Syllabus

Canadian Professional Responsibility

(Revised for August 2019)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.
Canadian Professional Responsibility

PART I. INTRODUCTION and ADMINISTRATION

A. Overview

This is a course prepared for the Federation of Law Societies of Canada (“FLSC”\(^1\)), National Committee on Accreditation (“NCA”\(^2\)). It is designed to cover the fundamental concepts of professional responsibility in the Canadian legal profession.

The regulation of lawyers in Canada is a matter primarily within the jurisdiction of the provinces.\(^3\) Because the laws, rules and regulations that govern lawyers, including professional codes of conduct, are currently different for each province and territory, this course does not purport to cover (and students are not expected to read) the different regulatory regimes of all of the different provinces. Rather, for purposes of this course, the FLSC’s Model Code of Professional Conduct (the “Model Code”\(^4\)) will be referred to as the basic and primary model guide for professional conduct in Canada. It is therefore anticipated that each student, after successfully completing this course (including the course examination), will become very familiar with the laws, rules and regulations of the given provincial or territorial jurisdiction in which he or she intends to become a member of the bar.

B. Course Objectives

The course has three main objectives.

(1) Concepts. The first objective is two-fold: to look at what the landscape of the legal profession in Canada is, can, and should be; and then to situate lawyers, their conduct and their dealings with clients and the profession in that landscape. The course also looks more broadly at various aspects of lawyering and the profession, including self-regulation, the nature of the adversary system, demographics and diversity, ethical tensions between zealous representation and a commitment to the public interest and access to justice. The course also looks at the ethical and professional obligations associated with specific practice roles and contexts. Overall, it is hoped that students will develop a sense of what the profession is about and what lawyers’ professional roles and responsibilities are in the profession.

(2) Skills. The second objective of the course – with specific reference to the Model Code – is to help students to think about what professional issues arise in practice, how they arise and how they can – and in some cases must – be dealt with.

\(^1\) Online: FLSC <http://www.flsc.ca/>.

\(^2\) Online: FLSC <http://www.flsc.ca/enca/>.

\(^3\) For a general description and some useful links, see FLSC, “Canada’s Law Societies”, online: FLSC http://flsc.ca/about-us/our-members-canadas-law-societies/.

(3) **Focused Critical Thinking.** The third objective of the course is to encourage students to think critically and imaginatively about the legal profession’s current and future opportunities and challenges. Thinking about what works, what doesn’t and alternatives is encouraged.

**C. Format, Materials and Readings**

**Format.** This course is designed to be self-taught. The required readings (see below) provide the basic course materials.

**Materials.** This course has three primary sources of materials:


(b) the *Model Code*. When reading the Model Code, students should read both the rules and the relevant commentaries. Students should also become familiar with the Table of Contents to the Model Code and be able to find the various provisions that might apply to a given issue or problem; and

(c) the edited versions of the *Groia* and *Trinity Western* Supreme Court of Canada cases.

**Required Readings.** The required readings for each topic are set out in this course outline (below). These are the readings that students are expected to read and with which they should become familiar for purposes of the course examination. From time to time further materials are also included as required readings to supplement the materials in the Casebook.

**Problems and Issues.** Each topic in this course outline has a list of non-exhaustive “issues to consider” that are included to help focus students’ thinking when going through the various topics and materials. There are also notes, questions and scenarios included in the Casebook that are useful tools to assist students when reviewing the materials and studying for the course examination.

**Further (Optional) Materials.** From time to time further (optional) materials are included in this course outline as well as at the end of each chapter of the Casebook. These optional materials are included to provide students with further background information on a given topic and to

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5 *Supra* note 4.

help students who are looking for more assistance or who want to think further about a given issue. They are not, however, required for purpose of the course examination. As such, they are truly “optional” materials.⁶

D. Evaluation

Evaluation for this course is based on a 100%, open-book, written examination. Further details about the examination and grading requirements for this course are available from the NCA.⁷

PART II. COURSE OUTLINE and READINGS

A. The Legal Profession: Lawyers in Society and a Society of Lawyers

Purpose. This first section of the course – Part A – considers two fundamental and recurring general questions: what is the legal profession and what is the role of the lawyer in the profession? These general questions are designed to get students thinking about what the legal profession is and its relationship with (and difference from) other commercial endeavours in society; and the role of the lawyer – specifically including the relevance of personal integrity, morality, honour, etc. – vis-à-vis clients, the profession and the public.

1. Professions and Professionalism: The Profession of Law and Law as a Profession

Issues to Consider:

a) What is a profession?
b) What is the “public interest”?
c) The role of lawyers and the profession in legal process and the regulation of society.
d) Law as a business and law as a profession: what is the difference? Is there a conflict? Must it be a “one-or-the-other” question? What is at stake in this discussion?
e) The power, opportunity and responsibility of lawyers in society.
f) What is legal ethics? What is the orientation of the lawyer’s value framework? What role do various principles play in determining the obligations of a lawyer? Loyalty? Integrity? Justice?
g) Lawyers’ obligations to themselves, clients, the court and society: is there a conflict?
h) Lawyers as moral or morally neutral actors: should personal honour, personal morality, etc. play a role in the lawyering process? What are the various arguments on either side of this question? What Model Code provisions animate both sides of this question? If there is a conflict, how should it be resolved? Whose morals are we talking about: the lawyer’s, clients’, society’s, others?

Required Readings:

(2) Casebook, Chapter 1.

