LEGAL PROFESSION (939-1) - SYLLABUS

1. Course Description

This is a course about legal ethics and professional responsibility in Canada. The Federation of Law Societies of Canada (FLSC) (http://flsc.ca) has developed mandatory competencies for our common law degree that all law students must demonstrate upon graduation (see http://docs.flsc.ca/National-Requirement-ENG.pdf). One of the competencies is "Ethics and Professionalism". In describing the importance of this competency, the FLSC Task Force on the Canadian Common Law Degree stated:

> Ethics and professionalism lie at the core of the profession. The profession is both praised for adherence to ethical codes of conduct and vilified for egregious failures. Increasing evidence of external scrutiny of the profession in this area and internal professional debates about ethical failures point to the need for each lawyer to understand and reflect on the issues. In the Task Force's view, the earlier in a lawyer's education that inculcation in ethics and professionalism begins, the better.
>
> The Task Force believes that more, not less, should be done in this area and that legal educators and law societies together should be identifying ways to ensure that law students, applicants for admission and lawyers engage in focused and frequent discussion of the issues. To ensure that law students receive this early, directed exposure the Task Force believes a stand-alone course is essential.[1]

Successful completion of this course will satisfy this competency.

Another project of the FLSC has been to develop a model code of professional conduct to be adopted by all provinces to ensure consistency in ethical standards for the delivery of legal services across the country. The FLSC has now created an interactive site where individuals can compare the FLSC code and its implementation by the codes of each Law Society across Canada (see http://flsc.ca/interactivecode/). The Law Society of Upper Canada has amended its Rules of Professional Conduct to mirror the FLSC Model Code. It came into force in October, 2014. This course will use LSUC Code for the course.

Another mandatory and arguably related FLSC common law degree competency is "legal and fiduciary concepts in commercial relationships." This course does not satisfy that competency. Students must take Business Associations to satisfy this competency.

[1] Summarized in FLSC Common Law Degree Implementation Committee, "Final Report" (2011) available on-line at http://flsc.ca/wp-content/uploads/2014/10/APPROVALCommitteeFinalReport2011.pdf.

2. Learning Outcomes

Following this course, the student should be able to demonstrate:

> … an awareness and understanding of the ethical requirements for the practice of law in Canada, including,
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> a. the duty to communicate with civility;
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> b. the ability to identify and address ethical dilemmas in a legal context;
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> c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to, circumstances that give rise to ethical problems;
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> ii. the fiduciary nature of the lawyer's relationship with the client;
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> iii. conflicts of interest;
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> iv. duties to the administration of justice;
>
> iv. duties relating to confidentiality and disclosure;
>
> vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and,
>
> vii. the importance and value of serving and promoting the public interest in the administration of justice.[2]

3. Classes

Wed
9-12 pm
G104

[2] This is directly from FLSC, "National Requirement" available on-line at http://docs.flsc.ca/National-Requirement-ENG.pdf.

4. Texts

Required

Alice Woolley, Richard Devlin, Brent Cotter, John Law, *Lawyers' Ethics and Professional Regulation* (2nd ed) (Toronto: LexisNexis, 2012)

Law Society of Upper Canada, *Rules of Professional Conduct* (posted on Blackboard (2015))

Law Society Act, RSO 1990, Chapter L.8 (selected provisions) (posted on Blackboard)

Other readings will be handed out or posted on our Blackboard site

5. Top Hat

We will be using this program to facilitate classroom discussion, and comprehension testing. Signing up with Top Hat is a required part of this class. The school will be paying for your licence so there is no additional financial commitment. In class, you will be able to access Top Hat through your laptop, smart phone or tablet.

Using Top Hat last year in Legal Profession was one of the best teaching experiences I have had. It allowed all students to test their knowledge of the material, to contribute to debates and to see where other students stood in relation to ethical and professional issues.

Here are a few comments from students in the class last year:[3]

> "I think the program facilitates our learning in an incredible way. It allows students who wouldn't normally participate to offer an option, and it's also interesting to see where other members of the class stand with regards to the questions."
>
> "I just wanted to let you know I really enjoyed using Top Hat in lecture today. Normally I am shy and do not enjoy participating and I found that it was a way more engaging lecture for me today as I was able to participate and sort of see what everyone else was thinking. I know people have been giving you a hard time about using the program and I just wanted you to know I personally think it was a very good choice and made the lecture a lot more enjoyable, and I think a number of my classmates felt the same."
>
> "To be honest, I was relieved when you announced we would be using Top Hat as a class because I felt uncomfortable voicing my opinion about some ethical issues we will certainly be confronting in our legal careers because of potential judgment

[3] All reproduction of feedback here is with the consent of the individual students.

from my colleagues. I think the program will be the perfect opportunity to ask some hard hitting questions that people might not feel comfortable lifting their hands to agree with in front of the class. Some students might even feel more comfortable talking in class if they see that a large number of students responded in the same way they did when polling the class with the program."

