

The Top Ten Canadian Legal Ethics Stories – 2015

By: Alice Woolley

Year's end invites assessment of what has passed. For me, that includes reflection on the most significant developments in legal ethics over the year (Reflections from past years here: [2014](#), [2013](#) and [2012](#)).

As usual, my assessment of significance isn't one that I claim to be objective or right; it is better characterized as, "things that happened in 2015 I thought were especially interesting" (with assistance from Richard Devlin, Adam Dodek and Amy Salyzyn). Some things drop off the list that could have stayed on it; access to justice remains a crucial and unsolved problem in Canada, but fell off the list because it was more chronic than involving specific developments or discussion, at least this year. Others are on the list for the fourth consecutive year; Trinity Western's law school was proposed in 2012, remains controversial, and law society decisions in relation to it are before several Canadian courts.

The one thing that constructing this list makes clear, however, is that the ethics and regulation of Canadian lawyers and judges remains an important and fruitful topic for our consideration: there is certainly no shortage of subject-matter.

1. Judges behaving badly

In August the Canadian Judicial Council (CJC) published the new [Canadian Judicial Inquires and Investigation By-laws 2015](#) which creates a new process for the consideration of complaints against judges, and abolishes the role of "independent counsel" to the CJC.

The CJC's new process is being used to consider the conduct of now Federal Court Trial Division Justice, and former Alberta Provincial Court Judge, Robin Camp, whose conduct of a sexual assault trial in 2014 led to a complaint being filed with the CJC by me, Professor Jennifer Koshan (Calgary), Professor Elaine Craig (Dalhousie) and Professor Jocelyn Downie (Dalhousie) (See ABlawg posts [here](#) and [here](#), and this [CBC story](#) which includes our complaint). The CJC has struck a [review panel](#) to assess Justice Camp's conduct.

Robin Camp was not the only judge whose conduct was considered by the CJC this year. On December 3 the CJC issued its [Report](#) in which a majority (with 3 dissenting) did not recommend removal of Judge Déziel for his participation in unlawful financing of a municipal election prior to his appointment. On November 19 the CJC announced that a three-member [Inquiry Committee](#), with one member dissenting, had recommended the removal of Justice Girouard, even though the Committee "could not conclude that the judge had participated in a transaction involving an illicit substance." The Committee's recommendation was based on its own concerns with the testimony offered by Justice Girouard at the Inquiry Committee hearing. The Council will now consider the Committee's recommendation.

And then there were the judges whose conduct didn't make it as far as the CJC but made the news. In February a [Quebec judge](#) told a woman applying for the return of a seized vehicle that her case could not be heard unless she removed her hijab. And in October a [Halifax judge](#) asked a woman in his courtroom to leave to breast feed her baby.

While some might see these cases as evidence of increased judicial impropriety, I tend not to think so. It is to me more likely that we are simply paying more attention to what judges do, and are less tolerant of some types of judicial behaviour. In either case, however, these issues create serious regulatory challenges for the CJC. Judicial independence is a crucial value, one on which the rule of law depends. But at the same time, judicial misconduct, and in particular misconduct which humiliates or denigrates people appearing in court, undermines the rule of law – the fair and unfettered access to the social settlement that law creates. The CJC, and the National Judicial Institute, need to develop regulatory responses – education, incentives and discipline – that maintain judicial independence while discouraging or disciplining wrongful conduct. Some supportable balance needs to be achieved.

2. Trinity Western University before the courts

At the end of 2014, the status of TWU was that the British Columbia Minister of Advanced Education had revoked consent for its law school, and the law societies of BC, Ontario, New Brunswick and Nova Scotia had either declined to approve the admission of its graduates, or had done so only conditionally (See [Law Matters, Summer 2015](#) for a general overview/discussion of TWU).

In February of this year the Nova Scotia Supreme Court [overturned](#) the Nova Scotia Barristers' Society's decision to only admit Trinity Western law graduates conditionally on the grounds that it was *ultra vires* the Society and, in any event, a violation of the *Charter*.

In July the Ontario Divisional Court [upheld](#) the Law Society of Upper Canada's decision not to accredit TWU law school, on the grounds that the Law Society had jurisdiction to consider the issue, and that its decision "did engage in a proportionate balancing of the Charter rights that were engaged by its decision and its decision cannot, therefore, be found to be unreasonable" (at para 124).