7 Supra note 2.

**Further (Optional) Materials:**

1. American Bar Association ("ABA"), Model Rules of Professional Conduct, “Preamble and Scope”, online: ABA
   https://www.americanbar.org/groups/professional_responsibility/publications/model_rule
   s_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html

2. Chief Justice of Ontario Advisory Committee on Professionalism, "Elements of Professionalism",
   https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/d/definingprofessoct

2. Regulation of Lawyers and Regulation of the Legal Profession

**Issues to Consider:**

a) The roles and responsibilities of law societies in the governance of the legal profession. What are their purposes? Are these purposes being achieved? What alternatives might be considered?

b) Structure of the legal profession.

c) The source, meaning, opportunity and responsibility of self-regulation.

d) Statutory and ethical regimes.

e) Education.

f) Good character requirement to practice law.

g) Accountability and the public interest.

h) Competence.

i) Admission, conduct and discipline.

j) Unauthorized practice.

k) Language rights.

**Required Readings:**

1. Casebook, Chapters 2, 3(C), 13.


3. Briefly skim the basic governing and regulatory materials for one Canadian jurisdiction.  


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8 Students should not spend a significant amount of time on this reading assignment. The point is for students simply to become aware of the basic governing and regulatory materials for a given jurisdiction (typically the jurisdiction in which a student plans to practice). For example, if a student were to pick Alberta as the jurisdiction for review, they would link to and skim three sets of materials: the website for the LSA (online: LSA <http://www.lawsocietyalberta.com/>), the Alberta Legal Profession Act, S.A. 1990, c. L-8 (online: Alberta Queen’s Printer <http://www.qp.gov.ab.ca/documents/Acts/L08.cfm?frm_isbn=0779732790>), and the LSA Code
of Conduct (online: LSA <http://www.lawsociety.ab.ca/lawyers/regulations/code.aspx>). This exercise is not for students to become fully familiar with each of these sets of materials; rather it is for students simply to become aware of some of the primary governing and regulatory materials in a given jurisdiction. For links to some of these regulatory materials for the various Canadian jurisdictions, see FLSC, "Publications and Resources", online: FLSC <http://www.flsc.ca/en/resources/>.

Further (Optional) Materials:

(2) LSO, “Protecting the Public”, online: LSO https://lso.ca/protecting-the-public?lang=en-ca
(4) LSO, “Paralegals”, online: LSO https://lso.ca/paralegals (skim various reports).

Provincial and Territorial Law Societies (Optional):⁹

(1) LSBC, online: https://www.lawsociety.bc.ca/
(2) LSA, online: https://www.lawsociety.ab.ca/
(3) Law Society of Saskatchewan, online: https://www.lawsociety.sk.ca/
(4) Law Society of Manitoba, online: http://www.lawsociety.mb.ca/
(5) LSO, online: https://lso.ca/
(6) Barreau du Québec, online: http://www.barreau.qc.ca/fr/
(7) Chambre des notaires du Québec, online: http://www.cnq.org/
(8) Law Society of New Brunswick, online: http://lawsociety-barreau.nb.ca/en
(9) Nova Scotia Barristers’ Society, online: http://nsbs.org/
(10) Law Society of Prince Edward Island, online: http://lawsocietypei.ca/
(11) Law Society of Newfoundland & Labrador, online: http://www.lawsociety.nf.ca/
(12) Law Society of Yukon, online: http://www.lawsocietyyukon.com/
(13) Law Society of the Northwest Territories, online: http://www.lawsociety.nt.ca/
(14) Law Society of Nunavut, online: http://lawsociety.nu.ca/

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⁹ These optional links are provided simply for students’ information regarding regional regulatory policies and requirements. See further supra note 3.
B.  Ethics, Lawyering and Professional Regulation

This section of the course addresses the general roles and responsibilities of the lawyer that arise in many, and in some cases all, aspects of the practice of law. The next part examines the obligations of lawyers in some specific practice contexts.

1.  The Lawyer-Client Relationship

This section of the course starts with a consideration of the lawyer-client relationship itself, including the creation of the relationship, the factors that influence and motivate lawyers and clients in this relationship, the general obligations of lawyers in the relationship and the circumstances that lead to the termination of the relationship. Throughout the discussion are various obligations, generated by law or by Codes of Professional Conduct, which are expected to frame and guide the lawyer’s conduct.

Issues to Consider:

a) When does a lawyer-client relationship come into existence?
b) What choices are available to the lawyer with respect to accepting clients?
c) What significance, for the lawyer and for the client, is the existence of the relationship?
d) What obligations for the lawyer arise as a result?
e) What are the motivations of lawyers, and the techniques they use, to acquire clients?
f) Are all of these motivations and techniques appropriate?
g) What larger values do they advance or undermine?
h) What circumstances lead to the termination of the relationship and what are the implications for the lawyer? For the client?

Required Readings:

(1) Casebook, Chapter 3, excluding Part C

2.  The Preservation of Client Confidences

This section addresses the lawyer’s obligation to preserve the confidences of his or her client. It examines the centrality of this obligation in virtually all lawyer-client relationships and the reasons for its importance, both in individualized terms between individual lawyers and clients and in systemic terms related to the functioning of the justice system as a whole. The section examines the sources of the lawyer’s obligations, the legal and ethical features of the obligations and the circumstances where exceptions to the obligations have been established.

