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CANADA UPDATE: A REVIEW OF CANADA'S RECENT HOLDING REGARDING THE PROPOSED SECURITIES ACT, CANADA'S ANTI-SPAM LAW THAT MAY SOON TAKE EFFECT, AND THE DISCIPLINARY HEARING OF JOE GROIA

*David Paulson**

THIS update includes three parts. Part I is a review of a recent decision by the Supreme Court of Canada that held the proposed Canadian Securities Act unconstitutional. Part II is a brief summary of Canada's anti-spam legislation, which is planned to take effect early next year. Part III is an analysis of a recent decision by the Law Society of Upper Canada disciplinary board, which found that Mr. Joe Groia fell below the professional standard of civility.

I. CANADA'S PROPOSED NATIONAL SECURITIES REGIME IS HELD UNCONSTITUTIONAL

On December 22, 2011, the Supreme Court of Canada (the Court) held that the proposed Canadian Securities Act (Securities Act) was unconstitutional.¹ The Securities Act, if validly adopted, would have created a single regulatory scheme to govern the trade of securities throughout Canada.² A single national regulator has been suggested as the best remedy to the barriers that an interprovincial system places on market participants.³ While creating a single national regulator seems like a noble goal, this is difficult to accomplish without the complete cooperation of each province; Parliament's general commerce power is limited by "the organizing principle that the orders of government are coordinate and not

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1. Reference Re Sec. Act, [2011] 3 S.C.R. 837 (Can.).

2. *Id.* at para. 2.

3. See *Peer Review of Canada*, FIN. STABILITY BOARD 30 (Jan. 30, 2012), http://www.financialstabilityboard.org/publications/r_120130.pdf.

subordinate one to the other.”⁴

The Court analyzed the Securities Act under five factors:

- (1) whether the impugned law is part of a general regulatory scheme;
- (2) whether the scheme is under the oversight of a regulatory agency;
- (3) whether the legislation is concerned with trade as a whole rather than with a particular industry;
- (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and
- (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.⁵

Against the backdrop of these factors, the Court found the Securities Act would have the effect of displacing provincial legislation—after a certain number of provinces opted in, provinces who chose not to opt-in would constructively have their provincial legislation displaced.⁶ Further, the Securities Act regulates matters that clearly fall within the provincial powers—and, if adopted, the effect “would be to duplicate and displace the existing provincial . . . securities regimes.”⁷

Focusing on the last three factors, the Court found the Securities Act unconstitutional.⁸ The trading of securities relates to a specific industry.⁹ Under the fourth factor, the Court found the provinces were capable of passing uniform legislation for most of the matters under the Securities Act and could delegate responsibility to a single regulator to accomplish the remaining parts of the Securities Act.¹⁰ The Court does recognize certain limitations of the provinces’ ability to accomplish this.¹¹ The fifth factor appears to be of significance; while the provinces have the choice of opting in to the Securities Act, the Court notes that the national goals of the Securities Act would not be met without participation from all of the provinces.¹²

While recognizing the importance of a single regulatory scheme, the Court held the Securities Act as a whole was unconstitutional under Parliament’s general commerce power.¹³ But the Court holds open the possibility that a similar scheme might succeed under Parliament’s power to regulate interprovincial or international trade.¹⁴ The Court also suggests a cooperative approach would be more appropriate.¹⁵ The Court pointed

4. *See Reference Re Sec. Act*, 3 S.C.R. 837 at paras. 47, 61-62, 71.

5. *Id.* at para. 80 (citing *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 661-662 (Can.)).

6. *Id.* at para. 99.

7. *Id.* at paras. 100, 106.

8. *Id.* at paras. 111, 134.

9. *Id.* at paras. 112, 117.

10. *Id.* at para. 118.

11. *See id.* at para. 121.

12. *Id.* at para. 123.

13. *See id.* at para. 129.

