

ETHICS IN PRACTICE

Sex on the Internet and Fitness for Judicial Office: *Correspondent's Report from Canada*

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Canada is a country better known for its calm and moderation than for noise and scandal. One of Canada's nicknames, after all, is 'the peaceable country'. At times Canadians look to our southern neighbours with some degree of envy in that their Declaration of Independence endowed them with 'life, liberty, and the pursuit of happiness', whereas our progenitors in Westminster saw fit to give us 'Peace, Order and Good Government' (which we refer to affectionately as 'POGG'). It is against this background that Canada can now boast of legal scandal to rival those in both the mother country and the American colossus. This made-in-Canada scandal contains all the requisite elements: sex, power, money, race, and the internet.

Lori Douglas was appointed by the federal Minister of Justice Irwin Cotler to the Manitoba Court of Queen's Bench in 2005.¹ The Prime Minister named her Associate Chief Justice of that court in 2009.² Prior to her initial appointment to the bench, Judge Douglas had been a partner at the Winnipeg law firm of Thompson Dorfman Sweatman (TDS), a leading large law firm in Manitoba.³ Judge Douglas's husband, Alan King, was also a partner at the same law firm. This is the context for the scandal.

At the end of August 2010, the Canadian Broadcasting Corporation (CBC), the state-owned, normally prudish and cautious broadcaster, broke the story that a complaint had been lodged with the Canadian Judicial Council against Judge Douglas. The CBC reported

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1 Department of Justice Press Release, 'Manitoba Judicial Appointments Announced' (20 May 2005), www.justice.gc.ca/eng/news-nouv/ja-nj/2005/doc_31520.html.

2 Prime Minister of Canada, 'Prime Minister Announces Manitoba judicial appointment' (19 May 2009), www.pm.gc.ca/eng/media.asp?id=2581.

3 See www.tdslaw.com.

that the complaint included nude photos of Judge Douglas engaging in sexual bondage. The complainant, Alan Chapman, claimed in CBC interviews aired nationally that, in 2003, Douglas's husband, Alan King, had represented him in a family law matter and had tried to seduce him into sleeping with Douglas because of King's interest in interracial sex (Chapman is black, King and Douglas are white). In furtherance of this plan, King allegedly emailed Chapman nude photos of Douglas engaged in sexual bondage. King also apparently posted those same photos on an internet site devoted to interracial sex called darkcavern.com. Chapman also alleged that King brought Douglas with him to a Winnipeg restaurant and left Chapman alone with Douglas, in a setting that Chapman described as feeling like 'a first date'. Chapman claims that the lawyers invited him to their home but he never went, and asserts that he never had sexual relations with Judge Douglas.

Chapman eventually complained to the partners at TDS and soon after King left the firm. Apparently, the law firm paid Chapman \$25,000 as part of a settlement agreement to forgo legal action against King and TDS. Chapman signed a confidentiality agreement and an undertaking to destroy all emails, photos and other materials that King had sent him. However, Chapman retained the photos and some of the emails and lodged his complaints with the Canadian Judicial Council and the Law Society of Manitoba in August 2010. Judge Douglas has temporarily stepped aside from active judging duties while the complaint is being resolved.

Chapman also sued King, Judge Douglas and TDS for \$67 million, although he quickly dropped the claim against Judge Douglas and later abandoned the claim against TDS. In response to the lawsuit, King issued a statement through his counsel explaining that King had settled the matter seven years ago and apologising to Chapman for any offence.⁴ Lawyers for King were also successful in obtaining an injunction against Chapman to prevent him from distributing any photos or emails from King and from tampering with his computer in any way.⁵

This fact pattern contains an abundance of ethical issues, many of which have not begun to be scrutinised in Canada. To begin, the CBC consulted a number of 'ethics' experts in order to assist it in the decision whether to publish this information. The CBC website contains a justification for why it chose to run the story.⁶ That the CBC felt that it needed to justify such a decision reveals much about the CBC, Canadian media culture and continued Canadian deference to authority. It is unimaginable that an American or a British broadcaster would have felt similarly inclined to offer such a justification. However, the CBC has come under harsh criticism from the Manitoba branch of the Canadian Bar Association for running the story.⁷

⁴ Letter from William S Gange, CBC.ca (undated), www.cbc.ca/news/pdf/gange-letter.pdf.