Required Readings:

(1) Casebook, Chapter 4
(2) Model Code, Chapter 3, Rule 3.3 and Commentaries; Rule 3.5-6 and Commentary; Rule 3.7 and Commentaries.
3. Conflicts of Interest

One of the most important obligations of lawyers in any context is to avoid conflicts of interest. This subject has been extensively addressed by Canadian courts and by the legal profession itself in efforts to ensure that clients and others have confidence in the appropriateness of lawyer representation of clients and, correspondingly, in the administration of justice itself. These obligations have placed lawyers in difficult situations and have had significant implications for client representation. As well, more than in most other areas of legal ethics, they have engaged the question of whether the practice of law is a business or a profession.

Issues to Consider:

a) When does a lawyer-client relationship come into existence?
b) Origins of conflicts of interest.
c) Sources and types of conflicts of interest: ethical, legal, economic, etc.
d) Client loyalty.
e) Changing firms: potential conflicts involving law students and lawyers.
f) Avoiding conflicts.
g) Remedies.
h) The implications for lawyers, clients and the administration of justice.
i) Is the current balance – largely framed for example by the Supreme Court of Canada in Martin, Neil, Strother and now McKercher – fair? Efficient?

Required Readings:

(1) Casebook, Chapter 5.
(2) Model Code, Chapter 3, Rule 3.4 and Commentaries.

4. The Adversary System and Lawyers as Advocates

Issues to Consider:

a) The adversary system and its impact on professional obligations.
b) Lawyers as advocates.
c) Lawyers as counsellors.
d) Truth and rights.
e) Candour.
f) Zealous representation.
g) Duties to clients, opposing counsel, the court, other parties (including un-represented litigants) and society.
h) Civility.
i) Document production.
j) Trial tactics, evidence and disclosure.
k) Witness preparation, conduct and perjury.
Required Readings:

(1) Casebook, Chapter 6.
(2) Model Code, Chapter 5; Chapter 3, Rule 3.7 and Commentaries.
(4) Groia v. Law Society of Upper Canada, 2018 SCC 27 (see edited version).

C. Some Specific Practice Areas

There are different practice areas and contexts in the Canadian legal profession, including, for example, criminal law, corporate law, family law, general civil litigation, poverty law, government lawyering, in-house counsel, etc. This section of the course aims to achieve at least the following: (i) to give students an appreciation of the range of obligations to clients, and the limits to these obligations, that arise in some of these various lawyering roles and contexts; (ii) to introduce students to the ways in which certain roles of lawyers have very specific, sometimes unique ethical and professional obligations associated with them in Canada; and (iii) to examine and critique these various obligations in the context of some of the overarching principles discussed in the initial parts of the course.

General Issues to Consider:

a) Is there a difference from an ethical perspective between the various practice areas and contexts?
b) Should there be?
c) Does the Model Code adequately contemplate these various practice situations?

1. Ethics and Dispute Resolution: Counselling and Negotiation

Issues to Consider:

a) When does a lawyer-client relationship come into existence?
b) Lawyer as negotiator, mediator and arbitrator.
c) Disclosure obligations.
d) Lies, misrepresentations and misleading truths: is there a difference?
e) Conflicts of interest.
f) Confidentiality.
g) Are adversarial rules helpful?
h) Expanding nature of legal services.
i) Collaborative lawyering.

Required Readings:

(1) Casebook, Chapter 7.
(2) Model Code, “tribunal”, Chapter 3, Rule 3.2-2 and Commentary; Chapter 5, Rule 5.7 and Commentaries; Chapter 7, Rule 7.2 and Commentaries.
Further (Optional) Materials:


2. Ethics and the Practice of Criminal Law

Required Readings:

(1) Casebook, Chapter 8.

(2) Model Code, Chapter 3, Rule 3.5-6 and Rule 3.5-7 and Commentaries; Chapter 5, Rule 5.1 and Commentaries.


3. Lawyers in Organizational Settings: Corporate Counsel

Required Readings:

(1) Casebook, Chapter 9.

(2) Model Code, Chapter 3, Rules 3.2-3, 3.2-7, 3.2-8 and Commentaries.

4. Government Lawyers

Required Readings:

(1) Casebook, Chapter 10.

(2) Model Code, Chapter 3, Rules 3.2-3, 3.2-7, 3.2-8 and Commentaries; Chapter 7, Rule 7.4 and Commentaries.

D. Access to Justice

This final part of the course looks at the delivery of legal services. Students should specifically consider various access problems, potential remedies and the role of lawyers and the profession with regard to issues of access to legal services in particular, and access to justice more generally.

Issues to Consider:

a) Access to legal services.

b) Who should pay: clients, their lawyers and/or society?

c) What are the problems and possible solutions?
d) Pro bono obligations.
e) Legal aid.
f) Community clinics.
g) Legal fees.
h) Insurance and pre-paid legal regimes.
i) Contingency fees.
j) Paralegals.
k) Class actions.

Required Readings:
(1) Casebook, Chapter 12.
(2) Model Code, Preface; Chapter 3, Rule 3.1 and Commentaries; Chapter 5, Rule 5.6-1 and Commentary; Chapter 7, Rule 7.6 and Commentaries.

