January 2, 2015

The Top Ten Canadian Legal Ethics Stories - 2014

By: Alice Woolley

For the last two years I have written up the "top ten" Canadian legal ethics stories for the prior year (2013 and 2012). This year I initially wondered whether it would be possible to identify ten important legal ethics stories. It wasn't. Moreover, it is fair to say that some of these stories now justify the descriptor "saga," making their third consecutive appearance on the list.

It should be noted that the ordering of the list is neither rigorous nor based on a precise calculation of each story's importance. Nor is the "Top Ten" descriptor a claim I'd aggressively defend. I'm not sure whether, in an objective sense, these are *the* top ten stories and nor am I sure which ones are more interesting and significant than the others. But since "Ten Canadian legal ethics stories listed in no particular order but that I, for my own idiosyncratic reasons, think are interesting and significant" is not exactly catchy, I'm sticking with "Top Ten."

1. **Trinity Western's Approval Revoked**

   On December 11, 2014 the British Columbia Minister of Advanced Education revoked the consent it had previously granted to Trinity Western University to open a law school. It did so based on the "current uncertainty over the status of the regulatory body approval" for the law school (CBC, December 11 2014). That uncertainty arose from the decisions by the law societies in British Columbia, Ontario, New Brunswick and Nova Scotia either not to approve the admission of graduates of Trinity Western or to do so only conditionally. My overview of the regulatory history of Trinity Western's proposal, and the issues it raises, is here. Elaine Craig's article from June 2014 on TWU is here. SLAW blog posts on Trinity Western from 2014 can be found here, here, here, here and here.

   The Trinity Western law school proposal is one of the legal ethics sagas. It has raised significant issues in legal ethics, particularly in relation to the effectiveness of the Federation of Law Societies (whose approval process was in the end not treated as binding or even given much weight); the scope of anti-discrimination and protection of diversity with respect to admission to the profession; the role of the law societies in determining that scope and protection (as opposed to, say, human rights commissions); the process used by law societies to consider Trinity Western's application; and, finally, the role of law societies in regulating the content of legal education.

   It is also a saga likely "to be continued" in the next few years: if Trinity Western proceeds with its various applications for judicial review of its law school, and if it

succeeds in those applications, either procedurally or substantively, then this matter will end up back before the Minister of Advanced Education and, perhaps, the law societies.

2. **Settlement of the complaint against Lori Douglas**

On November 24, 2014 the Canadian Judicial Council stayed its investigation into the conduct of Associate Chief Justice Lori Douglas in consideration for her agreement to retire effective May 2015. As noted in an article on CBC.ca, the investigation into ACJ Douglas had been ongoing for four years and cost approximately $3 million. The legitimacy of the investigation was – and continues to be – fiercely criticized. Most recently critics focused on the CJC's insistence on viewing the pictures of ACJ Douglas, even though the basic content of those pictures was widely known (see, e.g., Blatchford, Drummond #1, Drummond # 2, Open Letter).

The settlement agreement prevents the continuation of proceedings that seemed most unlikely to reach any satisfactory and fair conclusion given the muddied issues they raised – was the issue the failure to disclose the existence of the pictures on her written application for appointment? Was it Douglas's alteration of her personal diary once the investigation commenced? Or was it the existence of the pictures themselves? A letter written by Norman Sabourin in response to an Open Letter criticizing the CJC suggests all of the above.

The agreement also means, however, that the significance of online sexual pictures to future judicial applicants remains unclear. Do prospective judges need to disclose the existence of pictures that are on the web? Do they need to disclose the existence of pictures that may be put on the web at some future time? Does disclosure depend on the likelihood that the pictures will end up on the web? What, ultimately, is the burden on an applicant? From a policy perspective, given the increased prevalence of such pictures in a digital age, what would the effect of compulsory disclosure of such pictures be on applications by women to the bench relative to men over the longer term? These are questions that merit further consideration and clarification.

3. **The Canadian Bar Association Futures Report**

In August 2014 the Canadian Bar Association published the report of its Legal Futures Initiative, Transforming the Delivery of Legal Services in Canada. The result of extensive consultation and research, the Report offered a considered assessment of issues and challenges facing the legal profession, and made recommendations for changes to the regulation and education of Canadian lawyers. The most controversial of those recommendations are those supporting liberalization of the legal services market and that lawyers be permitted to practice in "Alternative Business Structures". Specifically, the Report recommended that "Lawyers should be allowed to practise in business structures that permit fee-sharing, multi-disciplinary practice, and ownership, management, and investment by persons other than lawyers or other regulated legal professionals" (Recommendation #1, p. 35). It also recommended regulatory changes to permit effective rather than direct supervision of non-lawyers (Recommendation #4, p. 42), fee-sharing with non-lawyers (Recommendation #5, p. 43) and compliance-based entity regulation (Recommendation #8, p. 47).

