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The Top Ten Canadian Legal Ethics Stories – 2012

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At the blog Legal Ethics Forum John Steele recently published a list of the top ten legal ethics stories in America in 2012 (here). With contributions from Adam Dodek (University of Ottawa), Malcolm Mercer (McCarthy Tetrault), Richard Devlin (Dalhousie), and other members of the Canadian Legal Ethics Listserv, here is my articulation of a Canadian edition:

The Top Ten

1. The Law Society of Upper Canada's modification of the articling requirement to allow, at least on a test basis, some people to become members of the bar through alternative forms of training.

The link to the LSUC website on the Articling Task Force is here. Former Law Society of Upper Canada Treasurer Gavin Mackenzie's critique of the change is discussed here. An article on the final vote of the Law Society is here. The irony of this is that one of the items in John Steele's list (at point 5, in the discussion of changes in general education) is about initiatives by the bars of New York and California to increase practical training requirements – in the form of a pro bono requirement in New York and in the form of striking a commission on practical training in California. Will the public in Ontario be well served by this change? Will the profession be improved in the long run? There was clearly a gap between the number of qualified people seeking articling positions and the number of positions available in Ontario, a gap that also exists elsewhere in Canada. Articling had become a barrier to entry to the profession that was hard to justify as a matter of principle or of sound public policy. But whether this solution to that gap represents regulation of the profession in the public interest remains to be seen.

2. Regulation of civility.

A conduct committee of the Law Society of Upper Canada issued its decision holding that Joe Groia was guilty of professional misconduct for incivility (here). The Supreme Court of Canada upheld the decision of the Barreau du Quebec sanctioning Gilles Doré for his incivility in writing a critical and intemperate letter to a judge (here). I was an expert witness in the Groia case (for Groia) and continue to be critical of the law societies' regulation of civility, and most especially of the Law Society's decision with respect to Groia. My most recent thoughts, including an analysis of the published civility decisions since 2007, are in a paper forthcoming in the Dalhousie Law Journal, a preliminary version of which can be found here. An article on a panel held on this issue in Toronto earlier this month, which featured myself, retired Supreme Court Justice Ian Binnie, David Humphrey and Tom Heintzman is here.

3. The conduct of the Canadian Judicial Council Inquiry Committee Regarding the Honourable Lori Douglas ("Inquiry Committee").

The Inquiry Committee hearing was brought about in response to the existence of pornographic photographs on the internet of Justice Douglas and to the disclosure (or not) of the existence of those photographs at the time she was appointed to the bench. In 2012 the Inquiry Committee proceedings were disrupted by

a. a judicial review application brought by Justice Douglas alleging bias against the Inquiry Committee,

b. the resignation of the Inquiry Committee's Independent Counsel Guy Pratte, who also brought a judicial application seeking to constrain the role of the Inquiry Committee in presenting evidence and questioning witnesses, and

c. a further judicial review application brought by Alex Chapman (who brought the existence of the photographs to light, and who was previously sexually harassed by Justice Douglas' husband, Jack King, at the time when he was King's client) seeking to prevent the resignation of the Independent Counsel.

The Canadian Judicial Council website on the Douglas inquiry, including the applications for judicial review brought by Douglas, by the Independent Counsel and by Chapman is here. Media coverage of the resignation of the Independent Counsel is here: Lawyers Weekly and Winnipeg Free Press.

4. Ongoing adoption of the Federation of Law Societies' Model Code of Professional Conduct ("FLS Code") by provincial law societies.

In 2012 the Law Society of British Columbia adopted a version of the FLS Code that will come into effect January 2013. The Law Society of Alberta adopted the FLS Code in 2011 (as did Manitoba), but adopted a version of the conflict of interest provisions (heavily modified) in 2012. The Law Society of Saskatchewan's version of the FLS Code came into effect July 1, 2012. The Nova Scotia Barristers' Society's version of the FLS Code came into effect January 1, 2012. Ontario, New Brunswick, Prince Edward Island, Newfoundland have yet to adopt the FLS Code, although the Law Society of Upper Canada is in the process of considering the issue. As I have discussed in a previous ABlawg post (here) the adoption of the FLS Code has its downsides, at least in Alberta, where the prior Code of Conduct was a superior document. However, the willingness of the law societies to work towards creating a common set of ethical standards for Canadian lawyers is a remarkable development in Canadian lawyer regulation, which has not generally featured a high level of national coordination. That coordination may prove helpful in the event that lawyer regulation faces any significant crisis or change.

5. Expansion of legal education.

2012 saw the first class of Thompson Rivers University finish its first year of law school and "overwhelming interest" in attending the law school at Lakehead University (Lakehead Law). In addition, law schools outside of Canada seek to serve the market for legal education in Canada, with Arizona State University seeking to grant a "North American Law Degree" which will qualify graduates to practice law in both Canada and the United States (ASU Press Release).

These developments reflect the fact that until 2011 there had been no meaningful expansion of legal education in Canada despite the overwhelming demand to attend law school. As an example, the Faculty of Law at the University of Calgary has seen applications for law school increase annually, with an increase of approximately 40% over the last five years; in each of the last two years approximately 1500 applications were received for 108 first year spots. At the same time, these developments are occurring in a legal services market that has features that reflect the complexity of its operation as an economic market. All of these facts appear to be true: there is enormous demand for law school; individual litigants cannot afford counsel in litigated cases (see the entry on self-represented litigants below); there is a shortage of articling positions, such that people graduating from law school, and in particular foreign trained but Canadian accredited graduates, cannot actually obtain their legal licenses; many sole practitioners operate in economically marginal circumstances; it is not clear that all Canadian lawyers are competent and providing a high quality of legal services. This demonstrates the point that regulation of the legal services market is complex, and structuring regulation to foster the accomplishment of optimal economic outcomes very difficult.