Further (Optional) Materials:
(1) Action Committee on Access to Justice in Civil and Family Matters, Working Group Reports, online: Canadian Forum on Civil Justice http://www.cfcj-fcjf.org/action-committee.10

10 Students should simply skim the various materials and publication links collected on this website to become aware of some of the problems and potential policies and solutions. Students are not required to read all of these documents in significant detail.
Appendix:

Groia v. Law Society of Upper Canada


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

- M.J. MOLDAVER J.:--

  1. 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. 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.

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.

…

[Mr. Groia subsequently appealed to the Ontario Superior Court of Justice – Divisional Court and eventually to the Ontario Court of Appeal, and eventually to the Supreme Court of Canada.]

Analysis

[MOLDAVER J. found that the standard of review of the Appeal Panel’s decision was '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. …

(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 conscience 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. …

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. …

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: …

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 …

70 The Appeal Panel Accounted for the Relationship Between Civility and Resolute Advocacy

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": … 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.

…

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. …

• (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: …

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.
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. …

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. …

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": …

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: … Unreasonable allegations, therefore, do nothing to advance the client's case. An ethical standard prohibiting such allegations does not impair resolute advocacy. …

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.

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".

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.

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.
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.

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.

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.

The Manner and Frequency of the Lawyer's Behaviour

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:

Considering the manner and frequency of the lawyer's behaviour was reasonable. …

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: … […]
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.

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. …

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…

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…. judicial intervention "might simply excite further provocation" on the lawyer's part, thereby frustrating the goal of maintaining an orderly, fair proceeding. 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.... 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. …

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

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. …

(2)

Application to Mr. Groia's Case
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.

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.

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.

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

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.

Moldaver J. then reviewed a series of examples in which the Appeal Panel found, based on Mr.
Groia’s good faith legal errors, constituted unreasonable behaviour on the part of Mr. Groia.

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.

…

• (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

(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.

• (iii)

The Manner in Which Mr. Groia Brought His Allegations

… 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.
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.

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

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.

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.

Appeal Allowed

[COTE J. disagreed with aspects of the approach taken by the majority with respect to the standard of review but J concurred in the Majority judgment]

A. KARAKATSANIS, C. GASCON AND M. ROWE JJ. Dissented. They agreed with Moldaver J.’s approach to the standard of review but disagreed with the way in which he applied the standard:

‘on the basis that 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.” On the latter point the minority expresses concerns that the decision will have the effect of:

- Immunizing Accusations Based on Honestly Believed Legal Errors;
- Validating Uncivil Conduct; and
- the culture of the legal profession and the administration of justice.]
The following is the judgment delivered by

Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. —

I. Overview

[1] Trinity Western University (TWU), an evangelical Christian postsecondary institution, seeks to open a law school that requires its students and faculty to adhere to a religiously based code of conduct prohibiting “sexual intimacy that violates the sacredness of marriage between a man and a woman”.

[2] At issue in this appeal is a decision of the Law Society of British Columbia (LSBC) not to recognize TWU’s proposed law school. TWU and Brayden Volkenant, a graduate of TWU’s undergraduate program who would have chosen to attend TWU’s proposed law school, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC’s decision violated religious rights protected by s. 2 (a) of the Canadian Charter of Rights and Freedoms. The Court of Appeal for British Columbia found that the LSBC should have approved the law school.

[3] In our respectful view, the LSBC’s decision not to recognize TWU’s proposed law school represents a proportionate balance between the limitation on the Charter right at issue and the statutory objectives governing the LSBC. The LSBC’s decision was therefore reasonable.

II. Background

A. The Parties

[4] TWU is a privately funded evangelical Christian university located in Langley, British Columbia. It offers around 40 undergraduate majors and 17 graduate programs spanning an array of academic disciplines and subjects, all taught from a Christian perspective. Its object is “to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian” (Trinity Western University Act, S.B.C. 1969, c. 44, s. 3(2)).

[6] TWU’s curriculum is developed and taught in a manner consistent with its religious worldview. The foundational beliefs of evangelical Christianity are also reflected in TWU’s Community Covenant Agreement (Covenant). The Covenant requires TWU community members to “voluntarily abstain” from a number of actions, including harassment, lying, cheating, plagiarism, and the use or possession of
alcohol on campus. At the heart of this appeal, however, is the Covenant’s prohibition on “sexual intimacy that violates the sacredness of marriage between a man and a woman” (A.R., vol. III, at p. 403).

[7] All TWU students and faculty must sign and abide by the Covenant as a condition of attendance or employment. The behavioural expectations set out in the Covenant apply to conduct both on and off campus. A student’s failure to comply with the Covenant may result in disciplinary measures including suspension or permanent expulsion. Students are expected to hold each other accountable for complying with the Covenant; disciplinary processes may be initiated as a result of a complaint by a TWU student regarding another student’s behaviour.

[8] While a large proportion of the students who enroll at TWU identify as Christian, TWU says that its students may, and in fact do, hold and express diverse opinions on moral, ethical and religious issues and are encouraged to debate different viewpoints inside and outside the classroom.

[10] The LSBC is the regulator of the legal profession in British Columbia. The LSBC’s structure, object and powers are set out in its governing statute, the Legal Profession Act, S.B.C. 1998, c. 9 (LPA). The LSBC has the statutory authority to determine who may be admitted to the British Columbia bar (see LPA, ss. 19 to 21).

B. TWU’s Proposed Law School

[11] Over two decades ago, TWU decided that it wished to establish a faculty of law and to add a three-year juris doctor (J.D.) common law degree program to its degree offerings. In June 2012, TWU submitted its proposal to British Columbia’s Minister of Advanced Education for the approval required to be able to grant law degrees, pursuant to the Minister’s authority under the Degree Authorization Act, S.B.C. 2002, c. 24, s. 4(1).

