A Judicial Coup d'Etat

Very inadequate attention has been paid to the persecution of Joseph Groia, former director of enforcement of the Ontario Securities Commission and a prominent Toronto barrister. He has been the subject of an unfeasible charge from the Law Society of Upper Canada of "incivility" in the lengthy trial of John Felderhof, chief geologist of Bre-X, and sole and scapegoat defendant in one of the greatest fraud cases in Canadian history.

Tens of billions of dollars of gold reserves were alleged to have been found in Indonesia by Bre-X and it rose from a penny stock to $286 (adjusted for stock splits) before the ore samples were discovered to be fraudulent and the mining property to be commercially worthless. The stock price evaporated. Felderhof was charged with insider trading in 1999. His trial started in 2001, but was delayed four years by the OSC's attempt to have trial judge Peter Hryn removed for bias, essentially because Hryn upheld the rules of evidence and did not allow the OSC to introduce herniating masses of uncatalogued exhibits.

Groia resisted this so successfully that, after he discovered in the Commission's jungle of documents items helpful to the defence, the OSC felt obliged to require him to prove the authenticity of evidence it had originally sought to admit before it would agree to its admission. Hryn was sustained by the Superior Court and then, on appeal by the OSC, by the Court of Appeal. After this four-year diversion, Felderhof's trial resumed in 2005.

Groia represented Felderhof very successfully and through most of the trial, he acted pro bono, as Felderhof ran out of money. But for Groia's generous and principled nature, would have fallen into the morass of the public defender system and been steamrollered by the OSC. Felderhof was acquitted in

2007. The Commission had acknowledged from the outset that it had no evidence that Felderhof had any knowledge of the fraud that was the basis of the Bre-X fiasco, and insider trading was the mousey charge born of this mountainous scam (where $6 billion were lost by trusting investors, to the more astute or lucky shareholders who sold their Bre-X stock to those left holding the bag when the fraud blew up). The OSC did not appeal.

It was a classic case of someone being selected as the fall guy and symbolic defendant. It was also a classic example of the lawyer as heroic and disinterested champion of an innocent underdog. This is the stuff of much legal lore and many fine novels and films. But the greatest drama, and the most egregious persecution in this whole sequence, were yet to come. Before the trial ended, The Law Society of Upper Canada had begun to intervene, objecting to Groia's "incivility." Its internal committee that determines what activities merit close scrutiny examined the case and eventually told Groia to justify his conduct. A mystified Groia was unaware that there was any conduct he needed to justify. His apparent real offence was to have won a case and exposed the OSC's effort at prosecution as unsupported by evidence and questionably motivated.

The trial judge had found nothing unprofessional in Groia's conduct. The trial had been robust on both sides and the conduct of the OSC was frequently very bellicose. It was a no-holds-barred battle, but as far as is known, the OSC did not generate a complaint about Groia. This appears to have been a spontaneous brainwave of members of the enforcement apparatus of the Law Society. Their motives are not clear, but should be examined in sworn testimony before this grim saga ends.

The militants in the Law Society were heard initially by a three-person panel of the Society, only one of whose members had any criminal law experience. The opening gambit of Groia's accusers was that Groia's infractions of professional and

barristerial standards had emerged indisputably in the Felderhof trial and that he had no right to defend himself at all before the hearing panel of the Law Society – indeed, that even attempting to do so was a abuse of process. No such offence had been alleged or found at trial and it was proposed to brush past the trial judge and the higher court jurists who confirmed his right to try the case and the rectitude of Hryn's conduct. Groia was to be condemned on the sole authority of his almost-anonymous enemies in a Law Society Star Chamber.

The purpose of the hearing was to determine the penalty to be imposed on the pre-convicted Groia. The entire notion of an accused putting up a defence of his conduct was to be rejected as not only superfluous, but in itself an affront to the whole concept of due process. As I was myself rather distracted by legal travails at the time, I only followed this vaguely. But having known Groia professionally, I doubted that he would ever behave unprofessionally, and it did seem to me then, as it does now, profoundly disconcerting that officials responsible for ensuring probity and integrity in the legal system and profession should challenge the right of an accused person to any defence at all. Even the Red Queen would take evidence, albeit after the sentence (which also preceded the verdict and the charge, but given the chance, the Law Society might emulate that also).

Groia's counsel in these proceedings is Earl Cherniak, another eminent barrister (who has acted successfully for me a number of times). As Groia gamely wrote in a monograph about the case, which has cost him most of the last 16 years and over $2 million dollars in costs and fees, it is rare that a lawyer has the opportunity to fight so clearly for such conspicuous matters of principle. It shortly emerged in the initial Law Society hearing that in addition to having the effrontery to contest his innocence of professional misconduct at all, Groia had used the word "government" as a supposedly pejorative

adjective or noun in reference to the OSC, and had allegedly omitted the word “simply” in quoting a statement uncontestedly uttered by Frank Switzer, the OSC director of communications.

Groia was also held to have spoken abusively in court on a number of occasions, including when he said that the “prosecutors’ statements were not worth the transcript paper they were printed on,” though there was ample reason for such reflections, which, again, were not found objectionable by the presiding judge or the jurists to whom these matters were referred in the action to remove Hryn. The hearing panel was partly overruled by the Law Society’s appeal panel (which had no one on it with any criminal law experience). This panel confirmed Groia’s right to defend himself, but found that Groia was unreasonable in his reflections on prosecutorial misconduct, motives, and integrity, and this was held to have had a serious adverse impact on the trial, though these findings were all contrary to the opinions of the trial judge and reviewing judges. The appeal committee purported to impose a suspension of a month and costs of $200,000 on Groia, who has appealed to the Divisional Court, where the matter now sits.

Even I – after all the megalomania and intellectual corruption and professional hypocrisy I have witnessed in the last decade in the U.S. legal system, and its echoes among the Canadian Quislings, who abound in the entourages and committees of public institutions in this country, down to clubs and honours-dispensers, heavy with their own cowardice and inflated sufficiency – even I was astounded at the sanctimonious pettifogging of these nasty proceedings. The complainants are among our traditionally most decayed servitors (in Cromwellian terms), the authors of what in France in successive centuries has been called “the treason of the clerisy,” the abuse of petty office to betray the principles of the national society to envy, malice, faction, and self-interest. It is the shrivelled and bitter detritus of

little, colonial Canada, the falsely obsequious greasers of the components of the system.

The underlying problem is that the secondary and often arbitrary or even spurious criterion of “civility,” after many centuries of judicial precedent have left the conduct of trials to presiding judges, is now being invoked by anonymous tinkerers in the bar bureaucracy to ignore and repeal the powers of judges and capriciously dictate the conduct of barristers. There is no precedent for such an intrusion, no legally authoritative mandate for it, no semblance of professional or legislative consultation. It is an outright usurpation, a coup d’etat judiciaire.

There has always been some doubt about the ability of the legal profession to regulate itself, and its attempts to do so have often amounted to a rather self-serving defence of the impermeability of the legal cartel to outside pressures whatever their merits. But this is an outrage – an unspecified faction within the bar administration emasculating the bench, ignoring most of the benchers, and randomly terrorizing the profession, the public and the public interest be damned. It must not succeed.

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