

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE QUÉBEC COURT OF APPEAL)

BETWEEN:

GILLES DORÉ

APPELLANT
(Appellant)

- and -

**PIERRE BERNARD, in his capacity as Assistant Syndic
of the Barreau du Québec**

RESPONDENT
(Respondent)

- and -

PROFESSIONS TRIBUNAL

and

ATTORNEY GENERAL OF QUEBEC

RESPONDENTS
(Respondents)

- and -

FEDERATION OF LAW SOCIETIES OF CANADA

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

and

YOUNG BAR ASSOCIATION OF MONTREAL

INTERVENERS

**FACTUM OF THE INTERVENER
FEDERATION OF LAW SOCIETIES OF CANADA**

Ms. Sophie Dormeau

1065 Pratt Avenue
Outremont, Québec
H2V 2V5

Tel.: 514 843-8118
Fax: 514 843-8529
sdormeau@sophiedormeau.ca

Counsel for the Appellant

**Mr. Claude G. Leduc
Mercier Leduc LLP**
164 Notre-Dame Street East
Montréal, Québec
H2Y 1C2

Tel.: 514 954-2000
Fax: 514 954-2035
cleduc@mercierleduc.qc.ca

**Counsel for the Respondent
Pierre Bernard**

**Ms. Dominique A. Jobin
Ms. Noémi Potvin
Attorney General of Québec**
2nd Floor
1200 de l'Église Road
Sainte-Foy, Québec
G1V 4M1

Tel.: 418 643-1477, #20788 / 20763
Fax: 418 644-7030
djobin@justice.gouv.qc.ca
noemi.potvin@justice.gouv.qc.ca

**Counsel for the Respondents
Professions Tribunal and
The Attorney General of Canada**

Mr. Richard Gaudreau

Bergeron, Gaudreau
67 Notre Dame de l'Île Street
Gatineau, Québec
J8X 3T3

Tel.: 819 770-7928
Fax: 819 770-1424
bergeron.gaudreau@qc.aira.com

Agent for the Appellant

**Ms. Marie-France Major
Lang Michener LLP**
Suite 300
50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Tel.: 613 232-7171
Fax: 613 231-3191
mmajor@langmichener.ca

**Agent for the Respondent
Pierre Bernard**

**Mr. Pierre Landry
Noël & Associates**
111 Champlain Street
Gatineau, Québec
J8X 3R1

Tel.: 819 771-7393
Fax: 819 771-5397
p.landry@noelassociates.com

**Agent for the Respondents
Professions Tribunal and
The Attorney General of Canada**

Mr. Babak Barin
Mr. Frédéric Côté
BCF LLP
Suite 2500
1100 René-Lévesque Blvd. West
Montréal, Québec
H3B 5C9

Tel.: 514 397-5554 / 4591
Fax: 514 397-8515
bbarin@bcf.ca
fcote@bcf.ca

Counsel for the Intervener
Federation of Law Societies of Canada

Sylvain Lussier, Ad. E.
Mr. David Grossman
Mr. Julien Morissette
Ms. Annie Galant, Law intern
Osler, Hoskin & Harcourt LLP
Suite 2100
1000 De La Gauchetière Street West
Montréal, Québec
H3B 4W5

Tel.: 514 904-5377 / 5762 / 5818
Fax: 514 904-8101
slussier@osler.com
dgrossman@osler.com
jmorissette@osler.com

Counsel for the Intervener
Canadian Civil Liberties Association

Mr. Colin S. Baxter
Cavanagh Williams Conway Baxter LLP
Suite 401
1111 Prince of Wales Drive
Ottawa, Ontario
K2C 3T2

Tel.: 613 569-8558
Fax: 613 569-8668
cbaxter@cwcb-law.com

Agent for the Intervener
Federation of Law Societies of Canada

Ms. Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, Ontario
K1R 7Y6

Tel.: 613 787-1009
Fax: 613 235-2867
pwilson@osler.com

Agent for the Intervener
Canadian Civil Liberties Association

Mr. Mathieu Bouchard
Mr. Éric Cadi
Ms. Audrey Boctor
Irving Mitchell Kalichman, LLP
Suite 1400
Place Alexis Nihon, Tower 2
3500 De Maisonneuve Blvd. West
Westmount, Québec
H3Z 3C1

