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Criminal Law Rules! The Contextual Use of Criminal Law Principles and *Charter* Values in *Groia v The Law Society of Upper Canada*

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The hot off the presses decision in *Groia v The Law Society of Upper Canada* confirms my belief that criminal law matters in all areas of law. Criminal law principles are foundational and have a reach beyond criminal case law. This is most evident in the rules of evidence where those principles do not distinguish between areas of law. Evidence is evidence no matter the context. It is the courtroom that gives the rules of evidence its perspective, not any particular area of law. There is a caveat to that proposition: some evidential rules blossom and find deeper meaning in the criminal law context where *Charter* rights provide a signpost to evidential rulings. In many ways, *Groia* borrows from the texture of criminal law, not only in the specific areas I will touch upon in this blog posting. The concept of fearless and resolute advocacy, peppered throughout the *Groia* decision, defines the criminal defence lawyer's duty to her client. A client who faces the ultimate sanction of our justice system, a potential loss of liberty and societal condemnation. In some ways, the fact that Justice Moldaver, who authored the majority decision in *Groia* and began his litigation career as a criminal lawyer, references criminal law principles in the *Groia* judgment should not surprise anyone. Yet, to see not only outright usage of criminal principles but to also detect an almost metaphysical reliance on criminal law analysis brings a welcome richness to this decision. It also helps that the case is situated in a quasi-criminal law environment as a prosecution by the securities commission. A prosecution with a decidedly criminal law bent as Jay Naster started his career as a Crown prosecutor.

I need only concentrate on a few paragraphs of the decision to illustrate my premise. First, the outright usage of criminal law principles is palpable in Justice Moldaver's finding that Groia's conduct did not amount to incivility. In Moldaver J's view, Groia made an honest mistake in his understanding of the rules of evidence, mistaking the Crown's obligation to disclose relevant and material evidence with an obligation to consent to the admission of such producible evidence. Crucially, this honest mistake was sincerely held, an important factor in the analysis on whether there was a basis for Groia's in court conduct. As Justice Moldaver suggests in paragraph 93, requiring an honest but mistaken belief as the foundational precept for the civility analysis is taken straight from the 1980 criminal law *Pappajohn* decision.

Pappajohn is itself a seminal case, and a foundational one at that, taught in all first-year law school criminal law courses. It provides the foundational elements of mistake of fact in a sexual assault context - the defence of mistaken but honest belief in consent. It is the start of a long line of cases where the Supreme Court struggles with the parameters of such a defence and when such a defence should be left to the consideration of the trier of fact, known as the air of reality test. It is also an infamous case, which at the time of the trial in the late '70s caused a shock

wave in Vancouver high society as wealthy business man, George Pappajohn was tried, convicted and incarcerated for the rape of a real estate agent. The case eventually led to the 1999 *Ewanchuk* decision where the Supreme Court made it clear that no means no and only yes means yes. On the pop culture side, the *Pappajohn* trial is also one of the cases dramatized in the radio series created by George Jonas (journalist) and Eddie Greenspan (legendary criminal defence lawyer), and then later television series, entitled the *The Scales of Justice*. When I teach *Pappajohn*, I bring in the script as published in the book series for the class to get a sense of the real-life drama surrounding the decision. Too often when we look at cases we forget the facts are not just a written narrative or story but are based in real life events.

Although, Justice Dickson wrote for the dissent in *Pappajohn*, his framing of the defence of mistake of fact was adopted by the majority decision, authored by Justice McIntyre. It was Justice Dickson, who clarified the defence in Canada as an honest belief that need not be reasonably held as opposed to the English authority in *Tolson* (see pages 150 to 154 of Justice Dickson's dissent in *Pappajohn*), which suggested the belief must be an honest and reasonable one. Later case law on the issue, particularly Chief Justice Lamer in *Davis*, emphasizes the need for the belief to be honestly or sincerely held, for the defence to cross the air of reality threshold. Reasonableness is not required but is a factor in determining the honesty of that belief. It is, in other words, part of the credibility assessment of the belief but not a controlling pre-requisite. In *Groia*, Justice Moldaver relies on this crucial distinction between an honest belief sincerely held and an honest and reasonable belief as a defining basis for finding Groia's conduct as not deserving sanction (see para 92).

