

ETHICS IN PRACTICE

Courthouse Cancellations and Challenges to Self-Regulation: *Correspondent's Report from Canada*

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The challenges to the self-regulation of lawyers that have occurred in many jurisdictions around the world have so far escaped Canadian lawyers. This has not been for lack of scandal; rather, as Allan Hutchinson wrote over a decade ago,¹ it has been due in part to lack of a single defining scandal like Watergate in the United States or the crisis of consumer complaints in England and Wales. However, the Canadian legal profession has not been without scandals of its own.² Given the thinness of support for self-regulation outside of the legal profession and the lack of political clout of lawyers, Canadian lawyers should be concerned that they may be one scandal away from the loss of self-regulation. Two seemingly unconnected events provide some insight into the Canadian predicament.

WHEN A COURTHOUSE IS NOT JUST A COURTHOUSE

On 29 March 2011, the Government of Ontario announced its last budget heading into a scheduled fall election.³ Ontario is the largest province in Canada with a population of

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¹ See AC Hutchinson, *Legal Ethics and Professional Responsibility* (Irwin Law, 1999) 2–6. The book is now in its second edition; see AC Hutchinson, *Legal Ethics and Professional Responsibility* (Irwin Law, 2nd edn 2006).

² See Adam M Dodek, 'Canadian Legal Ethics: Ready for the Twenty-First Century at Last' (2008) 46 *Osgoode Hall Law Journal* 1, 9–20 (documenting scandals).

³ The Government of Ontario enacted 'fixed election date' legislation pursuant to which provincial elections are to be held on the first Thursday of October every four years, unless the provincial legislature is dissolved earlier.

approximately 13 million (or 39 per cent of Canada's 34 million inhabitants). Its budget predicted revenues of \$106 billion and annual expenditures of \$122.9 billion, for a projected deficit of \$16.7 billion.⁴ This was an 'austerity but stay the course' budget: no big pre-election spending announcements and no dramatic public expenditure reductions. However, one of the few concrete cuts offered up by the Government of Ontario was the cancellation of a new \$181 million courthouse in the City of Toronto which was slated to begin construction in 2012.⁵

That the Ontario Government could so blithely cancel the planned construction of this courthouse is emblematic of the lack of political clout that lawyers hold in Canada. Toronto is Canada's largest city, home to half of Ontario's 42,000 lawyers. For 50 plus years, there was minimal investment in justice infrastructure as Ontario's population exploded. Ad-hoc courts were added in strip malls and other less than dignified locations. To its credit, since 2003 the current Ontario Government has embarked on a significant investment in justice infrastructure, renovating historic courthouses and building new ones. However, the Government obviously calculated that they would pay a minimal political price for cancelling the project. In the same vein, governments across the country have starved or slashed legal aid budgets over the past decades. Canadians do not seem to care about access to justice issues and they certainly do not seem to care about lawyers.

On 2 May 2011, Canadians went to the polls for the fourth national election in seven years. In each of these elections, the five major political parties issued detailed policy platforms promising a wide variety of spending initiatives designed to attract voters. I would conservatively estimate that these promises total between 800 and 1,000 pages. Not a single promise on a single page contains any commitment to increase legal aid transfers or improve access to justice for ordinary Canadians. Instead, the parties compete with each other to demonstrate their toughness on crime in a relatively safe country with ever-declining crime rates. Access to justice is the most important issue facing the legal profession and the justice system in Canada and it is nowhere on the political agenda. These cold, hard facts represent a real challenge to the Canadian legal profession. They also demonstrate the weak political position of the Canadian legal profession to resist serious incursions into self-regulation.

The first such scheduled election took place in October 2007 and the next one is scheduled for October 2011. On fixed election date legislation in Canada see generally Adam Dodek, 'The Past, Present and Future of Fixed Election Dates in Canada' (2010) 4 *Journal of Parliamentary and Political Law* 215, and see Adam Dodek, 'Evidence Re Fixed-Term Parliaments Submitted to the House of Lords, Select Committee on the Constitution', 30 September 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690603 (accessed 27 May 2011).

⁴ Ontario Ministry of Finance, '2011 Ontario Budget: Ontario's Economic Outlook and Fiscal Plan', 29 March 2011, www.fin.gov.on.ca/en/budget/ontariobudgets/2011/bk3.html (accessed 27 May 2011).

⁵ Patrick White, 'Ontario Budget Cuts New Courthouse Funding, Rebuffs Ford's Requests' *The Globe and Mail*, 29 March 2011, www.theglobeandmail.com/news/national/toronto/ontario-budget-cuts-new-courthouse-funding-rebuffs-fords-requests/article1961812 (subscription only) (accessed 27 May 2011).

