Law Society of Upper Canada v. Groia

Round five: Ottawa

Richard Macklin

Harry Kopyto acted for many disadvantaged people during the time he practised law, among them a client named Ross Dowson, who was embroiled in an ongoing dispute with the Royal Canadian Mounted Police.

In the mid-1980s, following a court decision to dismiss one of Mr. Dowson's cases, Mr. Kopyto appeared to have gone too far. In an interview about the decision, he said:

> This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it. Mr. Dowson and I have lost faith in the judicial system to render justice. We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue.

Mr. Kopyto was prosecuted for this comment and convicted of contempt of court. He was ordered to apologize or be barred from practising law in Ontario. He argued that his actions were protected under the *Canadian Charter of Rights and Freedoms* and, on appeal, was acquitted.[1] The Court of Appeal for Ontario held that the words used by a lawyer, even outside the courtroom, belong to a form of expression that is protected by the *Charter*. In such circumstances, the lawyer is not immune from a finding of contempt, but the test to be applied must recognize that the job of the lawyer is challenging, has many facets and is vital to our democratic society.

Other lawyers, facing challenges to their use of speech, have obtained mixed results in relying on the *Charter* to ground their defence.[2]

The latest clash between a lawyer's right of expression and potential liability is the case of Ontario lawyer Joseph Groia. This well-publicized case involves Law Society of Upper Canada Hearing Panel findings against Mr. Groia, on grounds that he behaved uncivilly in the successful defence of his client in a *Securities Act* prosecution – *R. v. Felderhof*.[3] The discipline dispute has been heard at two administrative tribunal levels and two court levels. Round five will take place in Ottawa, as Mr. Groia's application for leave to appeal to the Supreme Court of Canada was granted on February 12, 2017.

To date, the *Charter* has not played a large role in the proceedings. Mr. Groia invoked the *Charter* in his defence for the first time at the Court of Appeal for Ontario. One can anticipate an intensified focus on the *Charter* at the hearing in Ottawa, tentatively scheduled for November 6, 2017.

There has been thoughtful commentary in the Reasons for Decision of the four adjudicative bodies that have dealt with the case and addressed the many issues raised. The crux of the discussion, however, has been the focus on the practical challenge of propounding a test for when advocacy on behalf of a client (a constitutional imperative) crosses the line to where it undermines our sense of what our court system should reflect in the public interest (a democratic imperative).

The answer to this challenge requires a look at the facts in the *Groia* case and what has been said in the Reasons for Decision in the review thereof. Ultimately, however, the case is about speech in a protected forum. As argued in this article, to understand the balancing of interests in civility discipline cases we should look to the *Charter* and the constitutional dimensions that underlie the law of contempt of court and defamation.

By way of background, the *Felderhof* saga began in May of 1999, when the Ontario Securities Commission (OSC) charged John Felderhof with eight counts of contravening the *Securities Act*, following the collapse of the Bre-X Minerals Ltd. stock on the Toronto Stock Exchange. Mr. Felderhof retained Mr. Groia to act in his defence. At the time, Mr. Groia had been practising as a securities litigator for many years, including five years as chief litigation counsel and

director of enforcement at the OSC.

It is doubtful that anyone in the legal profession could have foreseen that the collapse of Bre-X would lead to the most extensive examination of how lawyers are to act toward each other in court and would engage fundamental freedom of expression issues.

Litigation is a complex process that, despite a seemingly unending array of rules and reported judgments, remains sufficiently amorphous that no two trials are exactly alike. Some cases take on a life of their own, and *R. v. Felderhof* was one such case. It became unhinged at the outset. Unlike so many cases of this nature, however, what happened in this hearing ended up before the Law Society of Upper Canada in discipline proceedings against Mr. Groia.

In looking back on *R v. Felderhof*, it is readily apparent that the defence strategy included at least the following:

1. putting the prosecution to the strict proof of its case, including, in the formal sense, proof of all documents. After all, the allegations against Mr. Felderhof sprung from falsified records and were based on the extent to which Mr. Felderhof had knowledge thereof. Thus, if Mr. Felderhof were to face a potential deprivation of his liberty, it would be on the basis of documents that met all necessary evidentiary thresholds;
2. emphasizing the duty of fairness of the prosecutor, drawing on such crucial Supreme Court of Canada judgments as *R. v. Boucher* and *R. v. Stinchcombe*;[4] and
3. relying on a defence of abuse of process, raised throughout the trial and argued at its closing.

Much of what later became the basis of the lack of civility charges against Mr. Groia stemmed from his forceful pursuit of these three strategic pillars. What appears to have got Mr. Groia into trouble was that in many of the instances where he used these strategies, especially the strategy of highlighting prosecutorial duties, he got the law wrong.[5] The more the prosecution failed to follow Mr. Groia's erroneous view of the law, the more he insulted it by asserting it should behave differently. Moreover, his were not soft insults. They were unremitting and included allegations of deceit, unethical behaviour, laziness and being unfit for prosecutorial office. The more he was wrong in law, the more baseless were his accusations against the prosecution.