6. Evaluation

(i) Method

1. Class Participation (10%)

Participating on Top Hat: throughout the course (almost weekly), you will be asked to answer comprehension questions and participate in surveys through Top Hat. Your participation mark will be based on the percentage of questions/surveys you answer.

Computer glitch safeguard: If you are unable to access Top Hat because of a computer glitch or for some other reason, you can submit to me, at the end of class, a signed and dated piece of paper with your responses to the Top Hat questions/surveys taken up in class.

2. Op-Ed (20%)

One of the goals of any progressive legal education is to equip students with the capacity to be able to critically evaluate existing legal structures, institutions, and laws (e.g. how they contribute or impede the search for social justice). An important part of that capacity is the ability to commit to a position on an identified issue relevant to the pursuit of justice and persuasively articulate and defend it. A good way to develop this skill is to practice writing an opinion piece that could appear in a blog or newspaper comment section.

Attached to the syllabus, you will find four examples of recent op-eds that I have written in relation to lawyers and ethics. See "What were the prosecutors thinking?" *Ottawa Citizen* (19 Nov 2010); "The Crown should align with justice, not the police" *Ottawa Citizen* (11 Dec 2010); "Are the lawyers pursuing the Jian Ghomeshi's lawsuit acting unethically" *Toronto Star* (6 Nov 2014); and "White, male lawyers should say 'no' to judicial appointments" *Globe and Mail* (18 Feb 2015).

To complete this assignment, you must choose an ethical/professional issue involving social justice and lawyers, law schools, lawyer regulation or judges. A good source for a topic will be our discussion on January 6 (first class) on the top 2015 legal ethics stories in Canada.

Your grade will be based on the following criteria: originality, persuasiveness, clear and concise thesis, relevance to social justice, degree of support (for example, case law, relevant data, rules of professional conduct) for your position, clarity of writing and compliance with the word limit. The maximum length of the op-ed is 850 words (this is the industry standard).

The op-ed must be submitted to Thuy Binh-Shiu (my assistant on the second floor of the law school) no later than **4:30 pm on Wednesday, February 24, 2016**. A penalty of 5% per day will be assessed to late submissions. **Please use your Winter mid-term exam number.**

3. **Drafting Rule of Professional Conduct (25%)**

This is a group assignment. The class will be divided up into 10 groups of five students. I will create the groups. The purpose of this assignment to is to provide you with an opportunity to draft a new rule of professional conduct or to recommend amendments to a current rule. The new rule or amendment must be relevant to advancing a social justice ethos in the profession.[4] You should follow the format of the Rules of Professional Conduct with a Rule and then Commentary. Your commentary section should include a brief discussion of (1) why you feel the rule/amendment is necessary; (2) its relationship to social justice; (3) elaboration on the parameters of the rule/amendment including with an example(s) of how it might operate in practice. You will receive a group grade for your assignment.

Your grade will be based on the following criteria: originality, clear and concise writing, persuasiveness, relevance to social justice and compliance with the word limit. The maximum length is 2,500 words.

The assignment must be submitted to Thuy Binh-Shiu no later than **4:30 on Wednesday, March 30, 2016.** A penalty of 5% per day will be assessed to late submissions. **Please use your Winter mid-term exam number.**

4. **Exam (45%)**

There will be a final exam written at the law school on **Thursday, April 14, 2016 (1:00 pm)**. The exam writing period will be **two (2) hours and OPEN BOOK**. In accordance with Universal Design, the exam has been set to be completed within ninety minutes. The format of the exam will be multiple choice. This is the format used for the Bar exams.

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[4] All of you will have been exposed to issues surrounding social justice & the legal profession in your A2J class. See also, Spencer Rand, "Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach" (2006) 13 *Clinical Law Review* 459; and, William P Quigley, "Letter to a Law Student Interested in Social Justice" (2007) 1 *DePaul Journal for Social Justice* 1 (available on Blackboard). See further, Susan D Carle, *Lawyers' Ethics and the Pursuit of Social Justice* (New York: NYU Press 2005).

(ii) Numerical Grade Distribution

All course work is to be marked and final grades submitted using the 100% scale. The average grade for this course will be B (73-76.9) and individual grades will be adjusted to conform to the B average.

(iii) Student Evaluations

Student evaluations of the course will take place in the class during the last week of term.

7. Office Hours

Office:
Room 2123
(519) 253-3000 (ext. 2966)
tanovich@uwindsor.ca (e-mail)
http://athena.uwindsor.ca/law/tanovich (website)
@dtanovich (twitter)

Hours: **Mon: 11:00-12:00 pm; 12:30-1:00 pm; Wed: 12:30-1:00 pm** (students may also arrange an appointment by e-mail). Extended office hours will be posted before the final exam.

8. Class Topics and Readings

January 6 [Week 1]
Introduction to the Course
Readings
No assigned readings ☺
Questions To Ponder
1. What are the top legal ethics stories in Canada for 2015?
2. If someone asked you to fill in the blank _____ to describe the professional work of a lawyer, what word(s) would you use? For example, lawyer as "loyal advocate."

