

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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### Names Will Never Hurt Me

One of the recent trends in professional regulation is the expectation of civility by practitioners. At some point incivility constitutes professional misconduct. The Supreme Court of Canada recently offered guidance as to when that point can be reached even where freedom of expression is protected by the *Canadian Charter of Rights and Freedoms*.

In *Doré v. Barreau du Québec*, 2012 SCC 12, a lawyer faced discipline for reacting to comments made by a Judge. The Judge:

... accused Mr. Doré of [TRANSLATION] “bombastic rhetoric and hyperbole” and said that the court must “put aside” Mr. Doré’s “impudence”. Justice Boilard characterized Mr. Doré’s request for a stay as “totally ridiculous” and one of his arguments as “idle quibbling”. Finally, he said [Mr. Doré] “fixated on or obsessed with his narrow vision of reality, which is not consistent with the facts, Mr. Doré has done nothing to help his client discharge his burden”.

The Judge was later reprimanded for those comments by the Canadian Judicial Council. However, the lawyer wrote a private letter to the Judge that was critical and insulting. In the lawyer’s letter:

the judge was called [TRANSLATION] “loathsome”, “arrogant” and “fundamentally unjust” and was accused by Mr. Doré of “hid[ing] behind [his] status like a coward”; having a “chronic inability to master any social skills”; being “pedantic, aggressive and petty in [his] daily life”; having “obliterate[d] any humanity from [his] judicial position”; having “non-existent listening skills”; having a “propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal attacks”, which “not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge”; and being “[un]able to face [his] detractors without hiding behind [his] judicial position”.

Mr. Doré was disciplined for conduct that lacked objectivity, moderation and dignity. On appeal he argued that this finding was

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contrary to his freedom of expression rights under the *Charter*.

The Court indicated that the disciplinary tribunal had to balance competing interests:

We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion.

The Court went on to discuss where the balance of those competing interests lies. While speaking about lawyers, the comments could probably apply to many professions:

Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their

profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

The Court upheld the finding of professional misconduct on the facts of this case.

The case is also important for stating that administrative tribunals exercising constitutional discretion in the interpretation of its enabling statute should be given deference. Courts should accept such interpretations where they are reasonable even if a court might have reached a different conclusion. For example, in this case the Court said that the tribunal's conclusion as to whether the expression could reasonably be restricted under section 1 of the *Charter* need only be reasonable.

The *Doré* case can be found at: [www.canlii.org](http://www.canlii.org).