Society Tribunal, Advocates' Society, Barreau du Québec, Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Independent Criminal Defence Advocacy Society, Federation of Law Societies of Canada, Ontario Crown Attorneys' Association, Ontario Trial Lawyers Association, Canadian Bar Association and Criminal Lawyers' Association of Ontario
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 161)

Moldaver J. (McLachlin C.J. and Abella, Wagner and Brown JJ. concurring)

CONCURRING REASONS:
(paras. 162 to 174)

Côté J.

DISSENTING REASONS:
(paras. 175 to 233)

Karakatsanis, Gascon and Rowe JJ.

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GROIA v. LAW SOCIETY OF UPPER CANADA

Joseph Peter Paul Groia

Appellant

v.

Law Society of Upper Canada

Respondent

and

**Director of Public Prosecutions,
Attorney General of Ontario,
Attorney General of Saskatchewan,
Law Society Tribunal,
Advocates' Society,
Barreau du Québec,
Canadian Civil Liberties Association,
British Columbia Civil Liberties Association,
Independent Criminal Defence Advocacy Society,
Federation of Law Societies of Canada,
Ontario Crown Attorneys' Association,
Ontario Trial Lawyers Association,
Canadian Bar Association and
Criminal Lawyers' Association of Ontario**

Interveners

Indexed as: Groia v. Law Society of Upper Canada

2018 SCC 27

File No.: 37112.

2017: November 6; 2018: June 1.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Law of professions — Discipline — Barristers and solicitors — In-court incivility — Law Society bringing disciplinary proceedings against lawyer based on uncivil behaviour during trial — Lawyer found guilty of professional misconduct by disciplinary tribunal — Approach for assessing whether in-court incivility amounts to professional misconduct — Whether decision reasonable.

Administrative law — Appeals — Standard of review — Law Society disciplinary tribunal — Standard of review applicable to Law Society’s decision finding lawyer guilty of professional misconduct for in-court incivility.

G, a lawyer, was hired by F to defend him against charges of insider trading and authorizing misleading news releases brought against him by the Ontario Securities Commission (“OSC”). F’s trial was characterized by a pattern of escalating acrimony and by a series of disputes between G and the OSC prosecutors, which included personal attacks, sarcastic outbursts and allegations of professional impropriety made by G. In particular, the OSC prosecutors and G disagreed over the scope of the OSC’s disclosure obligations and the format of such disclosure, as well

as over the admissibility of documents. Much of the disagreement stemmed from G's honest but mistaken understanding of the law of evidence and the role of the prosecutor. During the trial, despite the frequency and fervor of the dispute, the trial judge initially adopted a hands-off approach, but he finally directed G to stop repeating his misconduct allegations. G largely followed the trial judge's directions. Evidentiary disputes were eventually resolved and the trial was completed, with F being acquitted on all charges.

After F's trial, the Law Society brought disciplinary proceedings against G on its own motion, alleging professional misconduct based on his uncivil behaviour during the trial. A three-member panel of the Law Society Hearing Panel found G guilty of professional misconduct, suspended his licence to practice law for two months and ordered him to pay nearly \$247,000 in costs. On appeal by G, the Law Society Appeal Panel also concluded that G was guilty of professional misconduct, but it reduced G's suspension to one month and decreased the costs award against him to \$200,000. In its decision, the Appeal Panel developed a multi-factorial, context-specific approach for assessing whether in-court incivility amounts to professional misconduct. The Divisional Court upheld the Appeal Panel's decision as reasonable. A majority of the Court of Appeal dismissed G's further appeal.

Held (Karakatsanis, Gascon and Rowe JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Abella, **Moldaver**, Wagner and Brown JJ.: The Appeal Panel's decision should be reviewed for reasonableness. This Court's decisions establish that a reasonableness standard applies to law society misconduct findings and sanctions. Moreover, post-*Dunsmuir* jurisprudence has firmly entrenched the notion that decisions of specialized administrative bodies interpreting their own statute or statutes closely connected to their function are entitled to deference from courts, and are thus presumptively reviewed for reasonableness. That presumption applies here: the Appeal Panel's approach to determining when incivility amounts to professional misconduct and its application of that approach in assessing a lawyer's conduct involve an interpretation of the *Rules of Professional Conduct* enacted under its home statute and the discretionary application of general principles to the facts before it.

The presumption of deference is not rebutted. Determining when in-court behaviour amounts to professional misconduct does not fall under the category of questions of central importance to the legal system as a whole and outside the decision-maker's expertise, for which correctness review would be appropriate. Although the permissible scope of lawyers' behaviour is arguably of central importance to the legal system as a whole, it cannot be said that assessing whether incivility amounts to professional misconduct is outside the Law Society's expertise. To the contrary, Law Society disciplinary tribunals have significant expertise regulating the legal profession, and Law Society disciplinary panels are composed, in part, of other lawyers, who are aware of the problems and frustrations that confront a

practitioner. Furthermore, a deferential standard of review does not threaten a trial judge's power to control his or her courtroom. A trial judge is free to control the conduct in his or her courtroom irrespective of the degree of deference accorded to a Law Society's disciplinary decision by a different court. The fact that the behaviour occurs in a courtroom is an important contextual factor that must be taken into account when evaluating whether that behaviour amounted to professional misconduct; but it does not impact on the standard of review.

The multi-factorial, context-specific approach developed by the Appeal Panel for assessing whether a lawyer's in-court behaviour crosses the line into professional misconduct on the basis of incivility is appropriate. First, the Appeal Panel recognized the importance of civility to the legal profession and the corresponding need to target behaviour that detrimentally affects the administration of justice and the fairness of a particular proceeding. At the same time, it remained sensitive to the lawyer's duty of resolute advocacy — a duty of particular importance in the criminal context because of the client's constitutional right to make full answer and defence. The Appeal Panel recognized the need to develop an approach that would avoid a chilling effect on the kind of fearless advocacy that is at times necessary to advance a client's cause.

Second, the Appeal Panel developed an approach that is both flexible and precise. A rigid definition of when incivility amounts to professional misconduct in the courtroom is neither attainable nor desirable; rather, determining whether a

lawyer's behaviour warrants a finding of professional misconduct must remain a context-specific inquiry that is flexible enough to assess behaviour arising from the diverse array of situations in which lawyers find themselves. Yet, standards of civility must be articulated with a reasonable degree of precision. The Appeal Panel's approach strikes a reasonable balance between flexibility and precision: it sets a reasonably precise benchmark that instructs lawyers as to the permissible bounds of ethical courtroom behaviour, by articulating a series of contextual factors — what the lawyer said, the manner and frequency in which it was said, and the presiding judge's reaction to the lawyer's behaviour — that ought generally to be considered when evaluating a lawyer's conduct, and by describing how those factors operate when assessing a lawyer's behaviour.

With respect to what the lawyer said, while not a standalone “test”, the Appeal Panel determined that prosecutorial misconduct allegations, or other challenges to opposing counsel's integrity, cross the line into professional misconduct unless they are made in good faith and have a reasonable basis. Requiring a reasonable basis for allegations protects against unsupportable attacks that tarnish opposing counsel's reputation without chilling resolute advocacy. However, the reasonable basis requirement is not an exacting standard. It is not professional misconduct on account of incivility to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted. Nor is it professional misconduct to advance a novel legal

argument that is ultimately rejected by the court. The good faith inquiry asks what the lawyer actually believed when making the allegations. In contrast, the “reasonable basis” inquiry requires a law society to look beyond what the lawyer believed, and examine the foundation underpinning the allegations. Looking at the reasonableness of a lawyer’s legal position at this stage would, in effect, impose a mandatory minimum standard of legal competence in the incivility context — this would allow a law society to find a lawyer guilty of professional misconduct on the basis of incivility for something the lawyer, in the law society’s opinion, ought to have known or ought to have done. This would risk unjustifiably tarnishing a lawyer’s reputation and chilling resolute advocacy.

With respect to the frequency of what was said and the manner in which it was said, the Appeal Panel noted that, as a general rule, repetitive personal attacks and those made using demeaning, sarcastic, or otherwise inappropriate language are more likely to warrant disciplinary action. As for the presiding judge’s reaction to the lawyer’s behaviour, when the impugned behaviour occurs in a courtroom, what, if anything, the judge does about it and how the lawyer modifies his or her behaviour thereafter becomes relevant.

Finally, the Appeal Panel’s approach also allows Law Society disciplinary tribunals to proportionately balance the lawyer’s expressive freedom with its statutory mandate in any given case. The flexibility built into the Appeal Panel’s context-specific approach to assessing a lawyer’s behaviour allows for a

proportionate balancing in any given case. Considering the unique circumstances in each case enables Law Society disciplinary tribunals to accurately gauge the value of the impugned speech. This, in turn, allows for a decision, both with respect to a finding of professional misconduct and any penalty imposed, that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.

Although the approach that it set out was appropriate, the Appeal Panel's finding of professional misconduct against G on the basis of incivility was unreasonable. First, even though the Appeal Panel accepted that G's allegations of prosecutorial misconduct were made in good faith, it used his honest but erroneous legal beliefs as to the disclosure and admissibility of documents to conclude that his allegations lacked a reasonable basis. The Appeal Panel acknowledged that submissions made on the basis of a sincerely held but erroneous legal belief cannot ground a finding of professional misconduct, and accepted that in making his allegations of impropriety against the OSC prosecutors, G was not deliberately misrepresenting the law and was not ill-motivated. Despite this, the Appeal Panel used G's legal errors to conclude that he had no reasonable basis for his repeated allegations of prosecutorial impropriety. Such a finding was not reasonably open to the Appeal Panel. Allegations of prosecutorial misconduct based on a sincerely held but mistaken legal belief will be reasonably based as long as they have a sufficient factual foundation. The question for incivility purposes is not whether G was right or wrong on the law; rather, the question is whether, based on his understanding of the

law, his allegations of prosecutorial misconduct, which the Appeal Panel found were made in good faith, had a factual foundation. In this case, they did. G's legal errors, coupled with the OSC prosecutors' conduct, provided the reasonable basis for his allegations. Accordingly, based on the Appeal Panel's own approach, G's allegations were made in good faith and they were reasonably based.

Second, the other contextual factors in this case could not reasonably support a finding of professional misconduct against G on the basis of incivility. The evolving abuse of process law at the time accounts, at least in part, for the frequency of G's allegations; the presiding judge took a passive approach in the face of G's allegations; and G's behaviour changed in response to the directions of the trial judge. The Appeal Panel failed to account for these contextual factors in its analysis. The only conclusion that was reasonably open to the Appeal Panel on the record before it was a finding that G was not guilty of professional misconduct. Because G, in the circumstances of this case, could not reasonably be found guilty of professional misconduct, the complaints against him are dismissed and there is no need to remit the matter to the Law Society.

Per Côté J.: There is agreement with the majority that the Appeal Panel erred in finding that G committed professional misconduct and that there is no need to remit the matter back to the Law Society.

However, there is disagreement as to the applicable standard of review. The Appeal Panel's finding of professional misconduct is reviewable on the

correctness standard on the basis that the impugned conduct occurred in a courtroom. Applying the approach set out in *Dunsmuir*, this Court's existing jurisprudence does not dictate the standard of review in this appeal. The context of this case is different in one critical — and dispositive — respect: the impugned conduct occurred before a judge in open court. The fact that the relevant conduct occurred in a court of law implicates constitutional imperatives about the judiciary's independence and its capacity to control its own processes, and rebuts the presumption of reasonableness. Correctness review is required because the Law Society's inquiry into in-court professional misconduct engages the contours of the constitutional relationship between the courts and government regulators. Judicial independence is, without question, a cornerstone of Canadian democracy. It is essential to both the impartiality of the judiciary and the maintenance of the rule of law. An inquiry by a law society into a lawyer's in-court conduct risks intruding on the judge's function of managing the trial process and his authority to sanction improper behaviour. To protect judicial independence, and the authority of judges to manage the proceedings before them in the manner they see fit, the judiciary — not a regulatory body, a creature of the political branches of government — should have the final say over the appropriateness of a lawyer's conduct in that sphere. The reasonableness standard of review, which requires judicial deference to a law society's disciplinary determinations, is inconsistent with this prerogative. Therefore, correctness review is required to ensure proper respect for the judiciary's constitutionally guaranteed place in our democracy.

Per Karakatsanis, Gascon and Rowe JJ. (dissenting): There is agreement with the majority that reasonableness is the applicable standard of review. The simple fact that a lawyer's behavior occurs in the courtroom does not deprive the Law Society of its legitimate role in regulating the profession nor does it justify heightened judicial scrutiny. There is also agreement with the majority that, in articulating a standard of professional misconduct, the Appeal Panel reasonably set out a contextual approach which will vary according to the particular factual matrix in which it is applied.

However, the majority's disposition in this appeal is disagreed with. The Appeal Panel's decision was reasonable and there is no basis to interfere. Accordingly, the appeal should be dismissed. The majority fundamentally misstates the Appeal Panel's approach to professional misconduct and reweighs the evidence to reach a different result. This is inconsistent with reasonableness review as it substitutes the Court's judgment for that of the legislature's chosen decision maker. Where, as here, the standard of review analysis leads to the application of reasonableness, deference is not optional. Deference bars a reviewing court from conducting an exacting criticism of a decision in order to reach the result that the decision was unreasonable. It follows that a reviewing court also cannot supplement the decision maker's reasoning for the purpose of undermining it. Neither may a court reweigh evidence or contextual factors considered by the decision maker. At all times, the starting point of reasonableness review is the reasons for the decision under

review. There is no basis on this record to interfere with the Appeal Panel's decision. Its analysis was cogent, logical, transparent and grounded in the evidence.

A reviewing court should give effect to the Appeal Panel's decision to adopt an approach with both subjective and objective considerations (i.e. to require good faith and a reasonable basis for allegations of prosecutorial misconduct or that impugn the integrity of an opponent). It was open to the Appeal Panel to consider both the factual and legal bases for the allegations at issue, and to conclude that there was no reasonable basis in fact or in law for G's allegations. The Appeal Panel's mandate permits it to determine any question of fact or law that arises in a proceeding before it. As such, the Appeal Panel was entitled to consider whether there is a reasonable basis for the allegations. Reasonableness, as opposed to good faith, implies consideration of whether the allegations, objectively, had a legal or factual basis. The Appeal Panel's approach is justified by the serious consequences that irresponsible attacks can have on opposing counsel's reputation as well as the public perception of the justice system. Collapsing the subjective and objective elements of this approach restricts the Appeal Panel's ability to assess the reasonableness of legal submissions to determining whether the lawyer was acting in good faith. It was open to the Appeal Panel to hold that a lawyer who erroneously alleges prosecutorial misconduct or impugns the integrity of opposing counsel should not be shielded from professional sanction because of his or her own incompetence.

In determining whether G's allegations crossed the line into professional misconduct, the Appeal Panel applied its expertise and decided how to assess the evidence as a whole. It was open to the Appeal Panel to weigh the evidence in the way it did. Its findings were amply supported by the record, as were its conclusions on the cumulative effects of G's conduct. Ultimately, the reasons supported the Appeal Panel's conclusion that G was engaged in professional misconduct. Both the evidentiary foundation and the logic of the reasons were sound. The decision was justifiable, intelligible, and transparent and fell within the range of reasonable outcomes.

The Appeal Panel's decision also proportionately balanced the value of freedom of expression with its mandate to ensure that lawyers conduct themselves professionally. The Appeal Panel was alert to the importance of lawyers' expressive freedoms and the critical role of zealous advocacy in our system. In order to ensure that these principles were limited no more than necessary, the Appeal Panel adopted a contextual approach that took into account the dynamics of the courtroom setting. It was reasonable for the Appeal Panel to conclude that in the context of this trial, zealous advocacy did not require G to make unfounded allegations of prosecutorial misconduct, to impugn the integrity of his opponents or to frequently resort to invective when describing them.

There are a number of concerns about the implications that follow from the majority's decision: they immunize erroneous allegations from sanction by the

Law Society, validate improper conduct and threaten to undermine the administration of justice and the culture change that the Court has called for in recent years. Moreover, setting aside the decision of the Appeal Panel has the potential to undermine the ability of law societies to promote the efficient resolution of disputes. Law societies are important actors in the culture change that is needed. Their decisions respecting professional misconduct should be approached with deference.

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By Moldaver J.

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By Côté J.

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S.C.R. 247; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; **referred to:** *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796.

By Karakatsanis, Gascon and Rowe JJ. (dissenting)

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Earl A. Cherniak, Q.C., and Martin Mendelzon, for the appellant.

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Milan Rupic, for the intervener the Attorney General of Ontario.

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Terrence J. O'Sullivan, Deborah C. Templer and Matthew R. Law, for the intervener the Advocates' Society.

André-Philippe Mallette, for the intervener Barreau du Québec.

