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Hardball tactics, or an uncivil war?

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Two raucous trials in two cities tell very different stories about the boundaries of legal civility in Canada.

The first was a murder trial in a Brockville, Ont., courtroom in the late 1990s. Julia Elliott was accused of murdering an Ottawa man and her lawyer Kevin Murphy hurled so many insults and legal challenges as part of his defence that case judge Paul Cosgrove was sanctioned for failing to restrain the lawyer. "We deplore the tactics" used by Mr. Murphy, the Court of Appeal for Ontario wrote in a 2003 ruling. "One of the most disgraceful exhibitions that has ever been seen in a Canadian courtroom," independent counsel Earl Cherniak told the Canadian Judicial Council last fall.

Tempers also flared in a Toronto courtroom when defence lawyer Joe Groia railed against the tactics and motives of Ontario Securities Commission prosecutors who sought, unsuccessfully, to convict his client John Felderhof for alleged securities crimes related to the fall of Bre-X Minerals Ltd. "Appallingly unrestrained and on occasion unprofessional," ruled Mr. Justice Marc Rosenberg of the Appeal Court.

What happens when lawyers get spanked for bad behaviour?

The answer: It depends.

After Ms. Elliott was ultimately convicted of murder, Mr. Murphy was handed a new job. He is now a lawyer with the federal government's Public Prosecution Service and he declined to discuss the Elliott trial.

Mr. Groia wasn't so lucky. Next week the Law Society of Upper Canada will set a date in the new year for a hearing into allegations from the regulator that he engaged in professional misconduct by acting and communicating in a "rude," "abusive," and "offensive" manner during the Bre-X trial.

The Law Society has the right to reprimand, suspend or disbar lawyers found guilty of misconduct.

"I don't see this at all," said Mr. Groia in an interview. "I have a lot of trouble understanding why I can be so harshly criticized."

Ever since Canada's provincial law societies and professional associations began complaining a few years ago about the decline of civility, lawyers have hotly debated the need for regulators to police their

behaviour. Some argue that the crackdown is necessary to quash insulting and unnecessarily aggressive conduct that is being fed by increased competition and pressure from clients and law firms for legal victories. Others argue that the vigilance could discourage lawyers from fully defending clients.

Derry Millar, treasurer of the Law Society of Upper Canada, which regulates Ontario's lawyers and paralegals, has helped design a number of initiatives with judges, legal associations and law firms to promote higher standards of civility and professionalism. The society estimates it has prosecuted only a half-dozen lawyers for poor conduct and the pace has stepped up in the last year with the revelation of three cases, including Mr. Groia's.

In one case, a panel ordered a lawyer to pay \$500 after it ruled he swore at another lawyer outside a courtroom and called her "stupid," "pathetic" and "unprofessional." In another, a lawyer was suspended for 15 days after he sent an e-mail to a lawyer that insulted her legal ability.

"The public demands this and it is part of our role," Mr. Millar said. "If you don't set standards and ask people to live up to those standards, then the standards disappear and things become worse and worse."

Law societies in Alberta, British Columbia and Nova Scotia have also stepped up disciplinary actions against lawyers who, in some cases, were reprimanded for directing sexual insults or profanities at other lawyers.

The push for more civility in Canada gained momentum at the beginning of the decade when the Toronto-based Advocates' Society became concerned about unprofessional conduct and produced guidelines known as "Principles of Civility for Advocates."

Ron Slaght, a veteran litigator with Lenczner Slaght Royce Smith Griffin LLP, was president of the society in 2000 when civility was targeted. He said he was frustrated with "a general malaise" in lawyers' behaviour toward opponents.

"There was a decline in the culture of co-operation and collegiality which should be at the core of our profession," he said. While he applauds law schools, legal groups and law firms for better educating and mentoring young lawyers about the need for professional courtesy, he worries that civility is too vague and unscientific a concept to be policed by

regulators.

"I always get a little uncomfortable when regulatory bodies get involved with behavioural issues," he said.

Mr. Groia has hired as his lawyer Mr. Cherniak, the prominent Toronto lawyer who was so critical of Mr. Murphy's conduct in the Elliott murder trial.

In an interview, Mr. Cherniak said he will ask the Law Society panel hearing the Groia case to consider Mr. Groia's conduct through the prism of a "hard-fought and high-stakes" case. Mr. Groia's client Mr. Felderhof was the only executive who faced charges for the Bre-X gold-salting scandal that wiped out billions of dollars of investor savings.

"Civility has to be looked at in context," Mr. Cherniak said.

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