The merits of the CBA's proposals can be debated. The regulatory changes they propose are, in some cases, themselves top ethics stories from the year, as discussed below. But

of independent significance is the fact that the CBA has been willing to engage in this process, and to take positions that challenge the regulatory status quo. There is nothing modest or timid about the CBA's approach. When faced with a similar opportunity the American Bar Association ducked, declining to consider any liberalization to the rules preventing non-lawyer ownership (see James Moliterno's criticism of the ABA 20/20 Commission, here but also some debate on Moliterno's criticisms here). I am not an impartial observer– I was a member of the CBA's Professional Regulation Futures Committee – but in my view the CBA is to be commended for its initiative and openness to new ways of regulating the profession.

4. **Alternative Business Structures**

As noted, one of the key recommendations of the CBA was to permit alternative business structures (ABS), law firms that are owned, at least in part, by non-lawyers. In September the Law Society of Upper Canada released its Discussion Paper Alternative Business Structures: The Future of Legal Services, seeking input from its membership about whether, and to what extent, alternative business structures ought to be permitted.

The debate around ABS focuses on their risks and rewards, with opponents suggesting that ABS pose significant risks to lawyers' integrity and their provision of services to clients, while creating few real benefits to access to justice (see, e.g., Ontario Trial Lawyers Oppose ABS; Ken Chasse on ABS).

Proponents suggest that there is evidence to support ABS's positive effect on access to justice (Kowalski on ABS) and that, in any event, the risks posed by ABS to the legal profession ought not to be overstated (Mercer #1 and Mercer #2). The questions now are whether any law society will be willing to proceed with ABS, if so which one and if so will others follow suit?

5. **Jian Ghomeshi's Statement of Claim**

The serious criminal allegations against Jian Ghomeshi were one of the top news stories in Canada in 2014. But the allegations also had a legal ethics dimension. Specifically, was it ethical to file a statement of claim that was arguably meritless and that may have been intended to suppress legal claims against Ghomeshi? This question was debated by David Tanovich (arguing that filing such a claim is unethical) and me (arguing that, while ethically problematic, it is not improper). Howard Levitt and I have also raised questions about the sufficiency of the advice given by Ghomeshi in relation to filing the Statement of Claim.

6. **British Columbia Regulatory Task Forces**

As noted, the CBA Futures Project recommended the adoption of compliance-based entity regulation. In 2012, the British Columbia *Legal Profession Act* was amended to give the Law Society of British Columbia the authority to regulate law firms. The Law Society has struck a task force to "recommend a framework for the regulation of law firms" (LSBC Task Force). Adam Dodek wrote a paper advocating law firm regulation in 2012 (here) and it is significant that the law societies are taking concrete steps in this direction.

Of perhaps even greater note, however, is that in December 2014 British Columbia's Legal Services Regulatory Framework Task Force recommended that "the Benchers seek an amendment to the Legal Profession Act to permit the Law Society to establish new classes of legal service providers to engage in the practice of law, set the credentialing requirements for such individuals, and regulate their legal practice." The areas in which such legal service providers would be permitted to practice include family law. A loosening of the constraints on legal practice by non-lawyers may be the most significant development in increasing access to justice, particularly in family law, where it is estimated that 70% of participants are unrepresented (Julie MacFarlane, cited in Mercer #2)

7. **A2J**

Access to justice continues to be a significant issue for Canadian lawyers and the public, and for good reason. As John-Paul Boyd noted in a post on SLAW on December 5th: "The present situation is, with the greatest respect, staggering. We have at hand a crisis on a national scale, affecting a system that costs governments billions of dollars a year to maintain, and yet we as a society are unwilling to allocate the few millions of dollars that are necessary to tackle the problem as aggressively as it requires" (Boyd on A2J). Two major reports on access to justice were published in 2013 (Action Committee on Access to Justice in Civil and Family Matters Report and CBA Equal Justice Report) and, as indicated by the BC task forces, the CBA Futures Report and the debate over ABS, legal regulators and the legal profession are taking the access to justice problem seriously. They are trying to remove barriers to the provision of legal services and to facilitate access to lawyers and legal services. Until some material progress is made, however, access to justice will properly remain a top legal ethics story in Canada.