[12] TWU also submitted its proposal to the Federation of Law Societies of Canada, which received delegated authority from each of the provincial law societies in 2010 to ensure that new Canadian common law degree programs meet established national requirements. In December 2013, the Federation granted preliminary approval to TWU’s proposed law school program. The following day, the Minister granted approval to TWU’s proposed law school, authorizing TWU to grant law degrees to its graduates.

C. The LSBC’s Decision Not to Approve TWU’s Proposed Law School

[13] Under the LSBC’s Rules, adopted pursuant to the LPA, enrollment in the LSBC’s bar admission program requires proof of “academic qualification”. Under Rule 2-27 (now Rule 2-54 of the Law Society Rules 2015), this requirement is met with a bachelor of laws or equivalent degree issued by an “approved” common law faculty of law in a Canadian university.
A common law faculty of law is “approved” for the purposes of Rule 2-27 if it has been approved by the Federation “unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law”.

Therefore, when the Federation granted its preliminary approval to TWU’s law school on December 16, 2013, the law school became an “approved” faculty of law under the LSBC’s Rule 2-27, unless the Benchers declared that it was not.

[During a February 2014 meeting, the LSBC Benchers confirmed that they would vote on whether to approve a resolution declaring that TWU was not an approved faculty of law. That declaration failed and the TWU faculty continued to be approved. The members of the LSBC requested and held a Special General Meeting to consider a resolution directing the Benchers to declare that the TWU faculty of law was not approved. At the meeting, the proposed resolution was adopted. The Benchers decided to hold a referendum of LSBC members. The Benchers agreed that they would be bound by the results if (1) at least 1/3 of members voted and (2) at least 2/3 of those voting supported the resolution. In the referendum, 5951 voted in favour of the resolution, 2088 voted against. The Benchers passed a resolution declaring that the proposed faculty was not approved. The Minister later withdrew approval under the Degree Authorization Act.]
21(1)(b) of the *LPA*. However, ss. 20(1)(a) and 21(1)(b) of the *LPA* both explicitly allow the Benchers to "establish requirements, including academic requirements". TWU’s argument also ignores the Benchers’ authority, under s. 11(1) of the *LPA*, to "make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the *LPA*]". This authority is explicitly “not limited by any specific power or requirement to make rules given to the benchers” elsewhere in the *LPA* (see *LPA*, s. 11(2)).

[31] In our view, the *LPA* requires the Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school.

[32] The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest…The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the administration of justice. That object is set out in s. 3 of the *LPA* …:

[33] The LSBC’s overarching statutory object in s. 3 of the *LPA* — to uphold and protect the public interest in the administration of justice — is stated in the broadest possible terms. While the provisions of s. 3 set out means by which this overarching objective is to be achieved, those means are framed expansively and include “regulating the practice of law” and “preserving and protecting the rights and freedoms of all persons”. Section 3 of the *LPA*, read as a whole, manifests the legislature’s intention to “leave the governance of the legal profession to lawyers” (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 888).

[34] As the governing body of a self-regulating profession, the LSBC’s determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

[35] This Court most recently considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. There, Wagner J. repeatedly noted the deference owed to law societies’ interpretation of "public interest": that they have "broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest" (para. 22); that they must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute" (para. 24); and that they have "particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions" (para. 25).

[36] *Green* affirmed a long history of deference to law societies when they self-regulate in the public interest. For many years, this Court has recognized that law societies self-regulate in the public interest …As Iacobucci J. explained in *Pearlman*, the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests — those of clients and third parties.

[37] To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body’s particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar, a hallmark of a free and democratic society (*Canada (A.G.*), at pp. 335-36). Therefore, where a statute manifests a legislative
intent to leave the governance of the legal profession to lawyers, “unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected” (Pearlman, at p. 888). As Iacobucci J. later explained in Ryan, we give deference to law society decisions to “give[e] effect to the legislature’s intention to protect the public interest by allowing the legal profession to be self-regulating” (para. 40).

The LSBC in this case interpreted its duty to uphold and protect the public interest in the administration of justice as precluding the approval of TWU’s proposed law school because the requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school. The LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar. Ultimately, the LSBC determined that the approval of TWU’s proposed law school with a mandatory covenant would negatively impact equitable access to and diversity within the legal profession and would harm LGBTQ individuals, and would therefore undermine the public interest in the administration of justice.

In our view, it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public perception of the legal profession. We arrive at this conclusion for the following reasons.

Limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so in light of the societal trust placed in the legal profession and the explicit statutory direction that the LSBC should be concerned with “preserving and protecting the rights and freedoms of all persons” as a means to upholding the public interest in the administration of justice (LPA, s. 3(a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions…

Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (LPA, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.

As well, the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession — or, more accurately, by avoiding the imposition of additional impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public’s confidence in the same. A diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar (see LPA, s. 3(b)).

The LSBC’s statutory objective of “protect[ing] the public interest in the administration of justice by . . . preserving and protecting the rights and freedoms of all persons” entitles the LSBC to consider harms to some communities in making a decision it is otherwise entitled to make, including a decision whether to approve a new law school for the purposes of lawyer licensing. In the context of its decision
whether to approve TWU’s proposed law school, the LPA’s direction that the LSBC should be concerned with the rights and freedoms of all persons in our view permitted the LSBC to consider potential harm to the LGBTQ community as a factor in its decision making.

