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Must We Be Nice? Civility Rules and *Law Society of Alberta v. Smith,* 2025 ABLS 13

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Case Commented On: ***Law Society of Alberta v. Smith,*** **2025 ABLS 13 (CanLII)**

Lawyers as advocates must be "courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings" (Law Society of Alberta *Code of Conduct,* s 5.1-6); this duty in fact extends outside of the courtroom and applies to all persons "with whom the lawyer has dealings in the course of his or her practice" (*Code of Conduct*, s 7.2-1). What this means in practice is notoriously hard to identify; the Law Society Appeal Panel, in a (173 paragraph) decision considered when to sanction a lawyer for incivility. In this blog, I want to consider the Law Society's most recent attempt at this nettlesome question, and also and, more generally, whether this is a good use of the regulator's resources.

Whether or not law societies should regulate – and sanction – those lawyers thought to breach this duty is fraught for several reasons, given the basic ambiguity in the concept itself, and the difficulty in reconciling a rule requiring lawyers to 'play nice' in the context of a competitive justice system, and a lawyer's duty of 'resolute' advocacy. This has attracted scholarly attention: in her prior life as an academic, Justice Alice Woolley questioned whether a focus on civility is misplaced and may have the unintended effect of 'chilling' advocacy; lawyers are discouraged from calling others out, and the public's may see a privileging of the profession's guild interest over the client's interests ("Uncivil by too much civility: Critiquing Five More Years of Civility Regulation in Canada" (2013) 1:1 Dal L J 239).

Also, as Adam Dodek and Emily Alderson have noted, it is difficult to justify regulator's attention to civility (and the resources involved in prosecuting such claims) when the harms involved are generally not significant (and usually ephemeral), and draw resources away from actions by lawyers that are much more harmful to the public interest ("Risk Regulation for the Legal Profession" (2018) 55:3 AB L.R).

The test for when harsh or rude speech becomes professional misconduct was set out in *Groia v. Law Society of Upper Canada,* 2018 SCC 27(CanLII). Under *Groia*, when looking at civility, a reviewing body must take a contextual approach, and consider whether the impugned speech was not simply 'uncivil' but rather whether the person making it had "reasonably based, good faith arguments" for the claim, *even if those claims were based on legal or factual error* (at para 140).

The defences available to potential offenders, along with reasonable disagreement as to what incivility looks like may explain why prosecutions for incivility by the Law Society of Alberta are relatively rare and are usually accompanied by allegations of more significant code breaches. A

recent hearing at the Law Society Appeal Panel (the body hearing appeals from the Hearing Committee, which is the first tribunal to consider code breaches) revisited this question and provides valuable guidance to lawyers on the subject. The case in my view is fairly unique in that it appears that incivility was the primary basis for the complaint and also takes into account scholarship in this area. The case is also notable for a lengthy and well-reasoned dissent, which draws from academic scholarship and doubts whether civility prosecutions are a good use of a regulator's resources. As this comment will indicate, I am attracted to the dissent opinion but would in fact go further, and suggest that the factors that underpinning civility regulation (as set out in *Groia*) may require reconsideration.

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The Appeal Panel Finding

Charles Smith, a lawyer, acted for his daughter and son-in-law in a landlord-tenant matter that soon became acrimonious. From the Appeal Panel's reasons, the issue itself centered around the landlord's ability to list a property inhabited by his clients for sale, and so terminate the tenancy. During the matter, Smith sent several emails to opposing counsel, the common thread of which was that counsel had made a material misrepresentation to the Court (Smith uses more direct language). These emails are described by the dissent opinion as "patronizing, pompous, and full of accusations of misconduct" and I agree (at para 117). They were also more than vaguely threatening and written in an exceedingly hostile tone. Smith was cited for incivility in these communications; the initial hearing committee found that Smith had breached his duty of civility (to "other persons", presumably, as it is unclear if Smith was discourteous to the Court).

Smith appealed. The Appeal Panel reconsidered the matter, on what appears to be a standard of reasonableness (although this comment does not address the standard of review, it would seem to me the question at issue is one of law, and so governed by a standard of correctness (as the dissent appears to do)) (at para 94). The majority opinion is unclear as to what standard of review they are applying: they reference the test in *Groia* (suggesting they are reviewing on a standard of correctness) but then dismiss the appeal on the basis that the Hearing Committee's findings were "reasonable". The majority of the Appeal Panel confirmed the Hearing Committee's decision and found that Smith had not met his code obligation of civility.

The majority cites *Groia* in support of the view that civility is harmful – and should attract regulation – because it damages the administration of justice. Incivility erodes confidence in the justice system, calls to question the reliability of the result, and may call into question "the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism" (at para 81, citing *Groia* at para 67). The Appeal Panel acknowledges that civility cannot infringe upon zealous advocacy, but found that the impugned emails went beyond this, and contained "belittling, intimidation, bullying and accusations" (at para 95).

The Appeal Panel also found that Smith could not say that these communications were made either in "good faith" or "reasonable", such that they would be permissible under *Groia* (the dissent took issue with the majority's application of this test). Engaging in a context-specific analysis (as *Groia* requires), the Panel found that Smith's conduct could not be justified on these grounds; in other words, Smith's communications weren't part of an assertive litigation strategy, but rather were simply intended to harass and intimidate the opposing party.