14. *Id.*

15. *See id.* at para. 130.

to the approaches taken by Germany, Australia, and the United States—a national securities regime similar to these models remains a possibility, and this decision is likely a step in that direction.¹⁶

II. CANADA'S ANTI-SPAM LAW

On December 15, 2010, Bill C-28 was passed by the Government of Canada.¹⁷ The purpose of the law is to deter spamming and other deceptive and damaging online threats.¹⁸ On April 24, 2012, the Ministry of Industry stated the law is expected to take effect in 2013.¹⁹ Part of the delay may be attributed to the recent ruling that held the Securities Act unconstitutional and the possibility that Bill C-28 may also raise similar constitutional concerns.²⁰ The law has been categorized by a number of articles as the toughest anti-spam law in the world.²¹ Aside from the rigid requirements and stiff fines, the private right of action and the damages a plaintiff may receive are significant.²²

The thrust of the anti-spam provisions centers on an opt-in requirement. The law prohibits commercial electronic messages to be sent to a person, unless that person has previously consented to receiving the message.²³ There are several exceptions to this general rule, such as product recall information or information related to confirming a transaction that was previously entered into—arguably these would be examples of implied consent, which is permitted.²⁴ There is also a transitional provision, which appears to provide a small measure of grace for the first three years after the law takes effect.²⁵

Additionally, the consent requirement is not limited to e-mail; the Bill defines “electronic message” as “a message sent by any means of tele-

16. *Id.* at paras. 48-52.

17. *Bill C-28: Canada's Anti-Spam Legislation*, INDUS. CANADA, http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h_gv00567.html (last modified Nov. 11, 2011).

18. *Id.*

19. Bernice Karn, *Canada's Anti-Spam Legislation – Potential Delay?*, CASSELS BROCK LAW. (Apr. 26, 2012), http://www.casselsbrock.com/CBNewsletter/The_Cassels_Brock_Report__April_2012#art39908.

20. For a comprehensive discussion analyzing Bill C-28 in light of the Court's recent ruling, see Ravi Shukla, *Constitutionality of Anti-Spam Legislation*, LEXOLOGY (July 10, 2012), <http://www.lexology.com/library/detail.aspx?g=e94047f7-68b8-4e43-951b-67139447c010>.

21. See, e.g., Susanna Sharpe, *Implications of Canada's CASL - Toughest Anti-Spam Law the World Has Ever Seen*, CIRCLEID (Jan. 18, 2012, 12:17 PM), http://www.circleid.com/posts/how_canadas_new_anti_spam_act_could_affect_your_email_marketing/.

22. An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23, § 51 (Can.) [hereinafter Canada's Anti-Spam Legislation].

23. *Id.* § 6(1).

24. See *id.* § 6(6)(a)-(g).

25. *Id.* § 66.

communication, including a text, sound, voice or image message.”²⁶ A “commercial electronic message” is an “electronic message” whose purpose is “to encourage participation in a commercial activity.”²⁷

There is also a requirement that even if the “commercial electronic message” was consented to, it must contain means by which the receiver can opt-out of future messages.²⁸ Once a party indicates a preference to no longer receive any messages from the sender, the sender must give effect to this preference within ten business days.²⁹

The law also provides a broad scope of jurisdiction; if the message is sent or accessed by a computer system in Canada, then the law applies to the sender.³⁰ The word “accessed” suggests that if the e-mail or other form of “electronic communication” was routed through some type of computer system in Canada, then a Canadian court would have jurisdiction.³¹ There are similar express consent requirements to deter against spyware, malware, and other online threats.³²

The Bill provides for both administrative monetary penalties and damages in a private right of action. Only one action may be made, either the administrative or the private right of action.³³ It also appears that whoever brings the case first has a right to proceed.³⁴ In the case of a company or any person not considered to be an individual, the administrative monetary penalties are capped at \$10,000,000.³⁵ While this is no small sum, the private right of action may be even more damaging. In addition to compensatory damages, an individual may also receive a maximum of \$200 for each violation of sending an electronic message without consent, not to exceed \$1,000,000 for each day of occurrence.³⁶ In a case violating the provisions targeted at spyware and other online threats, the maximum fine is \$1,000,000 for each day the violation occurred.³⁷ In the case of a single plaintiff this may not seem daunting. But in the context of a class-action suit, this could easily bankrupt a small business and cause a serious problem for most mid-size businesses. The impact increases in scope when considered along with the three-year limitation period.³⁸

26. *Id.* § 1(1).

27. *Id.* § 1(2).

28. *Id.* §§ 6(2)(c), 11(1).

29. *Id.* § 11(3).

30. John Beardwood & Gabriel M. A. Stern, *Complying with Anti-Spam Legislation: A Cross-Jurisdictional View*, FASKEN MARTINEAU 4 (May 20, 2011), http://www.fasken.com/files/Publication/3a4ad896-e799-4c5e-b4bf-031c49865b1b/Presentation/PublicationAttachment/bb9deb86-0bb8-40e2-a7b5-a009b124484b/IP%20Bulletin_John%20Beardwood_May%202011.pdf.

