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Court upholds law society's incivility sanctions

Decision considering lawyer's courtroom obligations to be appealed

CHRISTOPHER GULY

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> **Lorne Sossin**
> Osgoode Hall Law School

Toronto securities lawyer Joe Groia believes he has been "disgraced and damaged" after being sanctioned for incivility by the Law Society of Upper Canada, and says he is prepared to challenge the LSUC's finding of professional misconduct against him to the Supreme Court, if necessary.

Groia, a litigator for the past four decades, has instructed his lawyer, Earl Cherniak, to seek leave at the Ontario Court of Appeal regarding a Feb. 2 Ontario Divisional Court ruling upholding an LSUC disciplinary appeal panel decision that imposed a one-month suspension and ordered Groia to pay the law society $200,000 in legal costs.

Groia — who is running to become one of 40 LSUC lawyer benchers on April 30 — said he was "extremely disappointed" by the Divisional Court three-judge panel's judgment in *Groia v. Law Society of Upper Canada* [2015] O.J. No. 444. However, he said he felt it provides better direction for the profession on counsel's courtroom conduct than what the LSUC's hearing and appeal panels offered in sanctioning him for what the law society characterized as a "consistent pattern of rude, improper or disruptive conduct" during the initial phase of the insider trading trial of his client, former Bre-X Minerals Ltd. senior executive John Felderhof, who was later acquitted.

Justice Ian Nordheimer, in written reasons agreed to by Justices Harriet Sachs and Alison Harvison Young, said "it is better that zealous advocacy be favoured over the desire for civility. Our justice system can tolerate uncomfortable and unpleasant exchanges in the courtroom much better than we can ever tolerate a wrongful conviction."

Yet Justice Nordheimer concluded there was "no principled basis for this court to interfere" with either the appeal panel's suspension penalty or its costs order, and dismissed Groia's appeal — but not without making an unprecedented interpretation.

"The Groia decision represents the most detailed consideration of the civility obligation in legal professionalism in Canada," said Osgoode Hall Law School Dean Lorne Sossin.

As Justice Nordheimer wrote, "zealous advocacy, including the use of language that may be very tough in its expression, is not, by itself, sufficient to open the door to professional misconduct proceedings."

Incivility involves conduct that is "rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality," and "that attacks the personal integrity of opponents, parties, witnesses or of the court, where there is an absence of a good faith basis for the attack, or the individual counsel has a good faith basis for the belief but that belief is not an objectively reasonable one," said the Divisional Court, noting that "a solitary instance of uncivil conduct will not, generally speaking, be sufficient to ground a complaint of professional misconduct, unless it is of a particularly egregious form."

Justice Nordheimer noted that uncivil in-court conduct requires an additional element to engage the disciplinary process — that of undermining, or having a "realistic prospect" of doing so, the proper administration of justice, such as "repeated personal attacks on one's opponents or on the judge or adjudicator, without a good faith basis or without an objectively reasonable basis; improper

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Ontario court nullifies minister's will for racism after he cuts out daughter

JOHN SCHOFIELD

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> **David Freedman**
> Queen's University law

A recent Ontario Superior Court decision that nullified a Toronto minister's will because his motivation for disinheriting his daughter was found to be racist has drawn criticism from wills and estates law experts.

"It's a very surprising case," said David Freedman, a law professor at Queen's University and former director of its elder law clinic. "I don't want to be critical of the judge personally, but it's problematic on a whole bunch of levels."

Superior Court Justice Cory Gilmore's Jan. 27 decision in *Spence v. BMO Trust Co.* [2015] O.J. No. 353 came after the minister's daughter, Verolin Spence, challenged Rector Emanuel Spence's will following his death in January 2013, arguing that the will offended public policy. The estate trustee, Toronto-based BMO Trust Company, opposed the applicant's request.

The minister's other daughter, Donna Spence, a U.K. resident who would have benefited from the will, did not appear at the hearing or respond in any way. In an affidavit, Verolin Spence said the minister had had little contact with Donna and her children after he immigrated to Canada from England in 1979. She described how her father, who had supported her during many years of post-secondary education, abruptly ended their relationship in September 2002 when she told him she was pregnant and the father was Caucasian. The minister told Verolin he was ashamed of her, she wrote, and said he would not allow a white man's child in his house. From 2002 until his death in 2013, he did not return her calls and had nothing to do with his grandson, now 11.

The court also considered an affidavit from Imogene Parchment, the minister's caregiver until his death, and a close friend of his wife Norma Spence, who predeceased him in 2011. She described Emanuel Spence as a difficult, demanding person with an explosive temper and virtually no friends.

After falling out with his daughter, Parchment wrote, the minister told her he had no use for Verolin and her "bastard white son." He changed his will in May 2010, he told her, so he could exclude Verolin and leave his $400,000 estate to Donna and her two sons, whose father was black. In her affidavit, Parchment said the minister told her on several occasions that he disinherited Verolin and her son because the son's father was white. But soon after changing the will, she added, Emanuel Spence also had an argument with Donna and ended their relationship.

The paragraph in the will specifically disinheriting Verolin reads, "I specifically bequeath nothing to my daughter, Verolin Spence, as she has had no communication with me for several years and has shown no interest in me as a father."

The affidavits were unchallenged by BMO Trust. But the company argued that public policy did not apply without a document specifically contrary to the public interest, and that extrinsic evidence of the minister's racist remarks was immaterial and contrary to the *Ontario Evidence Act*.