In coming to its conclusion, the Appeal Panel returns to the statutory objectives of the rule, and the support for civility set out in the majority opinion in *Groia*, namely that the rule seeks to "avoid prejudice to a client's cause, to avoid distraction, to avoid adverse impacts on other justice systems participants, and to instill public confidence in the administration of justice" (at para 111). It is notable that the majority thought it necessary to go behind the rule to the reason for the rule, effectively suggesting that public policy, and the public interest, militates the regulation of civility. It is here, and noting the reasons given by the Supreme Court, that I think opportunities for reconsideration the rule lie; in other words, I question whether incivility *in and of itself* truly does harm the justice system or, if it does, whether the presence (and enforcement of the rule) causes more harm than it avoids (as Woolley and Dodek and Alderson both suggest).

The Dissent

The dissent found that the allegations of incivility against Smith had not been made out. Looking first at the majority opinion, the dissent found that the test for incivility had been incorrectly applied by the panel (and appears to suggest that the majority applied an incorrect standard of review, in that the majority ultimately found the Hearing Committee's findings "reasonable"). The dissent then re-examined the subject communications according to the correct test and found that Smith's communications, while certainly rude (and perhaps more), they were reasonable and made in good faith. As the dissent stated, "even intemperate communications may be acceptable if there was a solid basis" (at para 152) . According to the dissent, although the majority recognised the test in *Groia,* they did not apply it, and looked more at the communications in the absence of their context, and failed to consider whether the lawyer had a reasonable and good faith basis for making the claim. The dissent also took issue with the majority's failure to balance Smith's statements mindful of both Smith's *Charter* rights and his duty towards his client of zealous advocacy.

In addition to disagreeing with the majority on a finding of guilt, the dissent makes some interesting observations as to whether or not law societies should undertake the "thankless work" of regulating civility (at para 114). Drawing (as I do) from the scholarship of Woolley and Dodek and Alderson, the dissent identifies certain pragmatic reasons why civility regulation is inadvisable: (1) it deals with a notoriously "contested" concept, made more complicated by the competitive nature of advocacy generally, (2) as in hockey, it tends to isolate attention on the response, and often does not consider the behaviour that prompted the communication, (3) it draws scarce resources away from more pressing regulatory priorities; (4) it may discourage lawyers calling each other out for misconduct (or lead to mischief in the use of civility rules as a legal strategy); (5) it does not involve harm to a client or the public at large; (6) civility prosecutions are "disproportionality associated with the status of lawyers and their clients" (*Smith,* at para 137) (7); it tacitly models a type of discourse, and therefore lawyer, which may bear little resemblance

to the society it serves, and unwittingly exclude (and penalise) a certain advocacy styles (at para 173).

These prudential reasons why a law society should not undertake the "thankless work" of regulating civility (at para 114) all in my view have merit and may be why regulators have been so reluctant to prosecute claims. The dissent agrees with the scholarship in this area, and appears to suggest (this is not stated explicitly) that law societies should withdraw from the civility field, and leave the regulation to those who are responsible for hearing the dispute, namely judges. The dissent also observes that in Smith's case, the communications were not effective advocacy, and this fact alone ought to discourage incivility by counsel.

Civility, Generally

But apart from the practical considerations noted by the dissent, drawn as I say from scholarship in this area, there is a more pressing reason why civility regulation may not be advisable. In *Groia* the Supreme Court set out why incivility interferes with the administration of justice, and this was cited by the majority opinion in *Smith* in support of their findings (at paras 64 – 67). It appears to be stated as self-evident by the Court that incivility can both prejudice a client's cause, distract other parties, and "erode public confidence in the administration of justice" (*Groia* at para 67).

But does it? I question whether the so-called 'salutary' benefits of civility work the effects the Court thinks. If we legislate not just what lawyers say but how they say it, are we getting a better justice system, or just compliance by its participants? Do (rude and unpleasant) emails between counsel erode the public's confidence in the justice system? There was no allegation that Smith, either in his communications or other litigation activities, sought either to delay the matter unnecessarily or impair resolution. He stated – in admittedly objectionable language – his good faith view of opposing counsel's conduct. Insofar as there is a public interest the law society must protect in the regulation of disputes, that interest lies in the efficient resolution of disputes (as both the Appeal Panel and *Groia* note), and I question whether the public's sensitivities are so fragile such that a regulator should involve themselves in the form the dispute takes. And, I suggest that the civility justifications identified in *Groia*, and endorsed by the Law Society, are inextricably tied to a normative view of the justice system and its participants that may not reflect the society it serves nor truly serve the ultimate aim of the justice system, which is the fair and efficient resolution of disputes.

A further basis that the Supreme Court (and so the Appeal Panel) concludes that civility is advisable is that uncivil communications can make a dispute more protracted, and complicate resolution. Perhaps. But it could be equally true that sharp and sometimes harsh comments hasten a dispute along or narrow issues. But forceful language could also have the opposite effect. And there are a plethora of ways (as anyone reading this blog will know) that counsel may delay, obfuscate, and otherwise fatigue an opposing party into submission, all quite within the rules. If Courts, and by extension Law Societies, wish to mandate civility, then more attention needs to be paid on the link, if any, between this ideal and the administration of justice generally.

The Appeal Panel (both the majority and dissent) did a service to the profession and the administration of justice in thoroughly considering whether civility ought to be regulated, and at

what point intervention is necessary. And, as this comment indicates, I am persuaded by the dissent opinion, which suggests that law societies should leave the field altogether and focus on matters that truly require protection of the public.

This post may be cited as: Fraser Gordon, "Must We Be Nice? Civility Rules and *Law Society of Alberta v. Smith,* 2025 ABLS 13" (12 June 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/06/Blog_FG_LSAvSmith.pdf