31. *Id.*

32. *See* Canada’s Anti-Spam Legislation §§ 7-8.

33. *Id.* § 48(1)-(3).

34. *See id.*

35. *Id.* § 20(4).

36. *Id.* § 51(1)(b)(i).

37. *See id.* § 51(1)(b)(ii).

38. *See id.* § 47(2).

If a company sent one e-mail a week to 500 people over the course of two years, and these e-mails were not consented to in accordance with this law, the maximum fine would be \$10,400,000, and this is a very small number of recipients. Thankfully, the law provides that a court must consider a number of factors to determine the amount payable under this law, including the sender's ability to pay.³⁹

While the law appears rather harsh, it contains a number of exceptions and demands the trial court exercise discretion in determining the fine or penalty.⁴⁰ The approach taken by the drafters of the Bill, to make the law broadly inclusive and then carve out some exclusions, appears to be an extremely effective way to combat unsolicited messages. In the end, the law will likely have a strong impact on reducing unwanted e-mails and phone calls, while at the same time have a limited adverse effect on small businesses and other individuals whose conduct may not necessarily be the specific target of this law.

III. THE DISCIPLINARY HEARING OF MR. JOE GROIA AND THE QUESTIONS THAT REMAIN

The Law Society of Upper Canada (Law Society) is Ontario's self-regulating body responsible for regulating, licensing, and disciplining lawyers.⁴¹ On June 28, 2012, a Law Society Hearing Panel (Tribunal) found Mr. Joe Groia guilty of professional misconduct.⁴² The charge was incivility, or in the words of the Tribunal, "not incivility *per se*, but rather the effect of a licensee's alleged uncivil conduct on the administration of justice."⁴³ This is a contentious topic and it should be noted that this article is not proposing that civility is unimportant, but merely suggesting—with the upmost respect for the Law Society of Upper Canada—that the Tribunal may have, in this case, expanded the definition of civility so dramatically as to cause confusion and injury to the public.

A. INTRODUCTION

This article cannot, in this limited space, undertake a detailed examination of the trial court transcript and evaluate the Law Society's ruling—nor is this necessary to point out some of the questionable aspects of the ruling. Rather, this article will focus on three primary aspects of the ruling that are especially troubling. First, the Law Society failed to clearly define civility; it appears to have held that context has no bearing on whether one's conduct is civil. Second, there were issues surrounding the evidence. The Tribunal failed to distinguish between the standard of

39. *See id.* § 51(3)(a)-(i).

40. *See id.* § 6(1), 6(6)(a)-(g).

41. *About the Law Society*, LAW SOC'Y UPPER CANADA, <http://www.lsuc.on.ca/with.aspx?id=905> (last visited Jan. 3, 2013).

42. *Law Soc'y of Upper Can. v. Joseph Peter Paul Groia*, [2012] ONLSHP 0094 (Can.).

43. *Id.* at para. 21.

proof and the evidentiary burden; but more importantly, a conflict of interest was created when it chose to consider the appellate court transcripts. Third, no one recommended the Law Society look into this matter—this was a unilateral action by the Law Society that appears to have been spurred on by the news media.

B. BACKGROUND

A brief background of the events leading up to this ruling is necessary to understand the impact and the unanswered questions left in its wake. In 1997, Mr. Groia was retained as counsel by Mr. John Felderhof who was charged with eight securities violations by the Ontario Securities Commission (the Commission or OSC).⁴⁴ During the first seventy days of the trial there was evidence of several disputes between the prosecution and defense involving “the admissibility of evidence and by countless accusations of prosecutorial misconduct made by Mr. Groia.”⁴⁵ This constant back and forth between the prosecution and defense culminated in an application by the prosecution, made on April 17, 2001, to have the judge presiding over the trial removed.⁴⁶ Both the Superior Court of Ontario and the Court of Appeal for Ontario dismissed the application, finding that Justice Peter Hryn did not lose jurisdiction and should continue to hear the case.⁴⁷ But in making this determination, both courts made extensive comments on Mr. Groia’s inappropriate conduct.⁴⁸ These comments were admitted into evidence and served as a basis for the Law Society’s finding that Mr. Groia was guilty of professional misconduct.⁴⁹ The Tribunal held that to permit Mr. Groia to re-litigate these comments would amount to “an abuse of process.”⁵⁰ After the application for Justice Hryn’s removal was denied and the case was remanded, the Commission retained new counsel, and the case proceeded without any further incident.⁵¹ Mr. Groia’s client was acquitted of all charges in 2007.⁵² And in 2009, the Law Society issued Mr. Groia notice of this disciplinary proceeding.⁵³ The disciplinary hearing of Mr. Groia appears to be entirely based on the conduct occurring during the first seventy days of the trial, just prior to the application from the prosecution to have the trial judge removed.⁵⁴