Tel.: 514 934-7733 / 7732 / 7737
Fax: 514 935-2999
mbouchard@imk.ca
ecadi@imk.ca
aboctor@imk.ca

Counsel for the Intervener
Young Bar Association of Montreal

Brian A. Crane, Q.C.
Gowling Lafleur Henderson, LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-0107
Fax: 613 563-9869
brian.crane@gowlings.com

Agent for the Intervener
Young Bar Association of Montreal

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FACTUM OF THE INTERVENER
FEDERATION OF LAW SOCIETIES OF CANADA

PART I – FACTS

1. The Federation of Law Societies of Canada (“**Federation**”) does not take a position with respect to the facts of this case except with respect to the Appellant’s statement that he wrote the 21 June 2001 letter to Justice Boilard as a private citizen. The Federation disagrees with this characterization. The letter, written immediately following the end of a trial before Justice Boilard and which related to that trial, cannot be separated from the Appellant’s role as a member of the legal profession.

PART II – QUESTIONS IN ISSUE

2. The Appellant has identified three main issues in his amended Factum. The Federation will address only the following:

Are lawyers bound by their code of professional conduct in all respects and at all times?

PART III – ARGUMENT

A. Summary of Position

3. The Federation submits that:

- i. Lawyers are bound at all times by their code of professional conduct when their conduct relates to the protection of the public, respect for the rule of law or the administration of justice;
- ii. A special ethical and social responsibility comes with membership in the legal profession; and
- iii. The unique and privileged position that a lawyer holds in society requires the lawyer to refrain from acts that are derogatory to the dignity of the profession. A lawyer must refrain from criticising, publicly or privately, the administration of justice in a manner that lacks objectivity, dignity and civility.

4. This Court has been asked to determine whether the obligation imposed on a lawyer by the regulator of the legal profession to refrain from acts that are derogatory to the profession

and undermine the administration of justice applies to a lawyer's private life. The Federation respectfully submits that this should be the case.

5. The Federation also submits that preserving the balance between the special status that the legal profession holds in society, the special privileges that are granted to the members of the legal profession and the duties that a lawyer has towards the public justifies certain restrictions on the lawyer's personal rights and freedoms, especially when the absence of such restrictions may undermine the protection of the public, the rule of law and the administration of justice.

B. Lawyers are bound at all times by their code of professional conduct

6. Lawyers are bound at all times by their code of professional conduct when the issue they are facing relates to the protection of the public, respect for the rule of law or the administration of justice. This is even more so when they write to a judge who has just heard their case to comment on events that occurred during the trial.

7. Section 2.00.01 of the *Code of Ethics of Advocates*,¹ which replaced the former section 2.03, is completed by section 2.01.01² as follows:

An advocate shall serve justice. He shall support the authority of the courts. He may not act in a manner which is detrimental to the administration of justice. [...]

Under the heading "General Duties and Responsibility to the Public", Section 2.00.001 reads:

An advocate shall act with dignity, integrity, honour, respect, moderation and courtesy.

8. The Federation's *Model Code of Professional Conduct*³ contains a similar rule which states that "[a] lawyer must encourage public respect for and try to improve the administration of justice."⁴ The accompanying commentary describes the scope of this obligation:

¹ *Code of Ethics of Advocates*, R.S.Q., c. B-1, r.1 [Tab 3].

² S. 2.01.01 replaced former s. 2.06 of the *Code of Ethics of Advocates*, R.R.Q., 1981, c. B-1, r.1, which stated: "The Lawyer shall support the authority of the courts" [Tab 2].

³ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 2009, online: Federation of Law Societies of Canada <<http://www.flsc.ca/en/pdf/ModelCode.pdf>> [Tab 6].

⁴ *Ibid.*, s. 4.06(1) at p. 66.

The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities [...]. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to any public statements.⁵ [Emphasis added]

9. The codes of professional conduct in force in virtually all of the Canadian jurisdictions and the Canadian Bar Association's *Code of Professional Conduct*⁶ contain almost identical rules.