UPDATE ON SEX ON THE INTERNET AND FITNESS FOR JUDICIAL OFFICE

In my last Correspondent's Report, I wrote about the controversy surrounding Justice Lori Douglas of the Manitoba Court of Queen's Bench. Justice Douglas is under investigation by the Canadian Judicial Council because of allegations that she was involved in her husband's posting of nude bondage photos of her on an internet site and his use of those photos to try to seduce a client into having sex with Justice Douglas. All of these events occurred prior to Justice Douglas's appointment to the bench. The Canadian Judicial Council has now referred the complaint of sexual harassment and discrimination to a Review Panel of five judges to determine whether the file should be closed or whether further action is warranted. The range of measures available to the Review Panel include referring the matter to a lawyer for further inquiries; pursuing remedial measures; expressing concern to the judge; and referring the case to a public inquiry committee.⁶

Meanwhile, Justice Douglas's husband, Manitoba lawyer Jack King, reached a consent agreement with the Law Society of Manitoba pursuant to which King admitted to committing professional misconduct in exchange for receiving a reprimand from the Law Society. King's former client was demonstrably upset with the sanction and has spoken out publicly about his displeasure. The media reaction to the sanction has been negative, characterising it in terms of the Law Society 'rapping King's knuckles' and the like.⁷

These are the sorts of cases that put self-regulation under the spotlight. Over a decade ago, the Alberta Court of Appeal stated:

The question of what effect a lawyer's misconduct will have on the reputation of the legal profession generally is at the very heart of a disciplinary hearing and is clearly best considered by elected members of that profession and the lay benchers appointed to assist in that task and others. It is one of the prime reasons why professional discipline hearings are entrusted to the profession itself.⁸

Since the scandal broke in the fall of 2010, the Law Society of Manitoba has been on the defensive. Like most of the other Law Societies in Canada, the Law Society of Manitoba has yet to adapt to the public's demand for real-time information in the Twitter age. A full two weeks after the disciplinary hearing, the Law Society of Manitoba had yet to post the decision on its website. A search for 'Jack King' under the lawyer lookup section of the Law Society of Manitoba revealed only King's address, telephone number and e-mail, but no indication of any discipline dispositions. This is not satisfactory.

⁶ See Canadian Judicial Council, 'Update on Two Complaints against Associate Chief Justice Lori Douglas', 5 January 2011, www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2011_0105_en.asp (accessed 27 May 2011).

⁷ See eg Carol Sanders and Gabrielle Giraday, 'Disgraced Lawyer gets Reprimand: Law Society Raps Knuckles for Soliciting Sex with Wife' *Winnipeg Free Press*, 29 March 2011, www.winnipegfreepress.com/local/disgraced-lawyer-gets-reprimand-118826224.html; Editorial, 'No surprise that King got love tap' *Winnipeg Sun* (29 March 2011), www.winnipegsun.com/comment/editorial/2011/03/29/17790611.html (both accessed 27 May 2011).

⁸ *Adams v Law Society of Alberta*, 2000 ABCA 240 at para 16. Thanks to Flora Stikker, JD Ottawa 2011 for sending me this quote at an opportune time.

All Law Societies in Canada, not just the Law Society of Manitoba, must engage in ‘active accountability’ to demonstrate to the public that they are fulfilling their mandate to protect the public interest. Like all public bodies, Law Societies must engage the public and seek to satiate the public desire for information. They must consider webcasting their proceedings and disciplinary hearings and posting their decisions online in real-time.⁹ Instead of struggling to keep up with developments, Law Societies should endeavour to use technology to shine as much light as possible on their operations in order to demonstrate to the public that they are fulfilling their public interest mandates.¹⁰ Just as other public bodies are doing, Law Societies must develop a social media strategy to communicate with the public. The Barreau du Québec is by far the Canadian leader in this respect. It has developed a series of videos for the public on aspects of the legal system as a sleek half-hour television show.¹¹ The Barreau du Québec is bringing its work to where the public is: in their living rooms and in cyberspace. It blogs, tweets and is on Facebook and other social media websites. Why aren’t the rest of Canadian Law Societies following this example?

Finally, it is unclear whether there will be any repercussions for King’s former law firm, which was aware of some of the accusations in 2003 and entered into a confidential settlement agreement with Mr Chapman. Like most Law Societies in Canada,¹² the Law Society of Manitoba has disciplinary authority over individual lawyers and not over law firms. I had expressed the hope that these events might shine some light on the actions of King and Douglas’s former law firm (they were partners at the same firm) and spark some debate on the issue of regulation of law firms in Canada. To date, this has not transpired.

⁹ The Supreme Court of Canada is an excellent model in both respects. See www.scc-csc.gc.ca.

¹⁰ The Barreau du Québec is the national leader in using technology to make legal information available to the public.

¹¹ www.barreau.qc.ca/videos/index.html (accessed 27 May 2011).

¹² Nova Scotia has the most extensive regulatory powers regarding law firms. They cover the spectrum from licensing to discipline and include some less intrusive compliance powers. See Regulations made pursuant to the Legal Profession Act, SNS 2004, c 28, Reg 7.2.3. Nova Scotia is the only jurisdiction in Canada with the clear statutory authority to discipline law firms. See Legal Profession Act, SNS 2004, c 28, s 27. The Law Society of Alberta and the Law Society of Newfoundland and Labrador have the authority to regulate law firms but do not actively do so.

New Threads, Shrinking Lawyers and More: *Correspondent's Report from Europe*

Matthias Kilian*

‘HONEY, I SHRUNK THE ...