Cara Zwibel, for the intervener the Canadian Civil Liberties Association.

Joseph J. Arvay, Q.C., and *Catherine George*, for the interveners the British Columbia Civil Liberties Association and the Independent Criminal Defence Advocacy Society.

Gregory DelBigio, Q.C., and Alison M. Latimer, for the intervener the Federation of Law Societies of Canada.

Paul Cavalluzzo and Adrienne Telford, for the intervener the Ontario Crown Attorneys' Association.

Allan Rouben, Thomas Connolly and Darcy Romaine, for the intervener the Ontario Trial Lawyers Association.

Pierre Bienvenu, Andres C. Garin and Jean-Christophe Martel, for the intervener the Canadian Bar Association.

Frank Addario, Samara Secter and Robin Parker, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of McLachlin C.J. and Abella, Moldaver, Wagner and Brown JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] The trial process in Canada is one of the cornerstones of our constitutional democracy. It is essential to the maintenance of a civilized society.

Trials are the primary mechanism whereby disputes are resolved in a just, peaceful, and orderly way.

[2] To achieve their purpose, it is essential that trials be conducted in a civilized manner. Trials marked by strife, belligerent behaviour, unwarranted personal attacks, and other forms of disruptive and discourteous conduct are antithetical to the peaceful and orderly resolution of disputes we strive to achieve.

[3] By the same token, trials are not — nor are they meant to be — tea parties. A lawyer's duty to act with civility does not exist in a vacuum. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. Care must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility.

[4] The proceedings against the appellant, Joseph Groia, highlight the delicate interplay that these considerations give rise to. At issue is whether Mr. Groia's courtroom conduct in the case of *R. v. Felderhof*, 2007 ONCJ 345, 224 C.C.C. (3d) 97, warranted a finding of professional misconduct by the Law Society of Upper Canada. To be precise, was the Law Society Appeal Panel's finding of professional misconduct against Mr. Groia reasonable in the circumstances? For the reasons that follow, I am respectfully of the view that it was not.

[5] The Appeal Panel developed an approach for assessing whether a lawyer's uncivil behaviour crosses the line into professional misconduct. The approach, with which I take no issue, targets the type of conduct that can compromise trial fairness and diminish public confidence in the administration of justice. It allows for a proportionate balancing of the Law Society's mandate to set and enforce standards of civility in the legal profession with a lawyer's right to free speech. It is also sensitive to the lawyer's duty of resolute advocacy and the client's constitutional right to make full answer and defence.

[6] Moreover, the Appeal Panel's approach is flexible enough to capture the broad array of situations in which lawyers may slip into uncivil behaviour, yet precise enough to guide lawyers and law societies on the scope of permissible conduct.

[7] That said, the Appeal Panel's finding of professional misconduct against Mr. Groia on the basis of incivility was, in my respectful view, unreasonable. Even though the Appeal Panel accepted that Mr. Groia's allegations of prosecutorial misconduct were made in good faith, it used his honest but erroneous views as to the disclosure and admissibility of documents to conclude that his allegations lacked a reasonable basis. However, as I will explain, Mr. Groia's allegations were made in good faith and they were reasonably based. As such, the allegations themselves could not reasonably support a finding of professional misconduct.

[8] Nor could the other contextual factors in this case reasonably support a finding of professional misconduct against Mr. Groia on the basis of incivility. The

evolving abuse of process law at the time accounts, at least in part, for the frequency of Mr. Groia's allegations; the presiding judge took a passive approach in the face of Mr. Groia's allegations; and when the presiding judge and reviewing courts did direct Mr. Groia, apart from a few slips, he listened. The Appeal Panel failed to account for these contextual factors in its analysis. In my view, the only conclusion that was reasonably open to the Appeal Panel on the record before it was a finding that Mr. Groia was not guilty of professional misconduct.

[9] Accordingly, I would allow Mr. Groia's appeal.

II. Factual Background

[10] Mr. Groia's alleged misconduct stems from his in-court behaviour while representing John Felderhof. Mr. Felderhof was an officer and director of Bre-X Minerals Ltd., a Canadian mining company. Bre-X collapsed when claims that it had discovered a gold mine proved false. The fraud — one of the largest in Canadian capital markets — cost investors over \$6 billion. The Ontario Securities Commission ("OSC") charged Mr. Felderhof with insider trading and authorizing misleading news releases under the *Securities Act*, R.S.O. 1990, c. S.5.

[11] Mr. Felderhof hired Mr. Groia, a former OSC prosecutor, to defend him. The trial proceeded in the Ontario Court of Justice before Justice Peter Hryn. It took place in two phases. Phase One began on October 16, 2000 and lasted 70 days. Phase

Two did not begin until March 2004. On July 31, 2007, Mr. Felderhof was acquitted of all charges.

[12] Phase One of the Felderhof trial was characterized by a pattern of escalating acrimony between Mr. Groia and the OSC prosecutors. A series of disputes plagued the proceedings with a toxicity that manifested itself in the form of personal attacks, sarcastic outbursts and allegations of professional impropriety, grinding the trial to a near standstill.

A. *Disclosure Disputes*

[13] Disputes between Mr. Groia and the OSC prosecutors arose during the disclosure process. The Bre-X investigation yielded an extensive documentary record. The OSC initially disclosed interview transcripts and so-called “C-Binders” — binders of documents the OSC intended to use as part of its case against Mr. Felderhof. It did not, however, disclose a substantial body of additional documents it had in its possession. The OSC prosecutors and Mr. Groia disagreed over the scope and format of further disclosure sought by the defence. According to Mr. Groia, it was the OSC’s responsibility to sort through all of the documents it had in its possession and to disclose hard copies of any relevant document to the defence. When the OSC prosecutors refused to do so, Mr. Groia wrote a letter to the OSC alleging that the prosecution was “operating under a serious misapprehension of its disclosure obligation[s]”, an error that Mr. Groia described as “an abuse of process”: Law Society Appeal Panel, 2013 ONLSAP 41, at para. 35 (CanLII) (“A.P. reasons”). He

would build on these themes as the trial progressed. In response, the OSC offered to disclose electronic copies of the documents in its possession and provide Mr. Groia “with a reasonable supply of blank paper”: A.P. reasons, at paras. 35-37.

[14] Dissatisfied with the OSC’s response, Mr. Groia moved for additional disclosure. Mr. Naster, the lead OSC prosecutor, argued that the OSC was not aware of any relevant document that had not been disclosed to Mr. Felderhof. The trial judge, however, agreed with Mr. Groia and ordered the OSC to disclose a further 235 boxes of documents and hard copies of documents stored on 15 discs in its possession.

B. *The Second Disclosure Motion*

[15] As the trial neared, the parties were still at odds over disclosure. Adamant that the OSC had not fulfilled its disclosure obligations, Mr. Groia sent Mr. Naster a letter accusing the OSC of adopting “a ‘win at any costs’ mentality” which demonstrated “a shocking disregard for [Mr. Felderhof’s] rights”.

[16] Mr. Groia then brought a motion arguing that the OSC’s disclosure was so deficient that it amounted to an abuse of process warranting a stay of proceedings. In the alternative, Mr. Groia sought full disclosure, and in the further alternative, an order prohibiting the OSC from calling witnesses until it made full disclosure. Interspersed throughout Mr. Groia’s submissions on the motion were allegations that the prosecutors were “unable or unwilling . . . to recognize their responsibilities”,

motivated by an “animus towards the defence”, and determined to make Mr. Felderhof’s ability to defend himself “as difficult as possible”.

[17] By the end of the motion, Mr. Groia conceded that the stringent test for a stay of proceedings had not been met. Accordingly, the trial judge declined to stay the prosecution. Once again, however, he was satisfied that the OSC had not fulfilled its disclosure obligations and he ordered additional disclosure. The trial judge also admonished the OSC for a comment made by one of its media personnel that the OSC’s goal “was simply to seek a conviction on the charges” it had laid: A.P. reasons, at para. 55.

C. *The Admissibility of Documents*

[18] Characteristic of most *Securities Act* prosecutions, the case against Mr. Felderhof relied heavily on documentary evidence. Between them, the prosecution and defence had nearly 100 binders containing thousands of documents. Disputes over the admissibility of those documents was a major source of friction throughout the trial.

[19] Mr. Naster initially suggested that either party could provisionally tender documents, subject to arguments as to their admissibility at the end of the trial. Mr. Groia rejected this approach. He was concerned that given the staggering size of the fraud, a number of Bre-X documents were falsified. As such, he insisted that the admissibility of each document should be ruled on as the document was tendered. Mr.

Naster then changed his position, seeking an omnibus ruling on the admissibility of all of the documents. The trial judge declined to hear Mr. Naster's motion, and the parties were put to the strict proof of each document they proposed to tender.

[20] The disputes resulted in frequent objections and lengthy arguments on the admissibility and use of individual documents. The first OSC witness had to be excused for large periods of time as the parties argued. The disputes became increasingly hostile and ground the trial to a near standstill. After 42 days of evidence, the first OSC witness's testimony had yet to be completed.

[21] Much of the disagreement stemmed from Mr. Groia's honest but mistaken understanding of the law of evidence and the role of the prosecutor. His position on the admissibility of documents was founded on two legal errors. First, Mr. Groia maintained that the prosecution was duty-bound to introduce all authentic, relevant documents and that its failure to introduce relevant exculpatory documents through its own witnesses was a deliberate tactic designed to ensure that Mr. Felderhof did not receive a fair trial.

[22] Second, Mr. Groia believed that he could put documents, acknowledged by the OSC as being authentic, to the first OSC witness even though that witness had not authored them and could not identify them. Mr. Naster's objections to this approach spawned further allegations of prosecutorial impropriety. Mr. Groia argued that the OSC was using "a conviction filter" and thwarting Mr. Groia's attempts to secure a fair trial for his client.

[23] Mr. Groia's mistaken position on the admissibility of documents was reinforced by Mr. Naster's comment in the first disclosure motion that he had "an obligation as a prosecutor to ensure that all relevant materials are placed before [the trial judge]": A.P. reasons, at para. 38. In addition, Mr. Groia mistook Mr. Naster's concession that he was duty-bound to *disclose* all relevant documents as a promise that he would consent to the *admissibility* of those documents at trial. In Mr. Groia's view, Mr. Naster unfairly reneged on this promise.

[24] The OSC was not entirely blameless for these skirmishes. Mr. Naster continued to challenge the trial judge's ruling declining to hear an omnibus document motion, lamenting that he was getting "shafted big time". Both sides stubbornly dug their heels in, refusing to budge and taking every opportunity to quarrel.

[25] Despite the frequency and fervor of the disputes, the trial judge initially adopted a hands-off approach, opting to stay above the fray. Mr. Naster repeatedly invited the trial judge to rule on Mr. Groia's allegations of prosecutorial misconduct and to stay the proceedings as an abuse of process if he found the allegations to be substantiated. For his part, Mr. Groia made it clear that while he did not intend to bring an abuse of process motion at the time, he was putting the prosecutors on notice that their conduct was unacceptable and laying the groundwork for an abuse of process motion later in the proceedings. Accordingly, the trial judge postponed any ruling on the propriety of the prosecution's conduct.

[26] It was not until the 57th day of trial that the judge directed Mr. Groia to stop repeating his misconduct allegations. Instead, whenever Mr. Groia felt the prosecution was acting inappropriately, he was to simply state that he was making “the same objection”. The trial judge reiterated his instruction a few days later. Mr. Groia largely followed the trial judge’s directions for the remainder of Phase One.

D. *The Judicial Review Application*

[27] During a scheduled three-week hiatus in the Felderhof trial, the OSC brought a judicial review application in the Superior Court before A. Campbell J., seeking the removal of the trial judge. The OSC argued that the trial judge had committed a number of errors which caused him to lose jurisdiction and undermined the OSC’s right to a fair trial. One of the OSC’s grounds for its application was the trial judge’s failure to rein in Mr. Groia’s uncivil behaviour, thereby creating a reasonable apprehension of bias.

[28] Justice Campbell dismissed the application. He found no jurisdictional error necessitating the trial judge’s removal. He concluded that the trial judge had acted in an even-handed manner throughout Phase One: *R. v. Felderhof*, 2002 CanLII 41888, at paras. 281-85 (“*Felderhof ONSC*”). Campbell J. also noted that Mr. Groia’s stance on the role of the prosecutor was mistaken, explaining, at para. 33, that the prosecution was entitled to seek a conviction “within the appropriate limits of fairness”. Despite Mr. Felderhof’s success on the judicial review application,

Campbell J. declined to order costs against the OSC, in part because of Mr. Groia's "appallingly unrestrained" conduct.

[29] The Court of Appeal for Ontario dismissed the OSC's appeal from Campbell J.'s order: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 ("*Felderhof ONCA*"). Writing for a unanimous panel, Rosenberg J.A. clarified that although the defence has the right to allege abuse of process, that allegation should only be made at the appropriate juncture and with a sufficient factual foundation. And even then, "defence counsel [was] obliged to make submissions without the rhetorical excess and invective that Mr. Groia sometimes employed": para 93.

[30] Campbell J. and Rosenberg J.A. were each critical of Mr. Groia's behaviour throughout the trial. Campbell J. observed that "Mr. Groia took every opportunity to needle Mr. Naster with sarcastic allegations of professional misconduct" (para. 284) and described Mr. Groia's submissions as "descend[ing] from legal argument to irony to sarcasm to petulant invective" (para. 64). Rosenberg J.A. similarly noted that "Mr. Groia was prone to rhetorical excess and sarcasm" and described his submissions as "unseemly", "unhelpful" and "improper": paras. 13 and 80.

[31] Both judges also voiced displeasure with how the prosecution had behaved, noting that there had been "tactical manoeuvring on both sides" (*Felderhof ONCA*, at para. 68), and that "[n]either side . . . ha[d] any monopoly over incivility or rhetorical excess" (*Felderhof ONSC*, at para. 264).

[32] The Felderhof trial resumed in March 2004, with new counsel appearing for the OSC. In line with the guidance provided by Campbell J. and Rosenberg J.A., the evidentiary disputes were resolved and the second phase of the trial proceeded without further incident, completing on July 31, 2007, with Mr. Felderhof being acquitted on all charges.

III. Procedural History

A. *The Law Society Disciplinary Proceedings*

[33] In 2004, the Law Society launched an investigation into Mr. Groia's conduct during the Felderhof trial. The Law Society initiated the investigation on its own motion; no independent complaint was filed against Mr. Groia. At Mr. Groia's request, the Law Society postponed its investigation until the Felderhof trial ended. On November 18, 2009 — more than nine years after the Felderhof trial began — the Law Society brought disciplinary proceedings against Mr. Groia, alleging professional misconduct based on his uncivil behaviour during Phase One of the trial.

[34] The professional misconduct allegations were first litigated before a three-member panel of the Law Society (the Hearing Panel). Mr. Groia testified in his own defence. The Hearing Panel concluded that allowing Mr. Groia to re-litigate the propriety of his conduct was an abuse of process given Campbell J.'s and Rosenberg J.A.'s findings on the issue — this despite the fact that Mr. Groia was not a party to the judicial review proceedings and made no submissions on his own behalf in

defence of his behaviour. Relying heavily on those findings, the Hearing Panel found Mr. Groia guilty of professional misconduct: Law Society Hearing Panel, 2012 ONLSHP 94 (“H.P. reasons”). It suspended Mr. Groia’s licence to practice law for two months and ordered him to pay nearly \$247,000 in costs: Hearing Panel decision on penalty, 2013 ONLSHP 59.

[35] Mr. Groia appealed the Hearing Panel’s decision to the Law Society Appeal Panel. The Appeal Panel found that the Hearing Panel had erred in treating the Felderhof judicial review findings as conclusive and precluding Mr. Groia from defending his behaviour. At the request of both parties, the Appeal Panel considered the professional misconduct allegations against Mr. Groia *de novo* based on the record of proceedings before the Hearing Panel, including Mr. Groia’s testimony before that body.

[36] The Appeal Panel grappled with the issue of when in-court incivility amounts to professional misconduct under the Law Society’s codes of conduct in force at the relevant time.¹ It reasoned that incivility “capture[s] a range of unprofessional communications” (para. 6) and ultimately settled on a multifactorial, context-specific approach for assessing a lawyer’s behaviour. In particular, the Appeal Panel articulated a series of contextual factors — what the lawyer said, the manner and frequency in which it was said, and the presiding judge’s reaction to the lawyer’s behaviour — that should generally be taken into account.

¹ Two sets of Law Society conduct rules were in force during the Felderhof proceedings: the *Professional Conduct Handbook*, effective January 30, 1987 to October 31, 2000, and the *Rules of Professional Conduct*, effective November 1, 2000 to September 30, 2014.

