Surviving the Litigious Jungle

Last week in this column I bewailed the persecution of Joseph Groia by the Law Society of Upper Canada for alleged incivility to the point of professional misconduct in a trial in which he secured the acquittal of John Felderhof, the only person accused in the immense, $6-billion Bre-X mining fraud case. I had sent in some editorial changes regarding some of the findings of the courts which had heard an appeal from the prosecutors for removal of the trial judge, Peter Hryn. Unfortunately, these changes did not make it into the printed edition (they did appear online). To clarify those points, the Ontario Securities Commission moved for removal of the trial judge and a new trial and Superior and Appeal Courts affirmed the trial judge, and did criticize Mr. Groia, though they also criticized the conduct of the OSC prosecutors. Justice Rosenberg for the Court of Appeal added that the incidences of unprofessional conduct by the OSC prosecutors were "perhaps less frequent."

The Divisional Court, last Monday, released its decision rejecting Mr. Groia's appeal from the hearing and appeal panels of the Law Society of Upper Canada, finding him guilty of misconduct and upholding his suspension for one month from practice and awarding costs against him of $200,000. (The appeal panel had reduced the hearing panel's suspension of two months and $246,000 in costs.)

While the decision was competently written and fairly thoroughly explained by Justice Ian Nordheimer on behalf of a panel including two of his colleagues (Justices Sachs and Harvison Young), and I will not reargue my points of last week, I believe it to be an unjust and dangerous decision – which I understand will be appealed.

The Divisional Court upholds the appeal panel's reversal of the hearing panel's determination that Groia should be penalized for not showing remorse for his conduct, which the first panel held to be a danger in the future to the exercise of justice. Nordheimer pointed out that this was implausible, since it was conceded that Groia was sincere in his aspersions of the OSC prosecutors and that it was unlikely that he would be a danger, given his many years of "unblemished" practice, including over 10 years since the incidents that gave rise to these proceedings. But the Divisional Court held that a good faith belief in his reasonableness did not liberate Groia from the finding of misconduct through "uncivil" behaviour that could "bring justice into disrepute."

Before moving on to broader issues, let us recall that Groia won the case for Felderhof, that the trial judge issued no complaint, penalty, or finding of contempt against him, and that the late Justice Archie Campbell's finding that the prosecutors had been equivalently intemperate and objectionable, though perhaps not as often, is undisputed, either in the Appeal Court review or the Division Court judgment. Groia was accused of four almost identical offences of being rude and disrespectful to prosecutors, but the complaint that gave rise to these many years of inquiry into Groia's conduct did not come from the OSC, but was generated within the Law Society. Early in his judgment, Nordheimer laments a rise in barristerial incivility, denies that there is any incongruity in "the profession," as he rather grandiloquently describes the Law Society of Upper Canada, acting in a disciplinary role where the trial judge has not, with no adverse reflection on the performance of the judge thereby, and refers a bit huffily to the O.J. Simpson trial and to film and television portrayals of courtroom proceedings generally.

Nordheimer writes early on that he will not go over in "excruciating" detail Groia's alleged verbal and behavioral

transgressions, and the only illustrative phrase cited is Groia's reference to the vast mass of documentary evidence the OSC sought first to admit and then selectively to challenge as "wheat and chaff." While the inference is incited that both sides regularly hurled frightful abuse at each other, the evidence focuses, as I wrote last week, on such tepid impeachments as whether Groia meant the noun or adjective "government" in reference to the OSC prosecutors, disrespectfully, and whether he misrepresented the OSC communications director's statement that the Commission "simply" wanted to get a conviction (against Felderhof). Nordheimer and his colleagues brushed aside interventions on Groia's behalf from the Advocates' Society, the Canadian Civil Liberties Association and Criminal Lawyers' Association, as not relevant to the constructive point on the evils of incivility the court claimed to be upholding. The justices denied that this was any sort of "test case" or a matter that directly affected the broad "public interest," concluded that Groia had brought justice into disrepute, and while agreeing with the "profession's" appeal panel rejection of what they called the hearing panel's principal conclusion, they supported its only minimal reduction of the initial penalty.

What really brings justice into disrepute is endlessly protracted disputes (this one is far from over, 16 years after the Felderhof case began), about whether relatively genteel disapprobation engaged in by both sides in court without overly upsetting a presiding judge sustained by two higher courts in the competence of his handling of the case, waved about like a bloody shirt by almost anonymous, self-launched inquisitors, leading to this bizarre finding. This is especially so when the decision is apparently a judicial pat on the head to the "profession" for commanding, Canute-like, the recession of the current societal wave of incivility and histrionic vulgarization of court proceedings.

At least in the United States, it is a notorious fact regularly condemned in the leading media outlets and in the Congress and often by senior judges and lawyers, that the civil U.S. legal system is a psychotically litigious jungle. U.S. criminal justice, is a playpen for corrupt and capricious prosecutors to operate a conveyor-belt to the country's hideously over-populated and expensive prison system (the country has a 99.5% conviction rate, 97% without a trial, because of the manipulation of the plea bargain system).

No one said anything about bringing justice into disrepute during the O.J. Simpson trial which so scandalized Justice Nordheimer, when every night during the trial the Dave Letterman *Late Show* program opened with "the Flying Ito's," five diminutive, berobed, men apparently of Asian ancestry, resembling the Simpson trial judge Lance Ito, who rushed on to the stage from the right, performed a spectacular series of cartwheels across the stage, black robes flying, and ran off the stage to the left.

In the United States, the law is generally "an ass," and a severely spavined ass at that, and almost everyone knows it. A bit of comic bathos is welcome. We haven't descended to quite such depths here, but we are on the same slip-way and this sort of proceeding accelerates the descent. Too much piety about the dignity of the process is implausible (and itself undignified).

If we had any serious leadership in the vital public policy area of justice, we would require the "profession" to submit to a much stronger criterion of public interest and stop these enervating Star Chambers. Radical, though well-considered, reforms would be welcome. (Joe Groia's election as a bencher of the Law Society, which he is seeking, could be a start). The legal profession in Ontario has substantially failed at self-regulation and that right should be curtailed.

The state's over-regulation of the financial industry should

also be rolled back, as in the United Kingdom, now the world's greatest international financial centre, where regulation is by the industry under the aegis of the governor of the Bank of England, and prosecutions are by the fraud section of the Crown Law Office under the authority of the non-political attorney general. An inordinate number of lawyers are traumatized by taking their incomes from clients they consider intellectually beneath them, just as, for essentially the same reason in reverse, many businessmen, to add a cubit to their intellectual stature, have squandered billions of dollars of their companies' and their own money in redundant business schools, as commerce is essentially arithmetic, a trade, and an intuition, not an academic pursuit. We should revive the high court of Parliament, but not by continuing to emasculate judges by dictating mandatory sentences in politically sensitive cases.

Pierre Trudeau emphasized individual rights to distract Quebec from the quarrel over jurisdictional rights. He defeated the separatists but transformed the bench into a legion of affirmative action, idiosyncratic hobby-horse tinkerers and meddlers. It is time to clean it all up, before we all become an uncoordinated mass of Flying Ito's.

First published in the *National Post*.