

# TOP FIVE 2018

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

## **GROIA v LAW SOCIETY OF UPPER CANADA, 2018 SCC 27**

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17113/index.do>

### **Facts**

Mr. Groia was a lawyer hired by John Felderhof to defend him against charges brought by the Ontario Securities Commission (OSC). At various points in the trial, there were disputes that took place between Mr. Groia and OSC prosecutors. These disputes included personal attacks, sarcastic outbursts, and allegations of professional impropriety by Mr. Groia. The issues that arose between the parties at trial were connected to Mr. Groia's honest but clearly mistaken understanding of evidence and the role which a prosecutor has at a trial. The trial judge initially took a hands-off approach but was forced to interfere as the altercations intensified. Mr. Groia was directed to correct his behaviour by the trial judge, and did so.

### **Procedural History**

After the trial concluded, the Law Society of Upper Canada (LSUC), now the

Law Society of Ontario (LSO), brought disciplinary proceedings against Mr. Groia because of his behaviour. Mr. Groia was found guilty of professional misconduct and had his license suspended for two months. He was also ordered to pay \$270,000 in costs. He appealed the decision. The internal LSO Appeal Panel concluded that he was guilty but reduced his suspension to one month and costs to \$200,000.

The *Federal Courts Act* (FCA) allows LSO disciplinary proceedings to be appealed. This appeal occurs through a legal process called a "judicial review". A judicial review occurs when there is an error of law, error of fact, or mix of the two. An error of law may occur when the wrong legal test is applied, evidence is ignored, or there is bias of the decision-maker. Errors of fact occur when there is an incorrect decision made based on the facts that have been available.



When a judicial review takes place, there are two ways to review a decision. The first way is to consider the reasonableness of the decision. The second is to consider the correctness of the decision. The standard of review for reasonableness focuses on whether there is a reasonable decision, supported by evidence and reasons. The standard of review for correctness focuses more on procedural fairness, legal questions, and jurisdiction issues.

The LSO disciplinary proceedings were reviewed by three judges in Ontario's Divisional Court, who upheld the LSO's decision as reasonable based on the evidence. Mr. Groia further appealed to the Court of Appeal for Ontario, but that Court also upheld the LSO's decision. Mr. Groia appealed to the SCC.

## Issues

1. Should Mr. Groia be held guilty of professional misconduct?

## Decision

The decision of professional misconduct made by the Appeal Panel was set aside as it was unreasonable.

## Ratio

A lawyer's professional obligation includes advocating strongly for their clients, and the duty to act civilly in their advocacy.

In determining a finding of professional misconduct, there is a three-step test:

1. What did the lawyer say?
2. How did they say it, and how frequently?
3. How did the trial judge interpret what was said?

## Reasons

To avoid the chilling effect on advocacy, the SCC had to grapple with what it means to act civilly. If there were regulators constantly watching over lawyers, would this impact the extent of a lawyer's advocacy for their client? And in cases where the lawyer has acted out of line, who decides that there has been incivility: the trial judge presiding over the case or the Law Society?

The majority ultimately decided Mr. Groia had an honest, but mistaken, understanding of the law. Thus, the finding of professional misconduct was unreasonable and may cause lawyers to alter how they defend their clients. Mr. Groia had a basis to accuse the prosecution of misconduct, even though it was rooted in a mistaken understanding.



Moreover, for much of the trial, the trial judge's reaction did not give him reason to alter his litigation strategy. Finally, when he was given direction by the trial judge to alter his behaviour, he complied.

Justice Côté agreed with the majority, but emphasized the importance of maintaining judicial independence. She stated that courts should be more vigilant in how they view law society disciplinary decisions, particularly because those decisions may impact the role and independence judges have at trial. Regulating a judge at trial can impede judicial independence.

Three dissenting judges would have upheld the finding of professional misconduct, holding that the LSO's decision was correct and Mr. Groia's behaviour was out of line. In their view, Mr. Groia's honest but mistaken belief should not be an excuse for his behaviour during the trial. Lawyers should be held to a certain standard, and to allow such behaviour may impact that standard.



## DISCUSSION

1. Mr. Groia made various comments to the prosecutors, including personal attacks and sarcastic outbursts. How might these be connected to a lawyer's duty to represent their client?
2. In this case, the trial judge directed Mr. Groia to change his aggressive strategy, and he complied. Why might the law society have sought to discipline Mr. Groia after the conclusion of the trial?
3. How might judicial independence and strong client advocacy be threatened by the prospect of disciplinary hearings for lawyers who act uncivilly towards one another?
4. Do you agree with the SCC's finding of the LSO's decision being unreasonable?
5. If the SCC's finding was wrong, was the punishment of \$200,000 and a month's suspension appropriate?