[45] That the LSBC considered TWU’s admissions policies in deciding whether to approve its proposed law school does not amount to the LSBC regulating law schools or confusing its mandate for that of a human rights tribunal. As explained above, the LSBC considered TWU’s admissions policies in the context of its decision whether to approve the proposed law school for the purposes of lawyer licensing in British Columbia, in exercising its authority as the gatekeeper to the legal profession in that province. The LSBC did not purport to make any other decision governing TWU’s proposed law school or how it should operate.

…

[47] … there can be no question that the LSBC was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC’s ability to self-regulate in the public interest.

…

1) Whether Freedom of Religion Is Engaged

[The majority of the Supreme Court found that the religious freedom of members of the TWU community was engaged by the LSBC’s decision.]

…

(3) Proportionate Balancing

…

[84] The LSBC was faced with only two options — to approve or reject TWU’s proposed law school. Given the LSBC’s interpretation of its statutory mandate, approving TWU’s proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to Charter protections more fully in light of the statutory objectives.

[85] The LSBC’s decision also reasonably balanced the severity of the interference with the Charter protection against the benefits to its statutory objectives. To begin, the LSBC’s decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU’s proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would “consider” amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU’s community members from attending an approved law school at TWU that is governed by a mandatory covenant.
… the LSBC’s decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU’s proposed law school with a mandatory covenant only prevents prospective students from studying law in their optimal religious learning environment where everyone has to abide by the Covenant.

Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community’s religious beliefs as preferred (rather than necessary) for their spiritual growth…

On the other side of the scale is the extent to which the LSBC’s decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on Charter rights at stake.

It is clear that the decision not to approve TWU’s proposed law school significantly advanced the LSBC’s statutory objectives — to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see LPA, ss. 3(a) and 3(b)).

First, the decision advances the LSBC’s relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it “is open to all academically qualified people wishing to live and learn in its religious community” (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant’s prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in TWU 2001, “[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost” (para. 25). It follows that the 60 law school seats created by TWU’s proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

…

…even if the net result of TWU’s proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 more law school seats per year, whereas those 60 seats remain effectively closed to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents “the violation of essential human dignity and freedom” and “eliminate[s] any possibility of a person being treated in substance as ‘less worthy’ than others” (Quebec (Attorney General) v. A, 2013
The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

Second, the decision furthers the statutory objective — protecting the public interest in the administration of justice by preserving rights and freedoms — by preventing the risk of significant harm to LGBTQ people who attend TWU’s proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU “they would have to either ‘live a lie to obtain a degree’ and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion” (para. 172). TWU’s Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU’s law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., Egale Canada Human Rights Trust (file No. 37318), at para. 14; Start Proud and OUTlaws (file No. 37209), at para. 6).

LGBTQ students enrolled at TWU’s law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (see evidence of Dr. Ellen Faulkner in A.R., vol. V, at pp. 828-29 and 834; Dr. Catherine Taylor in A.R., vol. V, at p. 904; Dr. Mary Bryson in A.R., vol. V, at pp. 967-68). The public confidence in the administration of justice may be undermined by the LSBC’s decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU’s proposed law school prevents concrete, not abstract, harms to LGBTQ people and to the public in general. The LSBC’s decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU’s proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC’s decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the Charter rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on Charter protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU’s proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.
V. Disposition

[106] The resolution of the LSBC to declare that TWU’s proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

The following are the reasons delivered by

Côté and Brown JJ. —

I. Introduction

[260] One way of understanding this appeal and the appeal in Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33 — and reliance was frequently placed upon this metaphor during submissions from both sides at the hearing — is that they call upon this Court to decide who controls the door to “the public square”. In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

[261] In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia (“LSBC”), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the Canadian Charter of Rights and Freedoms and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has — on this Court’s own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While, therefore, the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

…

F. The LSBC Exercised Its Discretion for an Improper Purpose and Relied on Irrelevant Considerations

…

[271] …The majority does not, however, properly account for the statutory limits to the LSBC’s public interest mandate.

[272] The importance of recognizing and respecting these limits cannot be overemphasized. This Court has warned against overstating the objective of any measure infringing the Charter (RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 144). This is especially so when the statutory objective relied upon to justify a Charter infringement is a broad mandate to protect the “public interest”, a notion that is inherently vague and difficult to characterize…
In our view, the majority’s broad interpretation of the LSBC’s public interest mandate eschews this prudent, rights-conscious methodology. It is completely untethered from the express limits to the LSBC’s statutory authority found in the Legal Profession Act, S.B.C. 1998, c. 9 (“LPA”). The LSBC’s mandate is limited to the governance of “the society, lawyers, law firms, articled students and applicants” (s. 11). It does not extend to the governance of law schools, which lie outside its statutory authority. It may only act with a view to upholding and protecting the “public interest” within the bounds of this mandate. These express limits to the LSBC’s mandate cannot be disregarded in order to justify the infringement of Charter rights. A careful reading of the LPA leads us to conclude that the only proper purpose of an approval decision by the LSBC is to ensure that individual licensing applicants are fit for licensing. Given the absence of any concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC’s statutory discretion for a proper purpose in this case would have been for it to approve TWU’s proposed law school.