[37] In the final analysis, the Appeal Panel concluded that Mr. Groia was guilty of professional misconduct. As indicated, it based its finding entirely on the record before the Hearing Panel. Because the Appeal Panel did not hear Mr. Groia testify, it was not in a position to assess his credibility. It therefore assumed that Mr. Groia had made his allegations of professional impropriety against the OSC prosecutors in good faith, based on his testimony before the Hearing Panel. Nevertheless, it concluded that Mr. Groia's repeated personal attacks lacked a reasonable basis. While the Appeal Panel acknowledged that the prosecutors "were not entirely blameless", it could find nothing in the way the OSC conducted the trial that suggested it adopted a win-at-all-costs approach or intentionally sabotaged Mr. Groia's attempt to secure a fair trial for his client. The Appeal Panel reduced Mr. Groia's suspension to one month and decreased the costs award against him to \$200,000.

B. *The Ontario Superior Court of Justice — Divisional Court, 2015 ONSC 686, 124 O.R. (3d) 1*

[38] Mr. Groia appealed to the Divisional Court from the Appeal Panel's decision. The Divisional Court reasoned that the Appeal Panel's approach did not sufficiently protect resolute advocacy. In its view, for a lawyer to be found guilty of professional misconduct, it was necessary that the lawyer's behaviour bring, or have a tendency to bring, the administration of justice into disrepute. Nevertheless, the Divisional Court upheld the Appeal Panel's decision as reasonable. It found that the Appeal Panel considered all of the relevant factors and "expressed, in a fair, rational

and understandable way, why [it] ultimately concluded that the appellant’s conduct amounted to professional misconduct”: para. 97.

C. *The Court of Appeal for Ontario, 2016 ONCA 471, 131 O.R. (3d) 1*

[39] A majority of the Court of Appeal dismissed Mr. Groia’s further appeal. Cronk J.A., writing for the majority, identified reasonableness as the appropriate standard of review. In her view, nothing displaced the presumption of reasonableness that applied to the Appeal Panel’s interpretation of its enabling legislation.

[40] Justice Cronk found the Appeal Panel’s decision reasonable. It did not unduly impinge on a lawyer’s duty to resolutely advocate on his or her client’s behalf; it proportionately balanced the lawyer’s and client’s expressive freedoms; and it was not vague or ill-defined. According to Cronk J.A., the Appeal Panel’s finding of professional misconduct was amply justified. In her view, Mr. Groia’s conduct “exceeded even the most broadly defined reasonable boundaries of zealous advocacy”, “affected the orderly progression of the trial” and “contributed to the delay in the completion of the testimony of the first witness”: para. 211.

[41] Justice Brown, dissenting, disagreed with the majority’s position on both the standard of review and the application of that standard to the Appeal Panel’s decision. In his view, the fact that Mr. Groia’s conduct took place in court fundamentally altered the analysis. The primacy of the judiciary as arbiters of in-court

conduct mandated correctness review to ensure that “courts remain the final umpires of the propriety of what barristers do in courtrooms”: para. 313.

[42] In Brown J.A.’s view, the Appeal Panel’s approach to determining whether a lawyer’s behaviour warrants professional sanction underemphasized the effect of the lawyer’s conduct on the fairness of the proceeding. Furthermore, it failed to give “meaningful consideration to the rulings made by the trial judge” and the “response of the barrister to those rulings”: para. 360. Brown J.A. proposed a test that assessed the lawyer’s conduct, its effect on the proceeding, and the presiding judge’s response: para. 319. Applying that test, he would not have found Mr. Groia guilty of professional misconduct. Although Mr. Groia’s personal attacks on the OSC prosecutors were improper, they did not undermine trial fairness. Mr. Groia largely complied with the trial judge’s instructions to refrain from making invective-laced allegations. And after the Court of Appeal for Ontario administered a “public shaming”, Phase Two of the trial proceeded without incident.

IV. Analysis

A. *The Standard of Review*

[43] This Court’s decisions in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 42, and *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 45, establish that law society misconduct findings

and sanctions are reviewed for reasonableness. That is the standard against which the Appeal Panel's decision is to be assessed.

[44] In the ordinary course, an established standard of review obviates the need for a full standard of review analysis: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62. However, given the lower courts' conspicuous disagreement on the standard of review, in my view it is helpful to explain why a reasonableness standard applies.

[45] Setting threshold criteria for a finding of professional misconduct and assessing whether a lawyer's behaviour satisfies those criteria involve the interpretation of the Law Society's home statute and the exercise of discretion under it and are thus presumptively entitled to deference. As I will explain, that presumption is not rebutted.

[46] This Court's post-*Dunsmuir* jurisprudence has firmly entrenched the notion that decisions of specialized administrative bodies "interpreting [their] own statute or statutes closely connected to [their] function" are entitled to deference from courts, and are thus presumptively reviewed for reasonableness: *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 21.

[47] That presumption applies here. The Appeal Panel's approach to determining when incivility amounts to professional misconduct and its application of that approach in assessing Mr. Groia's conduct involve an interpretation of the *Rules of Professional Conduct* enacted under its home statute and the discretionary application of general principles to the facts before it. The Appeal Panel's decision is thus presumptively reviewed for reasonableness.

[48] Mr. Groia, along with Brown J.A. in dissent, share the view that the presumption of reasonableness is rebutted in this case, albeit for different reasons. Mr. Groia argues that determining when incivility amounts to professional misconduct is a question of central importance outside the Law Society's expertise. He also adopts Brown J.A.'s position that a crucial distinction exists between in-court and out-of-court conduct, necessitating correctness review. With respect, I cannot accept these arguments.

(1) Question of Central Importance Outside of the Law Society's Expertise

[49] *Dunsmuir* identifies four narrow categories for which correctness review is appropriate. Only one is at issue here: questions of central importance to the legal system as a whole and outside the decision maker's expertise: *Dunsmuir*, at para. 60. Mr. Groia argues that determining when in-court behaviour amounts to professional misconduct falls under this category.

[50] Unquestionably, lawyers are vital to the proper functioning of the administration of justice in our free and democratic society. As Major J. observed in *R. v. McClure*, 2001 SCC 14 [2001] 1 S.C.R. 445, at para. 2:

The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system.

By guiding clients through this “complex web of interests”, lawyers uphold the rule of law. They provide those subject to our legal system a means to self-determination under and through the law and guard against arbitrary or unjustified state action: see A. Woolley, *Understanding Lawyers’ Ethics in Canada*, (2nd ed. 2016), at pp. 33-35.

[51] As such, the permissible scope of their in-court behaviour is arguably of central importance to the legal system as a whole. But even assuming that this raises a question of central importance, it cannot be said that assessing whether incivility amounts to professional misconduct is outside the Law Society’s expertise. To the contrary, Law Society disciplinary tribunals have significant expertise regulating the legal profession: *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 25; *Ryan*, at para. 42. One of the Law Society’s core functions “is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules”: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 15; see also *Law*

Society Act, R.S.O. 1990, c. L.8, s. 4.1. And the Law Society has over two centuries of institutional expertise fulfilling this mandate.

[52] Moreover, Law Society disciplinary panels are composed, in part, of other lawyers. As Cory J. remarked in *Re Stevens and Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 (H.C.J.), at p. 410: “Probably no one could approach a complaint against a lawyer with more understanding than a group composed primarily of members of his profession.” This understanding comes from experience. Lawyers are “keenly aware of the problems and frustrations that confront a practitioner”: *Stevens*, at p. 410.

(2) In-Court Versus Out-of-Court Conduct

[53] Even where the question under review does not fit neatly into one of the four *Dunsmuir* correctness categories, “a contextual analysis” that reveals a legislative intent not to defer to a tribunal’s decision may nonetheless rebut the presumption of reasonableness: *McLean*, at para. 22; *Edmonton East*, at para. 32; *Saguenay*, at para. 46. Brown J.A. and Mr. Groia refer to one particular contextual factor: Mr. Groia’s uncivil behaviour took place in a courtroom. In their view, reviewing professional misconduct findings based on in-court behaviour for reasonableness impermissibly infringes on judicial independence. They maintain that in assessing whether courtroom conduct crosses the line, correctness review is required to ensure “the court has the last word in answering the question”: *Groia ONCA*, at para. 280, per Brown J.A..

[54] With respect, the fact that Mr. Groia's uncivil behaviour took place in a courtroom is, in my view, irrelevant to determining the standard of review. To be sure, the independence of the judiciary is a constitutional cornerstone: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 69-73. Crucial to the principle of judicial independence is the presiding judge's power to control his or her courtroom. However, I do not see a deferential standard of review as threatening that power.

[55] In this regard, I agree with Cronk J.A. that "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": para. 67. Courts and law societies enjoy concurrent jurisdiction to regulate and enforce standards of courtroom behaviour. A trial judge is free to control the conduct in his or her courtroom irrespective of the degree of deference accorded to a law society's disciplinary decision by a different court.

[56] To be clear, the location of the impugned behaviour is unquestionably relevant to the misconduct analysis itself. As I will explain, the fact that the behaviour occurs in a courtroom is an important contextual factor that must be taken into account when evaluating whether that behaviour amounted to professional misconduct; but it does not impact on the standard of review.

[57] In sum, the Appeal Panel's decision is reviewed for reasonableness.

B. *Was the Appeal Panel's Decision Reasonable?*

(1) The Appeal Panel's Approach

[58] To determine whether the Appeal Panel's decision was reasonable, i.e. whether it fell within a range of reasonable outcomes, it is necessary to explore how the Appeal Panel reached its result. In this case, as is apparent from its reasons, the Appeal Panel first developed an approach for assessing whether a lawyer's behaviour crosses the line into professional misconduct on the basis of incivility. Having done so, it then evaluated whether Mr. Groia was guilty of professional misconduct.

[59] The Appeal Panel took a context-specific approach to evaluating a lawyer's in-court behaviour. In particular, it considered whether Mr. Groia's allegations were made in good faith and had a reasonable basis. It also identified the frequency and manner in which Mr. Groia made his submissions and the trial judge's reaction to Mr. Groia's behaviour as relevant considerations.

[60] Mr. Groia maintains that the Appeal Panel's approach led to an unreasonable result. Several interveners join him, pointing to perceived weaknesses in different aspects of the Appeal Panel's approach and urging this Court to adopt their preferred approaches for evaluating a lawyer's conduct.

[61] These arguments can be broadly grouped into four categories. First, the Appeal Panel's approach does not appropriately balance civility and resolute advocacy. Second, it does not provide enough guidance to lawyers. Third, it does not properly account for the presiding judge's reaction to the lawyer's behaviour and

judicial independence. Fourth, it disproportionately balances the Law Society's statutory mandate with the lawyer's right to free expression.

[62] For the reasons that follow, I would reject these submissions. When developing an approach for assessing whether incivility amounts to professional misconduct, the Appeal Panel recognized the importance of civility while remaining sensitive to the lawyer's duty of resolute advocacy — a duty of particular importance in the criminal context because of the client's constitutional right to make full answer and defence. Its context-specific approach is flexible enough to assess allegedly uncivil behaviour arising out of the diverse array of situations in which courtroom lawyers find themselves. At the same time, the Appeal Panel set a reasonably precise benchmark that instructs lawyers as to the permissible bounds of ethical courtroom behaviour, articulating a series of factors that ought generally to be considered when evaluating a lawyer's conduct and describing how those factors operate when assessing a lawyer's behaviour. Finally, the Appeal Panel's approach allows law society disciplinary tribunals to proportionately balance the lawyer's expressive freedom with its statutory mandate in any given case.

(a) *The Appeal Panel Recognized the Importance of Civility*

[63] To begin, when developing its approach, the Appeal Panel recognized the importance of civility to the legal profession and the corresponding need to target behaviour that detrimentally affects the administration of justice and the fairness of a particular proceeding. The duty to practice with civility has long been embodied in

the legal profession's collective conscience² — and for good reason. Civility has been described as “the glue that holds the adversary system together, that keeps it from imploding”: Morden A.C.J.O., “Notes for Convocation Address — Law Society of Upper Canada, February 22, 2001”, in Law Society of Upper Canada, ed., *Plea Negotiations: Achieving a “Win-Win” Result* (2003), at pp. 1-10 to 1-11. Practicing law with civility brings with it a host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.

[64] First, incivility can prejudice a client's cause. Overly aggressive, sarcastic, or demeaning courtroom language may lead triers of fact, be they judge or jury, to view the lawyer — and therefore the client's case — unfavourably. Uncivil communications with opposing counsel can cause a breakdown in the relationship, eliminating any prospect of settlement and increasing the client's legal costs by forcing unnecessary court proceedings to adjudicate disputes that could have been resolved with a simple phone call. As one American commentator aptly wrote:

Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice This mindset eliminates peaceable dealings and often forces dilatory, inconsiderate tactics that detract from just resolution.

² The first codified set of Canadian legal ethics implored lawyers that their behaviour “should be characterized by courtesy and good faith”: W.W. Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada”, in D. Gibson and W.W. Pue, eds., *Glimpses of Canadian Legal History* (1991), 237, at p. 276. Today, every provincial and territorial law society imposes a duty of civility in its code of professional conduct. The Law Society's *Rules of Professional Conduct* in force at the time of the Felderhof trial stated that “[a] lawyer shall be courteous, civil, and act in good faith . . . with all persons with whom the lawyer has dealings in the course of litigation”: r. 4.01(6).

(K.A. Nagorney, “A Noble Profession? A Discussion of Civility Among Lawyers” (1999), 12 *Geo. J. Legal Ethics* 815, at p. 817)

[65] Second, incivility is distracting. A lawyer forced to defend against constant allegations of impropriety will naturally be less focused on arguing the case. Uncivil behaviour also distracts the triers of fact by diverting their attention away from the substantive merits of the case. The trial judge risks becoming preoccupied with policing counsel’s conduct instead of focusing on the evidence and legal issues: Justice Michael Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim. L.R.* 97, at p. 105.

[66] Third, incivility adversely impacts other justice system participants. Disparaging personal attacks from lawyers — whether or not they are directed at a witness — can exacerbate the already stressful task of testifying at trial.

[67] Finally, incivility can erode public confidence in the administration of justice — a vital component of an effective justice system: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689. Inappropriate vitriol, sarcasm and baseless allegations of impropriety in a courtroom can cause the parties, and the public at large, to question the reliability of the result: see *Felderhof ONCA*, at para. 83; *Marchand (Litigation guardian) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, at para. 148. Incivility thus diminishes the public’s perception of the justice system as a fair dispute-resolution and truth-seeking mechanism.

[68] The Appeal Panel was alive to the profound importance of civility in the legal profession when developing its approach. It recognized that “‘civility’ protects and enhances the administration of justice” (para. 211), targeting behaviour that could call into question trial fairness and the public’s perception of the administration of justice (paras. 228 and 230-31).

[69] Mr. Groia and various interveners argue that the Appeal Panel should have gone further. Like the Divisional Court, they would require that before a lawyer can be found guilty of professional misconduct, the lawyer’s behaviour must bring the administration of justice into disrepute or impact trial fairness. With respect, I would not give effect to their arguments. I echo the comments of Cronk J.A. that such a requirement is “unnecessary and unduly restrictive”: para. 169. The Appeal Panel’s approach targets conduct that tends to compromise trial fairness and bring the administration of justice into disrepute, making an explicit requirement unnecessary. Moreover, uncivil behaviour worthy of sanction may not have a perceptible impact on the fairness of the particular proceeding. Finally, in my view, requiring the Law Society to evaluate the fairness of a proceeding would shift the focus away from the lawyer’s behaviour and inappropriately imbue the Law Society with a judicial function.

(b) *The Appeal Panel Accounted for the Relationship Between Civility and Resolute Advocacy*

[70] Second, in developing its approach, the Appeal Panel was sensitive to the lawyer's duty of resolute advocacy and the client's constitutional right to make full answer and defence. It held that "the word 'civility' should not be used to discourage fearless advocacy" (par. 211) and was careful to create an approach which ensured "that the vicissitudes that confront courtroom advocates are fairly accounted for so as not to create a chilling effect on zealous advocacy" (para. 232).

[71] Although of doubtless importance, the duty to practice with civility is not a lawyer's sole ethical mandate. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. The duty of civility must be understood in light of these other obligations. In particular, standards of civility cannot compromise the lawyer's duty of resolute advocacy.

[72] The importance of resolute advocacy cannot be understated. It is a vital ingredient in our adversarial justice system — a system premised on the idea that forceful partisan advocacy facilitates truth-seeking: see e.g. *Phillips v. Ford Motor Co.* (1971), 18 D.L.R. (3d) 641, at p. 661. Moreover, resolute advocacy is a key component of the lawyer's commitment to the client's cause, a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms: Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 83-84.

[73] Resolute advocacy requires lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer

thinks will help the client's case": Federation of Law Societies of Canada, *Model Code of Professional Conduct* (online), r. 5.1-1 commentary 1. This is no small order. Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable. These submissions can be met with harsh criticism — from the public, the bar, and even the court. Lawyers must stand resolute in the face of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary.