8. **The Boyle Recusal**

On September 4 2014, Tax Court Justice Patrick Boyle wrote a 47 page decision recusing himself from further participation in a matter in which he had previously issued a decision that was now under appeal to the Federal Court of Appeal. He did so on the basis of submissions made by the appellants and, in particular, what he felt were unfair allegations that he had been "untruthful, dishonest and deceitful" in his judgment, and what were "clear untruths" about him (see 2014 TCC 266 (para 4)). Some commentators have suggested that the factum of the appellants was not particularly unusual or out of order (Tax Judge Issues Rare Ruling in Own Defence) while others have suggested it was "unusually aggressive" and contained "*ad hominem*" attacks (Judge Slams Counsel, then Recuses Himself).

Whatever the ethics of counsel's conduct, however, Boyle's decision to engage with the merits of the case in a recusal decision raises its own ethical problems. An article reproduced on the Dalhousie Law school website quotes Professor Brent Cotter as saying "this engagement by the judge raises questions about whether impartiality has been preserved in this case" and quotes lawyer Gavin Mackenzie's description of Boyle's reasons as "completely unnecessary" and his suggestion that certain aspects of Boyle's judgment "can raise a legitimate question about the civility of the judge in this case" (Was Canadian Judge's Recusal in McKesson Out of Bounds).

The effects of Boyle's judgment is now before the Federal Court of Appeal, who recently allowed taxpayer's counsel to amend its grounds of appeal to include the question of whether the reasons for recusal compromised "the appearance and reality of a fair process in this case such that a new trial is necessary" (Notice of Motion). In his decision Justice Stratas said "the recusal reasons, by responding to the appellant's memorandum of fact and law, depart from the norm. They are a new, material development in this appeal and have become part of the real issues at stake." (2014 FCA 290 at para 11; see in general: FCA allows taxpayer motion).

9. **The Collapse of Heenan Blaikie**

On February 5, 2014 the national law firm, Heenan Blaikie, announced its dissolution. Even though the firm's economic foundations had been relatively solid, a diminution in partner earnings early in the year led to a "run on the bank" with 30 partners leaving and the firm dissolving soon after. In an article for *Legal Ethics* in June 2014 Adam Dodek summarized the various explanations offered for the firm's collapse: "the inability of a mid-tier large firm to compete in the Canadian legal market; the failure of the partnership model; a clash of cultures between the Toronto and Montreal offices; a failure in succession planning, etc. In a bizarre turn, one commentator blamed law schools for Heenan's fall, apparently on the theory that the market cannot absorb the number of Canadian legal graduates." ((2014) 17 Legal Ethics 135 at 136). Heenan had also allegedly had internal conflicts in relation to its international practice, and in particular its involvement in transactions in Africa which may have undermined its stability (How Heenan Blaikie's stunning collapse started with a rogue African arms deal).

From the distance of a few months the broader significance of Heenan's collapse seems less clear; it may have been a product of broader challenges and issues in the legal services market, but it may also simply reflect pathologies specific to Heenan at that time. A determination of its broader significance perhaps awaits future events.

10. **The LPP Path to Articling**

2014 saw the first entrants into Ontario's new alternate path to articling, the Law Practice Program (LPP). The LPP has been praised as opening up the profession to law school graduates who would otherwise be precluded from practice (see, e.g., The new faces of law school). In 2013 Tom Conway, then Treasurer of the Law Society of Upper Canada suggested that the LPP may be a better form of training than traditional articling, an entirely plausible claim given the dearth of regulation of articling, and of evidence to demonstrate the quality of education it provides (as discussed by Adam Dodek, here).

The LPP has also, however, been subject to criticisms in relation to the significant increase in articling fees associated with the program, the unavailability of student loans for participants and the fact that students are not paid for practicum placements (see e.g., Articling fees and access to justice and Reality bites for LPP students). Some critics, as evidenced by the comments to the article on Articling fees and access to justice, also complain that the LPP is enabling an unjustified expansion in the number of lawyers in Ontario.

As a final note, on December 27 Canada lost a legal icon with the death of Eddie Greenspan. For good and occasionally not so good reasons, Greenspan was an outsized figure in the Canadian profession and in relation to issues of legal ethics. In the casebook I co-edit and co-author he

appears in a less positive light from time to time (as the unsuccessful defendant in *Stewart v. Canadian Broadcasting Corp,* [1997] OJ No 2271 and as the author of a stinging and problematic 1999 National Post editorial directed at Justice Claire L'Heureux-Dubé after her judgment in *R v Ewanchuk,* [1999] 1 SCR 330). But Greenspan was also an ardent defender of Joe Groia in relation to the Law Society of Upper Canada's prosecution of Groia for incivility (The horrible crime of incivility) and actively worked to improve the quality of the Canadian legal system, both for his own clients and more generally, as evidenced by his last editorial, published posthumously (Stephen Harpers' scary crime bluster).

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**