The Purpose of the LSBC’s Approval Decision Is to Ensure That Individual Applicants Are Fit for Licensing

In deciding not to approve TWU, the LSBC purported to act under Rule 2-27(4.1) of the Law Society Rules (now Rule 2-54(3) of the Law Society Rules 2015) (“Rule”), which provides that, to satisfy the academic requirements for licensing, applicants must have a degree from an approved law faculty, a status which the LSBC may, in exercising its discretion, deny.

The Rule sets out no particular criteria for this discretionary decision. Its purpose, and the relevant considerations that may be taken into account in reaching such a decision, must therefore be found in the relevant objectives, duties and powers of the LSBC, as set out by the LPA (Shell Canada, at pp. 275-79). Further, they must be consistent with a contextual and purposive reading of the Rule (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21).

A plain reading of the Rule, in its entirety, leads to the obvious conclusion that its purpose is to ensure that individual applicants are fit for licensing. The Rule, which falls under the heading “Enrolment in the admission program”, sets out the requirements for an applicant to become licensed...

It is readily apparent that the approval of law faculties is tied to the purpose of assessing the fitness of an individual applicant for licensing. And the LSBC had received a legal opinion to this effect. It concludes that “[t]he object of [setting out academic or other qualifications] is that the Benchers are satisfied that candidates are ‘of good character and repute and . . . fit to become a barrister and a solicitor of the Supreme Court’ (s. 19(1))” (Legal Opinion re Academic Qualifications, May 8, 2013 reproduced in R.R., vol. III, pp. 87-116, at p. 90). Read in its entire context, the LSBC’s authority to approve law schools acts only as a proxy for determining whether a law school’s graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed.

This interpretation respects the express limits to the LSBC’s rule-making powers. Section 11 of the LPA grants the LSBC rule-making powers “for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the LPA]”. The powers are thus limited to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Any exercise of the LSBC’s discretion for a purpose extending beyond the express limits set out by s. 11 would be ultra vires.
More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying
the maxim of statutory interpretation *expressio unius est exclusio alterius* (“to express one thing is to
exclude another”), we can presume that the legislator did not intend to include the governing of law
schools among the LSBC’s rule-making powers at s. 11. The scope of its mandate is limited to
governance of “the society, lawyers, law firms, articled students and applicants”. Had the legislator
intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for
such a significant grant of authority.

This leads us to conclude that, in enacting the Rule under its power to make rules for the
governing of applicants, the LSBC sought to regulate entrance into the legal profession by ensuring that
individual applicants are fit for licensing.

This interpretation is consistent with the purpose of the *LPA* as a whole. A careful reading of the
*LPA* reveals that the scope of the LSBC’s mandate is limited to the governance of the practice of law. The
*LPA*’s provisions only relate to matters relevant to the governance of the legal profession and its
constituent parts (the LSBC, lawyers, law firms, articled students and applicants). Even its farthest-
reaching provisions confirm its limited mandate. For example, Part 3 of the *LPA* (ss. 26 to 35), concerned
with the protection of the public, is limited to allegations regarding the conduct or competence of a law
firm, lawyer, former lawyer or articled student (s. 26). Similarly, s. 28, which, under the heading of
“Education”, empowers benchers to establish and maintain or otherwise support a system of legal
education, grant scholarships, bursaries and loans, establish or maintain law libraries, and to provide for
publication of court and other legal decisions, expressly confines these actions to those taken “to promote
and improve the standard of practice by lawyers”. The LSBC’s object, duties and powers are, in short,
limited to regulating the legal profession, starting at (but not before) the licensing process — that is,
starting at the doorway to the profession.

Section 3 of the *LPA* states the LSBC’s overarching object and duty, which includes upholding
and protecting the public interest in the administration of justice by “preserving and protecting the rights
and freedoms of all persons”. It is on this basis that the majority concludes that the LSBC’s decision to
refuse to approve TWU’s proposed law school because of its admissions policy was a valid exercise of its
statutory authority. In doing so, it is our respectful view that it misconstrues the purpose underlying the
LSBC’s discretionary power to approve a law school under the Rule and extends the Rule’s scope
beyond the limits of the LSBC’s mandate.

Section 3 of the *LPA* cannot be understood in isolation. It must be examined “in [its] entire context
and … harmoniously with the [LPA’s] scheme [and object]” *Rizzo & Rizzo Shoes*, at para. 21, quoting
E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Section 3 does not grant the LSBC the
authority to exercise its statutory powers for a purpose lying outside the scope of its mandate under the
guise of “preserving and protecting the rights and freedoms of all persons”. For example, the LSBC could
not take measures to promote rights and freedoms by engaging in the regulation of the courts or bar
associations, even though such measures might well impact “the public interest in the administration of
justice”. These matters fall outside of the scope of its statutory mandate, as does the governance of law
schools.

It is the scope of the LSBC’s statutory authority that defines how it may carry out its public interest
mandate, not the other way around. Had the legislator intended otherwise, the rule-making powers at
s. 11 would have presumably provided the LSBC with broad discretionary power to make rules “to uphold
and protect the public interest in the administration of justice”.