[74] The duty of resolute advocacy takes on particular salience in the criminal law context. Criminal defence lawyers are the final frontier between the accused and the power of the state. As Cory J. noted in *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001), at p. 53:

It cannot be forgotten that it is often only the Defence Counsel who stands between the lynch mob and the accused. Defence Counsel must be courageous, not only in the face of an outraged and inflamed community, but also, on occasion, the apparent disapproval of the Court.

[75] For criminal defence lawyers, fearless advocacy extends beyond ethical obligations into the realm of constitutional imperatives. As the intervener the Criminal Lawyers' Association of Ontario ("CLAO") notes, defence lawyers advancing the accused's right to make full answer and defence "are frequently required to criticize the way state actors do their jobs": *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 32;

Doré, at paras. 64-66. These criticisms range from routine *Charter* applications — alleging, for example, an unconstitutional search, detention, or arrest — to serious allegations of prosecutorial misconduct. Defence lawyers must have sufficient latitude to advance their clients’ right to make full answer and defence by raising arguments about the propriety of state actors’ conduct without fear of reprisal.

[76] In saying this, I should not be taken as endorsing incivility in the name of resolute advocacy. In this regard, I agree with both Cronk J.A. and Rosenberg J.A. that civility and resolute advocacy are not incompatible: see *Groia ONCA*, at paras. 131-39; *Felderhof ONCA*, at paras. 83 and 94. To the contrary, civility is often the most effective form of advocacy. Nevertheless, when defining incivility and assessing whether a lawyer’s behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client’s cause. The Appeal Panel recognized the need to develop an approach that would avoid such a chilling effect.

(c) *The Appeal Panel’s Approach Is Both Flexible and Precise*

[77] The Appeal Panel developed an approach that is both flexible and precise. A rigid definition of when incivility amounts to professional misconduct in the courtroom is neither attainable nor desirable. Rather, determining whether a lawyer’s behaviour warrants a finding of professional misconduct must remain a context-specific inquiry that is flexible enough to assess behaviour arising from the diverse array of situations in which lawyers find themselves.

[78] And yet standards of civility must be articulated with a reasonable degree of precision. An overly vague or open-ended test for incivility risks eroding resolute advocacy. Prudent lawyers will steer clear of a blurry boundary to avoid a potential misconduct finding for advancing arguments that may rightly be critical of other justice system participants. In contrast, a standard that is reasonably ascertainable gives lawyers a workable definition which they can use to guide their behaviour. It also guides law society disciplinary tribunals in their task of determining whether a lawyer's behaviour amounts to professional misconduct.

[79] The Appeal Panel's approach strikes a reasonable balance between flexibility and precision. The Appeal Panel described its approach to assessing whether a lawyer's uncivil behaviour warrants professional sanction as "fundamentally contextual and fact specific", noting the importance of "consider[ing] the dynamics, complexity and particular burdens and stakes of the trial or other proceeding": paras. 7 and 232. By focussing on the particular factual matrix before it, the Appeal Panel's approach is flexible enough to accommodate the diverse array of situations in which courtroom lawyers find themselves.

[80] At the same time, the Appeal Panel's approach is sufficiently precise to delineate an appropriate boundary past which behaviour warrants a professional misconduct finding. The Appeal Panel identified a set of factors that a disciplinary panel ought generally to consider when evaluating a lawyer's conduct. It then provided guidance on how those factors operate when assessing a lawyer's behaviour.

Importantly, as the Appeal Panel recognized, this list is not closed and the weight assigned to each factor will vary case-by-case. I turn to those factors now.

(i) Factors to Consider When Assessing a Lawyer's Behaviour

1. *What the Lawyer Said*

[81] First, the Appeal Panel looked to *what* the lawyer said. Mr. Groia alleged prosecutorial misconduct throughout Phase One of the Felderhof trial. As such, the Appeal Panel had to determine when these kinds of allegations amount to professional misconduct. It concluded that prosecutorial misconduct allegations, or other challenges to opposing counsel's integrity, cross the line into professional misconduct unless they are made in good faith *and* have a reasonable basis: A.P. reasons, at paras. 9 and 235. In other words, allegations that are *either* made in bad faith *or* without a reasonable basis amount to professional misconduct.

[82] Two points about evaluating what the lawyer said warrant comment. First, I do not read the Appeal Panel's reasons as characterizing allegations made in bad faith or without a reasonable basis as a stand-alone "test" for professional misconduct. When the reasons are read as a whole, it is apparent that whether or not allegations of prosecutorial misconduct are made in bad faith or without a reasonable basis is simply one piece of the "fundamentally contextual and fact specific" analysis for determining whether a lawyer's behaviour amounts to professional misconduct: A.P. reasons, at paras. 7 and 232.

[83] To be clear, in some circumstances, bad faith allegations or allegations that lack a reasonable basis may, on their own, warrant a finding of professional misconduct. However, a law society disciplinary tribunal must always take into account the full panoply of contextual factors particular to an individual case before making that determination. A contrary interpretation would render redundant any assessment of the frequency or manner in which the allegations were made and the presiding judge's reaction — factors which the Appeal Panel considered relevant to the overall inquiry.

[84] Second, it was open to the Appeal Panel to conclude that allegations of prosecutorial misconduct or other challenges to opposing counsel's integrity must both be made in good faith *and* have a reasonable basis. Various interveners take issue with this standard. The British Columbia Civil Liberties Association argues that sanctioning a lawyer for making good faith allegations without a reasonable basis punishes the lawyer for simply being mistaken. The CLAO agrees, submitting that the Appeal Panel's standard does not give defence counsel the necessary latitude to fearlessly advance arguments that turn out to be incorrect. Accordingly, only allegations made in bad faith should warrant a finding of professional misconduct.

[85] I share the interveners' concerns that law societies should not sanction lawyers for sincerely held but mistaken legal positions or questionable litigation strategies. Nonetheless, in my view, the Appeal Panel's standard withstands scrutiny. Allegations that impugn opposing counsel's integrity must not be made lightly. A

reputation for integrity is a lawyer's most important professional asset. It generally takes a long time to build up and it can be lost overnight. Courts and legal commentators have emphasized the importance of a lawyer's reputation. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 118, Cory J. put it this way:

The reputation of a lawyer is of paramount importance to clients, to other members of the profession, and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.

[86] Maintaining a reputation for practicing with integrity is a lifelong challenge. Once sullied, a lawyer's reputation may never be fully restored. As such, allegations of prosecutorial misconduct must have a reasonable foundation. I agree with the Appeal Panel that anything less "gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions": para. 235. The consequences for the opposing lawyer's reputation are simply too severe to require anything less than a reasonable basis for allegations impugning his or her integrity.

[87] Finally, the Appeal Panel's reasonable basis requirement will not chill resolute advocacy. A lawyer must establish a "proper evidentiary foundation" before alleging abuse of process arising from prosecutorial misconduct: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 52-55. Absent a proper foundation, an abuse of process motion will be summarily dismissed: *R. v. Cody*, 2017 SCC 31, [2017] 1

S.C.R. 659, at para. 38. Unreasonable allegations, therefore, do nothing to advance the client's case. An ethical standard prohibiting such allegations does not impair resolute advocacy. To be clear, not all defence action summarily dismissed under *Cody* will warrant professional sanction. On the contrary, defence action a court deems illegitimate may well fall short of professional misconduct: *Cody*, at paras. 32-35.

[88] That said, the reasonable basis requirement is not an exacting standard. I understand the Appeal Panel to have meant that allegations made without a reasonable basis are those that are speculative or entirely lacking a factual foundation. Crucially, as the Appeal Panel noted, allegations do not lack a reasonable basis simply because they are based on legal error: at para. 280. In other words, it is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.

[89] Nor is it professional misconduct to advance a novel legal argument that is ultimately rejected by the court. Many legal principles we now consider foundational were once controversial ideas that were fearlessly raised by lawyers. Such innovative advocacy ought to be encouraged — not stymied by the threat of being labelled, after the fact, as “unreasonable”.

[90] In my view, there are two reasons why law societies cannot use a lawyer's legal errors to conclude that his or her allegations lack a reasonable basis. First, a finding of professional misconduct against a lawyer can itself be damaging to that lawyer's reputation. Branding a lawyer as uncivil for nothing more than advancing good faith allegations of impropriety that stem from a sincerely held legal mistake is a highly excessive and unwarranted response.

[91] Second, inquiring into the legal merit of a lawyer's position to conclude that his or her allegations lack a reasonable basis would discourage lawyers from raising well-founded allegations, impairing the lawyer's duty of resolute advocacy. Prosecutorial abuse of process is extraordinarily serious. It impairs trial fairness and compromises the integrity of the justice system: *Anderson*, at paras. 49-50; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 62-63. Defence lawyers play an integral role in preventing these dire consequences and holding other justice system participants accountable by raising reasonable allegations. Finding a lawyer guilty of professional misconduct on the basis of incivility for making an abuse of process argument that is based on a sincerely held but mistaken legal position discourages lawyers from raising these allegations, frustrating the duty of resolute advocacy and the client's right to make full answer and defence.

[92] My colleagues in dissent interpret the "reasonable basis" requirement differently. In their view, the Appeal Panel concluded that where allegations of impropriety made against opposing counsel stem from a mistake of law, the mistake

must be both honest *and* reasonable. And if the Appeal Panel determines that the mistake of law is unreasonable, even though it is honestly held, then the allegations of impropriety will not be reasonably based and can therefore lead to a finding of professional misconduct on account of incivility: Reasons of Karakatsanis J. et al., at paras. 193-96. In so concluding, they contend that my interpretation of the “reasonable basis” requirement — that allegations of impropriety must have a factual foundation, and not be based on innuendo or speculation — immunizes egregious legal errors from review, “effectively dispossess[ing] the law societies of their regulatory authority anytime a lawyer can cloak his accusations in a subjective legal belief”: reasons of Karakatsanis J. et al., at para. 221.

[93] Respectfully, my colleagues’ concerns are misplaced. When a lawyer alleges prosecutorial misconduct based on a legal mistake, law societies are perfectly entitled to look to the reasonableness of the mistake when assessing whether it is sincerely held, and hence, whether the allegations were made in good faith. Looking to the reasonableness of a mistake is a well-established tool to help assess its sincerity: see e.g., *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 156, per Dickson J., dissenting, but not on this point; *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 792; *R. v. Moreau* (1986), 26 C.C.C. (3d) 359 (Ont. C.A.), at pp. 374-75. The more egregious the legal mistake, the less likely it will have been sincerely held, making it less likely the allegation will have been made in good faith. And if the law society concludes that the allegation was not made in good faith, the second question — whether there was a reasonable basis for the allegation — falls away.

[94] I pause here to note that there is good reason why a law society can look to the reasonableness of a legal mistake when assessing whether allegations of impropriety are made in good faith, but not when assessing whether they are reasonably based. The “good faith” inquiry asks what the lawyer *actually* believed when making the allegations. The reasonableness of the lawyer’s legal mistake is one piece of circumstantial evidence that may help a law society in this exercise. However, it is not determinative. Even the most unreasonable mistakes can be sincerely held.

[95] In contrast, the “reasonable basis” inquiry requires a law society to look beyond what the lawyer believed, and examine the foundation underpinning the allegations. Looking at the reasonableness of a lawyer’s legal position at this stage would, in effect, impose a mandatory minimum standard of legal competence in the incivility context. In other words, it would allow a law society to find a lawyer guilty of professional misconduct on the basis of incivility for something the lawyer, in the law society’s opinion, *ought to have known* or *ought to have done*. And, as I have already explained, this would risk unjustifiably tarnishing a lawyer’s reputation and chilling resolute advocacy.

[96] That, however, does not end the matter. As my colleagues correctly observe, “the Law Society rules govern civility *and* competence”: reasons of Karakatsanis J. et al., at para. 193 (emphasis in original). A lawyer who bases allegations on “outrageous” or “egregious” legal errors may be incompetent. My

point is simply that he or she should not be punished for *incivility* on that basis alone. As such, any concern that law societies are “effectively dispossess[ed]” of their regulatory authority misstates my position.

[97] To conclude, I would not give effect to Mr. Groia’s and the interveners’ submissions criticizing how the Appeal Panel evaluated what the lawyer said. The Appeal Panel considered what the lawyer said to be an important contextual factor. Allegations of professional misconduct or other challenges to opposing counsel’s integrity must be made in good faith and have a reasonable basis. Although a reasonable basis is not a high bar, I see no basis for interfering with the Appeal Panel’s conclusion that it is necessary to protect against speculative or baseless allegations.

2. *The Manner and Frequency of the Lawyer’s Behaviour*

[98] The Appeal Panel also considered the frequency of what was said and the manner in which it was said to be relevant factors. A single outburst would not usually attract sanction. In contrast, repetitive attacks on opposing counsel would be more likely to cross the line into professional misconduct. The Appeal Panel also found that challenges to opposing counsel’s integrity made in a “repetitive stream of invective”, or with a “sarcastic and biting” tone were inappropriate. Finally, the Appeal Panel held that whether the lawyer was provoked was a relevant factor: paras. 233 and 236.

[99] Considering the manner and frequency of the lawyer's behaviour was reasonable. Trials are often hard fought. The stakes are high — especially so in a criminal trial where the accused faces a loss of liberty. Emotions can sometimes get the better of even the most stoic litigators. Punishing a lawyer for “a few ill-chosen, sarcastic, or even nasty comments” (A.P. reasons, at para. 7) ignores these realities.

[100] This does not mean that a solitary bout of incivility is beyond reproach. A single, scathing attack on the integrity of another justice system participant can and has warranted disciplinary action: see e.g., *Doré*; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74; *Law Society of Upper Canada v. Wagman*, 2008 ONLSAP 14. Be that as it may, it was well within the Appeal Panel's purview to conclude that, as a general rule, repetitive personal attacks and those made using demeaning, sarcastic, or otherwise inappropriate language are more likely to warrant disciplinary action.

[101] One final point. When considering the manner and frequency of the lawyer's behaviour, it must be remembered that challenges to another lawyer's integrity are, by their very nature, personal attacks. They often involve allegations that the lawyer has deliberately flouted his or her ethical or professional duties. Strong language that, in other contexts, might well be viewed as rude and insulting will regularly be necessary to bring forward allegations of prosecutorial misconduct or other challenges to a lawyer's integrity. Care must be taken not to conflate the

strong language necessary to challenge another lawyer's integrity with the type of communications that warrant a professional misconduct finding.

3. *The Trial Judge's Reaction*

[102] The third factor the Appeal Panel identified is the presiding judge's reaction to the lawyer's behaviour: para. 225. I agree that when the impugned behaviour occurs in a courtroom, what, if anything, the judge does about it becomes relevant. Unlike the Law Society, the presiding judge observes the lawyer's behaviour firsthand. This offers the judge a comparatively advantageous position to evaluate the lawyer's conduct relative to the Law Society, who only enters the equation once all is said and done. As Brown J.A. insightfully explained:

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 recreate, 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.

(Groia ONCA, at par. 318)

[103] These observations underscore the importance of considering the presiding judge's response to the lawyer's conduct. The question then becomes: how important is that response? Mr. Groia would treat the presiding judge's reaction as near-conclusive. He argues that law societies should rarely, if ever, initiate

disciplinary proceedings if the presiding judge took no issue with the lawyer's behaviour. This is because allowing law societies to second-guess the presiding judge on the scope of acceptable courtroom conduct erodes judicial independence.

[104] In my view, Mr. Groia's restrictive approach is inappropriate for a number of reasons. First, unlike the presiding judge, law societies are not tasked with maintaining the fairness of any particular proceeding. The presiding judge has a responsibility to intervene when the fairness of the trial is at stake: *Brouillard v. The Queen*, [1985] 1 S.C.R. 39, at p. 44; *R. v. Henderson* (1999), 44 O.R. (3d) 628 (C.A.), at p. 641. This duty includes controlling uncivil behaviour that risks undermining the fairness — and the appearance of fairness — of the proceeding: *Marchand*, at para. 148. In contrast, by setting and enforcing standards of civility, law societies foster fairness and cultivate public confidence in the administration of justice on a profession-wide level. Preventing law societies from supervising courtroom behaviour absent a trial judge's intervention frustrates these functions.

[105] Second, as the Appeal Panel recognized, “there may be many reasons why a trial judge may choose to remain relatively passive in the face of one or both counsels’ courtroom incivility”: para. 225. For instance, as Campbell J. pointed out, judicial intervention “might simply excite further provocation” on the lawyer’s part, thereby frustrating the goal of maintaining an orderly, fair proceeding: *Felderhof* *ONSC*, at para. 284. Judges may also be reasonably concerned about the appearance of impartiality — especially in a jury trial, where reprimanding counsel in the jury’s

presence could conceivably prejudice that lawyer in the jury's eyes. In these situations, the trial judge's silence is not a tacit approval of the lawyer's behaviour, but rather a conscious decision taken to protect trial fairness.

