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ETHICS IN PRACTICE

An Education and Apprenticeship in Civility: *Correspondent's Report from* Canada

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The title of this report would seem to be drawn from the pages of a Jane Austen novel. In actual fact, civility is a top issue for the legal profession in Canada. Contrary to popular stereotypes about Canadians being exceedingly polite and bland, Canada apparently has a civility problem. At least the legal profession thinks that lawyers in this country do. The last decade has witnessed the rise of a civility movement within the Canadian legal profession. It has parallels with the movement south of the border which seems to have run its course. In Canada, the civility movement stands at a crossroads with the high profile discipline hearing of a flamboyant lawyer seemingly putting civility itself on trial. The emphasis on civility risks overshadowing the more important issue of access to justice.

The focus on civility coincided with a renewed interest in professionalism within the legal profession around the turn of the millennium. The Chief Justice of Ontario and the head of Ontario's Law Society (still called the Law Society of Upper Canada despite the fact that no political entity of that name has existed since 1841) came together to form the Chief Justice of Ontario's Advisory Committee on Professionalism as a tripartite partnership between bench, bar and academe.[1] The Committee was created in part in response to a perceived growing lack of civility among lawyers. The Committee's first order of business was to create a document entitled *Defining Professionalism*, which articulated a broad-based conception of professionalism identifying 10 'building blocks'.[2] The Committee focused its energies on

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1 See www.lsuc.on.ca/advisory-committee-professionalism.

2 See Chief Justice of Ontario's Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, 'Elements of Professionalism' (October 2001; revised December 2001 and June 2002), www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf. The elements of professionalism identified were scholarship; integrity; honour; leadership; independence; pride; spirit; collegiality; service; and balanced commercialism.

organising colloquia on professionalism with lawyers, judges and academics.[3] At the same time, the Advocates' Society, a leading barristers' organisation in Ontario, published a booklet entitled *Principles of Civility for Advocates*,[4] which was subsequently adopted by the Canadian Bar Association and incorporated as an appendix to its Code of Professional Conduct.[5] Similar initiatives were undertaken in other Canadian jurisdictions.[6]

In the late 2000s, the Law Society of Upper Canada made civility a priority in continuing education and in enforcement. According to Law Society statistics, a significant proportion of complaints against lawyers in Ontario involve civility. The Law Society convened 'civility forums' across the province of Ontario to discuss civility problems and brainstorm responses thereto.[7] The skeptic in me believes that those lawyers likely targeted as having 'civility problems' were unlikely to have been in attendance at these meetings. When the Federation of Law Societies of Canada decreed that all law schools in Canada must require their students to complete a course in ethics and professionalism, the first item on the list of subjects to be included in such a course was 'the duty to communicate with civility'.[8] Surprisingly absent from this list was any mention of access to justice, a shocking oversight that was properly addressed by the Federation committee tasked with implementing the first report.[9]

Some within the legal profession in Canada are not comfortable with the profession's prioritisation of civility and professionalism. My colleague, legal historian and Law Society bencher Constance Backhouse, has written eloquently about the use of concepts like civility and professionalism to exclude outsider groups in Canada, especially women and minorities.[10] In a paper written for the very first Colloquium on the Legal Profession convened by the Chief Justice of Ontario's Advisory Committee on Professionalism, Professor Backhouse documented some of this history and also described the more recent experience of some of the first women on Canada's highest courts. Writing about Bertha Wilson, the first woman to serve on the Supreme Court of Canada (1982–91), Backhouse asserts that

3 Since 2008, I have been a member of the Chief Justice of Ontario's Advisory Committee on Professionalism and have participated in several colloquia.

4 www.advocates.ca/new/advocacy-and-practice/institute-for-civility-and-professionalism.html.

5 Canadian Bar Association, *Code of Professional Conduct* (Canadian Bar Association, rev edn 2009), www.cba.org/CBA/activities/pdf/codeofconduct.pdf.

6 eg Nova Scotia Barristers' Society, Task Force on Professional Civility, *2002 Report*, www.nsbs.org/archives/reports/2002ReportOnTheTaskForceOfProfessionalCivility.pdf; Barreau du Quebec, *Guide de courtoisie professionnelle* (2009). For a comprehensive review of Canadian civility initiatives see Alice Woolley, 'Does Civility Matter?' (2008) 46 *Osgoode Hall Law Journal* 175, 177–9.