6. The proposal for a private, religious law school.

Trinity Western University has proposed the establishment of the first private and religious law school in Canada, commencing in September 2015 if approved (Canadian Lawyer Article). The application brought by Trinity Western University has been seen by many in the legal academy as undesirable given the official policy of Trinity Western that students must agree to refrain from "homosexual behavior" (TWU Policies). The Canadian Council of Law Deans questioned whether the Federation of Law Societies ought to approve a law degree granted by Trinity Western as sufficient for entry into the Canadian profession. The Federation has stated that it has no jurisdiction to consider Trinity Western's policies, even if discriminatory, stating in a letter dated December 4, 2012, that "The national requirement, approved by law societies, does not contemplate or authorize an inquiry into the admission philosophy of a law school program, either existing or new, or an investigation into whether the admission policies of an educational institution are consistent with federal or provincial law. The only reference to admissions policy in the national requirement pertains to the minimum number of years of post-secondary instruction required to be completed prior to entry to law school." Despite the Federation's position, Trinity Western's proposed law school is likely to remain a live issue and to create controversy going forward.

7. Conflicts of interest.

It is arguable that the question of how to regulate conflicts of interest related to lawyers' representation of clients was less at the forefront of Canadian legal ethics than in past years, and less than it is likely to be in 2013. It remains, however, an unsettled and controversial question, and events in 2012 anticipate what are likely to be significant developments in the law on conflicts of interest in 2013. Specifically, in 2013 the Supreme Court of Canada will likely decide *Canadian National Railway v McKercher LLP et al* (see an excellent summary of the background by Malcolm Mercer and Brendan Owen Brammall here). In addition, in 2013 the Law Society of Upper Canada is likely to release its decision in the disciplinary hearing into potential violations of their conflict of interest obligations by Beth DeMerchant and Darren Sukonick in their representation of Hollinger Inc. (see a critical account of the case by Jim Middlemiss here). It should also be noted as evidence of the ongoing controversy around conflicts that in Alberta, the Law Society only adopted the FLS Code's approach to conflicts of interest after modifying it significantly.

8. Self-represented litigants and "Organized Pseudolegal Commercial Argument" (OPCA) litigants.

Self-represented litigants continue to be a significant part of judicial dispute resolution, and the problems with ensuring fairness to those litigants continue. In a speech to the 5th Bi-ennial International Legal Ethics Conference in Banff in July 2012 (see below), Chief Justice Wittmann of the Court of Queen's Bench noted the challenges for the judiciary and the legal profession in this respect. Professor Julie Macfarlane at the University of Windsor Faculty of Law is currently in the process of completing a study of the experience of self-represented litigants, in which she documents the negative experience of those litigants in the court (newspaper article here; Professor Macfarlane's webpage for the research here). The issue of OPCA litigants was addressed by Associate Chief Justice Rooke in his decision in *Meads v Meads*, 2012 ABQB 571, which was analyzed in a blog by Professor Watson-Hamilton (here). Although OPCA litigants may be represented, and so do not raise issues identical to those created by self-represented litigants, OPCA litigants similarly raise challenging issues for ensuring the fair administration of justice – for those they litigate against and for themselves.

9. Internationalization and regulation of law firms.

In 2011 Macleod Dixon merged with the international law firm Norton Rose LLP. In November 2012 Fraser Milner Casgrain announced its intentions to merge with SNR Denton and Salans in 2013, to form a law firm that will have 2500 lawyers and 79 offices worldwide (see here). This is a significant development in Canada, where previously the pre-eminent firms have been Canadian based, with only limited international operations. It is especially significant given the changes in the operation of law firms in Australia and the UK, where the existence of non-lawyer owned firms providing legal services has been accepted. That option was rejected by the American Bar Association in 2012, which decided against exploring it further (see item 3 in John Steele's top ten list). Does the internationalization of Canada's law firms foreshadow other changes here reflecting those elsewhere, or will Canada remain the conservative outlier that it has been since other jurisdictions moved away from self-regulation and it did not? On a more positive note with respect to regulatory nimbleness, it should be acknowledged that British Columbia has taken steps toward the direct regulation of law firms in 2012 through amendment of the legislation empowering the Law Society. This follows from Nova Scotia's prior amendment of its legislation permitting findings of professional misconduct against law firms (Nova Scotia *Legal Profession Act*, SNS 2004, c 28, s 45(5)). Both are welcome developments. See announcement re BC here. See Adam Dodek's 2012 Canadian Bar Review article on the regulation of law firms here.

10. International Legal Ethics Conference and Canadian Association of Legal Ethics.

In 2012 Canada was the host to the 5th bi-ennial International Legal Ethics Conference (in Banff, Alberta July 12-14 - here). 2012 also saw the formation of the Canadian Association of Legal Ethics. These developments show the growing sophistication of legal ethics in Canada, which as recently as 2000 Adam Dodek described as a "subject in search of scholarship" (here).