When the Groia appeal is heard, the Supreme Court of Canada will be faced with eloquently stated but competing visions of how to assess when fearless advocacy crosses the line into offending conduct. The judgment appealed from is a Court of Appeal ruling that split two-to-one in the result. The majority saw this as an administrative law problem (which it is) and deferred to the findings of the Law Society Appeal Panel, including its test for assessing when incivility rises to the level of professional misconduct. That test was stated by the Law Society Appeal Panel as follows:

> 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.[6]

The dissent in the Court of Appeal delved more deeply into the various rulings made throughout the Felderhof trial and the various judicial admonitions against Mr. Groia. Those admonitions were made by the trial judge and the two courts that reviewed the proceedings, midstream, on the prosecution's application for judicial review. Relying on those other proceedings, the dissent found that Mr. Groia had been controlled by the trial judge and admonished by the reviewing courts. Ultimately, after Mr. Groia was admonished by three courts in regard to the first phase of the *Felderhof* trial, the second phase of the trial proceeded without incident. Thus, Mr. Groia was not incorrigible and the system, while having sustained some collateral damage, had worked through Mr. Groia's improper conduct. The dissenting judge would have allowed Mr. Groia's appeal.

The granting of leave to appeal by the Supreme Court of Canada is welcome news. Lawyers throughout Canada will benefit from the court's guidance on what behaviour crosses the civility line. We know from the Law Society Appeal Panel's reasons in *Groia* that an allegation against opposing counsel must be made in "good faith" and supported on a "reasonable basis." We know from the leading Supreme Court of Canada case on the discipline of a lawyer, *Doré v. Barreau du Québec*, that a discipline panel must give "due regard to the importance of the [freedom of expression] rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion."[7] Moreover, in *Groia*, the lawyer's advocacy was on behalf of a client charged with a serious offence, as contrasted to Mr. Doré – who wrote a private letter to a judge on his own behalf. One can argue that the need to give meaning to the expression rights in question is further heighted in a case like Mr. Groia's.

The factual circumstances in incivility complaints will vary widely and, thus, open-ended tests, such as those set out in *Groia* and *Doré*, are a sensible response. That does not mean additional guideposts for analyzing Mr. Groia's case should not be explored. Thus, at the Groia appeal, the parties and interveners may wish to consider making arguments that use, by analogy, contempt of court jurisprudence and the law related to defamation.

It is acknowledged that contempt and defamation law raise different policy issues than do discipline cases. However, the assessment of the value of speech for *Charter* purposes can be informed by "scandalizing the court" and defamation case law. In *R. v. Kopyto*, the Court

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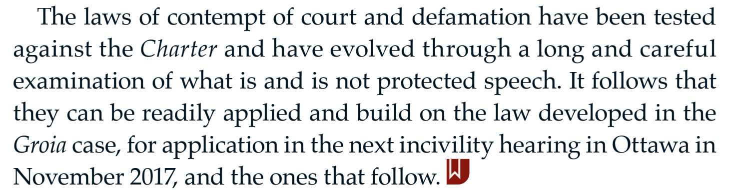
of Appeal accepted that criticism of the judiciary (and, presumably, prosecutors), even if not felicitously worded, was worthy of protection under the *Charter*. Thus, in Mr. Kopyto's case, he was acquitted on grounds that his admittedly distasteful comments fell short of a constitutional contempt standard. Specifically, the comments were not of a nature that could be credibly argued to pose a serious danger to the court system. In effect, the court applied the *Charter* to elevate the threshold for liability from the previous common-law standard. Under the pre-*Charter* test, liability could be found merely on proof of words uttered that were calculated to bring a court into contempt or lower its authority. The standard for a finding of discipline should be similarly elevated when the underlying conduct raises *Charter* issues.

In the law of defamation, a defendant can plead the truth of his or her publication as an absolute defence. The defendant can also plead qualified privilege. A qualified privilege defence posits that a person may make defamatory statements about another without incurring liability so long as he or she acts honestly, in good faith and without malice. Good faith, a right or duty in a proper subject, a proper occasion and a proper communication to those having a like right, duty or interest, are essential to constitute the privilege. In a civil suit, a lawyer's statements in court would in most cases be covered by absolute privilege. In discipline proceedings, however, the test for qualified privilege – applied by analogy – appears well suited. Indeed, the Law Society Appeal Panel test mirrors the test for qualified privilege and can be seen as an example of the application of that test, without calling it that. In addition, the well-established tests for malice and recklessness, in the qualified privilege context, provide useful and familiar bases on which to assess whether allegations made by a lawyer against opposing counsel were made in "good faith" and supported on a "reasonable basis." Moreover, the rationale for the qualified privilege defence – the public interest in the exchange of ideas – is rooted in the common law's respect for freedom of expression. The same respect for freedom of expression underlies a discipline hearing in relation to whether a lawyer's words have breached the rules of professional conduct.

The laws of contempt of court and defamation have been tested against the *Charter* and have evolved through a long and careful examination of what is and is not protected speech. It follows that they can be readily applied and build on the law developed in the *Groia* case, for application in the next incivility hearing in Ottawa in November 2017, and the ones that follow.



Notes

1. *R v Kopyto*, [1987] OJ No 1052 (CA).
2. See *Klein v Law Society of Upper Canada* (1985), 16 DLR (4th) 489 (Ont Div Ct); *Khalil v OCA* (2000), 147 OAC 213 (Div Ct); *Doré v Barreau du Québec*, 2012 SCC 12 [Doré].
3. *R v Felderhof*, [2002] CanLII 41888 (ONSC)
4. *R v Boucher*, 1999 CanLII 12789 (SK QB); *R v Stinchcombe*, [1991] 3SCR 326.
5. See especially A.Campbell J's findings in *R v Felderhof*, [2002] CanLII 41888 (ONSC), and the discussion in the appeal judgment from that ruling, [2003] CanLII 37346 (ONCA).
6. *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2013 ONLSAP 41 (CanLII) at paras 235–236.
7. *Doré*, *supra* note 2 at para 66.

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