7 Law Society of Upper Canada, *Treasurer's Report on the Civility Forum* (27 May 2010), www.lsuc.on.ca/media/convmay10_treasuers_report.pdf.

8 Federation of Law Societies Task Force on the Common Law Degree, *Final Report* (October 2009) (Hunter Report) 9, www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf.

9 Federation of Law Societies of Canada Common Law Degree Implementation Committee, *Final Report* (August 2011) (Conway Report) 19, www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf.

10 Constance Backhouse, 'Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives', paper presented at the First Colloquium on the Legal Profession, London, Ontario, October 2003, www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf. Legal Historian Wes Pue has similarly described how the promulgation of ethical codes by the Canadian legal profession was motivated by a desire to exclude outsider groups from gaining a foothold in the profession. W Wesley Pue, 'Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada' (1991) 20 *Manitoba Law Journal* 237, 255–8.

'[p]rofessional norms of civility and collegiality were used here to demarcate, bolster and protect the masculine judicial circle. These ethical norms, so touted in professional rhetoric, were not used to extend collegial community to the first woman as an equal, but to isolate and exclude her.'[11] While Professor Backhouse is a legal historian, the events she depicts in her paper occurred in the recent past, only 10 to 30 years ago.

Alice Woolley opposes the civility movement on several grounds. Connecting to Backhouse's concerns, Woolley objects to civility because it is too subjective. She finds this particularly problematic in a diverse bar 'in which lawyers may simply have different senses of what constitutes "polite" behaviour' and therefore we may require 'greater tolerance of forms of expression than are countenanced by the civility movement. Otherwise civility would become shorthand for elitism.'[12] Next, Woolley asserts that civility may have a chilling effect on lawyers holding each other to account and thus undermine the ability of law societies to fulfil their obligation to regulate lawyers' ethics.[13] Finally, Woolley contends that lawyers should not have to be civil where it undermines their ability to advocate for their client.[14] Many members of the bar share Woolley's concerns that the focus on civility will run roughshod over counsel's duty to be a fearless advocate for their client.[15]

One case has come to symbolise and perhaps threaten the civility movement in Canada: *Law Society of Upper Canada v Joseph Peter Paul Groia,* known generally as the 'Joe Groia case'. Mr Groia stands accused of professional misconduct by the Law Society in connection with his actions as counsel in defending John Felderhof of charges of insider trading. Felderhof was the Vice President of the high-flying mineral company Bre-X, which crashed and burned in the late 1990s after exposure of a massive fraud, leaving investors with billions of dollars in losses. The Law Society alleges that Groia 'failed to treat the Court with courtesy and respect' because of his 'consistent pattern of rude, improper and disruptive conduct'; 'failed to act in good faith' and failed to conduct himself 'in a fair, courteous, respectful, and civil manner to the Court'; 'undermined the integrity of the profession by communication with the [Ontario Securities Commission] in a manner that was abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer'; communicated with prosecutors in a manner that was 'abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer', etc.[16]

11 Backhouse, *ibid.* See also Constance Backhouse, *Petticoats and Prejudice* (Osgoode Society for Legal History, 1991); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (University of Toronto Press, 1999).

12 Woolley (n 6) 183.

13 *Ibid*, 180.

14 *Ibid*, 81.

15 See eg Edward Greenspan and L David Roebuck, 'The Horrible Crime of Incivility' *The Globe and Mail*, 2 August 2011, www.theglobeandmail.com/news/opinions/opinion/the-horrible-crime-of-incivility/article2113385; Philip Slayton, 'There Can be Too Much Civility' *Canadian Lawyer*, May 2010, www.canadianlawyermag.com/There-can-be-too-much-civility.html. *Contra* Michael Code, 'Counsel's Duty of Civility: An Essential Duty of Fair Trials and an Effective Justice System' (2007) 11 *Canadian Criminal Law Review* 97.

16 Notice of Application, Law Society Hearing Panel File No LCN 62/09 *Law Society of Upper Canada v Joseph Peter Paul Groia* (on file with author).