... profession’ could have been a recent confession of some bar executives at the dinner table. For the second year in a row, some of the 27 German bars reported a decrease in the number of lawyers admitted. With an overall nationwide increase of just 1.58% to 155,679 lawyers between 1 January 2010 and 1 January 2011, the annual growth has only been slower in four years since a unified German lawyers’ profession was created 133 years ago.¹ Those figures are not likely to change in the foreseeable future. According to the latest statistics, the current lawyer/law student ratio in Germany is 2:1. In some years during the 1980s and 1990s it was exactly the other way around, with two law students enrolled for every lawyer admitted to the bar. The President of the German Federal Bar, Axel Filges, made an interesting remark when asked to comment. He thinks that increasingly the only law graduates to apply for membership of the bar will be those who make the decision to become a lawyer based on complete conviction rather than despair—resulting in a better overall quality of legal services. It does not take too much imagination, though, to think that some more time will have to pass before the hackneyed Shakespearean wisdom is finally retired and replaced by something along the lines of ‘the first thing we do, let’s hatch some lawyers ...’

Germany was in for a premiere recently: The lawyers’ profession took the Ministry of Justice to court for the first time over a long simmering dispute about the profession’s rule-making body, the so-called ‘Satzungsversammlung’. Ever since the profession was stripped of most of its self-regulating powers by the German Constitutional Court in 1987² there has been uncertainty as to what self-regulating powers remained for the profession. The Constitutional Court ruled that all fundamental decisions on how lawyers conduct their profession must rest with the federal parliament and not with the profession itself—and that the federal parliament is also not free to delegate rule-making powers to the profession at will, but must retain responsibility for all regulatory issues that potentially infringe core constitutional rights of members of the profession. Against the background of these very

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¹ In 1924, 1960, 1963 and 1964.

² The decision was published on 14 July 1987. Many jokingly refer to the date of the judgment as the profession’s ‘Bastille Day’ as it was the bicentenary of the French Revolution.

strict limitations, many saw the profession's rule-making body set up by parliament in the mid-1990s as a paper tiger—many of the 35 rules of professional conduct it has promulgated over the past 15 years are a simple repetition of provisions in the Lawyers' Act. To add insult to injury, when the Satzungsversammlung became a bit more creative, rules were repeatedly struck down by the courts or by the Ministry of Justice³ for being *ultra vires*, for not being in the public interest or simply for being disproportionate. While some commentators have quipped that it is no masterly achievement for the profession—and certainly no good promotion of lawyers' skills—if a group of 150 senior lawyers is unable to promulgate rules that can pass the scrutiny of ministries and courts, others felt that the Satzungsversammlung had sometimes been treated unfairly and the profession should take a stand. The opportunity came when the Ministry of Justice struck down yet another professional rule in 2010, a somewhat innocent provision that required lawyers to maintain a reasonable infrastructure not only in their head office, but also in branch offices.⁴ The German Supreme Court came to the rescue of the lawyers' parliament and reversed the decision of the Ministry of Justice. Before the Satzungsversammlung went to court, some had argued that the profession should have waited for a better suited test case as the key issues of the case in question were technicalities (ie, does the term 'law office' only cover a 'head office' or does it include 'branch offices' too?). Nevertheless, as a result of the ruling the lawyers' parliament has become more self-assured—it will be interesting to see whether it will try to push the boundaries of its delegated powers more actively in the future and be more willing to challenge controversial decisions of the Ministry of Justice.

Across the border from Germany in the **Czech Republic**, tailors have become the biggest fans of the *Advokáti* as Czech lawyers are currently investing in the sartorial department. After more than 60 years, the gown has been re-introduced in the Czech Republic as the official robe of the profession. When the Communists seized power after the Second World War in what was then the Czechoslovak Republic, the new rulers quickly abandoned century-old traditions and turned the lawyers that were allowed to continue practising from members of a liberal profession into 'people's advocates'. One key element of this transformation process involved doing away with any professional insignia, including the gown. While over the decades lawyers have become used to this, in the post-communist era the issue became increasingly contentious—not so much because lawyers had a desire for more pomp, but because they felt that they were not on an equal footing with the judges in the courtroom. With the support of the Czech Bar, the Ministry of Justice finally introduced a new regulation on the matter in 2009. With effect from 1 June 2011, gowns are to be worn by lawyers in all criminal proceedings and in proceedings before the Supreme Court and the Supreme Administrative Court of the Czech Republic.

In **Switzerland**, an interesting decision of the supervisory body (Aufsichtskommission) in the canton of Zurich—where one-third of Swiss lawyers practise—was published recently:

³ The authorising body to which rules have to be submitted before they can come into force.

⁴ Which German lawyers have been allowed to have since 2008.

A foreign incorporated law firm had filed an application to set up a Swiss subsidiary. All shares were to be held by the foreign corporation. Based on Article 8 of the Federal Swiss Lawyers' Act,⁵ the application was turned down. The Aufsichtskommission held that an incorporated law firm owned by another (Swiss or foreign) incorporated law firm would lack the independence that all legal services providers (whether a physical person or body corporate) must guarantee. The ruling, dated 6 May 2010, effectively rules out any corporate groups of law firms involving the participation of Swiss subsidiaries. The Aufsichtskommission emphasised that the cross-border element of the case was irrelevant as foreign lawyers with a right to practise law in Switzerland as physical persons are free to own or dominate any law firm domiciled in the canton.