In December the BC Supreme Court [overturned](#) the Law Society of British Columbia's decision not to treat TWU as an approved law school for the purposes of Law Society admission. While Chief Justice Hinkson held that the Law Society had jurisdiction to make the decision (at para 108), he also held that the Law Society had wrongfully fettered its discretion (at para 120) by making a decision based on a referendum of its membership, and that it did not grant TWU proper participatory rights in making the decision (at para 125). Chief Justice Hinkson further held that the Law Society had not properly assessed the *Charter* issues (at para 152) in relation to Trinity Western's application.

Trinity Western's case is bound for the Supreme Court. One question that may perplex that Court – or, at least, which perplexes me – is whether the *Charter* will permit variation between how provincial law societies treat TWU. Does section 1 permit some provinces to reasonably restrict religious freedom in pursuit of protection of equality rights, while others restrict equality to protect religious freedom? And if so, what would that variability do to the quest for national standards across regulation of the legal profession? Trinity Western continues to raise not just

existential constitutional questions, but also challenges for achieving a cohesive national approach to professional regulation.

3. National Competency Standard

On a related note, the Federation of Law Societies has begun a process of consultation with the provincial law societies to develop a national competency standard for admission to the profession. In August 2015 the National Admissions Standards Project Steering Committee published a document (not available online) seeking to move the provincial law societies toward the development of a national assessment regime which would include written examinations and the assessment of applicants through articling. The Report asked the provincial law societies to commit “to the direction for moving forward outlined in the proposal” with a goal of implementing the first assessment by 2018. The Report has been controversial. In October students at UVic [initiated](#) a referendum against it.

At this time, however, opposition to the Federation’s initiative seems premature. Aspects of the Report are concerning. Its reliance on education jargon makes it hard to understand what the Federation is actually proposing, and some of its discussion hints at a national multiple-choice bar examination, which, while said to be different from the US state bar examinations, sounds a lot like them. The Report is, however, aimed at discussion more than concrete proposals, and each provincial law society would have to agree to any proposed changes. The process needs to unfold further before it can be reliably critiqued.

That is not to suggest that the issues aren’t important: achieving a pedagogically sound national competency evaluation would be a significant accomplishment for the profession, while having the wrong sort of evaluation would be detrimental to a wide-range of constituencies, including the public, prospective lawyers, law firms and law schools. More discussion and evaluation needs to occur to ensure that it is the former of these, not the latter, that happens.

4. The Supreme Court on Money-Laundering

In February the Supreme Court issued its decision on the constitutionality of federal money-laundering legislation in relation to lawyers (*Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015 SCC 7](#)). The Court held that, as applied to lawyers, the legislation and regulation violated sections 7 and 8 of the *Charter*. The provisions violated section 8 because they provided insufficient protection to solicitor-client privilege, and violated section 7 because of the section 8 issues and also because the provisions imposed duties on lawyers that undermined a lawyer’s commitment to her client’s cause. As I discussed on [ABlawg](#), while the Court’s recognition of the legal significance of a lawyer’s loyalty to her client’s cause is welcome, analytical deficiencies in the decision make its ultimate significance for the regulation of lawyers unclear.

5. Lawyer advising

Also in 2015 the Supreme Court issued *Guindon v Canada*, [2015 SCC 41](#), which upheld a penalty imposed on Julie Guindon pursuant to section 163.2 of the *Income Tax Act* for providing “flawed and misleading” advice to her clients, advice which was “indicative either of complete disregard of the law and whether it was complied with or not or of willful blindness” (at paras 85-86, quoting the Tax Court of Canada’s factual findings). The issue at the Supreme Court related to constitutional issues with section 163.2, but in upholding the severe penalty imposed

on Ms. Guindon the Court effectively validated a scheme for regulating the quality and content of lawyer advising.