The case has been the subject of newspaper and magazine profiles in both legal trade publications and the popular press.[17] There is much discussion about Groia in the blogosphere; there is even a blog called 'Free Joe Groia'.[18] A lesser lawyer might simply have apologised, accepted penance from the Law Society and moved on. But Mr Groia is no stereotypically sheepish Canadian. He rejected a reported deal with the Law Society and has purportedly spent over $1 million on his defence.[19] It would not be surprising if the Law Society ends up spending a similar amount as it has retained the services of one of the premier barristers in the country to argue its case. This case is for all the marbles; for Groia, but also for the Law Society in terms of its civility agenda.[20] There have already been 10 hearing dates in 2011 and at least seven more are scheduled for the first two months of 2012. The case is not set to conclude until the end of April 2012. Meanwhile, Groia has not been content to simply plead his case before the Law Society. He has embarked on a nationwide speaking tour at Canadian law schools. Civility in Canada has become the Groia case.

The Groia case is emblematic of much that is wrong with our justice system and with the regulation of lawyers: too much time and money spent on cases that do not warrant it at the expense of addressing other issues. The Groia discipline hearing also raises questions of what forum is best suited to address particular conduct issues of lawyers. Much of the concerns regarding civility relate to litigation. Indeed, many of the organisations that have led on this issue are barristers' organisations. In Groia's case, the uncivil conduct of which he stands accused relates solely to his in-court activities. In vigorously defending Felderhof, Groia was not chastised let alone sanctioned by the trial judge for his alleged uncivil conduct. The prosecution complained about the trial judge's failure to control Groia and attempted to have the judge removed on grounds of reasonable apprehension of bias. This too was unsuccessful.[21] As the court famously quipped about Groia's defence of Felderhof and about litigation generally, 'a hard fought trial is not a tea party'.[22]

To the extent that civility is very much a litigation problem,[23] it is incumbent upon courts as supervisors of this process to control and if necessary sanction lawyers' behaviour, whether

17 See Bruce Livesey, 'The Trials of Joe Groia' *Report on Business Magazine*, 29 September 2011, www.theglobeandmail.com/report-on-business/rob-magazine/the-trials-of-joe-groia/article2185204; Jeff Gray, 'Bre-X Lawyer in his Own Words' *Globe and Mail*, 2 August 2011, www.theglobeandmail.com/report-on-business/industry-news/the-law-page/bre-x-lawyer-joe-groia-in-his-own-words/article2117472; Kevin Marron, 'Uncivil Law' *Canadian Lawyer*, May 2006, www.canadianlawyermag.com/Uncivil-law.html; Drew Hasselback, 'Civility Takes Centre Stage at ABA Meeting' *Financial Post*, 10 August 2011, http://business.financialpost.com/2011/08/10/civility-takes-centre-stage-at-aba-meeting.

18 http://groia-case.blogspot.com.

19 Livesey (n 17).

20 It is clear from the press coverage that many see the case as much bigger than an inquiry into the conduct of Mr Groia. See eg Betsy Powell, 'Civility Movement "Not Helpful" Ethicist Tells Discipline Hearing' *Toronto Star*,12 August 2011, www.thestar.com/news/crime/article/1038852—civility-movement-not-helpful-ethicist-tells-discipline-hearing (reporting on the testimony of Professor Alice Woolley before the discipline hearing); Greenspan and Roebuck (n 15); Slayton (n 15).

21 See *R v Felderhof* [2002] OJ No 4103 (SCJ), aff'd (2003), 68 OR (3d) 481 (CA).

22 *R v Felderhof* [2002] OJ No 4103, para 275 (SCJ).

23 See Wendy Matheson, 'Ten Litigators to Watch Out For' (2006) 25(1) *Advocates' Society Journal* 17; Megan Seto, 'The Importance of Being Civil' *Canadian Lawyer*, 3 October 2011, www.canadianlawyermag.com/3892/the-importance-of-being-civil.html?print=1&tmpl=component.

it occurs in or out of court.[24] Judges have been far too timid about policing and sanctioning bad behaviour by lawyers. Many Canadian judges are alive to this problem and judicial education programs are addressing it. As a former Chief Justice stated while conducting a review of civil justice in Ontario, 'Judges should move to zero tolerance mode when confronted with uncivil behaviour in the courtroom'.[25] This is a matter of protecting the court's process but it is also a matter of pragmatic regulation. The courts are best suited to observe, regulate and—if need be—immediately sanction the conduct of lawyers appearing before them.