But that is not the only basis for this finding. The subtler reliance on criminal law principle comes as Justice Moldaver speaks of another aspect of Groia's conduct; whether he was acting in good faith. Contrary to the dissent's interpretation of the majority's position on this, Justice Moldaver suggests he is not conflating reasonableness with good faith. Indeed, he maintains these concepts act separate and apart. Here, Justice Moldaver relies on criminal law *Charter* language as he defines the concept of good faith in the same terms as the s.24(2) *Grant* analysis. Section 24(2) is a remedial section, triggered once the court finds a violation of a *Charter* right. It is a criminal law remedy as evidence can be excluded under this section on the basis of a breach that brings the administration of justice into disrepute. *Grant* is a sophisticated analysis that heavily relies upon societal norms and aspirations. It is a remedy that engages long-term goals of society and is firmly situated in the kind of society we want to live in as well as the kind of behaviours we will or will not tolerate as a society. It is firmly fixed in the public confidence in our justice system. Section 24(2) plays an educative role, a disciplinary role and an aspirational one. It is retrospective, in the sense it must revisit the past actions of the authorities in breaching the *Charter*, but it is prospective in its relief. Admittedly, after doing a couple of presentations on s. 24(2), I am attracted to the *Grant* analysis as I find the test to be an elegant and inspirational one.

But back to *Groia* and Justice Moldaver's pulling into the mix conceptual images from s. 24(2) in the shape of good faith. Part of the s. 24(2) analysis requires the court to assess the seriousness of the breach, in other words the seriousness of the *Charter* infringing conduct. In *Groia*-terms this can be equated to the seriousness of the alleged professional misconduct. Justice Moldaver in paragraph 93 enters into an ersatz s. 24(2) analysis as he describes good faith on a sliding

scale "The more egregious the legal mistake, the less likely it will have been sincerely held, making it less likely the allegation will have been made in good faith." This is exactly what is done in a s. 24(2) analysis. There, the court situates the police conduct on a "scale of culpability" with "inadvertent or minor violations" at one end and "wilful or reckless disregard of *Charter* rights" at the other (see *R v Paterson*, 2017, SCC at para 43). All of this is, of course, reviewed in light of all of the circumstances of the case – in other words a contextual analysis.

Interestingly, this 24(2) like analysis intersects with the honest but mistaken legal mistake analysis undertaken by Justice Moldaver. As part of the s. 24(2) good faith assessment, the court considers whether the police were relying on an erroneous view of the law at the time of the events. This view of the law may be correct at the time but later changed through case law or it may be erroneously held through a mistaken understanding of the law (*R v Vu*, 2013, SCC para 69 & *R v Duarte*, 1990, SCC, para 60). However, there is an obligation on the police to be up to date on the law. They cannot rest on wilful blindness. A noted difference in the analysis is the requirement in *Paterson* at paragraph 44 of the majority reasons of Justice Brown that the good faith errors be reasonable. Negligence, in accordance with this standard, is not good faith and neither are unreasonable errors based on ignorance (see *R v Buhay*, 2003, SCC at para 59). As an aside, Justice Moldaver dissented in *Paterson*. In any event, this discussion must be kept in context – what Justice Moldaver is discussing is civility not competency. The line must be clearly drawn to ensure the integrity of our adversarial system and the buttressing concept of resolute advocacy.

It should finally be mentioned that at no point does Justice Moldaver reference s. 24(2) or the pertinent case law. In a contextual analysis such as this one, anything goes. Which leads me to the last point in this brief blog that obviously the *Groia* decision continues the Supreme Court's predilection to contextualize. This modern approach to everything where 'context is everything' first appears in statutory interpretation principles (see *Rizzo Shoes*, 1990, SCC at paras 21 and 22) but has outgrown the written law to be a favoured solution to all problems. The contextual approach opens the rule of law door, which so often in the more rigid application of law is closed. Whether this open-door policy is a good one, I leave for another day but needless to say, the Supreme Court is certainly consistent. In the end, by using criminal law principles and *Charter* aspirations in areas not traditionally considered true criminal law, the 'idea of context' is everything is getting a large and liberal interpretation. In a very real sense, criminal law rules!

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