Further east, in **Romania** the training system for future lawyers underwent significant changes in 2010. Passage through the Institutul Național pentru Pregătirea și Perfecționarea Avocaților (INPPA), the National Institute for the Training of Lawyers, is now the only way to become a Romanian *Avocat*. Until recently, graduates had the option to undergo professional training under the auspices of one of the regional bars. Now an entry exam has to be taken with the INPPA at its headquarters in Bucuresti or at one of its six regional branch offices. Those who pass—the failure rate in the entry exam is up to 70 per cent—then have to undergo practical training with a law firm and theoretical training with the INPPA for two years. The new training regime puts more emphasis on classroom teaching at the INPPA's training centres: up to 70 per cent of overall postgraduate training will be at the INPPA rather than in a law firm.

In **Poland**, a heated and somewhat bizarre dispute between the tax authorities and the lawyers' profession on the taxation of pro bono legal services has taken a new turn: In a decision dated 23 March 2010, the Supreme Administrative Court sided with the profession and ruled that pro bono legal work must be exempted from the obligation to pay VAT (value added tax). Before the ruling, the tax authorities and the Ministry of Finance had taken the view that a lawyer must pay VAT for pro bono legal services, based on the value of the services provided for free. There is some hope that the court decision will put an end to this long-running dispute and encourage more lawyers to undertake pro bono work.

⁵ 'Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte'—BGFA.

Legal Ethics in the Academic Curriculum: Correspondent's Report from the United Kingdom

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The legal profession and legal academics in England and Wales continue to debate the value of compulsory legal ethics teaching and assessment within the academic stage of training.¹ Learning and teaching of legal ethics has developed rapidly in recent years,² but it remains an optional part of most law school academic curricula and is often left to professional conduct training at the vocational stage. Economides and Rogers' report to the Law Society, *Preparatory Ethics Training for Future Solicitors*, was published in March 2009. They recommended that 'awareness of and commitment to legal values and the moral context of the law, [be] mandatory in undergraduate law degrees'.³ They advised that an outcomes-based approach be taken so as to permit flexibility but also that the professional bodies should provide assistance to law schools to introduce legal ethics teaching to law students. Their recommendations also extended to the vocational stage of training and post-qualification CPD mandatory ethics training as well. The Law Society's Education and Training Committee commissioned Professor Andy Boon to consider and develop a model curriculum for legal ethics at the initial academic stage of training—perhaps a more modest approach than that originally envisaged by Economides and Rogers, but a bold step nonetheless against the backdrop of intense regulatory change as regards the legal professions in England and Wales as well as the major changes facing higher education institutions over the next few years.⁴

Professor Andy Boon launched his report *Legal Ethics at the Initial Stage: A Model Curriculum* on 16 March 2011 at the University of Westminster, which was the culmination

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¹ For a discussion of the development of this debate see Andrew Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2002) 5(1) *Legal Ethics* 34–67. For a recent discussion of the increasing importance of legal ethics training see Andrew Boon and Julian Webb, 'Legal Education and Training in England and Wales: Back to the Future?' (2008) 58 *Journal of Legal Education* 79. See also Matthias Kilian's report from the German *Juristentag* in relation to this move in Germany: Matthias Kilian, 'German Chocolates, Austrian Trainees, Swiss In-House Counsel and More: Correspondent's Report from Europe' (2010) 13 *Legal Ethics* 220.

² Nigel Duncan, 'Preparing Ethical Lawyers: A Prescription and a Practical Proposal' (2010) 13 *Legal Ethics* 79–92.

³ See Janine Griffiths-Baker, 'Correspondent's Report from England and Wales' (2009) 12 *Legal Ethics* 77–79 for details of Economides and Rogers' report.

⁴ See, for a discussion of the challenges facing law schools and the legal services sector in this context, Nigel Duncan, 'Batting for a Future: An Ethics Response to the Challenges Facing Law Schools' (2010) 19(1) *Nottingham Law Journal* 1–11.

of a Law Society commissioned project to examine the introduction of compulsory legal ethics teaching at the undergraduate stage, to provide a model syllabus with learning outcomes, and to examine best practice in curriculum design and delivery.⁵ The study also aimed to consider resource implications and hurdles. The launch included panel sessions with representatives from the Law Society Education and Training Committee; the Solicitors Regulation Authority Education and Training Committee; the Bar Standards Board Education and Training Committee; ILEX Professional Standards; and Professor Julian Webb, Director of the UK Centre for Legal Education. The Law Society is currently consulting on the proposals. The model curriculum has three principal aims: to encourage reflection on the nature of legal ethics, to provide the tools necessary to help students to behave ethically, and to enable students to be involved in professional ethics formation in the future. The model ethics syllabus includes: ethics and law; system ethics and the administration of justice; regulation of legal services; theory of professionalism; legal professions; professional regulation; and professional ethics.⁶

Boon's report concludes that although legal ethics teaching and assessment could be taught successfully pervasively, it would be preferable for at least some of the legal ethics curriculum to be contained in a discrete module. The most effective way to introduce compulsory ethics training would be to include it as a full foundation subject as part of the Joint Statement Requirements. The Joint Statement Requirements set out the areas that must be covered in any qualifying law degree. However, law schools would likely wish to arrest any encroachment on the non-specified credits within the law degree and to limit the foundation subjects to the current 180 of 360 credits in a standard qualifying law degree.⁷ Thus a discrete core legal ethics module is likely to prove controversial unless the 'core' is freed up by a less prescriptive approach as regards the other foundation subjects. Were it not to be possible to agree on the inclusion of legal ethics as a full foundation subject, then an alternative approach would be to deliver legal ethics as a half core subject with the remainder of the legal ethics delivered pervasively. To ensure that legal ethics is covered to the requisite degree, the Law Society could amend the Day One Outcomes for solicitors so as to reflect the legal ethics outcomes that would need to be met prior to a student being admitted as a solicitor. This would leave it to legal education institutions to determine the best way to teach and assess the legal ethics components so as to meet the outcomes, but it might also permit them to leave legal ethics training to the vocational stage, as now, unless the outcomes were clearly worded so as to specify academic level coverage.