⁵ See Kenyon Wallace, 'Man Ordered to Return Nude Photos of Judge' *National Post*, 3 September 2010, www.nationalpost.com/related/topics/ordered+return+nude+photos+judge/3476021/story.html#ixzz11uqKPvQL.

⁶ See Cecil Rosner, 'Why we are Telling the Story of the Judge and the Nude Photos' CBC.ca (31 August 2010), www.cbc.ca/canada/manitoba/story/2010/08/31/f-rosner-why-publish.html.

⁷ See Jen Skerritt, 'Judicial Sex Scandal Bar Association Slams CBC "Attack"' *Winnipeg Free Press*, 4 September 2010, www.winnipegfreepress.com/local/judicial-sex-scandal-bar-association-slams-cbc-attack-102210304.html.

The CBC was absolutely correct to run the story. The core of the justification offered by the CBC is as follows:

The issues here deal with a lawyer's duty to a client; the duty of other legal professionals to report matters of concern to the relevant professional associations; the duty of a potential judge to disclose pertinent matters in advance of his or her selection; and the responsibilities of judicial selection committees as they make their choices.⁸

Res ipsa loquitur. The CBC asked the ethics experts—including *Legal Ethics* editorial board member, Alice Woolley—not to reveal the information until the CBC ran the story. This leads to the question of whether it would have been proper for those experts to reveal the information if the CBC had not released the story after a reasonable amount of time had passed. I think it certainly would have been. There are very serious questions involved here that are in the public interest.

Much of the media interest in Canada has focused on what Judge Douglas did or not disclose in her judicial appointment application form in 2005 and when she was elevated to Associate Chief Justice in 2009. The Personal History Form seeks background information and asks candidates to explain their qualifications for judicial appointment, and to disclose any criminal, disciplinary or litigation history, financial difficulties, taxes, and health issues.⁹ The form also asks candidates, 'Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?' This is the question on which commentators have focused. As these forms are confidential we do not know what Judge Douglas disclosed, however there are press reports that she did disclose something about her husband to the committee that interviews judicial candidates.¹⁰ Those interviews and the committee's reports are also confidential. However, the Minister of Justice who appointed Judge Douglas to the bench in 2005 has asserted that he had no idea about the photos.

This catch-all 'what else should the committee know?' question has never been adjudicated on by the Canadian Judicial Council or by the courts. However, a provincial court judge was removed from office for failing to disclose a criminal conviction for which he had received a pardon.¹¹ Many commentators have asserted that if the allegations are true Judge Douglas should resign or be removed from office because she would never have been appointed to the bench had the Minister of Justice known of the existence of nude photos. However, this cannot be the relevant test. For one, the requirements for appointment—both official and unofficial—are different from those for removal.

The standards for removing a judge from office are very high. A federally appointed judge holds office during good behaviour and may only be removed after a joint address to

⁸ See Rosner (n 6).

⁹ Office of the Commissioner for Federal Judicial Affairs Canada, Federal Judicial Appointments, Personal History Form, www.fja.gc.ca/appointments-nominations/forms-formulaires/ph-fc/phf-fc-law-lois-eng.pdf.

¹⁰ See Wallace (n 5) (reporting that King's lawyer told the press that Judge Douglas had discussed a problem her husband had with Chapman with the vetting committee).

¹¹ See *Re Therrien*, 2001 SCC 35; [2001] 2 SCR 3.

both Houses of Parliament.¹² The Canadian Judicial Council may recommend to the Minister of Justice that a judge be removed only when the judge has

- ... become incapacitated or disabled from the due execution of the office of judge by reason of
- (a) age or infirmity,
 - (b) having been guilty of misconduct,
 - (c) having failed in the due execution of that office, or
 - (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office ...¹³

In practice, only the most egregious behaviour results in a recommendation from the Canadian Judicial Council to the Minister of Justice that a judge be removed from office.¹⁴

The test for removing a judge is not and cannot be one of 'never would have been appointed'. There are many things that come to light about judges following their appointment to the bench that could lead one to opine that had the matter been known to the Minister of Justice, the person would never have been appointed. For instance, a judge's ties to an unsavoury client or cause that embarrasses the Minister, or a short temper which leads the judge to yell at counsel or litigants may cause some to conclude that had such facts been known, the judge would never have been appointed in the first place.