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This is not to say that public interest considerations are irrelevant to the exercise of the LSBC’s discretionary power. The LSBC’s duty is to uphold and protect the public interest; however, this duty may only be exercised within the scope of its statutory mandate. The LPA does not empower the LSBC to police human rights standards in law schools. Provincial legislatures, including British Columbia’s, have conferred that mandate upon provincial human rights tribunals. The LSBC does not enjoy a free-standing power under its “public interest” mandate to seek out conduct which it finds objectionable, however much the “public interest” might thereby be served. Under the Rule, the LSBC can act in the public interest only for the purpose of ascertaining whether individual applicants are fit for licensing.

While ensuring the competence of licensing applicants clearly falls within the LSBC’s mandate, this purpose does not rationally extend to guaranteeing equal access to law schools. The fact that the Rule sets out minimum requirements for licensing confirms that the LSBC is properly concerned with competence, not with merit. Setting admissions criteria to select the “best of the best” is up to law schools. To be clear, the selection of law students does not in any way fall within the LSBC’s mandate, which is confined to the narrow task of ensuring that those who have graduated from law school and who apply for licensing meet minimum standards of competence and ethical conduct. …Contrary to what the majority concludes at paras. 42 and 43 of their reasons, equal access to the legal profession and diversity in the legal profession are distinct from the duty to ensure competent practice. Indeed, the facts of this appeal are an example. Despite the unequal access effected by the requirement that applicants to TWU commit to a community covenant, the LSBC concedes its lack of concern regarding the competence or ethical conduct of TWU graduates. Relatedly, and while the majority notes (at para. 45) that “[the LSBC did not purport to make any other decision governing TWU’s proposed law school or how it should operate],” the majority’s statement (at para. 39) that “[the LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar” would logically apply to other aspects of law school admissions which might be said to create inequitable barriers to legal education, such as tuition fees. By the majority’s logic, then, the LSBC would be entitled (or indeed, required) to consider such barriers in accrediting law schools in order to promote the competence of the bar as a whole.

At their core, the majority’s reasons err by assimilating legal education to the LSBC’s mandate. … The LSBC must, however, take licensing applicants as they come; its statutory mandate empowers it to control the doorway to the profession, not to decide who knocks on the door. … Any measures undertaken by the LSBC to promote diversity in the legal profession must fall within the bounds of its statutory mandate as expressed at the time those actions are undertaken. Though the majority denies it, by allowing the LSBC to refuse to accredit a law school solely on the basis of its admissions policies — and in the absence of any concerns relating to the fitness of that school's graduates — it allows the LSBC to do that which it is not statutorily empowered to do — govern law schools by regulating their admissions policies. It does, in effect, tell law schools “how [they] should operate” ( Majority Reasons, at para. 45). But so long as a law school’s admissions policies do not raise concerns over its graduates’ fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them.

The majority’s overextension of the LSBC’s mandate is equally apparent in discussing the LSBC’s duty to “prevent[t] harm to LGBTQ law students” (para. 40). The majority correctly notes that any risk of harm falls on “LGBTQ people who attend TWU’s proposed law school” (para. 96 (emphasis added); see also paras. 98 and 103); in other words, the harm occurs in the context of legal education rather than the legal profession. Again, it is conceded by the LSBC that it has no basis for doubting that the graduates of TWU’s proposed law school will be competent lawyers that will practise in accordance with human rights codes prohibiting discrimination against LGBTQ persons. There is, therefore, no basis upon which to find that such harms will manifest in the legal profession. Any harms to marginalized communities in the context of legal education must be considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees.
The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate.

...  

[293] The only proper purpose for the LSBC’s approval decision is to ensure that individual applicants are fit for licensing. Given that the LSBC concedes that there are no concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC’s statutory discretion for a proper purpose would have been to approve TWU.

...  

(3) Approving TWU’s Proposed Law School Is Not Against the LSBC’s Public Interest Mandate

[326] In our view, even were the majority’s overbroad interpretation of the LSBC’s statutory mandate to apply, approving TWU’s proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU’s proposed law school. Accommodating religious diversity is in “the public interest”, broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

...  

[335] The “public interest”, broadly understood, is therefore served by accommodating TWU’s religious practices, including the Covenant. That this is so is confirmed by provincial and federal legislation. Contrary to the LSBC decision under review, the Legislative Assembly of British Columbia has already determined that the public interest is served by accommodating religious communities by providing that they do not contravene provincial human rights law when they grant a preference to members of their own group (Human Rights Code, s. 41). This provision was described by this Court in TWU 2001, at para. 28, as “accommodat[ing] religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion”. The practical exclusion of LGBTQ individuals from attending TWU’s proposed law school is therefore a direct result of the Legislature’s accommodation of the TWU community. Further, that exclusion — which expresses a community code of conduct in conformity with orthodox evangelical beliefs —is not directed to LGBTQ persons; no one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The purpose of TWU’s admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community.

...  

III. Conclusion

[341] Under the LSBC’s governing statute, the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. The LSBC’s decision denying approval to TWU’s proposed law school has a profound impact on the s. 2 (a) rights of the TWU community. Even if the LSBC’s statutory “public interest” mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, approving the proposed law school is not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession. Nor does it condone discrimination against LGBTQ persons. In our view, then, the only
decision reflecting a proportionate balancing between Charter rights and the LSBC’s statutory objectives would be to approve TWU’s proposed law school.

[342] The appeal should be dismissed. We therefore dissent.
Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (www.canlii.org). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

Sign in to Quicklaw via http://www.lexisnexis.com/ca/legal. The first time you sign in to Quicklaw you will be asked to change or personalize your password. Remember your User ID and password are personal, and should not be shared with anyone.

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