C. CIVILITY

The Tribunal openly acknowledges there is no single definition of civil-

44. *Id.* at paras. 4, 7.

45. *Id.* at para. 9.

46. *Id.* at para. 10.

47. *Id.* at paras. 12-13.

48. *Id.*

49. *Id.* at paras. 110-11, 156, 178-80, 184-87, 189.

50. *Id.* at para. 96.

51. *Id.* at para. 14.

52. *Id.*

53. *Id.* at para. 16.

54. *See id.* at paras. 14, 97.

ity.⁵⁵ Several sources are listed, and perhaps by cobbling together the various excerpts one could come up with some basis against which the Tribunal is measuring Mr. Groia's conduct. The Tribunal quotes the Supreme Court of Canada (the Court) in the context of a lawyer who has written a private letter to a judge criticizing his ruling; the pertinent part defines incivility as "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy."⁵⁶ In the same decision the Court stated, "[o]n the other hand, lawyers should not be expected to behave like verbal eunuchs. *They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.*"⁵⁷ The Court of Appeal for Ontario described incivility as "[u]nfair and demeaning comments."⁵⁸

The Tribunal made several other references to what civility may or may not look like, but settled on a rather vague definition, stating that incivility does not necessarily require "the use of a profane language, extreme rudeness, violence, harassment or racial epithets[;]" rather, "[a] pattern of conduct that includes persistent attacks and sarcasm directed at opposing counsel can form the basis of incivility."⁵⁹

As noted by the Tribunal, Mr. Groia's controversial comments were made in the first phase of the trial and centered primarily on the prosecutor's failure to comply with the court's rulings regarding document production, and the position taken by the Commission that arguably continued throughout the first phase of this trial—specifically, that the Commission's "goal [was] simply to seek a conviction."⁶⁰

There is ample evidence the Commission had serious shortcomings in their disclosures. The lead investigator stated these shortcomings were due to "budgetary considerations."⁶¹ There was evidence to suggest the prosecutor agreed that a number of documents were authentic and relevant and then subsequently took the contrary position.⁶² There was evidence that after failing to disclose all documents, the prosecution's solution was to produce 197 more boxes, which they alleged would, finally, comply with the judge's order.⁶³

Indeed, it was not Mr. Groia, but rather the prosecutor, who was censured for challenging the court's rulings "in a context strongly suggesting that they were presumptively wrong and unfair."⁶⁴ Yet, the Tribunal found there was no evidence of prosecutorial misconduct because Mr. Groia's client was not acquitted on the basis of prosecutorial misconduct

55. *Id.* at para. 56.

56. *Id.* at para. 59.

57. *Id.*

58. *Id.* at para. 66.

59. *Id.* at para. 62.

60. *Id.* at para. 116.

61. *Id.* at para. 115.

62. *See, e.g., id.* at para. 142.

63. *Id.* at para. 118.

64. *Id.* at para. 173.

and “[i]ncidents such as the OSC’s refusal to produce the relevant documents and the manner in which the prosecution tendered them did not amount to prosecutorial misconduct.”⁶⁵

This is slightly concerning, but what is more concerning is the Tribunal’s finding that because Mr. Groia did not seek a stay and pursue a motion based on prosecutorial misconduct, his only motivation must have been to disrupt the proceedings by provoking the prosecution.⁶⁶ And perhaps most concerning of all, the Tribunal found Mr. Groia fell short of his “overriding duty to ensure that the trial was conducted fairly and efficiently, and in an atmosphere of calm.”⁶⁷ The Tribunal found that the duties Mr. Groia owed to his client were second to ensuring an efficient trial and an “atmosphere of calm.”⁶⁸ So, where is this coming from? The Tribunal quotes the Court:

But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.⁶⁹

The Court is stating that counsel should not mislead the court, make baseless accusations, or withhold documents. This is commonly understood and accepted, but it lends nothing to the Tribunal’s statement that Mr. Groia should have been more concerned with the trial being conducted efficiently and in an “atmosphere of calm” than he should have been with defending his client. Ironically, the last portion of this quote explicitly states that one must not withhold documents they are required to produce, yet according to the Tribunal, “the OSC’s refusal to produce the relevant documents . . . did not amount to prosecutorial misconduct.”⁷⁰

Additionally, the Tribunal states that the conduct of the opposing counsel cannot serve as justification for one’s own conduct.⁷¹ Perhaps this is true in some instances, but where the basis of the charge is incivility rooted in false accusations that were allegedly unjustified, common sense would dictate that if the accusations had some basis—and were grounded in the misconduct of opposing counsel—then the Tribunal must address

65. *Id.* at para. 177.

66. *Id.* at para. 135.

67. *Id.* at para. 137.

68. *Id.*

69. *Id.* (quoting *R. v. Lyttle*, [2004] 1 S.C.R. 193, para. 66 (Can.)).

70. *Id.* at para. 177.

71. *Id.* at para. 182.

this fact.⁷² There was clearly some basis for all of the accusations Mr. Groia laid against the prosecution.

While finding that Mr. Groia failed to conduct the trial in an efficient and calm manner, the Tribunal concluded Mr. Groia did not have a basis to make these allegations, and because they were unjustified, they constituted conduct that fell below the standards of professional conduct.⁷³ But this, the heart of the ruling by the Tribunal, highlights the confusion and the lack of clarity caused by this decision.

The Tribunal would not recognize any evidence Mr. Groia put on regarding the conduct of the prosecution because it claimed this evidence had no bearing on Mr. Groia's conduct and was not a valid defense, nor did the Tribunal even call any members of the prosecution as witnesses.⁷⁴ The Tribunal would not let Mr. Groia relitigate the issues raised by the Superior Court of Ontario and the Court of Appeal for Ontario, despite the fact that these statements were made in the context of the prosecution's application to have the trial judge removed.⁷⁵ The Tribunal focused the discussion on Mr. Groia's failure of his overriding duty to ensure the trial was conducted efficiently and in an "atmosphere of calm,"⁷⁶ and then found that the "attacks on the prosecution were unjustified and therefore constituted conduct that fell below the standards of principles of civility, courtesy and good faith required by the *Rules of Professional Conduct*."⁷⁷ The end of the Tribunal's reasoning appears to rest solidly on the grounds that Mr. Groia was intentionally misleading the court.⁷⁸ This appears to be illogical. If the misconduct was based on unjustified attacks and misleading the court, then why was the conduct of the opposing counsel irrelevant? Why would the Tribunal not allow Mr. Groia to defend against the statements found in the rulings by the Superior Court of Ontario and the Court of Appeal for Ontario?

D. THE BURDEN OF PROOF AND THE CREATION OF A CONFLICT OF INTEREST

The burden of proof in a disciplinary hearing before the Law Society is the civil standard, which is proof on a balance of probabilities; otherwise put—more likely than not.⁷⁹ While the Tribunal appears to have grasped this point well, it appears to have failed to understand that regardless of the standard of proof, the evidence must always be "clear, convincing and

72. *Id.* at para. 190.

73. *Id.*

74. *Id.* at paras. 26, 182.

75. *Id.* at para. 96.

76. *Id.* at para. 137.

77. *Id.* at para. 190.

78. *Id.* at para. 189.

79. *How to Prepare for an Ontario Tribunal Hearing*, LAW SOC'Y UPPER CANADA, <http://rc.lsuc.on.ca/jsp/ht/prepareForTribunalHearing.jsp> (last updated June 2012); see also *F.H. v. McDougall*, [2008] 3 S.C.R. 41, paras. 40-44 (Can.).

cogent.”⁸⁰ The Law Society mistakes the burden of proof for the evidentiary burden when it rejects a high evidentiary standard.⁸¹

While the standard of proof states that the evidence must establish that Mr. Groia is more likely than not guilty of misconduct — the evidence to support this conclusion must still be “clear, convincing and cogent.”⁸² The Court explicitly stated this when the Court held, “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.”⁸³ The effect of neglecting this distinction can lead to a critical error, specifically in this case where the Law Society relied heavily on the admonishments of the Superior Court of Ontario and the Court of Appeal for Ontario to support a finding that Mr. Groia was guilty of incivility.⁸⁴