The question for the Canadian Judicial Council's consideration, and for judicial ethics commentators, is whether Justice Douglas has engaged in misconduct such as to warrant removal from judicial office or some lesser sanction. While many Canadians may express disdain or outrage at any activities involving sexual bondage, this alone should not be grounds for removal of a judge. We do not want to begin the process of judging what our judges do in their bedrooms.

Of much greater concern is what Judge Douglas did as a lawyer at TDS, the same firm in which her husband was a partner. As a member of that firm, Judge Douglas was also in a lawyer-client relationship with Mr Chapman and owed him a duty of loyalty. She was not simply the 'spouse of' Chapman's lawyer; Douglas herself was also his lawyer. This is a critical issue.

Similarly, questions are being raised as to how the law firm handled the matter in 2003 and the extent to which it reported the actions of its partner, Mr King, to the Law Society. In Canada, individual lawyers owe duties under the applicable Law Society codes of conduct;

¹² Constitution Act 1867, s 99(1) (Can).

¹³ Judges Act, RSC 1985, c J-1, s 65(2).

¹⁴ Eight inquiries have been held by the Canadian Judicial Council since 1990. See Canadian Judicial Council, 'Inquiry Committee Decisions', www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp. In only one case has the Canadian Judicial Council recommended the removal of a judge. See *In Re Cosgrove*, Report to the Minister of Justice (30 March 2009), www.cjc-ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf. Justice Cosgrove resigned on the eve of the Minister of Justice's introduction of the joint resolution of both Houses of Parliament.

law firms, with a few exceptions, do not.¹⁵ The issue of law firm discipline has been debated in the US over the past two decades and recently in Australia. Increasingly, the issue is turning to regulation of law firms rather than simply discipline. Shining the light on the actions of TDS may spark such a debate in Canada.

Unlike in Australia and England and Wales, Law Societies in Canada have largely escaped public criticism. The Law Society of Manitoba is being called to account for its actions in 2003 because it apparently investigated the matter at that time but took no disciplinary action against King and, according to Chapman, it did not interview him in 2003. The Law Society now faces a complaint instigated by Chapman against King and TDS. In November 2010, the Law Society authorised charges of professional misconduct against King based on breaches of its Code of Professional Conduct regarding integrity, conflict of interest and sexual harassment. In adjudicating these charges, a Law Society Discipline panel will also have to examine the Law Society's own actions in 2003.

This is a tough case for the Canadian Judicial Council because its decision will be subjected to unparalleled scrutiny, not only because of the prurient subject matter of the allegations but also because it is judging one of its own. Judge Douglas is one of the 39 members of the Canadian Judicial Council. The Canadian Judicial Council does not appear to have any different process when a complaint is made against one of its members. It should.

Finally, Chapman's civil claim against his former lawyer was dismissed in November 2010 by the Manitoba Court of Queen's Bench, the very court of which Judge Douglas is a member. Indeed, as mentioned above, King was quick to obtain an injunction against Chapman in the Manitoba Court of Queen's Bench. The oddity of a colleague of Judge Douglas granting an injunction in a case in which she is at least a witness was not lost on some members of the media and certainly was not missed by Chapman, who openly questioned his ability to obtain a fair trial. As the Court of Queen's Bench is the only court with jurisdiction over Chapman's civil claim, it would appear inescapable that Judge Douglas's court will hear Chapman's case. However, it is not unavoidable that one of Judge Douglas's colleagues hear the case. Manitoba legislation gives Court of Appeal judges jurisdiction to preside over trials and they enjoy all the powers of judges of the Court of Queen's Bench.¹⁶ The Chief Justice of Manitoba should have given serious consideration to assigning one of the judges of the Court of Appeal to preside over this case. As the saying goes, 'not only must justice be done; it must also be seen to be done'. Chapman has said that he plans to appeal. The saga continues.

¹⁵ 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 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 are authorised to regulate law firms but do not actively do so.

¹⁶ Court of Appeal Act, CCSM c C240, s 24.