However, this would not be the only hurdle facing the model curriculum. Were the Law Society to wish to introduce compulsory legal ethics training at the academic stage of training, it would have to negotiate with a number of other stakeholders, namely the Solicitors Regulation Authority, the Bar and the Joint Academic Stage Board, law schools

⁵ Andrew Boon, *Legal Ethics at the Initial Stage: A Model Curriculum* (Law Society, 2010), www.lawsociety.org.uk/new/documents/2011/Model-ethics-syllabus-Nov2010.pdf (accessed 27 May 2011).

⁶ See for a summary Andrew Boon, 'Ethics Teaching on Law Degrees?' (2011) 22 *UKCLE Newsletter*, www.ukcle.ac.uk/resources/directions/issue-22-spring-2011/boon (accessed 27 May 2011).

⁷ See p 36 of the Report for details.

and the Legal Services Board. It may also now need to negotiate with ILEX Professional Standards, which is increasing in prominence as a third branch of the legal profession. Without buy-in from these stakeholders it is unlikely that the model curriculum will have persuasive force; rather it will at best be integrated in a piecemeal way into the undergraduate degree in law schools that already have an interest in legal ethics teaching. Law academics have the opportunity to give their views regarding the proposals to the Law Society over the next few months. At the same time, the professional bodies are seeking to commission research to examine the whole training framework for legal professionals in England and Wales in light of the Legal Services Act 2007, which foreshadows a wholesale change in the regulatory environment in the legal services sector.

Strengthening Judicial Ethics in China— The New Principles and Regulation: *Correspondent's Report from China*

Richard Wu*

On 6 December 2010, the Supreme People's Court of China promulgated a revised version of the Basic Principles of the Professional Ethics of Judges,¹ together with a similar revised version of the Regulation on Judicial Behaviour.² These superseded the old versions of 18 October 2001 and 4 November 2005 respectively.

The Principles lay down the general obligations that judges are to observe in discharging their duties. For example, they should exercise their judicial powers independently,³ and put equal emphasis on substantive and procedural justice.⁴ Their cases should be handled strictly in accordance with the time limits imposed by law,⁵ and the principle of 'judicial openness' properly implemented.⁶ They should not accept gifts from litigant parties,⁷ engage in profit-making business activities,⁸ or seek personal advantages by virtue of their judicial office.⁹ Rather, judges need to develop a high standard of professional ethics and maintain a good personal reputation. Efforts should be made to lower litigation costs for parties,¹⁰ and both litigants and lawyers must be dealt with in a respectful manner.¹¹ Judges also need to observe judicial etiquette and dress properly.¹² In addition, they should not take advantage of their former judicial office to interfere with court cases after retirement.¹³

In comparison with the Principles, the Regulation sets out detailed procedures for judges to follow in their daily administration of justice. For example, it stipulates that judges should maintain the right of litigants to commence legal proceedings, particularly the rights of

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1 The full text of the Principles is available at www.law-lib.com/law/law_view.asp?id=164002 (in Chinese).

2 The full text of the Regulation is available at www.law-lib.com/law/law_view.asp?id=336404 (in Chinese).

3 Principles, Art 8.

4 *Ibid*, Art 10.

5 *Ibid*, Art 11.

6 *Ibid*, Art 12.

7 *Ibid*, Art 16.

8 *Ibid*, Art 17.

9 *Ibid*, Art 18.

10 *Ibid*, Art 21.

11 *Ibid*, Art 22.

12 *Ibid*, Art 24.

13 *Ibid*, Art 26.

women, children, the elderly and the handicapped.¹⁴ If a party is physically handicapped or seriously ill and cannot commence legal proceedings in court himself, or authorise others to do so on his behalf, the handling judge can visit that party to collect relevant materials in order to facilitate legal proceedings.¹⁵ In addition, if a litigant lives a long way away from the court, the judge can receive the relevant materials from the litigant over the internet or by post, provided that the facts of the case are straightforward, legal relationships are clear, and the dispute is not major.¹⁶

With regard to court trials, the Regulation prohibits judges from changing the date and time of hearings without a valid reason.¹⁷ Judges cannot drink wine before court trials,¹⁸ nor can they smoke, chat with each other, fall asleep, take telephone calls or leave their seats during trials.¹⁹ They should not quarrel with litigants or other litigation participants,²⁰ and should ensure that litigation participants receive equal treatment in court.²¹