10. The Federation submits that there can be no distinction between the private and "work-related" actions of a lawyer when they relate to the lawyer's duties and responsibility to the public. As explained by Beverly G. Smith:

[T]he appearance of an honourable system of justice peopled by honourable persons must be upheld at all times in order to foster public respect for it. Any conduct of the lawyer, public or private, that would tend to derogate from that is not good professional conduct.⁷

11. A similar conclusion was reached by the British Columbia Court of Appeal in *Law Society of British Columbia v. Canada (Attorney-General)*:

The respondents say that [the *Legal Professions Act* of British Columbia] is an Act to provide a licensing system, to regulate competency, and to police the integrity of those entitled to practice law. I think that it is much more than that. The power given the Benchers has been held to be wide. Branca, J.A., speaking for this court in *Prescott v. Law Society of British Columbia* [1971] 4 W.W.R. 433 at 440, after setting out the definition of "conduct unbecoming a member of the Society", said:

The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this province. One of

⁵ *Ibid.*

⁶ Canadian Bar Association, *Code of Professional Conduct*, 2009, Chapter XIII at p. 91, online: Canadian Bar Association: <http://www.cba.org/CBA/activities/code/> [Tab 5].

⁷ Beverly G. Smith, *Professional Conduct for Canadian Lawyers*, Markham: Butterworths, 1989 at p. 241 [Tab 20].

the most important statutory duties confided to that body is that of disciplining their fellow members who fail to observe the proper standards of conduct and/or ethics which are necessary to keep the profession on that very high plane of honesty, integrity and efficiency which is essential to warrant the continued confidence of the public in the profession.⁸ [Emphasis added]

12. A lawyer failing to discharge his or her duties and responsibility to the public, even in private life, does not comply with the lawyer's professional code of conduct. The bargain reached between the public and the legal profession cannot be maintained on a part-time basis.

13. This Court has already decided that: "the privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned".⁹

14. This Court has also decided that:

[T]he Quebec legislator has made the practice of certain professions subject to restrictions and various control mechanisms. The Professional Code [...] now governs the 44 professional orders constituted under the Act. It establishes a body, the Office des professions du Québec, whose function is to see that each order carries out the mandate expressly assigned to it by the Code, which is the principal reason for the existence of the order: to ensure the protection of the public [...]. In pursuing this fundamental objective, the legislature has granted the members of certain professions the exclusive right to perform certain acts. [T]he exclusive right to practise a profession "must not be granted except in cases where the acts done by these persons are of such a nature and the freedom to act they have by reason of the nature of their ordinary working conditions are such that for the protection of the public they cannot be done by persons not having the training and qualifications required to be members of the order".

The legal profession is one such profession. [The *Act Respecting the Barreau du Québec*] provides that [a series of] acts, performed for others, shall be the exclusive prerogative of the practising advocate or solicitor.

In return for this monopoly, the legislature has imposed a number of obligations and responsibilities on the people who perform these exclusive acts. The Barreau du Québec is responsible for the implementation of, compliance with and enforcement of those rules [...].

⁸ *Law Society of British Columbia v. Canada (Attorney-General)*, (1980) 115 D.L.R. (3d) 549 at para. 22 (B.C.C.A.), affd [1982] 2 S.C.R. 307 [Tab 8].

⁹ *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 36 [Tab 9]. See also *Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869 at p. 887: "the self-governing status of the professions, and of the legal profession in particular, was created in the public interest" [Tab 10].

The Barreau has [...] adopted a code of ethics governing the general and special duties of the professional towards the public, his clients and his profession, particularly the duties to discharge his professional obligations with integrity, refrain from acts that are derogatory to the dignity of the profession, refrain from incompatible responsibilities and avoid conflicts of interest, and respect professional secrecy [...].¹⁰ [Emphasis added]

15. A lawyer taking the Oath of Allegiance in Quebec or in a number of other Canadian jurisdictions (for example in Ontario), unequivocally undertakes:

In Quebec:

I _____ do swear (or solemnly affirm) that I will fulfill the duties of the profession of advocate with honesty, integrity and justice.

I will show respect in word and in deed for the persons entrusted with the administration of justice. [...]

I will comply with the Professional Code (R.S.Q., c. C-26), the Act respecting the Barreau du Québec (R.S.Q., c. B-1) and the regulations of the Bar, always bearing in mind my duty not to compromise the honour and dignity of the profession which I enter this day.¹¹ [Emphasis added]

In Ontario:

I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. [...] I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession.¹²

16. If the oath the lawyer has taken is to mean anything, no compromises can be made to protect the public by maintaining the confidence of the public in the justice system.

