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The Top Ten Canadian Legal Ethics Stories – 2013

Written by: Alice Woolley

Once again John Steele at Legal Ethics Forum has compiled his list of the top ten ethics stories of 2013 ([here](#)). As was the case last year, his list has inspired me to think about the top ten ethics stories in Canada (2012 is [here](#)). On reviewing last year's list it is clear that a number of the stories of significance in 2012 remained important this year. As well, legal ethics in Canada continues to develop as a matter of practical and intellectual significance, with practitioners, judges, regulators and academics paying attention to the conduct and regulation of lawyers and judges.

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1. **Conflicts of interest: the Supreme Court speaks.** On July 5, 2013 the Supreme Court issued its judgment in *Canadian National Railway v. McKercher LLP* [2013 SCC 39](#), in which it affirmed the “bright line rule” that “a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated” (para. 27). It also limited the rule so that it only applies where the new representation is directly adverse to the immediate legal interests of the client and where it would not be “unreasonable for a client to expect that its law firm will not act against it in unrelated matters” (para. 37). While the Court’s judgment has been subject to some criticism (e.g., by me on [ABlawg](#)) it has also been acknowledged to be a significant step forward in clarifying the obligations of lawyers in relation to their current clients (also by me, and by Malcolm Mercer on [SLAW](#)).

Other notable 2013 Supreme Court judgments that address lawyers’ ethics include *Ontario v. Ontario Criminal Lawyers’ Association of Ontario* [2013 SCC 43](#) which limited the role and compensation of *amicus curiae* appointed by the court (see [ABlawg round table](#)) and *Wood v. Schaeffer* [2013 SCC 71](#) which indirectly considered the role of the lawyer in advising clients (ABlawg post forthcoming shortly).

2. **Regulatory innovation and change by the law societies.** Canada’s law societies are on the move. The Benchers of the Law Society of British Columbia have approved a merger with the Society of Notaries Public of British Columbia, to create a program for the creation of “certified paralegals” and, as well, to develop a regulatory framework to credential and regulate other legal service providers (see in general, [News Release December 9 2013](#)). The Nova Scotia Barristers’ Society is actively considering

regulatory reforms, including a move to outcomes/risk-based regulation ([here](#)). It completed an extensive research paper [Transforming Regulation in the Public Interest](#) and has undertaken a consultation process with its members to consider regulatory change. The Law Society of Upper Canada appointed David Wright as its first Tribunal Chair who, with two vice-chairs, will be actively involved in adjudicating disciplinary proceedings. This change was first approved in June 2012 ([here](#)) but the appointment of Wright, a former chair of the Human Rights Tribunal of Ontario, demonstrates the Law Society's commitment to this new approach ([here](#)).

These developments reflect a remarkable shift in Canada's regulatory landscape. While Canada's legal profession remains self-regulating, and not all law societies have embarked on these sorts of developments, the changes show a sophistication and engagement on the part of regulators that is to be commended.

3. **Law Society of Upper Canada approval of Lakehead University Faculty of Law's Integrated Practice Curriculum as a Pathway to Licensing.** On November 21 2013 the Law Society of Upper Canada approved Law Practice Programs offered by Ryerson University (English) and the University of Ottawa (French) as alternatives to articling ([here](#)). It also approved Lakehead's Integrated Practice Curriculum, in which students take approximately 10-20 extra credit hours across the course of their law degree, and complete practical and experiential education, as a replacement to articling after graduation (Lakehead's program is described [here](#)).

While the Lakehead program in and of itself does not reflect an enormous change in the credentialing of Canadian lawyers, if it is expanded to other law schools and jurisdictions, it could transform Canada into a more experience based version of American legal education. Except for the bar examinations, the totality of the preparation of legal education will be governed by the law schools. The significance of that sort of change is considerable.

4. **Resignation of the Inquiry Committee of the Canadian Judicial Council concerning the Honourable Lori Douglas.** The Lori Douglas proceedings are not new, nor are extensive criticisms of their legitimacy and fairness (see, e.g., [this](#) one of numerous columns by National Post columnist Christie Blatchford). But the decision of the Inquiry Committee to resign en masse ([here](#)) has reinforced the perception that the proceedings have gone badly awry, and are undermining public confidence in the fair and effective regulation of the ethics of the judiciary (see my SLAW post [here](#))
5. **Federation of Law Societies' Approval of Trinity Western University's Proposed Common Law Degree.** In December the Federation of Law Societies approved Trinity Western University's Proposed School of Law Program (See general information on the FLS website [here](#) and the [Approval Committee Report](#)). The Federation did so despite some "concerns" with respect to: "i. the teaching of Ethics and Professionalism; ii. the teaching of the elements of the Public Law competency relating to the *Canadian Charter of Rights and Freedoms* and human rights law principles; and iii. the budget for the proposed school." (para. 48). It nonetheless concluded that in relation to Ethics and Professionalism and the teaching of public law, the issues amounted only to a "concern" not a "deficiency" and could be addressed through the provision of "additional materials in future annual reports, including more detailed course outlines demonstrating exactly

how the competencies will be met.” (para. 52). It also viewed the budgetary issues as capable of being addressed in its future annual reports (para. 53).