Under the Regulation, judges should adhere to the principle of 'combining mediation and court trial with priority given to mediation', thereby making full use of mediation in the dispute resolution process.²² In carrying out this process, judges should follow the principles of legality and voluntariness to avoid unlawful mediation and blind pursuit of a high success rate.²³ However, judges should not compel the parties to carry out mediation if one party has persistently indicated his unwillingness to resolve a dispute through such means.²⁴ Moreover, if the differences between the parties are so substantial that mediation has proved to be impossible, judges should proceed to court trials in accordance with law.²⁵

On execution of court judgments, the Regulation requires judges to observe strictly the procedures for seizure, auction and realisation of the assets of judgment debtors, but the value of such seized, auctioned or realised assets should not exceed the amount of judgment debt.²⁶ Judges should also authorise the preparation of inventories regarding the types and quantities of assets seized and request that judgment debtors sign or affix the company chop²⁷ on such inventories to confirm their content.²⁸ They should also strictly follow the

¹⁴ Regulation, Art 9.

¹⁵ *Ibid*, Art 12(1).

¹⁶ *Ibid*, Art 12(2). This is a procedure called 'institution of legal proceedings from a distance'. However, it seems to be a matter of discretion for the trial judge, as the wording used in the Regulation is 'can' and not 'should'. In normal cases, litigants should institute legal proceedings in court, without the use of internet or post/email (see Art 12(3) of the Regulation).

¹⁷ *Ibid*, Art 28(2).

¹⁸ *Ibid*, Art 29(6).

¹⁹ *Ibid*, Art 30(3).

²⁰ *Ibid*, Art 30(6).

²¹ *Ibid*, Art 30(4).

²² *Ibid*, Art 39(1).

²³ *Ibid*, Art 39(2).

²⁴ *Ibid*, Art 42(2).

²⁵ *Ibid*, Art 44(2).

²⁶ *Ibid*, Art 64(1).

²⁷ Affixing of the company chop is a legal formality under Chinese law for a company to acknowledge its legal liability or obligation.

²⁸ Regulation, Art 64(2).

procedures for the auctioning and realisation of seized assets, including the lawful appointment of valuation and realisation agencies in order to protect the lawful interests of judgment creditors.²⁹

With regard to activities outside the judiciary, judges should not accept any invitation to participate in seminars or forums organised by government authorities, enterprise and business entities, law firms and intermediaries who have any interest in court cases currently being handled by them.³⁰ Nor should judges participate in any profit-making organisations,³¹ or accept gifts, cash or any invitation to feasts which contravene the requirements of a clean and ‘corruption-free’ judiciary.³² Moreover, judges should only accept press or media interviews through arrangement by the judiciary or with its prior approval.³³ Judges should not express any view that is detrimental to judicial justice nor comment on court cases and related parties which they are currently handling; also, they must not disclose any state secret, commercial secret, individual privacy matter or other ‘non-public’ information obtained in the course of their work.³⁴ Moreover, they should consciously maintain the public image of judges in social activities,³⁵ and refrain from using police cars and wearing judicial uniforms when visiting recreational places.³⁶

Finally, the Regulation sets out new provisions on supervision and sanction. Judges in breach of the Principles will be subject to disciplinary action by the People’s Courts. Any breach involving a violation of law will be treated seriously in accordance with the relevant legal stipulations.³⁷

As the Principles and the Regulation clearly indicate, China has stepped up its legal efforts to strengthen judicial ethics. Whether these new rules will be complied with fully by Chinese judges, however, remains to be seen.

²⁹ *Ibid*, Art 64(3).

³⁰ *Ibid*, Art 81(1).

³¹ *Ibid*, Art 82(2).

³² *Ibid*, Art 82(3).

³³ *Ibid*, Art 84(1).

³⁴ *Ibid*, Art 84(2).

³⁵ *Ibid*, Art 87(1).

³⁶ *Ibid*, Art 87(2).

³⁷ *Ibid*, Art 93.

Judicial Recusal, Spouses and Health Care Reforms: *Correspondent's Report from the USA*

John Steele*

The normally staid topics of judicial ethics and the standards for judicial recusal have become the focus of political debates, editorials, and letter writing campaigns. Most of the recent focus falls on conservative justices of the United States Supreme Court and in particular on their anticipated participation in what is expected to be an important ruling on the constitutionality of the health care reforms championed by President Obama and the Democratic Party. But the issue is not simply about partisan politics. It's also about the structure of the US federal judiciary and the need to think about the impact of two-career couples on the judicial recusal rules.

There has been a partisan demand that Justice Clarence Thomas of the Supreme Court recuse himself from ruling on the constitutionality of the health care reforms. Thomas's wife, Virginia Thomas, founded a conservative political advocacy group, Liberty Central, which is aligned with the Tea Party movement and which published materials claiming that the health care reforms were unconstitutional. (She resigned from that group in early 2011.) To make matters worse, when Justice Thomas was filing his financial disclosure forms each year, he repeatedly failed to disclose his wife's work at Liberty Central, a failure he explained as inadvertent but which was undeniably embarrassing and led some to suggest that the omission was in effect a concealment. On top of that, Justice Thomas appeared at a conference sponsored by some wealthy libertarians (known as the 'Koch brothers') who have been opposed to the expansion of the federal regulatory structure. Another conservative Supreme Court Justice, Antonin Scalia, likewise appeared at a libertarian-sponsored conference and spoke about the US Constitution at a forum sponsored by the conservative and anti-government Tea Party caucus of the US Congress. (The forum was open to all members of Congress and was attended by a few Democrats, who described Justice Scalia's talk as non-partisan.) Finally, a third conservative member of the court, Samuel Alito, attended what many thought was a conservative fundraising dinner.