17. The profession of a lawyer is a personal fact about the lawyer that inevitably changes the way he or she relates to the rest of the world.¹³ Once a lawyer raises his or her hand and takes the oath of allegiance, the lawyer unequivocally accepts to be governed by the rules

¹⁰ *Fortin v. Chrétien*, 2001 SCC 45 at para. 11-14 [Tab 7].

¹¹ *Regulation Respecting Entry on the Roll of the Order of Advocates*, R.S.Q., c. B-1, r.8, Schedule 1 [Tab 4].

¹² *By-law 4* adopted pursuant to ss. 62 (0.1) and (1) of the *Law Society Act*, R.S.O., c. L-8, s. 21(1) [Tab 1].

¹³ Daniel R. Coquillette, *Real Ethics for Real Lawyers*, Durham: Carolina Academic Press, 2005 at pp. 3-4 [Tab 13].

and standards of the legal profession that are different and more demanding than those governing the ordinary citizen.¹⁴

18. Canadian society expects lawyers, in their public and private lives, to refrain from acts that undermine the administration of justice and the rule of law. If as a result of the duty to protect the public, to preserve the rule of law or to encourage respect for the administration of justice, a personal liberty of a lawyer is breached, such infringement is justified in a free and democratic society like Canada.

C. Special Ethical and Social Responsibility comes with membership in the legal profession

19. One of the hallmarks of civilized society is the rule of law. Its importance is manifested in virtually every activity in which citizens engage.

20. As one of the key protagonists of the justice system with whom the general public has the greatest contact, lawyers hold a unique and privileged position in society.

21. The law is a profession different from all of the other professions. It is the profession most intimately connected with the rule of law and the administration of justice.

22. Membership in the legal profession is a privilege. Finding the right and measured balance in dealing with the competing values and demands inherent in the difficult but fundamental role that a lawyer as citizen and lawyer as a professional plays in a democratic society can at times be challenging, but the pursuit of membership in the legal profession is a personal choice.

23. The law is “not merely a trade but rather a profession, which entails a higher calling in pursuit of the public interest.”¹⁵ The idea that entry into the profession is a choice to serve a cause greater than the person of the lawyer is well illustrated in the following passage from *Real Ethics for Real Lawyers* by Daniel R. Coquillette:

The profession of being a lawyer has been the focus of my academic work as a legal historian and as a specialist in legal ethics. More important, it has been the business of my life [and] the business of your lives. [...] I believe that my profession and your profession, is in deep trouble today. The question is, “Who cares?”

¹⁴ *Ibid.*

¹⁵ Adam M. Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 *Osgoode Hall L. J.* 1 at p. 4 [Tab 14].

Notice my choice of words. It is not our “occupation”, our “career” or our “vocation” that is in trouble. It is our “profession”. There is a big difference among these terms. “Occupation”, from the Latin *occupatio*, refers to “means of passing one’s time” - simply a way to pass the time each day. I hope we are all doing more than this! “Career” is somewhat more elevated. It comes from the Latin *carraria*, of “vehicle”, and refers to a forward motion through life. It shares the same root as “careen” - the way vehicles are driven in Boston. Some of us are certainly “careening” through life, and yet, there should be more. Finally, there is “vocation”, from the Latin *vocare* meaning “to call”. Historically, it refers to a divine call in the sense of being fit for something, talented in something.

Simply passing your time in an occupation, or careening through life in a career or even being called by your talent to do a particular job does not require anything from *you*. But being a “professional” most certainly does. Here the root is the Latin *professio*, or “declaration”, referring to a vow, a declaration of belief - an avowal made by *you*. All of you have taken “professional” oaths. These oaths require you to uphold the rule of law and to obey the regulations of the bar. They are not equivocal. [...] If your word means anything, you are committed to this formal “profession” of obedience and to other “professional” duties.

This obligation is a deeply personal one. It is a delusion of young, inexperienced lawyers to think that they can separate their personal from their professional lives and their personal from their professional morality. [...] We can’t split ourselves down the middle. Indeed, the word “integrity” itself comes from Latin root *integritas*, as in “integral” and “integration”. It means “wholeness” or “oneness”. There is just one of each of us. [...]