[106] Furthermore, in some cases the trial judge's decision to remain passive may prove wrong and give rise to an unfair trial. It would be illogical to bar the Law Society from reviewing a lawyer's behaviour based on a trial judge's error.

[107] Third, behaviour that the presiding judge deems inappropriate may not rise to the level of professional misconduct. This Court stressed in *Cody* that courts will no longer tolerate "illegitimate" defence action — including baseless arguments and the way in which they are presented. However, as indicated, improper defence behaviour is not necessarily professional misconduct, be it a function of incivility or incompetence: *Cody*, at paras. 32-35. The Law Society must therefore be careful not to place too much weight on a judge's criticism of defence behaviour.

[108] Fourth, as I explain above at paras. 54-55, the Law Society's decision to discipline a lawyer in no way impairs the presiding judge's ability to control his or her courtroom. Just as the Law Society's disciplinary decision is not conditional on the judge's response, the judge remains free to set boundaries of appropriate courtroom behaviour irrespective of any law society standards of civility: see *Jodoin*, at para. 23.

[109] It follows that the judge's reaction is not conclusive of the propriety of the lawyer's conduct. Rather, as the Appeal Panel concluded, it is simply one piece of the contextual analysis. Its weight will vary depending on the circumstances of the case.

[110] Part and parcel of the presiding judge's response is how the lawyer modified his or her behaviour thereafter. The lawyer who crosses the line, but pays heed to the judge's direction and behaves appropriately from then on is less likely to have engaged in professional misconduct than the same lawyer who continues to behave inappropriately despite the judge's instructions.

(d) *The Appeal Panel's Approach Allows for a Proportionate Balancing of Lawyers' Expressive Rights and the Law Society's Statutory Mandate*

[111] An administrative decision that engages the *Charter* by limiting its protections will only be reasonable if it reflects a proportionate balancing of the *Charter* protections at play with the decision maker's statutory mandate: *Doré*, at para. 57; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 39. This Court explained in *Loyola* that a "proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate": para. 39.

[112] Law Society decisions that discipline lawyers for what they say may engage lawyers' expressive freedom under s. 2(b) of the *Charter*: *Doré*, at paras. 59,

63 and 65-68. This is true regardless of whether the impugned speech occurs inside or outside a courtroom. Courtroom lawyers are engaged in expressive activity, the method and location of the speech do not remove the expressive activity from the scope of protected expression, and Law Society decisions sanctioning lawyers for what they say in the courtroom have the effect of restricting their expression: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 978; *Montréal (City) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 56 and 82.

[113] As such, a particular professional misconduct finding that engages a lawyer's expressive freedom will only be reasonable if it reflects a proportionate balancing of the law society's statutory objective with the lawyer's expressive freedom. Similarly, an approach to assessing whether a lawyer's uncivil communications warrant law society discipline must allow for such a proportionate balancing to occur.

[114] Under its statutory mandate, the Law Society has a duty to advance the public interest, the cause of justice and the rule of law by regulating the legal profession: *Law Society Act*, s. 4.2. Disciplinary tribunals fulfill an integral subset of this function by setting and enforcing standards of professional conduct — in this case civility. Performing this mandate can engage lawyers' expressive rights under the *Charter*: *Doré*, at para. 63.

[115] Allowing lawyers to freely express themselves serves an important function in our legal system. As Steel J.A. noted in *Histed*, at para. 71:

The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it.

At issue in *Histed* was a disciplinary decision resulting from a lawyer's criticism of a judge. Steel J.A.'s comments were thus restricted to critical remarks directed at the judiciary. I would go further and add that lawyers play an integral role in holding *all* justice system participants accountable. Reasonable criticism enhances the transparency and fairness of the system as a whole, thereby serving the interests of justice. Overemphasizing civility has the potential to thwart this good by chilling well-founded criticism: A. Woolley, "Does Civility Matter" (2008), 46 *Osgoode Hall L.J.*, 175, at p. 180. Proportionately balancing lawyers' expressive rights, therefore, "may involve disciplinary bodies tolerating a degree of discordant criticism": *Doré*, at para. 65.

[116] When the impugned behaviour occurs in a courtroom, lawyers' expressive freedom takes on additional significance. In that arena, the lawyer's primary function is to resolutely advocate on his or her client's behalf. As I discuss above at paras. 74-75, resolute advocacy in the criminal context allows the client to meaningfully exercise his or her constitutional right to make full answer and defence.

Law society tribunals must account for this unique aspect of lawyers' expressive rights when arriving at a disciplinary decision arising out of in-court behaviour.

[117] That said, speech is not sacrosanct simply because it is uttered by a lawyer. Certain communications will be far removed from the core values s. 2(b) seeks to protect: the search for truth and the common good: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762 and 765. The protection afforded to expressive freedom diminishes the further the speech lies from the core values of s. 2(b): *Keegstra*, at pp. 760-62; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 72-73. As such, a finding of professional misconduct is more likely to represent a proportionate balance of the Law Society's statutory objective with the lawyer's expressive rights where the impugned speech lies far from the core values of lawyers' expressive freedom.

[118] The flexibility built into the Appeal Panel's context-specific approach to assessing a lawyer's behaviour allows for a proportionate balancing in any given case. Considering the unique circumstances in each case — such as what the lawyer said, the context in which he or she said it and the reason it was said — enables law society disciplinary tribunals to accurately gauge the value of the impugned speech. This, in turn, allows for a decision, both with respect to a finding of professional misconduct and any penalty imposed, that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.

[119] In addition, the Appeal Panel's reasonable basis standard allows for a proportionate balancing between expressive freedom and the Law Society's statutory mandate. Allegations impugning opposing counsel's integrity that lack a reasonable basis lie far from the core values underpinning lawyers' expressive rights. Reasonable criticism advances the interests of justice by holding other players accountable. Unreasonable attacks do quite the opposite. As I have explained at paras. 63-67, such attacks *frustrate* the interests of justice by undermining trial fairness and public confidence in the justice system. A decision finding a lawyer guilty of professional misconduct for launching unreasonable allegations would therefore be likely to represent a proportionate balancing of the Law Society's mandate and the lawyer's expressive rights.

[120] In contrast, sanctioning a lawyer for good faith, reasonably based allegations that are grounded in legal error does not reflect a proportionate balancing. Advancing good faith, reasonable allegations — even those based on legal error — helps maintain the integrity of the justice system by holding other participants accountable. Well-founded arguments exposing misconduct on the part of opposing counsel thus lie close to the core of the s. 2(b) values underpinning a lawyer's expressive freedom. Discouraging lawyers from bringing forward such allegations does nothing to further the Law Society's statutory mandate of advancing the cause of justice and the rule of law. If anything, silencing lawyers in this manner undercuts the rule of law and the cause of justice by making it more likely that misconduct will go unchecked.

(e) *Conclusion*

[121] In sum, I would not give effect to Mr. Groia's and the interveners' challenges to the Appeal Panel's approach to incivility, and in particular, when a lawyer's courtroom conduct warrants a finding of professional misconduct. The Appeal Panel appreciated the need to guard against the consequences of incivility, and remained sensitive to the lawyer's duty of resolute advocacy. Its contextual analysis accommodates the diversity of modern legal practice. At the same time, the Appeal Panel articulated a series of factors — what the lawyer said, the manner and frequency in which it was said, and the presiding judge's reaction to the lawyer's behaviour — and explained how those factors operate in a way that is sufficiently precise to guide lawyers' conduct and instruct disciplinary tribunals in future cases. Finally, the Appeal Panel's approach allows for a proportionate balancing of lawyers' expressive rights and the Law Society's statutory mandate.

(2) Application to Mr. Groia's Case

[122] While I take no issue with the Appeal Panel's approach, I am respectfully of the view that the Appeal Panel unreasonably found Mr. Groia guilty of professional misconduct. In assessing "what" Mr. Groia said, the Appeal Panel reiterated that misconduct allegations or other challenges to opposing counsel's integrity cross the line into professional misconduct unless they are made in good faith and have a reasonable basis. The Appeal Panel accepted that Mr. Groia's allegations of misconduct were made in good faith. It based its finding of professional

misconduct primarily on the fact that his allegations lacked a reasonable basis. However, contrary to its own approach, the Appeal Panel used Mr. Groia's sincerely held but erroneous legal beliefs to reach this conclusion — one which, as I have explained above at paras. 88-91, cannot be reasonable.

[123] Once the allegations of impropriety — what Mr. Groia said — are no longer in the mix, it becomes apparent that the other factors in this case cannot reasonably support a finding of professional misconduct against him. As I will explain, the frequency of Mr. Groia's allegations was, to some extent, a product of the uncertainty surrounding the manner in which abuse of process allegations should be raised — a factor the Appeal Panel did not consider.

[124] Moreover, the trial judge took a largely hands off approach and did not direct Mr. Groia as to how he should be bringing his allegations. Eventually, the trial judge did intervene, albeit quite late in the day, and he instructed Mr. Groia not to keep repeating the same allegations over and over again, but to simply register his objection. In response, Mr. Groia complied, albeit with the odd slip. And when the reviewing courts admonished Mr. Groia for his behaviour during Phase One of the Felderhof trial, Phase Two proceeded entirely without incident. Again, the Appeal Panel did not factor the trial judge and reviewing courts' response to Mr. Groia's behaviour and how Mr. Groia modified his conduct thereafter into its analysis.

[125] Taking these factors into account, I am respectfully of the view that there is only one reasonable outcome in this matter: a finding that Mr. Groia did not engage in professional misconduct on account of incivility.

(a) *The Appeal Panel Used Mr. Groia's Mistaken Legal Beliefs to Conclude That His Allegations Lacked a Reasonable Basis*

[126] The Appeal Panel acknowledged that submissions made on the basis of a sincerely held but erroneous legal belief, cannot ground a finding of professional misconduct. It accepted that in making his allegations of impropriety against the OSC prosecutors, "Mr. Groia was not deliberately misrepresenting the law and was not ill-motivated": para. 332. That said, the Appeal Panel used Mr. Groia's legal errors to conclude that he had no reasonable basis for his repeated allegations of prosecutorial impropriety.

[127] With respect, such a finding was not reasonably open to the Appeal Panel. Mr. Groia's legal errors, coupled with the OSC prosecutors' conduct, provided a reasonable basis for his allegations. Had Mr. Groia been right in law, his abuse allegations against the OSC prosecutors would almost certainly have been substantiated.

[128] Recall that the allegations arose during disputes about disclosure and the admissibility of documentary evidence. Mr. Groia argued that the prosecutors were using a "conviction filter" to deliberately undermine the fairness of Mr. Felderhof's

trial by failing to tender, as part of the OSC's case, any relevant, authentic document of Mr. Groia's choosing. He launched further allegations of impropriety when the prosecutors objected to his attempts to introduce documents through a witness that had neither seen nor authored them. His beliefs in this regard were fuelled, in part, by comments made by Mr. Naster during the first disclosure motion brought by Mr. Groia, early on in the Felderhof proceedings. They were also supported, in part, by the trial judge's rulings against the OSC on disclosure issues and his rejection of the OSC's request for an omnibus ruling on the admissibility of all documents.

[129] During the first disclosure motion brought by Mr. Groia, Mr. Naster submitted to the court that he had "an obligation as a prosecutor to ensure that all relevant materials are placed before [the trial judge]" and that he was "duty-bound" to place relevant materials before the court. While Mr. Naster was referring to his disclosure obligations, his statements lent credence to Mr. Groia's sincerely held but mistaken belief that the prosecution was legally required to introduce all relevant documents through its own witnesses, and that the OSC was acting improperly in refusing to do so.

[130] In its reasons, the Appeal Panel was careful to point out that it was *not* concluding that Mr. Groia's allegations lacked a reasonable basis because of his sincerely held but mistaken legal beliefs. It stated, at para. 280:

Our concern about the submissions quoted above is not merely that Mr. Groia was making incorrect legal submissions; that, of course, is not a basis for a finding of professional misconduct. [Emphasis added.]

The Law Society confirmed its position in the oral hearing before this Court, acknowledging that “it is not professional misconduct to make an erroneous submission as to the law”.

[131] However, as the following extracts from the Appeal Panel’s reasons show, it did precisely what it professed it should not do. Specifically, it repeatedly used Mr. Groia’s sincerely held but mistaken legal beliefs to ground its conclusion that Mr. Groia’s allegations lacked a reasonable foundation. For example, it reasoned:

[Mr. Groia’s] submissions, in our view, directly attack the integrity of the prosecutors, by alleging that they cannot be relied upon to keep their ‘word’ and are lazy and incompetent Further, they have no factual foundation. As a matter of the law of evidence that Mr. Groia ought to have known, Mr. Naster was perfectly entitled to object to Mr. Groia putting documents to a witness notwithstanding that the witness could not identify them and suggesting that they be marked as exhibits.

...

. . . The OSC was taking strict but nevertheless principled positions on admissibility which were consistent with the law of evidence. Mr. Naster was acting in a responsible fashion. In short, there was nothing to justify Mr. Groia’s aggressive personal attack on the prosecutors’ good faith and integrity. His submissions regarding the ‘conviction filter’ not only were wrong in law but did not have a reasonable basis.

...

In our view, there was no basis for such a suggestion. In fact, Mr. Naster’s submissions were correct in law and it was Mr. Groia who made erroneous and unreasonable submissions on the law of evidence. Mr. Groia’s comments about the prosecutor on this occasion were insulting and directly impugned his integrity.

...

. . . 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. [Emphasis added; paras. 285, 295, 312 and 324.]

[132] In each of these passages, the Appeal Panel concluded that Mr. Groia's allegations lacked a reasonable basis because the OSC prosecutors were right in law. Put another way, the Appeal Panel concluded that Mr. Groia's allegations lacked a reasonable basis because he was wrong in law. This was unreasonable. As I have explained, allegations of prosecutorial misconduct based on a sincerely held but mistaken legal belief will be reasonably based *as long as they have a sufficient factual foundation*. The question for incivility purposes is not whether Mr. Groia was right or wrong on the law. Rather, the question is whether, based on *his* understanding of the law, his allegations of prosecutorial misconduct, which the Appeal Panel found were made in good faith, had a factual foundation. In this case, they did.

[133] As indicated, had Mr. Groia's views on the role of the prosecutor and the law of evidence been correct, he would have been justified in alleging abuse of process. His submissions regarding professional misconduct would not only have had a reasonable basis; they may well have been accepted. The prosecution repeatedly and intentionally failed to tender all relevant documents, despite Mr. Groia's repeated requests. It also objected to Mr. Groia presenting any relevant document of his choosing to a Crown witness. Viewed this way, it is apparent that Mr. Groia's

allegations, based as they were on his sincerely held but mistaken legal beliefs, had ample factual foundation.

[134] I appreciate that the Appeal Panel also found that Mr. Groia's allegations had no factual foundation because, contrary to Mr. Groia's understanding, "the prosecutors had not promised that they would introduce all relevant documents, regardless of the rules of evidence": para. 324. This contributed to the Appeal Panel's finding that Mr. Groia's allegations lacked a reasonable basis. Respectfully, however, that conclusion was not reasonably open to the Appeal Panel.

[135] Mr. Groia's understanding of what the OSC prosecutors said must be assessed in light of his sincerely held but mistaken legal beliefs. This is because failing to appreciate how Mr. Groia's legal mistakes coloured his understanding of the facts effectively allowed the Appeal Panel to use those legal mistakes to find that his allegations lacked a reasonable basis, contrary to its own approach.

[136] As discussed, Mr. Groia mistakenly believed that the prosecution was legally required to introduce all relevant documents through its own witnesses. It is therefore understandable that he would interpret Mr. Naster's submission that he was "duty-bound" to place all relevant documents before the court as a promise to tender those documents. This is especially so given the trial judge's failure to correct Mr. Groia's mistaken legal positions, a point I discuss in greater detail below. It was unreasonable to conclude that Mr. Groia's assertions that the OSC was renegeing on its promises lacked factual foundation. They were based on an ambiguous statement that

Mr. Groia reasonably interpreted as a promise because of his erroneous understanding of the law of evidence.

[137] In this regard, it is important to note that the Appeal Panel would normally be in a position to consider the reasonableness of the lawyer's legal beliefs — in this case, Mr. Groia's erroneous understanding of the role of the prosecutor and the law of evidence — and conclude that they were not sincerely held. However, that finding was not open to the Appeal Panel here. In view of the fact that it did not hear Mr. Groia testify, the Appeal Panel assumed that his legal mistakes were sincerely held, and therefore that his allegations of prosecutorial misconduct were made in good faith: para. 238.