However, many lawyers and lawyers' organisations are not keen on judicial regulation of lawyers, despite the fact that all Canadian lawyers are 'officers of the court'. As discussed in previous correspondent's reports,[26] these organisations continue to oppose attempts by courts to regulate lawyers' behaviour and assert the increasingly untenable position that only the relevant provincial Law Society can regulate lawyers. Law Societies simply cannot and should not regulate all aspects of lawyers' conduct. Self-regulation does not necessarily equate with sole regulation. It is in the public interest for Law Societies in Canada to accept a system of complementary regulation of lawyers rather than competitive regulation. This is best demonstrated by one of the Law Society of Upper Canada's responses to the civility problem. It has created a program whereby if a judge observes uncivil conduct in court, the judge may refer that lawyer to the Law Society for investigation or mentoring. The Law Society partners with defence counsel, the Crown and other lawyers' organisations to provide mentoring to these lawyers who are deemed to be in need of guidance as to what is and what is not acceptable behaviour in court.[27] The mindset of competitive regulation needs to be supplanted by one of cooperative regulation whereby the Law Societies, courts and other bodies share the responsibilities for regulating lawyers depending on who is best suited to regulate the conduct with the public interest as the ultimate touchstone for such divisions of labour.

I am concerned about the priority given to civility in the regulation of lawyers in Canada. As Woolley notes, much of the behaviour for which law societies have sought to sanction lawyers in the name of civility is actually captured by the content of other underenforced rules.[28] And she is certainly correct in asserting that '[i]t is not obvious that the response to the law societies' lack of rigorous enforcement of their existing rules should be the enactment of more rules …'.[29] Having studied the history of the regulation of the profession in Canada, I share Backhouse's concerns regarding the manner in which notions of civility and professionalism have been used by the legal elite to exclude dissenting and outsider groups. In many respects, civility in the legal profession in Canada parallels ideas of manners in Jane Austen's

24 See Code (n 15).

25 The Hon Coulter A Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ministry of the Attorney General, Toronto, 2007) 147, www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf; see also Code (n 15).

26 See Alice Woolley, 'Judicial Regulation of the Legal Profession: Correspondent's Report from Canada' (2010) 13(1) *Legal Ethics* 104; Adam Dodek, 'Courthouse Cancellations and Challenges to Self-Regulation: Correspondent's Report from Canada' (2011) 14(1) *Legal Ethics* 125.

27 See Law Society of Upper Canada, *Civility Complaints Protocol*, www.lsuc.on.ca/with.aspx?id=642.

28 Woolley (n 6) 185–6.

29 *Ibid*, 184.

nineteenth century England. The halls of legal offices in Canada are replete with tales of rudeness and incivility on the part of elite lawyers, but somehow these lawyers do not become the subject of law society discipline processes. In sum, I am troubled by the priority given by Law Societies to civility in terms of time, resources and money. There are other issues that are more pressing for the limited resources of legal regulators, as I discuss in more detail below.

If self-regulation is ever restricted in Canada, it is unlikely to be the result of a perceived civility crisis; it will more likely be due to anger at the legal profession's failure to address access to justice issues. I fear that attempts by Law Societies and lawyers' organisations to address the perceived civility deficit drain desperately needed resources from the real challenge to the justice system and ultimately to self-regulation in Canada: access to justice. There are signs that we may be moving to a critical juncture in Canada.

In August 2011, the Governor General, the Queen's representative in Canada and the holder of an office that is supposed to be non-partisan and non-political and which usually studiously steers away from controversy, appeared before the national conference of the Canadian Bar Association and effectively chastised the members of the Canadian bar. His Excellency, himself a member of the legal profession and a former law dean, stated:

> We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal.
>
> What happens if we fail to meet our obligations under the social contract? Society will change the social contract, and redefine professionalism for us. Regulation and change will be forced upon us—quite possibly in forms which diminish or remove our self-regulatory privilege. …
>
> For many today, the law is not accessible, save for large corporations and desperate people at the low end of the income scale charged with serious criminal offences. We must engage our most innovative thinking to redefine professionalism and regain our focus on serving the public.[30]

When Canadian legal history is written, it may show that the profession was distracted by civility and failed to devote sufficient interest to access to justice. In short, the Canadian legal profession is addressing the wrong crisis.