The purpose of these hearings before the Superior Court of Ontario and the Court of Appeal for Ontario was not to determine whether or not Mr. Groia’s conduct was acceptable; the purpose was to determine whether the trial judge should be removed.⁸⁵ Mr. Groia was not a party to these proceedings; he was not even the lawyer who represented the defense in these proceedings.⁸⁶

The Tribunal openly acknowledges this and proceeds to suggest, “as a matter of substance,” that he was a party to these proceedings.⁸⁷ The Tribunal’s ruling does not address the fact that the defense was concerned with the case against its client, not the critiques of Mr. Groia’s conduct. By holding that the statements made by the Superior Court of Ontario and the Court of Appeal for Ontario constituted evidence, the Tribunal appears to suggest that the defense should have focused their appeal on Mr. Groia’s comments.

The appellate transcripts do not have any inherent probative value nor are they relevant. Unless the Tribunal cannot independently define civility and must rely on the appellate courts to tell them what it is, there is no reason why Mr. Groia’s conduct should be analyzed in any other context than that of a complete trial transcript. This would not be such an issue except for the fact that by considering the transcripts of these appellate courts the Tribunal is creating a conflict of interest. Instead of advocating for his client, the lawyer must now advocate for himself or suffer the consequences of having this admitted in a disciplinary hearing. This is fur-

80. *Compare Law Soc’y of Upper Can.*, [2012] ONLSHP 0094, para. 25 (erroneously conflating the evidentiary burden and the civil standard of proof), with *McDougall*, 3 S.C.R. 41, paras. 45-46 (“[t]here is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge . . . [s]imilarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”).

81. *Law Soc’y of Upper Can.*, [2012] ONLSHP 0094, para. 25.

82. *McDougall*, 3 S.C.R. 41, para. 46.

83. *Id.*

84. *See, e.g., id.* at para. 97.

85. *See id.* at paras. 10-13.

86. *Id.* at paras. 39, 91.

87. *Id.* at para. 92.

ther highlighted by the fact that the Tribunal would not permit Mr. Groia to relitigate these issues during the disciplinary hearing.⁸⁸

E. THE "INVESTIGATION"

The Tribunal goes to great lengths to express the importance of self-regulation.⁸⁹ This slowly evolves into the statement that, "[t]he self-governing aspect of law societies in the public interest, as well as the unique position of their disciplinary panels to determine when incivility crosses the line, is well-recognized."⁹⁰ But the Law Society should be a self-regulating body, not an organization prone to be swayed by the latest headlines. Not a single individual appears to have lodged any complaint against Mr. Groia. The Law Society appears to have first learned about Mr. Groia's conduct from a news report, and it remains unclear whether the Law Society even read the transcript of the trial court prior to filing a notice of the hearing against Mr. Groia.⁹¹

These facts suggest the possibility that the Law Society had an agenda prior to bringing trial against Mr. Groia; this is further supported by the Tribunal's statements regarding a recent decline in civility that raises some concerns.⁹²

F. CONCLUSION

There is no doubt that during a trial a lawyer can cross the line and say something that is quite uncalled for, but this recent finding of misconduct does little to suggest where the line is actually crossed, or to what extent a lawyer's inappropriate response may be tempered by the circumstances. Additionally, this ruling creates a conflict of interest by finding Mr. Groia should have refuted or appealed the comments made by the Superior Court of Ontario and the Court of Appeal for Ontario. This conflict is further amplified by the Tribunal's holding that the comments are irrefutable persuasive evidence of Mr. Groia's misconduct. Most significantly, the Tribunal suggests that a lawyer's duties to his client are second to the duties of ensuring the trial is conducted in an efficient and calm manner.

Civility is important, an interest that has long been recognized, but the Tribunal's concept of civility is over-aggressive. Civility in the context of refraining from misleading the court, refraining from making racial epithets, or cursing, is one thing—these likely take precedence over a lawyer's duty to fiercely advocate for his client. But efficiency and calm should not be wrapped into the same category as misleading a tribunal, nor should efficiency and calm take precedence over the duty to zealously advocate.

88. *Id.* at para. 96.

89. *Id.* at paras. 74-80.

90. *Id.* at para. 79.

91. *Id.* at paras. 18, 20.

92. *Id.* at para. 72.