The quality and content of lawyer advising was also before the courts in September 2015, when the Federal Court [heard](#) Edgar Schmidt's request for a declaration that the Department of Justice has not properly advised the Minister about when Parliament must be told that proposed legislation is not consistent with the Bill of Rights or the *Charter* (CBA National Magazine story, [here](#)). Schmidt alleges that the Department has taken the position that legislation is only not consistent with the Bill of Rights or the *Charter* when it has a less than 5% chance of being upheld in Court.

The questions of what lawyer advice ought to look like (how it differs from advocacy), and how it ought to be regulated, are complex and, I have [argued](#), ones with which the profession has not sufficiently grappled. The *Guindon* and Schmidt cases force further consideration of them.

6. Truth and Reconciliation Commission

In June 2015 the [Truth and Reconciliation Commission](#) issued 94 Calls to Action to address the “cultural genocide” created by residential schools (CBC overview [here](#)). Many of the TRC's Calls to Action aim at Canada's legal system, including its training of lawyers. Recommendation 27 calls upon the Federation of Law Societies of Canada “to ensure that lawyers receive appropriate cultural competency training” in relation to the residential schools, Aboriginal rights, Indigenous law and Aboriginal-Crown relations. Recommendation 28 calls upon law schools to require students to “take a course in Aboriginal law.” The TRC suggests that both will require “skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.” The Calls to Action further recommend a variety of changes to the civil and criminal justice systems aimed at reducing barriers to holding the government to account for historical wrongs to aboriginal peoples, ameliorating the significant issues for aboriginal people in Canada's criminal justice system – as offenders, as accused and as victims – and for the recognition and implementation of Aboriginal justice systems.

Prime Minister Trudeau has [said](#) that the government will “fully implement” the TRC's Calls to Action. If he succeeds in this ambition it would be a significant transformation for the Canadian legal system, one that would affect not just the training of Canadian lawyers, but also their resources, competencies and work environment, particularly those working in the criminal justice system.

7. Resignation of Quebec's bâtonnière

In September 2015 Lu Chan Khuong agreed to resign as bâtonnière of the Barreau du Quebec ([Lawyer's Weekly](#), October 9, 2015; [CBC](#)). In May she had been the first person elected to that role, with 63% of the vote. Her September resignation followed from a summer of disputes and the filing of lawsuits between Khuong and the Barreau. In July the Barreau's board of directors had suspended her from her position because it was revealed that she had been arrested for shoplifting designer jeans, a matter which had been resolved through a diversion program. Khuong filed a statement of claim seeking reinstatement, and the Barreau launched a countersuit seeking damages for harm caused to its reputation. Lawyers weighed in publicly on both sides of the issue, with 68.5% of 991 lawyers present at a meeting in August reaffirming their confidence in Khuong (see [Ottawa Citizen](#)), while Lucien Bouchard, Bernard Landry, Daniel Johnson & Pierre-Marc Johnson co-wrote a letter supporting the Barreau's decision to suspend her (see

[Ottawa Citizen](#)). Also in August a judge declined Khuong’s application for immediate reinstatement.

According to an interview included in a [detailed story](#) in November’s Canadian Lawyer Magazine, Khuong decided to resign after realizing that “someone needed to sacrifice themselves to end this insane situation, which was really hurting my family and the profession I love. And I knew it had to be me”. She also suggested that she may run again to be bâtonnière in two years time.

8. Regulatory Innovation

In September the Law Society of Upper Canada Working Group on Alternative Business Structures issued a [report](#) to Convocation advising that it “does not propose to further examine any majority or controlling non-licensee ownership models for traditional law firms in Ontario at this time” (at para 56) but that it will continue to explore options for “more limited non-licensee ownership models” (at para 57).

The Nova Scotia Barristers’ Society is moving towards a [new model](#) for regulating lawyers, which is “risk-focused, proactive, principled and proportionate”. The new model will include removing barriers to fee sharing and will require lawyers and legal entities to implement [management systems](#) for ethical legal practice. [Canadian Lawyer](#) explored the issue of entity regulation, including Nova Scotia’s proposed changes, in its October issue.

In November, the Prairie law societies (Alberta, Manitoba and Saskatchewan) issued a [discussion paper](#) in relation to entity regulation, compliance-based regulation and alternative business structures. The paper provides an update on work of other jurisdictions, explains and defines each concept, and develops “the start of a regulatory framework, applicable across Alberta, Saskatchewan and Manitoba for consideration and discussion” (p 3).