Given those events, and given the anxiety generated in certain circles by the anticipated decision on the constitutionality of health care, it is not surprising that some challenged the impartiality of the conservative justices and even demanded that they recuse themselves from the case when it reaches the court. That criticism exposed an oddity about the ethics of US federal judges: the judges in the lower federal courts are bound by the Code of Conduct

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for United States Judges, but the Supreme Court is not strictly bound by that or any other code of judicial ethics. The rationale for that omission is a separation of powers argument. The Supreme Court, being a creature of the US Constitution, cannot be directly regulated by the Congress or the President. Accordingly, when a recusal issue arises as to any particular Supreme Court justice, that justice is supposed to look to the Code of Conduct for 'guidance', and is not required to explain in writing his or her decision on recusal. There is no mechanism for the court as a whole or for any reviewing body to rule on the adequacy of the justice's recusal decision. In the eyes of some, this renders recusal issues outside the rule of law and tarnishes the court's institutional credibility.

To change that, various proposals have been floated. It is not clear whether any of the proposals will induce the Supreme Court to act or will prompt the Congress to pressure the court. Some have suggested that the Supreme Court be formally bound by the Code of Conduct. Others suggest that recusal decisions be made in writing, or that they be subject to review by the other members of the court or by special panels of retired judges from the lower courts. All such proposals risk the possibility that new mechanisms for recusal will become infected with ordinary partisan politics and that as a result the Court will suffer a loss of public confidence. Increasing the number of ethics rules and building new processes for raising claims of ethical improprieties do not always make things better.

The recent controversy has also highlighted the need to develop a consensus on how to regulate potential conflicts of interest arising in the context of two-career couples. Justice Thomas's situation is not the only case raising the issue. One of the most closely watched cases in the US federal courts is the litigation seeking to hold bans on same-sex marriage to be unconstitutional. One of the judges assigned to hear the appeal on that case, Stephen R Reinhardt of the United States Court of Appeals for the Ninth Circuit, is married to Ramona Ripston, former Executive Director of the ACLU (American Civil Liberties Union) of Southern California. On behalf of her organisation, Ripston had taken an active interest in the case and in related legal challenges to the bans, but did not appear as a party or as counsel of record in the case on appeal. When the parties supporting the ban asked Judge Reinhardt to recuse himself, he issued an opinion denying the request and taking the position that a spouse's personal interests should not automatically be attributed to a judge. In my view, Reinhardt's position reflects the inevitable consensus. As a formal matter, a decision on a judge's recusal will not turn on the career and the political views of the judge's spouse, even if the spouse is outspoken.

Tobacco, Recusals, and Sexual Assault Reforms: *Correspondent's report from Australia*

Linda Haller*

SEXUAL ASSAULT REFORMS

The Victorian Government has just released a review of its Sexual Assault Reform Strategy.¹ The strategy was an ambitious project begun in 2007 to improve the justice system's response to sexual assault. Legislative reforms then included a ban on any cross-examination by the accused² and the need to obtain leave before cross-examining the complainant on sexual history.

The 2011 review has noted substantial improvements not only in procedures but also in culture within the courts and legal profession in relation to sexual assault cases. For instance, judges reported a reduction in defence counsel aggressiveness during cross-examination, although some lawyers had shifted to more subtle and complex forms of questioning.³

One of the more interesting findings of the review is that the proportion of guilty pleas in sexual assault cases has been declining in Victoria. The reasons remain unclear but are not necessarily the result of the Sexual Assault Reform Strategy. Mandatory inclusion on a sexual offenders register if convicted, demonisation in the press and the lottery nature of 'oath against oath' trials are other possible reasons.⁴ The Director of Public Prosecutions has laid part of the blame with an increasingly complex Evidence Act.⁵ Delays in hearing dates can lead both innocent and guilty defendants to plead guilty. Defendants in sexual assault cases are perhaps less likely to plead guilty in Victoria on that basis, given that the reforms require sexual assault cases to be fast-tracked to hearing.⁶

One flow-on effect of giving priority to sexual assault cases is that other cases before the courts wait longer to be heard.⁷ Obtaining an early trial date does not appear to be of concern in some forms of litigation, where a trial date seems far from the minds of at least some of the parties. I speak, of course, of tobacco 'litigation' ...

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¹ *Sexual Assault Reform Strategy Final Evaluation Report*, www.justice.vic.gov.au (accessed 27 May 2011).

² A legally aided lawyer is provided for this purpose.

³ *Sexual Assault Reform Strategy Final Evaluation Report* (n 1) 120.

⁴ *Ibid*, 214.

⁵ Jeremy Rapke, 'Justice not Stats' *The Age* (Melbourne), 1 May 2011, www.theage.com.au (accessed 27 May 2011).

⁶ Criminal Procedure Act 2009 (Vic), s 212.

⁷ *Sexual Assault Reform Strategy Final Evaluation Report* (n 1) 106–7.