In her decision setting aside the will and, pursuant to the *Succession Law Reform Act*, dividing the estate equally between the daughters Verolin and Donna, Justice Gilmore cited two leading precedents for the courts interfering with wills on public policy grounds: *Canada Trust Co. v. Ontario Human Rights Commission* [1990] O.J. No. 615, which ended the trust's stated policy of awarding scholarships only to people who were white or of British nationality or parentage, and *McCorkill v. McCorkill Estate* [2014] N.B.J. No. 231, which prohibited the transfer of the residue of an estate to the National Alliance, a group espousing white nationalism.

Like *McCorkill*, Justice Gilmore argued, the minister's intentions required further scrutiny.

"Were it not for the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the will," Justice Gilmore wrote. "However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist principle."

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Defence lawyers: There was no need for 'perp walk'

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Bernstein said Liscio brought a change of clothing for her client to enable him to show "dignity and respect for the court," a task defence counsel often take on to help accused make full answer and defence.

"The protocol in the Brampton courthouse right now is that the guards…who search the clothing will not take the clothing directly from a friend or family member. It has to go through counsel," Bernstein said. "This is not appropriate because it's not for lawyers to be engaged in the job of correctional staff."

In the wake of Liscio's arrest, the Criminal Lawyers' Association (CLA) and others are pressing Ontario's Ministry of Community Safety and Correctional Services for reform.

"Given this unfortunate event, I can imagine criminal defence lawyers not wanting to provide clothing at court to clients," said Joseph Neuberger, president of the Toronto Lawyers Association. "One can easily imagine the accidental, and completely unintentional, passing of contraband in clothing provided by the family of an accused, which is then handed over to court staff for the in-custody accused to dress in for court. It should not be for the lawyer to search the clothing. It is expected that court security, not lawyers, must search the items. Having counsel search the clothing puts counsel in a very awkward position and, if something is found, makes the lawyer a witness."

Neuberger also suggested by e-mail that "extended days and hours must be available at the jails in order to allow families to attend at the jails for the clothing changes, and there must be an onus on the jails to permit the clothing changes, even on short notice, if an accused must be in court and

Neuberger

wants to dress in a respectful manner before the court. If a clothing change can only occur at court, then an order should be sought [from the court] that would allow the families to provide the clothing directly to court staff and thereby removing the lawyer from the exchange."

CLA president Anthony Moustacalis was to meet with provincial officials to discuss creating a new protocol around clothing exchanges, and to discuss procedures when lawyers are arrested in courthouses.

He said he would like to see jails get the resources to do clothing exchanges more often, especially during a trial.

"Alternatively, if it's going to be done at the courthouse, then the court officer should have the responsibility of doing it directly with the public, and not have lawyers become a clothing courier service."

Moustacalis said police should also be directed that for arrests of officers of the court and all other citizens, "handcuffs should only be used when it's necessary for public and officer safety…That's always been the law."

The Toronto Lawyers Association called on the Peel Regional Police to conduct an inquiry into its investigation of Liscio, and especially the way she was arrested.

"The manner of the arrest was completely unnecessary, and was humiliating to Ms. Liscio and to the profession," Neuberger said.

"Any arrest ought to be conducted in as dignified manner as possible given the particular circumstances of the case."

The Criminal Defence Lawyers Association of Calgary, where Liscio attended law school and is known, expressed in a press statement shock at her arrest and "at the high-handed and very public manner in which the police chose to deal with her and the allegations against her. There can simply be no reasonable excuse to actually effect a formal arrest and handcuff a lawyer engaged in the proper representation of a client in court, and then 'perp-walk' the lawyer out of court."

The association noted that its own president, senior defence counsel Ian Savage, was similarly arrested, handcuffed and incarcerated at the Calgary court house last September while he was representing a client. No charges were laid against him.

Calgary defence counsel Kelsey Sitar, of Sitar & Milczarek, said clothing exchanges are a live issue for lawyers in her city.

"Our remand centre is located on the city outskirts, and can be difficult to access for family members of accused persons to drop off changes of clothing for court," she said via e-mail. "It is therefore quite common for defence counsel to deliver changes of clothing to clients — either at the courthouse or at the remand centre."

Posno: Uncertainty is creeping in

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Lawyers and law professors interviewed by *The Lawyers Weekly* suggested, however, that the decision overlooks another key precedent in *Robinson Estate v. Robinson* [2011] O.J. No. 3084, which underlined the courts' longstanding practice not to consider evidence of the testator's intentions.

The intentions of the testator might be considered if the validity of a will is challenged on the basis of testamentary capacity or undue influence related to fraud, but is typically off limits, said Anne Posno, a Toronto lawyer with experience in estates litigation. "Is that what courts should be doing — going behind the words of an otherwise valid document?" she said. "It raises uncertainty in an otherwise certain area."

Freedman said the decision "appears to be a fundamental change in the law, and an open-ended invitation for people to challenge wills based on the subjective intentions of the deceased."

While the ruling may encourage individuals to litigate, Freedman agreed with Posno in predicting that judges will see it as a one-off decision and will effectively disregard it as a potential precedent.

"I'm hoping when the courts stand back and take a look at this they'll decide that extrinsic evidence is not admissible," said Posno.

The minister's racism would be offensive to any right-minded person, he noted. "The question is does the law have to intervene, and I would say no," he said.

In her written decision, Justice Gilmore cited an article by University of Alberta law professor Bruce Ziff that defends the consideration of extrinsic evidence in *McCorkill*. But in an e-mail to *The Lawyers Weekly*, Ziff said *Spence* raises a number of concerns, including the potential for "costly and time-consuming challenges based on allegations and improper motives of all sorts."

The extent to which the law can serve as a "cure-all" for social ills like racism is an open question, Ziff wrote.

"Cases like Spence pit competing social norms against each other," he added. "The predictable result of the need for a multi-variable balancing process is a line between valid and invalid property transfers that is imperfect and in constant flux."