[138] In short, Mr. Groia's legal errors, coupled with how the OSC prosecutors conducted themselves, *provided* the reasonable basis for his allegations. Based on its own findings, including that Mr. Groia's allegations were made in good faith, it was not reasonably open to the Appeal Panel to conclude that Mr. Groia was guilty of professional misconduct on account of incivility. On its own approach, his allegations were made in good faith and reasonably based.

[139] My colleagues in dissent accept that the Appeal Panel “considered . . . the . . . legal underpinnings of Mr. Groia's claims to determine whether they had a reasonable basis”: reasons of Karakatsanis J. et al., at para. 191. In their view, it was open to the Appeal Panel to do so.

[140] Respectfully, I cannot agree. Allowing the Appeal Panel to consider the legal underpinnings of a lawyer's allegations would allow it to find a lawyer guilty of professional misconduct for nothing more than making good faith allegations of impropriety that stem from a sincerely held legal mistake. As I have explained at paras. 88-91, such a finding is unreasonable. It does not account for Mr. Groia's duty of resolute advocacy — a duty of particular importance in this case given its impact on his client's right to make full answer and defence. Mr. Groia was both entitled and bound to protect his client's rights by raising reasonably based, good faith arguments about the propriety of the OSC's conduct — even though those arguments turned out to be legally incorrect. Nor does such a finding reflect a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory objective of advancing the cause of justice and rule of law by setting and enforcing standards of civility (see para. 121).

[141] In the end, what Mr. Groia said — his allegations impugning the OSC prosecutors' integrity — should not have been used to ground a finding of professional misconduct against him. The Appeal Panel unreasonably concluded otherwise.

(b) *The Other Contextual Factors Cannot Reasonably Support a Finding of Professional Misconduct*

[142] The other contextual factors in this case cannot reasonably ground a finding of professional misconduct against Mr. Groia. The frequency of Mr. Groia's

allegations, the presiding judge's response, and how Mr. Groia modified his behaviour in response to the directions of the presiding judge and the reviewing courts all suggest that Mr. Groia's behaviour during Phase One of the Felderhof trial was not worthy of professional sanction. The manner in which Mr. Groia raised his allegations was inappropriate. But that cannot, in the circumstances of this case, reasonably support a finding of professional misconduct.

(i) The Evolving Law of Abuse of Process Affected the Frequency of Mr. Groia's behaviour

[143] When Phase One of the Felderhof trial took place, uncertainty surrounded how allegations of abuse of process should be brought forward. Specifically, prior to Rosenberg J.A.'s decision dismissing the OSC's appeal of its judicial review application, it was not at all clear that defence counsel who wished to raise abuse of process should refrain from repeating their allegations throughout the trial but wait instead until the end of trial to bring a motion. Given this procedural uncertainty — uncertainty that the Appeal Panel did not account for — the frequency of Mr. Groia's allegations was understandable.

[144] This Court instructed that an abuse of process motion should typically be brought at the end of trial: *R. v. La*, [1997] 2 S.C.R. 680, at para. 27; see also *R. v. Clement* (2002), 166 C.C.C. (3d) 219 (Ont. C.A.), at para. 14. The Court reasoned that deciding the abuse motion at the end of the proceeding gives the trial judge a full evidentiary record to assess the prejudice caused by the abusive conduct and tailor an

appropriate remedy. What remained unclear was the manner in which counsel was entitled to raise abuse of process arguments. Could these allegations be made repeatedly throughout the trial? Or must a lawyer hold off in raising them until the end of the trial during an abuse of process motion?

[145] Mr. Groia opted for the former. By repeatedly accusing the prosecutors of the same deliberate wrongdoing, Mr. Groia was laying the evidentiary groundwork for an abuse of process motion he intended to bring at the end of trial. He was also putting the OSC “on notice” of his intention to bring the motion. This approach was improper. To be sure, prosecutors are entitled to notice that the defence believes their conduct is improper and will be bringing an abuse of process motion at the end of the proceeding. But defence counsel is not entitled to repeatedly make the same allegations of deliberate wrongdoing outside of that motion. Accordingly, the trial judge did not have to listen to the same allegations, made over and over again by Mr. Groia. Indeed, he should have acted sooner to curb them: see *Felderhof ONSC*, at para. 93.

[146] But hindsight is 20/20. The frequency of Mr. Groia’s abuse allegations must be evaluated based on the state of the law when he made them. The Appeal Panel failed to account for the uncertainty surrounding the proper approach to raising abuse of process arguments — uncertainty that was only clarified by Rosenberg J.A. in his reasons dismissing the OSC’s appeal of its judicial review application.

[147] I appreciate that the way in which the evolving law of abuse of process influenced Mr. Groia's allegations was not argued before the Appeal Panel. Nevertheless, in my respectful view, it was unreasonable for the Appeal Panel to evaluate Mr. Groia's behaviour based on the law of abuse of process Rosenberg J.A. articulated in *Felderhof* three years after the conduct at issue took place.

(ii) The Judges' Reactions to Mr. Groia's Behaviour and Mr. Groia's Response

[148] The Appeal Panel also failed to factor into its analysis how the trial judge reacted to Mr. Groia's behaviour and how Mr. Groia modified his conduct in response to the trial judge and reviewing courts' directions. Both of these factors suggest that Mr. Groia's behaviour was not worthy of a finding of professional misconduct.

[149] Mr. Groia began accusing the OSC prosecutors of impropriety early on in the proceedings. Yet for the vast majority of Phase One, the trial judge adopted a passive stance, choosing not to comment on the substance of Mr. Groia's allegations or the manner in which he was making them. The trial judge remained largely silent even as the OSC prosecutors repeatedly complained about Mr. Groia's behaviour and insisted that the trial judge rule on whether their conduct was improper.

[150] For example, after one hotly contested exchange between the parties, the trial judge accepted that Mr. Groia's allegations were "notice that [an abuse of

process] application may come at the end of the day” and stated that “there is no ruling to be made with respect to that matter”. The trial judge responded to another of the OSC’s requests to rule on Mr. Groia’s allegations by stating that he expected both counsel “to conduct themselves professionally”.

[151] It was not until the 57th day of trial that the judge first instructed Mr. Groia to simply make “the same objection” when he believed the prosecutors were acting inappropriately. On the record before this Court, the trial judge reminded Mr. Groia to refrain from repeating his misconduct allegations on two more occasions in the remaining weeks of Phase One. In response, Mr. Groia largely complied with the trial judge’s admonition.

[152] The Appeal Panel noted the relevance of the presiding judge’s reaction to the professional misconduct inquiry. However, it did not once mention how the trial judge reacted to Mr. Groia’s allegations when assessing his behaviour. This was a significant omission. While I accept that the trial judge’s passive approach throughout the bulk of Mr. Groia’s prosecutorial misconduct allegations does not, on its own, absolve Mr. Groia of any wrongdoing, it nevertheless shaped both the substance and manner of Groia’s allegations.

[153] First, by failing to correct Mr. Groia’s legal mistakes, the trial judge buttressed the reasonableness of Mr. Groia’s sincerely held but mistaken belief that the OSC prosecutors were in fact acting abusively. Second, the trial judge’s failure to admonish Mr. Groia for the manner in which he raised his allegations signaled to Mr.

Groia that there was nothing wrong with the way he was impugning the prosecutors' integrity. It was therefore imperative for the Appeal Panel to consider the trial judge's reaction when evaluating Mr. Groia's conduct. In this regard, I note that this was a judge-alone trial, and admonishing Mr. Groia for the manner in which he was impugning the prosecutors' integrity could not possibly have prejudiced him the way it might have had this been a jury trial. Equally, there was nothing preventing the trial judge from admonishing Mr. Groia for his mistaken legal beliefs and letting him know that they did not form a proper basis for allegations of prosecutorial misconduct.

[154] Nor did the Appeal Panel incorporate Mr. Groia's marked change in behaviour in response to the directions of the trial judge and the reviewing courts into its analysis. When the trial judge instructed Mr. Groia how to object when he thought the prosecution was offside, Mr. Groia, for the most part, listened. And after receiving a "public shaming" from Campbell J. and Rosenberg J.A., Phase Two of the Felderhof trial unfolded without incident. It was incumbent on the Appeal Panel to factor in Mr. Groia's compliance with the judges' directions when assessing his behaviour. Both the trial judge's passivity and Mr. Groia's compliance with the directions given by every judge involved in this case militate against a finding of professional misconduct.

(iii) The Manner in Which Mr. Groia Brought His Allegations

[155] The final contextual factor is the manner in which Mr. Groia brought his allegations. My colleagues assert that I “discount the manner in which Mr. Groia made his allegations”, thereby “setting a benchmark for professional misconduct that permits sustained and sarcastic personal attacks”: reasons of Karakatsanis J. et al., at paras. 211 and 227.

[156] Respectfully, I take issue with that characterization of my reasons. I appreciate that a lawyer can be found guilty of professional misconduct for challenging opposing counsel’s integrity in an inappropriate manner. However, in this case, the manner in which Mr. Groia made his allegations could not, on its own, reasonably ground a finding of professional misconduct.

[157] To be sure, Mr. Groia should not have made his allegations in the sarcastic tone that he sometimes employed. The tenor of his allegations at times descended into what can fairly be described as “petulant invective”: *Felderhof ONSC*, at para. 64. However, as indicated, throughout the majority of Phase One, the trial judge did not criticize Mr. Groia for the manner in which he was making his allegations. Although the trial judge’s passivity cannot be taken as acquiescence, it is nonetheless a relevant contextual factor to consider when evaluating the language and tone Mr. Groia chose to employ. When the trial judge did intervene, Mr. Groia appropriately modified the way in which he pursued his abuse of process arguments. The sarcastic manner in which Mr. Groia challenged the prosecutors’ integrity simply

cannot, in light of the other contextual factors in this case, justify the Appeal Panel's finding of professional misconduct.

[158] My colleagues in dissent rely heavily on Campbell J. and Rosenberg J.A.'s critical comments of Mr. Groia's behaviour throughout Phase One to reach a contrary conclusion: reasons of Karakatsanis J. et al., at para. 225. Those comments, however, were made in a proceeding to which Mr. Groia was not a party, without giving Mr. Groia an opportunity to defend himself. While undoubtedly helpful in guiding Mr. Groia on the scope of appropriate behaviour going forward, it is unfair to take those comments as conclusive proof of professional misconduct on account of incivility. Further, as indicated, despite the criticisms levelled at Mr. Groia by Campbell J. and Rosenberg J.A. for the uncivil way in which he had made his allegations against Mr. Naster, the trial judge never once castigated Mr. Groia for the tone or manner of his submissions or the language used by him.

V. Conclusion and Disposition

[159] The Appeal Panel's finding of professional misconduct against Mr. Groia was unreasonable. The Appeal Panel used Mr. Groia's sincerely held but mistaken legal beliefs to conclude that his allegations of prosecutorial misconduct lacked a reasonable basis. But, as I have explained, Mr. Groia's legal errors — in conjunction with the OSC prosecutor's conduct — *formed* the reasonable basis upon which his allegations rested. In these circumstances, it was not open to the Appeal Panel to conclude that Mr. Groia's allegations lacked a reasonable basis. And because the

Appeal Panel accepted that the allegations were made in good faith, it was not reasonably open for it to find Mr. Groia guilty of professional misconduct based on what he said. The Appeal Panel also failed to account for the evolving abuse of process law, the trial judge's reaction to Mr. Groia's behaviour, and Mr. Groia's response — all factors which suggest Mr. Groia's behaviour was not worthy of professional discipline on account of incivility. The finding of professional misconduct against him was therefore unreasonable.

[160] Looking at the circumstances of this case as a whole, the following becomes apparent. Mr. Groia's mistaken allegations were made in good faith and were reasonably based. The manner in which he raised them was improper. However, the very nature of Mr. Groia's allegations — deliberate prosecutorial misconduct depriving his client of a fair trial — led him to use strong language that may well have been inappropriate in other contexts. The frequency of his allegations was influenced by an underdeveloped abuse of process jurisprudence. The trial judge chose not to curb Mr. Groia's allegations throughout the majority of Phase One. When the trial judge and reviewing courts did give instructions, Mr. Groia appropriately modified his behaviour. Taking these considerations into account, the only reasonable disposition is a finding that he did not engage in professional misconduct.

[161] I would allow the appeal and set aside the decision of the Appeal Panel with respect to the finding of professional misconduct against Mr. Groia and the

penalty imposed. I would award costs to Mr. Groia in this Court and in the courts below, as well as in the proceedings before the Law Society. Because Mr. Groia, in the circumstances of this case, could not reasonably be found guilty of professional misconduct, the complaints against him are dismissed and there is no need to remit the matter back to the Law Society: *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3, at para. 66.

The following are the reasons delivered by

CÔTÉ J. —

[162] I agree with my colleague, Moldaver J., that the Law Society Appeal Panel erred in finding that Mr. Groia committed professional misconduct in the course of defending his client, Mr. Felderhof. However, I write separately to express my disagreement as to the applicable standard of review. In my view, the Appeal Panel's finding of professional misconduct is reviewable on the correctness standard on the basis that the impugned conduct occurred in a courtroom, as discussed by Brown J.A. in his dissenting reasons in the Court of Appeal (2016 ONCA 471, 131 O.R. (3d) 1). I concur with the majority's disposition of this case because the Appeal Panel's conclusion that Mr. Groia committed professional misconduct was incorrect.

[163] As always, when it comes to the standard of review, our approach is guided by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. That case

prescribes a two-step analysis. First, we must look at our existing jurisprudence to ascertain whether the appropriate degree of deference has already been determined. Second, if an analysis of existing precedent does not prove fruitful, we must look to the relevant contextual factors to determine whether the correctness standard or the reasonableness standard is appropriate (*Dunsmuir*, at paras. 62-64).

[164] Applying that approach here, our existing jurisprudence does not dictate the standard of review in this appeal. Although *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, and *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, involved professional misconduct allegations, the context of this case is different in one critical — and dispositive — respect: the impugned conduct occurred before a judge in open court. As I discuss below, the fact that the relevant conduct occurred in a court of law implicates constitutional imperatives about the judiciary’s independence and its capacity to control its own processes. The nature of the impugned conduct therefore distinguishes this case from both *Ryan* and *Doré*.

[165] Turning to an analysis of the contextual factors, *Dunsmuir* instructs that “[d]eference will usually result where a tribunal is interpreting its own statute”, as is the case here (para. 54 (emphasis added)). But this presumption is just that: a presumption that can be rebutted, not an inviolable command that is “carved in stone” (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22). *Dunsmuir* permits — indeed, it expressly envisions — that the

presumption of reasonableness will be rebutted in “the exceptional *other* case” (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16 (emphasis in original)).

[166] This is such a case. The fact that the impugned conduct occurred in a courtroom rebuts the presumption of reasonableness. I agree, on this point, with Brown J.A.’s dissenting reasons in the court below: correctness review is required because the Law Society of Upper Canada’s inquiry into in-court professional misconduct “engages the contours of the constitutional relationship between the courts and government regulators” (C.A. reasons, at para. 312).

[167] Judicial independence is, without question, a cornerstone of Canadian democracy. It is essential to both the impartiality of the judiciary and the maintenance of the rule of law (*Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10). As Chief Justice Dickson remarked more than 30 years ago: “The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system” (*Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 73 (emphasis in original); see also *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 827-28).

[168] An inquiry by a law society into a lawyer’s in-court conduct risks intruding on the judge’s function of managing the trial process and his authority to sanction improper behaviour. It does so by casting a shadow over court

proceedings — in effect, chilling potential speech and advocacy through the threat of *ex post* punishment, even where the trial judge offered the lawyer no indication that his or her conduct crossed the line. And it permits an administrative body to second-guess the boundaries of permissible advocacy in a courtroom that is ultimately supervised by an independent and impartial judge.

[169] I do not contest that the Law Society has the statutory authority to sanction in-court conduct. However, the contextual reality that must be considered when determining the standard of review for such decisions is that the courtroom is “the workplace of the independent judiciary” (C.A. reasons, per Brown J.A., at para. 312). To protect this independence, and the authority of judges to manage the proceedings before them in the manner they see fit, the judiciary — not a regulatory body, a creature of the political branches of government — should have the final say over the appropriateness of a lawyer’s conduct in that sphere. The reasonableness standard of review, which requires judicial deference to a law society’s disciplinary determinations, is inconsistent with this prerogative. Therefore, correctness review is required to ensure proper respect for the judiciary’s constitutionally guaranteed place in our democracy.

[170] Assuming (without deciding) that the Appeal Panel adopted the correct test for professional misconduct, I conclude that its application of that test to Mr. Groia’s conduct was incorrect. As a result, I concur with the majority that the Appeal Panel erred in finding that Mr. Groia committed professional misconduct.