TOBACCO WINS A RECUSAL IN THE HIGH COURT

Tobacco litigation is a fairly distorted and impoverished example of litigation, given that it so often seems to consist entirely of interminable interlocutory skirmishes and the occasional confidential settlement but never (at least so far as Australia is concerned) a trial on the merits.

One tussle, between British Tobacco and the McCabe family and their lawyers, has finally come to a conclusion. This was a case in which the plaintiff's first lawyer, Peter Gordon, received leaked confidential internal law firm documents that threw some light on the extent to which tobacco lawyers were party to their client's 'document retention policy'. Gordon passed the documents on to *The Age* newspaper. The tobacco companies subsequently achieved a court order that Gordon cease acting for the McCabe family (Rolah McCabe having since passed away due to her lung cancer). Leon Zwier, a partner at large commercial law firm Arnold Bloch Liebler, took over the fight, acting pro bono. The McCabe family argued that the documents were not privileged because they revealed fraud and should be used to reopen the case in the Victorian Court of Appeal. That claim of fraud will never be determined by the courts because the McCabe case was settled earlier this year. We know extremely little about the settlement given its confidential terms, except that Rolah McCabe's family walked out of court with smiles on their faces while the lawyers for British Tobacco appeared more sombre.⁸

Meanwhile, other tobacco cases continue a seemingly endless round of interlocutory skirmishes in the courts, including restraint and recusal applications. In *British American Tobacco Australia Ltd v Peter Gordon*⁹ and *British American Tobacco Australia Services Ltd v Blanch*,¹⁰ tobacco companies successfully sought to restrain lawyers acting against them. Big tobacco has now had a big win in the High Court of Australia, with the High Court agreeing that a judge should have recused himself due to a reasonable apprehension of bias.

The judge was a member of the Dust Diseases Tribunal, established to deal with the many asbestos related claims arising in Australia. When defendants claim that the plaintiff's lung disease was due to smoking as well as to asbestos exposure, tobacco companies are joined in proceedings. This happened in the *Alan Mowbray* case.¹¹ During discovery in 2006 the presiding judge needed to determine whether documents were protected by privilege or whether they were tainted by fraud. Given the interlocutory nature of the discovery hearing, the judge was entitled to and did rely on hearsay evidence from a tobacco company whistleblower regarding the now infamous 'document retention policy'. The judge noted that these allegations would be fully ventilated when¹² the case proceeded to a full hearing.

8 Mark Hawthorne, 'McCabe Family Reaches Settlement with Tobacco Giant over Landmark Case' *The Age* (Melbourne), 31 March 2011, www.theage.com.au (accessed 27 May 2011).

9 *British American Tobacco Australia Ltd v Peter Gordon* [2007] NSWSC 230.

10 *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70.

11 (*Re Mowbray*) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15.

12 Given the past history of tobacco litigation some might say 'if'.

But he made an interlocutory finding on the evidence then before him that there was evidence of fraud. He also noted that ‘such allegations were not new’, citing the *McCabe* litigation. At around the same time that he made these comments in the *Mowbray* case the same judge had flown to the United States to take bedside testimony from another dying plaintiff, Donald Laurie. It would be understandable if his sense of frustration at getting these cases to hearing was running high.

Three years later the tobacco company asked the judge to recuse himself from further hearing the *Laurie* case, arguing that the comments he made in the *Mowbray* case could indicate to a fair minded observer that he had pre-judged the tobacco company.¹³ The judge refused to recuse himself and Big Tobacco appealed. The New South Wales Court of Appeal held that the judge had acted properly, although the three-member court split 2:1. Undeterred, Big Tobacco appealed to the High Court of Australia. Here it was successful, although only by the barest of margins, with the court dividing 3:2. The majority of the High Court agreed with the tobacco company that the judge should no longer hear cases involving the tobacco company. They pointed to skeptical comments the judge made about the brevity of the tobacco company’s document retention policy and why lawyers not scientists were put in charge of assessing the value of research material.

A few comments come to mind as the result of this High Court decision. First, comments by presiding judges in the course of a hearing, interlocutory or otherwise, are an important, immediate and direct way in which lawyer and client excesses can be kept in check. The High Court’s decision in *Laurie* may chill judges from pulling lawyers into line because of fear of a recusal application. The irony in many of the tobacco cases is that a full trial in which the tobacco companies are required to provide evidence to rebut such allegations of fraud and judicial and community cynicism about the true reason for document retention policies and other tactics may never eventuate: plaintiffs die of the disease for which they are suing, lose heart or interest in the battle, surviving family members are threatened with costs applications¹⁴ or settle on confidential terms, and lawyers are paid handsomely by Big Tobacco to *avoid* a trial on the merits for as long as possible. Judges are left to make comments based on what they see, which is the much less fulsome evidence tendered in interlocutory proceedings.

Second, it would not be surprising if more and more judges are now experiencing some frustration with the conduct of lawyers in tobacco ‘litigation’. This recent experience in Australia reveals the dangers should judges be too candid in expressing any sense of frustration or suggesting likely causes. A recusal application may be just around the corner, putting the case even further beyond a trial date.

¹³ *Claudia Jean Laurie v Amaca Pty Ltd and others* [2009] NSWDDT 14.

¹⁴ ‘Tobacco Company Accused of Bullying’ *The World Today*, www.abc.net.au (accessed 27 May 2011).