These developments are interesting and potentially exciting but also raise questions about how easy it will be to create a truly innovative regulatory structure here. The self-regulatory and provincial nature of the law societies ensures change is slow, uneven and susceptible to interruption. That may not be an entirely bad thing – regulatory change creates risks and only possible rewards – but in an increasingly disrupted legal services market, the status quo also creates risks, ones to which the profession has not yet revealed itself able to respond.

9. Campaigning in the Law Society Upper Canada Election

In April the Law Society of Upper Canada had its bench election. Prior to the election, the Ontario Trial Lawyers’ Association [published](#) on its website a list of benchers who opposed the introduction of Alternative Business Structures. It stated that “OTLA urges all association members and other eligible licensed lawyers to vote for the following candidates opposed to ABS.”

As detailed by Malcolm Mercer in a comment to a [column](#) I wrote about this on SLAW, it appears that the OTLA campaign had only a limited effect on voting patterns. The campaign brings to the forefront, however, the fundamental tension in the self-regulatory structure of professional governance. On the one hand, in an electoral system it makes perfect sense for voters to promote and vote for benchers based on those benchers’ positions on issues that affect their personal interests. If lawyers are given a vote, then why shouldn’t we expect them to vote at

least in part based on their own interests? But on the other hand, the legal mandate of any law society is to act in the public interest, not in the self-interest of lawyers. How do we trust benchers chosen based on the collective expression of lawyer self-interest to discharge that legal mandate?

That the OTLA's campaign brought this tension to the foreground does not necessarily suggest that these types of electoral campaigns are all bad. While I remain concerned about this sort of campaign for the reasons I expressed on SLAW, there are other reasonable perspectives on the issue. It may be true, for example, that if some lawyers are voting in their own interests, then it's better that that be out there in the public domain – that the presence of self-interest be transparent and open for debate, rather than opaque, especially since the clash between a range of self-interested points of view might generate something close to the public interest. And ultimately it may be better that lawyers be engaged with the electoral process – for whatever reason – than that they simply not participate at all.

10. Joe Groia and Civility Regulation

In the Law Society election Joe Groia was elected as a bencher. In the meantime, however, he continues his challenge to the Law Society's efforts to discipline him for his conduct of the defence of John Felderhof in the Bre-X matter. In February the Divisional Court upheld the Law Society's imposition of a one-month suspension on Groia, although it articulated a more rigorous approach to the regulation of lawyer incivility than had the Law Society (*Groia v LSUC*, [2015 ONSC 686](#)). It held that incivility “begins with conduct that is rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality. It is conduct that attacks the personal integrity of opponents, parties, witnesses or of the court, where there is an absence of a good faith basis for the attack, or the individual counsel has a good faith basis for the belief but that belief is not an objectively reasonable one” (at para 74). In addition, it is “ultimately necessary for a finding of professional misconduct for the uncivil conduct to have undermined, or to have had the realistic prospect of undermining, the proper administration of justice” (at para 76).

The Divisional Court's approach to the regulation of civility is, while still very problematic, the best articulation to date in being both relatively clear and very narrow in scope. The problem for Groia was that the Court was not prepared to overturn the Law Society's characterization of his conduct as uncivil, even though it is not clear that anything he did or said in the Felderhof trial could reasonably be said to satisfy this high standard (I'm a long-standing defender of Groia and critic of civility regulation, and was a witness in his original disciplinary hearing. See e.g., [here](#)). Groia has appealed to the Ontario Court of Appeal, who heard his case this past December.

And finally, as with last year, a note in memoriam: On February 26, 2015 Monroe Freedman, described by the [New York Times](#) as a “dominant figure in legal ethics whose work helped chart the course of lawyers’ behavior in the late 20th century and beyond”, died at age 86. His most famous paper, “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest

Questions” (1965) 64 MICH L REV 1469 was published 50 years ago this year. It remains relevant and influential today, and will be the subject of a special session at the AALS meetings on January 7. My tribute to Monroe, “Rigorous, Relevant and Right: The Scholarship of Monroe Freedman” can be found [here](#). Monroe was my mentor and my friend. I miss him very much.

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