[171] As Moldaver J. describes (at paras. 126-41), the Appeal Panel effectively disregarded its own stated approach, using Mr. Groia's sincerely held but erroneous legal beliefs to support its conclusion that he engaged in professional misconduct. Once that factor is set aside, there is little else upon which a finding a professional misconduct could be correctly made.

[172] In particular, I find it relevant that the presiding judge elected to adopt a relatively passive approach to confronting Mr. Groia's aggressive tactics, even in the face of repeated requests from the prosecution to sanction his behaviour. This was well within the scope of legitimate options open to the judge in the context of this trial. But as a consequence, Mr. Groia was entitled to rely on the judge's responses (or lack thereof) in calibrating his litigation strategy. Once the judge did intervene, Mr. Groia largely complied with his instructions. And the second phase of the trial ran smoothly. The Appeal Panel failed to give appropriate weight to these considerations.

[173] I also agree with Moldaver J. (at paras. 143-47) that the uncertain state of the law regarding the manner in which abuse of process allegations should be raised weighs against a finding of professional misconduct. We rightly expect that lawyers will push the boundaries of the law, where appropriate, in advancing the interests of their clients. The law would stagnate in the absence of creative and novel legal argumentation. Although this does not give lawyers free licence to knowingly advance frivolous or completely baseless positions, we must be sensitive to the

potential chilling effect on legal advocacy when assessing the jurisprudential context in which alleged misconduct occurs. Here, I am prepared to err on the side of accepting that there was some procedural uncertainty — which the Appeal Panel did not account for — that contextualizes the frequency of Mr. Groia’s allegations. This, too, undermines the correctness of the Appeal Panel’s ultimate conclusion.

[174] For these reasons, I would allow the appeal. I agree with Moldaver J.’s disposition as to costs. I also agree that there is no need to remit the matter back to the Law Society.

The following are the reasons delivered by

KARAKATSANIS, GASCON AND ROWE JJ. —

I. Introduction

[175] We have read the reasons of our colleague Justice Moldaver and agree with him on a number of key issues. We agree that reasonableness is the applicable standard of review: Moldaver J.’s reasons (M.R.), at paras. 43–57. We also agree that the simple fact that a lawyer’s behavior occurs in the courtroom does not deprive the Law Society of Upper Canada of its legitimate role in regulating the profession nor does it justify heightened judicial scrutiny: M.R., at paras. 53–56. Lastly, we agree that, in articulating a standard of professional misconduct, the Law Society Appeal

Panel reasonably set out a contextual approach which will vary according to the particular factual matrix in which it is applied: M.R., at paras. 77–80.

[176] However, we disagree with Justice Moldaver’s disposition in this appeal. In our view, the Appeal Panel’s decision was reasonable. The Panel set out an approach for assessing whether Mr. Groia had committed professional misconduct and faithfully applied it. Its analysis was cogent, logical, transparent, and grounded in the evidence. Its decision achieved a reasonable balance of its statutory objectives and an advocate’s freedom of expression. There is no basis to interfere.

[177] We also have a number of concerns about Justice Moldaver’s application of the reasonableness standard. Respectfully, we are of the view that he fundamentally misstates the Appeal Panel’s approach to professional misconduct, and reweighs the evidence to reach a different result. This is inconsistent with reasonableness review as it substitutes this Court’s judgment for that of the legislature’s chosen decision maker. Further, we have serious concerns about the impacts that will follow from our colleague’s analysis and disposition in this appeal.

II. Analysis

A. *The Reasonableness Standard*

[178] Judicial review upholds the rule of law and legislative supremacy: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 30. In most

instances, both principles can be sustained by deferring to the legislature's delegated decision maker: *ibid.*, at para. 49. Such deference recognizes that delegated authorities will have greater expertise in matters under their scope of authority and are better situated than courts to choose from among the range of reasonable outcomes: *ibid.*

[179] Where, as here, the standard of review analysis leads to the application of reasonableness, deference is not optional. In *Dunsmuir*, this Court defined reasonableness as concerned “mostly with the existence of justification, transparency and intelligibility within the decision-making process” and “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: para. 47. On one hand, reasonableness is a threshold that decision makers must satisfy with regard “both to the process of articulating the reasons and to outcomes”: *ibid.* On the other hand, reasonableness prescribes a method of review that requires courts to begin their analysis with “respectful attention to the reasons offered or which could be offered”: *ibid.*, at para. 48, quoting D. Dyzenhaus, “The Politics of Defence: Judicial Review and Democracy” in M. Taggart ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[180] In applying the reasonableness standard, deference bars a reviewing court from conducting an exacting criticism of a decision in order to reach the result that the decision was unreasonable: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 56. It follows that a reviewing court also cannot

supplement the decision maker's reasoning for the purpose of undermining it. Neither may a reviewing court reweigh evidence or contextual factors considered by the decision maker: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 61; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 41; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at para. 38; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 29; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 34.

[181] Fundamentally, reviewing courts cannot simply “pay lip service to the concept of reasonableness review while in fact imposing their own view”: *Dunsmuir*, at para. 48. At all times, the starting point of reasonableness review is the reasons for the decision under review.

B. *The Appeal Panel's Decision Was Reasonable*

[182] For the reasons that follow, we would find that the Appeal Panel's decision was reasonable.

(1) The Appeal Panel's Approach to Civility and Professional Misconduct

[183] The Appeal Panel started its analysis by examining lawyers' professional conduct obligations and the concept of civility. It reviewed the rules and the codes of

conduct, as they appeared at the time of the *Felderhof* trial as well as related commentary, and noted the need to balance a lawyer's expressive rights with his or her professional obligations: 2013 ONLSAP 41 (A.P. reasons), at paras. 202-20 (CanLII). The Appeal Panel also highlighted the impact of uncivil behaviour on the administration of justice: A.P. reasons, at paras. 228–31. The Panel noted that incivility is about more than “hurt feelings”; attacks on the integrity of one's opponent risk disrupting a trial and risk rendering opposing counsel ineffective: para. 230.

[184] Following its detailed analysis of the importance of civility in the legal profession, the Appeal Panel articulated its approach to determining when uncivil courtroom behaviour crosses the line. This approach is “fundamentally contextual and fact-specific” so as to take into account the trial context and avoid a chilling effect on zealous advocacy: A.P. reasons, at para. 232. All of the surrounding circumstances must be considered. The Appeal Panel noted that the trial judge's reaction, while relevant to an assessment of misconduct, is not determinative: para. 225.

[185] The Appeal Panel then narrowed its focus to the issue arising in Mr. Groia's case, “the extent to which zealous defence counsel may impugn the integrity of opposing counsel and make allegations of prosecutorial misconduct”: para. 234.

The Panel stated:

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. [paras. 235-36]

[186] Notably, the Appeal Panel determined that any allegations of professional misconduct or that impugn the integrity of opposing counsel must be made in good faith and with a reasonable basis. Even where these two requirements are met, lawyers must be respectful and avoid the use of invective. The Appeal Panel was clear that any such allegations must be considered in context; the requirement to consider good faith and reasonableness are necessarily informed by the way the trial unfolded.

[187] We agree with Cronk J.A., writing for the majority of the Ontario Court of Appeal, that 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": 2016 ONCA 471, 131 O.R. (3d) 1, at para. 125. Here, there is no doubt that it was open to the Appeal Panel to adopt the approach it did. The Panel's reasoning was nuanced and flexible, responsive to the particular factual matrix in which it is applied. This approach flowed directly from the Panel's thorough consideration of the rules, related commentary, and the

jurisprudence. The adaptability of this approach ensures that it will not sanction zealous advocacy. It ensures that the context in which the impugned conduct occurred will be adequately accounted for, from the trial judge's reaction to the "dynamics, complexity and particular burdens and stakes of the trial": A.P. reasons, at para. 233. Importantly, the Panel noted that professional misconduct is about more than "mere rudeness" (para. 211); rather, the focus is on allegations of prosecutorial misconduct or that impugn the integrity of an opponent: paras. 210 and 235.

[188] Respectfully, we consider that Justice Moldaver reformulates the Appeal Panel's approach to professional misconduct. While he acknowledges the appropriateness of its chosen contextual approach, he effectively reframes the Appeal Panel's approach as consisting of three factors: (1) what the lawyer said; (2) the manner in which it was said; and (3) the trial judge's reaction (M.R., at para. 36). Tellingly, while not found in the Appeal Panel's reasons, this formulation closely resembles the tests urged by Mr. Groia and the dissenting judge of the Ontario Court of Appeal, both of whom advocated a correctness standard of review. As noted above, the Panel did not opt for such a restrictive framework and instead adopted a fact-specific and contextual approach for ascertaining professional misconduct: A.P. reasons, at paras. 7 and 232.

(2) The Appeal Panel's Assessment of the Case

[189] We turn now to the Appeal Panel’s application of its approach to the facts of this case. In our view, the Appeal Panel’s analysis of the *Felderhof* trial was a faithful and reasonable application of the approach it outlined.

(a) *Whether Mr. Groia Had a Reasonable Basis for His Allegations*

[190] Because the Appeal Panel did not have the benefit of hearing Mr. Groia’s testimony, it assumed that Mr. Groia “held an honest belief in his allegations of prosecutorial misconduct”: para. 238. On this basis the Appeal Panel assumed Mr. Groia was acting in good faith. The Appeal Panel clearly stated, however, that “it is professional misconduct to make [such allegations] . . . unless they are both made in good faith and have a reasonable basis”: para. 235 (emphasis added). The Appeal Panel thus suggested that the Law Society can still consider the reasonableness of a lawyer’s allegations even where they are made in good faith, in that they arise from a mistaken but sincerely held belief. As such, the Panel’s reasons focussed primarily on whether Mr. Groia had a “reasonable basis” for his allegations of prosecutorial misconduct and his comments that impugned the integrity of his opponents. Mr. Groia argued that he had such a basis: A.P. reasons, at paras. 239-40. The Appeal Panel disagreed. In our view, it was open to the Appeal Panel to do so.

[191] The Appeal Panel’s reasons demonstrate that it considered both the factual and legal underpinnings of Mr. Groia’s claims to determine whether they had a reasonable basis:

Our concern about the submissions quoted above is not merely that Mr. Groia was making incorrect legal submissions; that, of course, is not a basis for a finding of professional misconduct. Our concern is that Mr. Groia appears to have been using those submissions as a platform to attack the prosecutors, and in particular to impugn their integrity, without a reasonable basis to do so.

...

[Mr. Groia's] submissions, in our view, directly attack the integrity of the prosecutors, by alleging that they cannot be relied upon to keep their 'word' and are lazy and incompetent. . . . Further, they have no factual foundation. As a matter of the law of evidence that Mr. Groia ought to have known, Mr. Naster was perfectly entitled to object to Mr. Groia putting documents to a witness notwithstanding that the witness could not identify them and suggesting that they be marked as exhibits. . . .

...

In our review of the record, we could find no evidentiary foundation for the allegations of deliberate prosecutorial misconduct at this point in the trial. . . . His submissions regarding the 'conviction filter' not only were wrong in law but did not have a reasonable basis. And again, these submissions amplified and repeated comments made earlier in the trial, to the effect that the prosecutors were acting deliberately to make it impossible for Mr. Felderhof to get a fair trial. [Emphasis added; paras. 280, 285 and 295.]

[192] As the Panel noted, being wrong on the law is itself not a basis for professional misconduct in most situations: para. 280. However, it is clear from the passages cited above that the Appeal Panel was concerned with more than just whether Mr. Groia's legal submissions were *correct* or not. Errors of law may be so egregious that submissions based on those errors have no "reasonable basis". Put another way, allegations — made in good faith — may constitute professional misconduct if they have no reasonable *legal basis*.

[193] In our view, it was open to the Panel to consider both the factual and legal bases for the allegations at issue. The Appeal Panel’s mandate permits it to determine “any question of fact or law that arises in a proceeding before it”: *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.35(1). Indeed, the Law Society rules govern civility and competence: *Rules of Professional Conduct* (2000), Rule 2.01 (now Rule 3.1). One rule that Mr. Groia was accused of having breached prohibits “ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners”: *Rules of Professional Conduct* (2000), Rule 6.03(1) commentary; see A.P. reasons, at paras. 203 and 208. This standard can only be applied with some reference to the basic legal information a responsible lawyer is expected to possess or seek out before criticizing another lawyer’s professional conduct. The Appeal Panel’s choice to require a *reasonable* basis for the submissions indicates its intention to weed out egregious mistakes of law.

[194] As such, the Panel was entitled to consider whether there is a reasonable basis for the allegations where a lawyer alleges prosecutorial misconduct or impugns the integrity of opposing counsel. “Reasonableness”, as opposed to “good faith”, implies consideration of whether the allegations, objectively, had a legal or factual basis. This approach simply permits the Appeal Panel to consider, as a whole, the reasonableness of allegations that raise prosecutorial misconduct or impugn the integrity of opposing counsel, within the context of the proceedings. This is justified by the serious consequences that irresponsible attacks can have on opposing counsel’s reputation as well as the public perception of the justice system.

[195] Following the Appeal Panel’s review of the evidence, the Panel concluded that there was no reasonable basis (in fact or in law) for Mr. Groia’s allegations against the Ontario Securities Commission (OSC) prosecutors. It held that there was “no foundation” for Mr. Groia’s allegations, and that there was nothing “to suggest that either the OSC or the prosecutors were dishonest or intentionally attempting to subvert the defence” or that the prosecutors were “too busy or lazy to comply with their obligations”: paras. 266, 269, 304 and 306. While the prosecutor’s actions “may well have formed the basis for an aggressive attack on the Crown’s case”, “they did not provide a reasonable basis for repeated allegations of deliberate prosecutorial misconduct”: A.P. reasons, at para. 323.

[196] These conclusions were open to the Appeal Panel. They flowed directly from the Appeal Panel’s thorough consideration of the evidence. The Panel “reviewed Mr. Groia’s remarks in their context, often by relying on Mr. Groia’s own explanations in the course of the hearing panel proceeding” and gave Mr. Groia the benefit of the doubt whenever possible: para. 241. It considered the conduct of the prosecutors to determine whether Mr. Groia’s allegations had a basis in the record: see, e.g. paras. 256-58, 268-69, 276, 285, 288, 295-96, 298, 300-305, 312, 314, 316 and 325. However, despite this balanced review of the evidence, the Panel found that “[n]othing the prosecutors did justified [Mr. Groia’s] onslaught”: para. 322. In our view, it was open to the Appeal Panel to conclude there was no reasonable basis in fact or in law for Mr. Groia’s allegations of prosecutorial misconduct and his comments that impugned the integrity of his opponents.

[197] Justice Moldaver takes a different view of the Appeal Panel’s reasoning respecting the “reasonable basis” requirement. He suggests that the Appeal Panel determined that a lawyer’s *bona fide* legal mistakes can *never* ground a finding of professional misconduct: paras. 126-27. He therefore concludes that Mr. Groia’s good-faith (though mistaken) belief that the OSC prosecutors’ actions were contrary to law in part “*provided* the reasonable basis for his allegations”: para. 138 (emphasis in original). Respectfully, we are of the view that a reviewing court should give effect to the Appeal Panel’s decision to adopt an approach with both subjective and objective considerations (i.e. to require “good faith” and a “reasonable basis”). We would not collapse the distinction between these criteria by restricting the Appeal Panel’s ability to assess the reasonableness of legal submissions to determining whether the lawyer was acting in good faith.

[198] The majority’s approach effectively creates a novel mistake of law defence: a lawyer will have a “reasonable basis” for allegations of misconduct anytime his beliefs as to the law — if they were correct — would create such a basis. This makes the “reasonable basis” requirement dependent on the *subjective* legal beliefs of the lawyer. As such, any accusations grounded in an honestly held legal belief will be immune from Law Society sanction, irrespective of how baseless that legal belief is.

[199] However, the Appeal Panel explicitly *rejected* the idea that whenever a lawyer’s accusations are based on an honestly held belief in the law, they necessarily

have a “reasonable basis”. As discussed above, the Panel was of the view that allegations must have a *reasonable legal basis* to be justifiable, and this inquiry should not focus solely on the subjective beliefs of the lawyer. It is not a respectful reading of the Appeal Panel’s reasons to articulate a novel test for professional misconduct, then fault the Panel for failing to apply it. It was open to the Appeal Panel to hold that a lawyer who erroneously alleges prosecutorial misconduct or impugns the integrity of opposing counsel should not be shielded from professional sanction because of his or her own incompetence.

[200] Justice Moldaver also takes issue with the Appeal Panel’s finding that Mr. Groia had no reasonable *factual* basis for his accusations. The Appeal Panel’s decision respecting Mr. Groia was based in part on its conclusion that it is professional misconduct to make allegations that “impugn the integrity of opposing counsel” without a reasonable basis to do so: paras. 235, 320 and 324. The Panel found that Mr. Groia “repeatedly cast aspersions” on Mr. Naster, accusing him of reneging on promises when Mr. Naster contested the admissibility of certain documents: paras. 297, 299 and 319-20. The Panel determined, however, that these allegations had no factual basis:

. . . 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. [Emphasis added; para. 324.]