The Federation’s approval of Trinity Western’s program is not the final word on this issue. Law societies that have not delegated their power to approve law degrees to the Federation must determine for themselves whether the school’s program satisfies the credentialing requirements which they are empowered to impose by virtue of their constituting legislation, taking into account the distinct human rights laws that govern in each province. Clayton Ruby has indicated that he will be seeking judicial review of the Federation’s decision ([here](#)). Opposition to the Trinity Western program remains significant (See Elaine Craig’s op-ed in the Globe and Mail, [here](#)). Regardless of how these events unfold, however, the Federation’s decision is a significant first step towards the approval of a Canadian law school teaching through a religious perspective.

6. **The Law Society of Upper Canada dismissal of disciplinary proceedings against Beth DeMerchant and Darren Sukonick.** The reasons issued by the Law Society for finding that DeMerchant and Sukonick had not been in a conflict of interest when representing Hollinger International Inc. and Conrad Black during the sale of Hollinger’s newspaper businesses to CanWest, are not especially interesting as a matter of doctrinal law (the DeMerchant decision is [here](#)). Of greater interest is the arguably questionable decision by the Law Society to pursue the charges as long as they did (discussed by Allan Rouben at [SLAW](#)) and the question of whether the case indicates the problems that law societies have in relation to the direct regulation of lawyers at large law firms. The decision may not legitimately have significance in the latter respect – if the charges were baseless then they ought not to have succeeded, regardless of the nature of the practice of the lawyer against whom they were made. But it may nonetheless reinforce the perception that lawyers at large law firms can resist professional discipline with an effectiveness that lawyers at smaller firms cannot.
7. **The Law Society of Upper Canada Appeals Decision on Joe Groia and incivility.** In lengthy [reasons](#) the Law Society of Upper Canada Appeal Panel halved the sanction imposed on Joe Groia, eliminated the costs award against him (with a new costs award to be determined through a subsequent proceeding), and reversed many of the legal determinations made in the original panel. In particular, it rejected the position that a lawyer would be committing an abuse of process to the extent he sought to litigate the legitimacy of his conduct in the face of judicial criticism of that conduct in prior proceedings to which he was not a party and which involved different legal issues. The panel also narrowed the definition of incivility and emphasized that “the word ‘civility’ should not be used to discourage fearless advocacy manifested by passionate, brave and bold language.” (para. 211)
8. **Edgar Schmidt’s Litigation re the Conduct of the Minister of Justice and the Deputy Minister of Justice.** Schmidt’s litigation was commenced at the end of 2012 but remains of significant importance with respect to the question of the ethical duties of lawyers when advising clients. Schmidt alleged that the Minister of Justice and the Deputy Minister failed to satisfy their statutory obligations to examine proposed legislation to determine if it is “inconsistent with the purposes and provisions” of the *Canadian Bill of*

Rights or the *Canadian Charter of Rights and Freedoms*, and to advise the House of Commons if it is so (*Canadian Bill of Rights*, SC 1960, c 44, s. 3; *Department of Justice Act*, RSC 1985 c J-2, s. 4.1; *Statutory Instruments Act*, RSC 1985 c S-22, ss. 3(2) and (3)). Schmidt alleged that the Department's policy was only to direct the Minister to advise the House on the sufficiency of legislation where it had a less than 5% chance of surviving a court challenge (see my post on Schmidt on [ABlawg](#)). A recent [article](#) in the Canadian Bar Association's National Magazine discussed developments in the Schmidt case, including the federal government's decision in February 2013 to proceed on the merits of the litigation and noted that Schmidt is now represented by notable litigator Joseph Arvay. The website [charterdefence.ca](#) provides information with respect to Schmidt's case, including document disclosure respecting the Department of Justice's approach to these matters.

9. **The Lawyers of the Prime Minister's Office and the Mike Duffy Affair.** The precise nature and legality of the conduct of Nigel Wright and Ben Perrin, lawyers working at the Prime Minister's Office and dealing with the problem of Mike Duffy and his expenses, remains unclear. However, the case does suggest the ethical challenges and risks for lawyers working in political settings, in which the legal and ethical implications of decisions can be obscured (as I discussed on [SLAW](#)). This issue has been considered in the United States since Watergate, but this case may be the first time it has been publicly observable here.
10. **The CBA Futures Initiative** Begun in 2013 and continuing into 2014, the CBA Futures Initiative is addressing issues related to the ethics and regulation of the legal profession, education and training of lawyers, and innovation in business structures (see [here](#)). While the insights and innovations of the process are uncertain at this time, the CBA seems committed to considering matters of regulatory innovation and change, particularly in relation to the adoption of alternative business structures (ABS). If the CBA can identify a path to ABS, this will significantly progress the regulatory innovation and change identified in #3, and will help Canada move towards keeping pace with regulatory developments in other jurisdictions such as Australia and England.

I would like to add Rob Ford, since it seems that no Canadian top ten list could be complete without him. But try as I might I could not see the legal ethics angle to his story.

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