With the Access to Justice crisis increasingly in the foreground, the legal profession in Ontario is more concerned with supply-side issues, specifically the apprenticeship period known as 'articling' required for all qualifying lawyers in Canada. Due to a relative equilibrium between the number of available articling positions and the number of graduating law students in Canada, most aspiring lawyers have always been able to find articles and thus qualify to be called to the bar (as bar exams are not significant barriers to entry in Canada). There have always been students who have struggled to find articles and concerns have focused on the challenges that minorities and other 'outsider groups' have faced in securing articles, but over 90 per cent of those seeking articles were able to secure them. Over the past few years, Canada's largest province has seen over a 15 per cent increase in the number of students seek-

30 His Excellency the Right Honourable David Johnston, Governor General of Canada, 'Canadian Bar Association's Canadian Legal Conference—The Legal Profession in a Smart and Caring Nation: A Vision for 2017', Halifax, 14 August 2011, www.gg.ca/document.aspx?id=14195.

ing articling placements, with the number of articling positions remaining stagnant.[31] The increase in demand for articles is largely a result of Canadians studying law abroad and internationally trained lawyers immigrating to Canada. But it is also due to expansion in the number of Canadian law students.

For 30 years, the number of law faculties in Canada remained stable at 21. All law schools in Canada are part of publicly-funded universities and require authorisation and funding in order to be established. In September 2011, Canada added a 22nd law school: Thompson Rivers University's Faculty of Law (TRU Law) opened for business in Kamloops, British Columbia. TRU Law intends to offer an academic program 'that pays particular attention to legal issues facing energy, natural resources, and the socio-economic challenges confronting Canada's First Nation and Aboriginal communities'.[32] Another new law school is slated to open in September 2013 in Lakehead University in Thunder Bay, Ontario. In addition, in 2009, the Common Law Faculty at the University of Ottawa expanded its entering class by 75 students and the Université de Montréal has similar plans to expand its common law program. Student demand for more law schools certainly exists in Canada as roughly eight applicants compete for every one law school spot.

The articling crisis represents a real challenge for the legal profession in Ontario and, by extension, for the rest of Canada because of increasing reciprocity in recognising legal credentials between provincial regulators. The profession strongly supports articling but not enough individual lawyers seem willing to step onto the field and call for the ball. There is very little supervision by the Law Society of the articling process and even less accountability. It is thus frequently acknowledged that there are wide discrepancies in individual students' articling training and experience. Articling seems to have continued because it has always existed, and while that might be a historical explanation for its persistence, it is an unsatisfactory reason for its continued existence. There is conceptual agreement on the need for lifelong learning in the legal profession but there is very little coordination between those involved in this endeavour: law schools, Law Societies and lawyers. Law Societies need to confront the question of what is the purpose of articling and ascertain whether they are meeting that purpose. Law Societies need to ask what my fellow Canadian Jordan Furlong has called the 'moneyball question in law—if we weren't doing things the way we are, how would we be doing them?'[33] Tradition explains why things are the way they are but it is not a good enough reason to justify why it should continue to be so. As the Dean of the Faculty of Law at the University of Calgary recently quipped: 'Civility is Canada's charm. Complacency is its curse.'[34]

31 See Law Society of Upper Canada, Professional Development and Competence Department, *Resource and Program Report*, May 2011, 4–5, www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485117 (noting 1,473 articling applications in 2006 and 1,837 in 2010, an increase of 17.9%).

32 www.tru.ca/law.html.

33 Jordan Furlong, 'Ask Yourself the Moneyball Question', 19 September 2011, www.attorneyatwork.com/articles/the-moneyball-question.

34 Ian Holloway QC, 'The Canadian Lawyer in the Twenty-First Century' (2011) 69(5) *The (Vancouver) Advocate* 691, 691.