If we go back to the origins of our professional traditions in the Inns of Court, or the foundations of the American legal profession and the first American law schools, we will discover a duty-based deep theory for the formalization of legal education in the Anglo-American tradition. Law was initially taught as a humanistic study in both American and English universities. The Inns of Courts - the ultimate source of the “barrister ideal” in English law - strengthened the identification of individual lawyers with the system of justice. Maintaining this identity was seen as a professional duty. [...]

I do not have time here to trace the details of how American legal education left its roots for the more modern emphasis on goal instrumentalism. [...] Self-respect demands that we get away from the intellectual tyranny of instrumentalism. We have a [proud] heritage [...]. This heritage is founded on our ancient duties: to protect the rule of law as an ideal, to serve the system of justice on which our democracy is based, and to study and promote humanism - the mutual bounds of our humanity and on which peace itself ultimately depends. [...] The ultimate answer to the question “Who cares?” has to be, “We do”.¹⁶ [References omitted] [Emphasis added]

¹⁶ Coquillette, *supra* note 11, at pp. 10, 11, 13 and 14 [Tab 13].

24. A lawyer's responsibility to demonstrate respect for the administration of justice and its members cannot be restricted to the lawyer's professional activities but is a general responsibility that must follow the lawyer in the pursuit of his or her activities in the community and private life. A lawyer's responsibilities in that pursuit are greater than those of a private citizen.

25. Maintenance of public confidence in and respect for the rule of law, fundamental to order and justice in a free and democratic society, depends to a significant degree on lawyers projecting an image of objectivity, dignity and civility. It is critically important that every lawyer project such an image "as the image of one has an impact on the image of the whole."¹⁷ All lawyers in Canada, regardless of the jurisdiction of their membership, have a duty to act with objectivity, dignity and civility in all matters that relate to the protection of the public, the administration of justice and respect for the rule of law.

26. The conduct of a lawyer toward a judge, in or outside of the courtroom, in public or in private, can affect the judicial system as a whole, and the confidence that the public places in it. As explained in the Report of the Inquiry Committee concerning the Hon. P. Theodore Matlow, preserving that public confidence is vital:

Maintaining confidence on the part of the public in [the] justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. [...] Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.¹⁸

27. Because of the importance of maintaining public confidence in the judiciary and the administration of justice, it is imperative that all lawyers act with objectivity, dignity and civility both in their public and private lives when their conduct relates to the protection of the public, the respect for the rule of law and the administration of justice.¹⁹

¹⁷ Inquiry Committee appointed under subsection 63(3) of the Judges Act to conduct an investigation into the conduct of Mr. Justice Theodore Matlow, a Justice of the Ontario Superior Court, *Report to the Canadian Judicial Council*, May 28, 2008, at para. 126, online: Canadian Judicial Council < http://www.cjc-ccm.gc.ca/cmslib/general/CJC_20080528.pdf > [Tab 22].

¹⁸ *Ibid.* at para. 118, citing *Re Therrien*, 2001 SCC 35 at para. 108-111.

¹⁹ For further theoretical analysis of the concept of legal professionalism and of both its moral and institutional elements, see: H.W. Arthurs, "Lawyering in Canada in the 21st Century", (1996) 15 Windsor Y.B. Access Just. 202 [Tab 12]; Trevor C.W. Farrow, "Sustainable Professionalism", (2008) 46 Osgoode Hall L.J. 51 [Tab 15]; Eliot Freidson, "Professionalism as Model and Ideology" in Robert L. Nelson, David M. Trubeck and Rayman L. Solomon, ed., *Lawyers' Ideals/Lawyers' Practices*, Ithaca: Cornell University Press, 1992 [Tab 16]; Robert W. Gordon and William H. Simon, "The Redemption of Professionalism?" in Robert L. Nelson, David M.

D. Appellant failed to discharge his duties and responsibility to the public

28. The Federation submits that the Appellant, a lawyer, failed to discharge his duties and responsibility to the public and the legal profession when he wrote the 21 June 2001 letter to a member of the judiciary. The Federation submits that a letter to a member of the judiciary from a member of the legal profession, particularly one relating to a trial in which they both participated, is necessarily related to the exercise of his or her profession. It is not and cannot be a private matter. In the submission of the Federation, the tone and language of the Appellant's June 21 letter were disrespectful towards the administration of justice and derogatory to the legal profession. If the *Barreau du Québec* was prevented from sanctioning such conduct the respect of the public for the Canadian legal system would be compromised.