[201] Justice Moldaver states that it was “not reasonably open” to the Appeal Panel to find that Mr. Groia’s allegations lacked a reasonable factual basis: M.R., at para. 134. This, according to his analysis, is because the Panel should have appreciated how Mr. Groia’s legal mistakes “coloured his understanding of the facts”: M.R., at para. 135. With respect, the Appeal Panel was entitled to make the findings of fact it made. Reasonableness review of a decision requires deferential consideration of the rationales of the decision maker.

(b) *The Appeal Panel’s Weighing of the Evidence*

[202] In determining whether Mr. Groia’s allegations crossed the line into professional misconduct, the Appeal Panel applied its expertise and decided how to assess the evidence as a whole.

[203] The Appeal Panel focussed, for example, on the disrespectful manner in which Mr. Groia made his allegations: paras. 290, 299 and 328. The Panel noted Mr. Groia’s sarcastic use of the word “Government” to describe the OSC’s lawyers. The Panel found that it was wrong to use the term “as a way of casting aspersions on opposing counsel without a reasonable basis”: para. 286. The Panel also highlighted numerous instances in which Mr. Groia directly attacked the integrity of his opponents in a harsh and cutting way. On the issue of the admission of documents, Mr. Groia repeatedly commented that he could not enter a document “because the Government isn’t prepared to stand by its representations to this Court” and because the prosecutors “don’t live up to their promises”: A.P. reasons, at para. 299. Mr.

Groia also remarked: “My friend doesn’t like the fact that he is being held to statements he made in open court. I am sorry. He made those submissions” and asked the judge: “Is my friend ever going to explain to this Court, or God forbid, ever apologize to this Court for the Government’s conduct in this case?”(*ibid.*) When arguing about the admissibility of a *National Post* article, 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” (*ibid.*, at para. 311).

[204] The Appeal Panel also placed significant weight on the cumulative impact of Mr. Groia’s comments: para. 318. Mr. Groia’s comments built on one another throughout the course of the *Felderhof* trial, and the Panel therefore found it necessary to measure their cumulative effects rather than considering each in isolation: paras. 285 and 319.

[205] Following its consideration of the evidence as a whole, the Appeal Panel concluded that Mr. Groia had engaged in professional misconduct. While the Appeal Panel noted that certain of Mr. Groia’s comments did not cross the line into professional misconduct, it concluded that his conduct, when considered cumulatively, can “best be described as a relentless personal attack on the integrity and the *bona fides* of the prosecutors”: paras. 252, 270, 280, 317 and 318. The Panel also determined that Mr. Groia’s behaviour had a negative impact on the trial and on the administration of justice: paras. 313 and 332. In light of all of the facts at play, the Panel concluded that Mr. Groia’s allegations crossed the line and warranted sanction.

[206] In our view, it was open to the Panel to weigh the evidence in the way it did. Its findings regarding the disrespectful way that Mr. Groia made his allegations were amply supported by the record, as were its conclusions on the cumulative effects of his conduct. Ultimately, the reasons support the Appeal Panel's conclusion that Mr. Groia was engaged in professional misconduct: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56; *Ryan*, at para. 47. Both the evidentiary foundation and the logic of the reasons were sound: *ibid.* The decision is justifiable, intelligible, and transparent and falls within the range of reasonable outcomes: *Dunsmuir*, at para. 47.

[207] Justice Moldaver takes issue with the way that the Appeal Panel weighed the evidence before it. He would reduce the weight assigned to the manner and effects of Mr. Groia's comments because the state of the law regarding abuse of process was uncertain at the time of the *Felderhof* trial: M.R., at para. 143.

[208] We cannot agree that the Appeal Panel was unreasonable in failing to take such an approach. Most notably, Mr. Groia never raised the unsettled state of the law regarding abuse of process before the Appeal Panel: see A.P. reasons, at para. 239. To criticize the Appeal Panel's reasons for failing to consider an argument never raised before it has no basis in reasonableness review. Adding another matter that the Appeal Panel ought to have considered is a means of reweighing of evidence, which is inappropriate on deferential review: *Suresh*, at para. 29.

[209] Furthermore, whatever uncertainty there was regarding the timing of when abuse of process allegations should be made, there was no uncertainty about the underlying rules of professional ethics and law of evidence upon which Mr. Groia had launched his volleys of ill-considered attacks.

[210] Justice Moldaver also places significant weight on the trial judge's reticence to intervene when Mr. Groia made his allegations: M.R., at paras. 136, 148–54 and 157. However, the Appeal Panel paid close attention to the interventions that the trial judge made in the course of the proceedings but noted that a trial judge's interventions are not a determinative consideration: paras. 53-56, 76-77, 86-88, 90-91, 103, 263, 269, 272 and 281. The Panel was entitled to determine that other factors warranted more weight in the circumstances of this case.

[211] In the same vein, Justice Moldaver would also discount the manner in which Mr. Groia made his allegations on the basis that the trial judge had not intervened: M.R., at para. 157. In our view, the Appeal Panel was entitled to place substantial weight on Mr. Groia's use of unnecessary invective: A.P. reasons, at paras. 236 and 328.

[212] Justice Moldaver uses the trial judge's lack of intervention in respect of Mr. Groia's legal errors as an indication that the Panel was unreasonable in concluding that Mr. Groia's allegations lacked a factual foundation: M.R., at paras. 136 and 153. With respect, we consider that it is within the Panel's statutory responsibility to assess the reasonableness of lawyers' submissions. The fact that the

trial judge did not tell Mr. Groia that he was wrong in law did not require the Panel to find that his submissions were reasonable.

[213] Thus we cannot agree with Justice Moldaver's application of the reasonableness standard. In our view, he misstates the Appeal Panel's approach and reweighs the evidence in order to reach a different result. Our colleague may have preferred choices other than those made by the Appeal Panel. However, that is no basis to intervene on judicial review and rebalance the scales. In reasonableness review, courts must resist the temptation to come to a conclusion different than the tribunal's, particularly where there is a logical and evidentiary underpinning for the tribunal's conclusions: *Southam*, at paras. 79-80.

(3) Conclusion on the Reasonableness of the Appeal Panel's Decision

[214] For over 200 years, the Legislature has delegated to the Law Society the authority to determine both the rules of professional conduct for the profession and their interpretation: *Law Society Act*, ss. 34(1) and 62(0.1)10. Recognizing this expertise, this Court has consistently held that law societies should be afforded deference: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 45; *Ryan*, at para. 42. The Law Society is a specialized body; here, it was applying its own rules to a specific case that fell well within the core of its expertise.

[215] Because of the Law Society's broad mandate, this is not one of the "rare occasions where only one 'defensible' outcome exists": *Wilson v. Atomic Energy of*

Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 35, per Abella J. The existence of reasonableness review is, rather, premised on the fact that “certain questions that come before administrative tribunals do not lend themselves to one specific, particular result”: *Dunsmuir*, at para. 47.

[216] For the reasons set out above, we are of the view that there is no basis on this record to interfere with the Appeal Panel’s decision. The Panel articulated an approach for professional misconduct that flowed directly from its consideration of the rules, commentary and jurisprudence. It faithfully followed its approach, based on the evidence respecting Phase One of the *Felderhof* trial, and concluded that Mr. Groia had no reasonable basis for the allegations he made against the OSC prosecutors. It then weighed the whole of the evidence and determined that when considered in light of all of the relevant factors, Mr. Groia’s comments constituted professional misconduct. The Panel’s logic, rationales and conclusion were reasonable.

[217] We would also find that the Appeal Panel’s decision proportionately balanced the value of freedom of expression with its mandate to ensure that lawyers conduct themselves professionally. As this Court noted in *Doré*, “[i]n the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives”: para. 7. The Appeal Panel was alert to the importance of lawyers’ expressive freedoms and the critical role of zealous advocacy

in our system: A.P. reasons, at paras. 214-17. In order to ensure that these principles were limited no more than necessary, the Appeal Panel adopted a contextual approach that took into account the dynamics of the courtroom setting: para. 7. In addition, the Appeal Panel gave Mr. Groia the benefit of the doubt and assumed that he acted in good faith. However, it was open to the Appeal Panel to determine that at a certain point, the cumulative effect of Mr. Groia's allegations meant that the balance shifted and that there was a need for limits on Mr. Groia's conduct. It was reasonable for the Appeal Panel to conclude that "[i]n the context of this trial, zealous advocacy did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct", to "impugn the integrity of his opponents" or to "frequently resort to invective" when describing them: para. 328.

[218] Finally, we note that all of the adjudicators and judges who reviewed this decision on the standard of reasonableness also concluded that the Appeal Panel's ultimate finding of misconduct was reasonable. The only person to conclude that Mr. Groia's conduct did not amount to misconduct was the dissenting judge at the Ontario Court of Appeal, who applied a correctness standard of review. This Court should resist the temptation to substitute its view on what the Appeal Panel should have done. The focus on a reasonableness review is on the Appeal Panel's actual reasons. In this case, the Appeal Panel's decision was reasonable.

C. The Impacts of Allowing This Appeal

[219] We have a number of concerns about the implications that follow from Justice Moldaver's reasons. Respectfully, we are concerned that they immunize erroneous allegations from Law Society sanction, validate improper conduct and threaten to undermine the administration of justice and the culture change that this Court has called for in recent years.

(1) Immunizing Accusations Based on Honestly Believed Legal Errors

[220] As discussed, Justice Moldaver's reasons effectively create a mistake of law defence that immunizes lawyers from professional sanction whenever their allegations are based on honestly held legal beliefs. In our view, this approach would potentially immunize lawyers who make accusations based on erroneous, unsupportable or even reckless beliefs about the law.

[221] Allowing any honestly held legal belief to provide a "reasonable basis" for allegations of prosecutorial misconduct, taken to its logical conclusion, means that the more outrageous the lawyer's legal belief is, the more justified his allegations of impropriety become. This approach creates an unduly high threshold for professional misconduct, one that could effectively dispossess the law societies of their regulatory authority respecting incivility anytime a lawyer can cloak his accusations in a subjective legal belief.

(2) Validating Uncivil Conduct

[222] We are concerned that allowing this appeal will be seen as a validation of Mr. Groia's conduct and will undermine the Law Society's ability to sanction unprofessional conduct.

[223] The Appeal Panel determined that even if a lawyer has a reasonable basis for an allegation of prosecutorial misconduct, "she must avoid use of invective to raise the issue": para. 236. This is a reasonable approach. The *Rules of Professional Conduct* were — and remain today — "crystal clear" that counsel must treat witnesses, other lawyers, and the court with fairness, courtesy and respect: *R. v. Felderhof* (2003), 235 D.L.R. (4th) 131 (Ont. C.A.) (*Felderhof* (ONCA)), at para. 96; *Rules of Professional Conduct* (2000), Rules 4.01(1), 6.03(1) (now Rules 2.1-1, 2.1-2, 5.1-1, 5.1-5, 5.6-1, 7.2-1 and 7.2-4).

[224] In setting aside the decision of the Appeal Panel, Justice Moldaver, however, says little concerning the inappropriate manner in which Mr. Groia brought his allegations. Instead, he says that "[s]trong language . . . will regularly be necessary to bring forward allegations of prosecutorial misconduct": para. 101.

[225] With respect, we take a contrary view; we cannot agree with any suggestion that Mr. Groia's conduct was permissible, let alone "necessary". As the Appeal Panel noted, Campbell J. initially found that it was "unnecessary" for Mr. Groia to make his submissions respecting prosecutorial misconduct in the "repetitive stream of invective" he did: *R. v. Felderhof*, 2002 CanLII 41888 (Ont. S.C.J.) (*Felderhof* (ONSC)), at para. 271. He described Mr. Groia's conduct as "appallingly

unrestrained and on occasion unprofessional”, “inappropriate”, “extreme” and “unacceptable”: *R. v. Felderhof*, 2003 CanLII 41569 (Ont. S.C.J.) at paras. 18 and 21. The judge noted that on one occasion, Mr. Groia’s conduct more resembled “guerilla theatre than advocacy in court”: *Felderhof* (ONSC), at para. 91. Rosenberg J.A. of the Court of Appeal substantially agreed with these characterizations and called Mr. Groia’s rhetoric “improper”: *Felderhof* (ONCA), at paras. 78-82. It is true that the Appeal Panel did not treat the view of these two judges as determinative. It in fact recognized that the comments of Campbell J. and Rosenberg J.A. should be given limited weight: A.P. reasons, at para. 201. Nonetheless, we note that after reviewing the entire record of the *Felderhof* trial, the Panel came to a similar conclusion about Mr. Groia’s conduct.

[226] We agree with the Appeal Panel that there is no excuse for the manner in which Mr. Groia brought his allegations: para. 328. It is when lawyers are tested with challenging situations that the requirements of civility become most important. When lawyers are raising difficult issues like prosecutorial misconduct, they are nonetheless “constrained by their profession to do so with dignified restraint”: *Doré*, at para. 68 (emphasis added). Motions respecting prosecutorial misconduct “can and should be conducted without the kind of rhetoric engaged in by [Mr. Groia]”: *Felderhof* (ONCA), at para. 96. Zealous advocacy did not require that he “frequently resort to invective in describing opponents who were trying to do their jobs”: A.P. reasons, at para. 328.

[227] By assigning limited weight to the manner in which Mr. Groia brought his allegations, Justice Moldaver’s reasons can be read as setting a benchmark for professional misconduct that permits sustained and sarcastic personal attacks on opposing counsel. In our view, there is simply no place in Canadian courtrooms for this type of conduct. Deciding that the Law Society cannot sanction the allegations that Mr. Groia unleashed on his opponents sends the wrong message to those who look to this Court for guidance.

(3) Undermining the Administration of Justice

[228] Finally, we are concerned about the broader impact of setting aside the Appeal Panel’s decision on the culture of the legal profession and the administration of justice.

[229] The Appeal Panel quite reasonably stated that professionalism is a key component of the efficient resolution of disputes. Uncivil, abrasive, hostile or obstructive conduct “necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice”: A.P. reasons, at para. 218, quoting *Felderhof* (ONCA), at para. 83. It distracts not only counsel, who become preoccupied with defending their own integrity rather than advocating for their clients’ interests, but also triers of fact, who are required to weigh in on acrimonious personal disputes rather than focusing on the merits: see A.P. reasons, at paras. 230-31 and 332. Most importantly, though, unprofessional attacks erode the relationship of mutual respect that is crucial to resolving disputes efficiently. When

this occurs, even minor disagreements become more protracted; issues that might have been resolved out of court become subject to vigorous argument, taking up court time and costing litigants money unnecessarily: see M. Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim. L.R.* 97, at p. 105.

[230] The Appeal Panel’s recognition of the importance of civility to the administration of justice is consistent with this Court’s repeated calls to address access to justice concerns. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, the majority challenged all participants in the justice system to “work in concert to achieve speedier trials” (para. 116), and pushed Crown and defence counsel to collaborate when appropriate and use court time efficiently (para. 138). The majority stated that “[a]ll courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials”: para. 139. Similarly, in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, this Court called for a culture change in the civil context as a means of promoting timely and affordable access to justice: para. 2. The Court specifically called on trial counsel to be cognizant of the pressures on the justice system and “act in a way that facilitates rather than frustrates access to justice”: para. 32. Finally, in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, this Court renewed the calls set out above, and set out specific guidance for judges and counsel alike to do what they can to improve the efficiency of the justice system: paras. 37-39.

[231] Condoning Mr. Groia’s conduct risks eroding civility in courtrooms and increasing the pressures on an already strained system. Moreover, setting aside the decision of the Appeal Panel has the potential to undermine the ability of law societies to promote the efficient resolution of disputes. Law societies are important actors in the culture change we need. Through their enabling legislation, they are provided with the authority to sanction lawyers who commit professional misconduct and, in turn, promote efficiency in our system. They should be empowered to do that, not undermined through second-guessing by the courts. Their decisions respecting professional misconduct should be approached with deference.

III. Conclusion

[232] We are of the view that this appeal should be dismissed. A respectful reading of the Appeal Panel’s reasons makes clear that the Panel’s decision was a balanced decision that grappled with the difficult issues at play and arrived at a reasonable outcome.

[233] Perhaps unease with the Appeal Panel’s finding of professional misconduct stems in part from the severity of the penalty that was handed down to Mr. Groia. A one-month licence suspension and a \$200,000 cost award may seem harsh to some, but that misses the point. That issue is not before us on this appeal, nor is it a basis upon which to disturb the Appeal Panel’s finding of misconduct.

*Appeal allowed with costs, KARAKATSANIS, GASCON and ROWE JJ.
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