29. The interaction of a lawyer with a member of the judiciary in private or in public, lacking objectivity, dignity and civility violates the lawyer's oath of allegiance, adversely affects the image of the legal profession and undermines the judicial system as a whole. As explained by the Ontario Court of Appeal:

Conduct that may be characterized as uncivil, abrasive, hostile or obstructive [...] diminishes the public's respect for the court and for the administration of [...] justice [...].²⁰

30. In his introduction to the Advocates' Society's *Principles of Civility*, the Honourable R. Roy McMurtry, Chief Justice of Ontario, as he was then, endorses the view that "civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system."²¹ He explains:

For decades, a significant segment of the public, often unfairly, has viewed lawyers as difficult, contentious individuals. The result is that lawyers and judges often become attractive political targets, a process that can undermine the very foundations of our democratic society which is, of

Trubeck and Rayman L. Solomon, ed., *Lawyers' Ideals / Lawyers' Practices*, Ithaca: Cornell University Press, 1992 [Tab 17]; Deborah L. Rhode and David Luban, *Legal Ethics*, New York: Thomson Reuters/Foundation Press, 2009 [Tab 19]; W. Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View", (2006) 75 *Fordham L. Rev.* 1473 [Tab 21]; and Warren K. Winkler, "Introduction to Principles of Professionalism for Advocates" in Institute for Civility and Professionalism, ed., *Principles of Professionalism for Advocates and Principles of Civility for Advocates*, 2009, online: The Advocates' Society < <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf> > [Tab 18].

²⁰ *R. v. Felderhof*, [2003] O.J. No. 4819 at para. 84 (Ont. C.A.) [Tab 11].

²¹ R. Roy McMurtry, "Introduction to Principles of Civility for Advocates" in Institute for Civility and Professionalism, ed., *Principles of Professionalism for Advocates and Principles of Civility for Advocates*, 2009, at p. 8, online: The Advocates' Society < <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf> > [Tab 18].

course, an independent justice system that enjoys the confidence of the citizenry.²²

31. The Appellant's conduct has been more than "difficult" or "contentious" in this case. The Appellant has not only failed to discharge his duties and responsibility to the public by acting without "dignity, integrity, honour, respect, moderation and courtesy" as required by the *Code of Ethics of Advocates*, but he has also shown disrespect in both word and deed for a member of the judiciary entrusted with the administration of justice. By doing so, the Appellant undermined the respect for the administration of justice and tarnished the image of the legal profession as a whole.

32. A scurrilous attack by a lawyer on a judge, made publicly or privately, undermines the administration of justice and enfeebles in the eyes of the public the image of the legal profession. Conversely, constructive criticism of any component of the justice system or the legal profession, if done objectively and with moderation and courtesy, is indispensable in a free and democratic society.

PART IV - COSTS

33. As the Federation's submissions are made solely to assist the Court, the Federation seeks no order as to costs and requests that no order of costs be awarded against it.

PART V - ORDER SOUGHT

34. The Federation submits that the decision of the Quebec Court of Appeal ought to be maintained.

35. The Federation is seeking an order authorizing it to present oral argument not exceeding 20 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montreal, this 14th day of January 2011.

Mr. Babak Barin
Mr. Frédéric Côté
BCF LLP
Counsel for the Intervener the
Federation of Law Societies of Canada

²² *Ibid.*

PART VI – TABLE OF AUTHORITIES

LEGISLATION AND REGULATION

Paragraph(s)

By-law 4 adopted pursuant to ss. 62(0.1) and (1) of the Law Society Act, R.S.O., c. L-8, s. 2(1) and 21(1) 15

Code of Ethics of Advocates, R.R.Q., 1981, c. B-1, r.1, s. 2.03 and 2.06 7

Code of Ethics of Advocates, R.S.Q., c. B-1, r.1, s. 2.00.01 and 2.01.01 7

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DOCTRINE

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Daniel R. Coquillette, *Real Ethics for Real Lawyers*, Durham: Carolina Academic Press, 2005 17,23

DOCTRINE (cont'd)

Paragraph(s)

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