January 13 [Week 2]
Legal Professionalism
Social Justice Lawyering – JAW Conference
Specific Topics
Building Blocks of Professionalism
Defining Social Justice Lawyering – Sources?
Readings
Chapter 2 (pp. 67-117) (this is mostly background reading for the course)

Questions to Ponder

1. What is the nature of the regulation of lawyers in Canada? How is it carried out? What are some of the criticisms/benefits?
2. In 2001, the Chief Justice's Advisory Committee on Professionalism released its "Elements of Professionalism". The Committee is currently in the process of revising this document. What is missing? What would you remove? (http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf)
3. What rules in the LSUC's Code of Professional Conduct are relevant in thinking about social justice lawyering.

Notes

Our class will end at 10:15 and we will reconvene at the CAW Centre (Ambassador Auditorium) for the JAW morning panel & then back to the law school for the keynote.

> **The 8th Annual Justice at Work Career Conference: Lawyering for Change**
> **10:30 AM – 11:40 AM – Morning Panel Discussion: How to Use Your Law Degree for Change**
> Alhagi Marong, Legal Affairs Officer, United Nations Mission in South Sudan
> Ryan Peck, Executive Director, HALCO
> Sukanya Pillay, Executive Director and General Counsel, CCLA
> Andrew Pinto, Partner, Pinto Wray James LLP
> Ari Kaplan, Partner, Koskie Minsky LLP
> Jagmeet Singh, NDP Critic to the Attorney General
> **12:00 PM – 1:30 PM – Lunch and Keynote (Moot Court)**
> Desmond Cole, Columnist, Toronto Life

January 20 [Week 3]
Introduction to Legal Ethics

Specific Topics

Distinguishing professionalism, legal ethics and professional responsibility
Regulation
Sources
Drawing from theory: essential elements of ethical lawyering

Readings

Chapter 1 (pp. 1-11 (up to D.); 16-64) (background readings from Week 2)
Blackboard Reading: Pearce, Danitz & Leach, "Revitalizing The Lawyer-Poet: What Lawyers Can Learn from Rock and Roll"(2005) 14 *Widener LJ* 907

Questions To Ponder

1. What is the difference between professionalism, legal ethics and professional responsibility?
2. What is the nature of lawyer regulation? What should be regulated?
3. What are the sources to guide ethical decision making?
4. How can legal theory assist ethical reflection?

Scenarios

We will take up #3 (page 29); #5 (page 51); and, #6 (page 63). We will also watch a video-taped debate on civility and regulation.

January 27 [Week 4]
The Lawyer-Client Relationship: Part I – Formation & Termination
Specific Topics
Advertising
Making Legal Services Available
Choosing Clients
Withdrawal & Disclosure of Error/Omission
Readings
Chapter 3 (pp. 121-151; 189-205)
Questions to Ponder
1. What standard should be used to assess ethical/professional advertising?
2. Is the current regulation of legal fees satisfactory?
3. What standards should guide the solicitation of clients?
4. Lawyers' Oath – refuse no cause reasonably founded – should there be a discretion to refuse to accept a retainer?
5. Can a lawyer ever withdraw from a criminal case?

Scenarios
We will take up #1 (page 145); #6 (page 147); #10 (page 164); #18 (page 194); #19 (page 204)

February 3 [Week 5]
The Lawyer-Client Relationship: Part II - Competence
Specific Topics
Competence
Cultural Competence
Readings
Chapter 3 (pp. 151-189)
Questions to Ponder
1. What are the elements of competence?
2. What is the standard for determining incompetence in professional discipline?
3. What is cultural competence? Why is it so important to ethical lawyering?

Scenarios
We will take up #11 (page 185)
We will also watch a video on Cultural Competence and work through questions on the conduct of the lawyer.

February 10 [Week 6]
Confidentiality
Specific Topics
Definition – Distinguishing Confidentiality and SC Privilege
Explaining Confidentiality
Exceptions
Confidentiality and Withdrawal
Disclosing Evidence of a Crime
Readings
Chapter 4 (pp. 207-241; 256-271)

Questions to Ponder

1. What are confidentiality/privilege so fundamental to the lawyer-client relationship?
2. What information acquired by the lawyer is confidential? What is the difference between confidentiality and privilege?
3. How should confidentiality be explained to the client?
4. What general principles guide when a lawyer can breach confidentiality?
5. How should we regulate evidence of a crime in a lawyer's possession?

Scenarios

We will watch a video on Confidentiality and work through questions on the conduct of the lawyer

February 17
Reading Week – No Class ☺

February 24 [Week 7]
Duty of Loyalty/Conflicts of Interest

Specific Topics

Former/current clients
Using client's case for publicity/media
Intimate relationships with clients

Readings

Chapter 5 (pp. 275-290; 330-354)
Blackboard Reading: *CNR v McKercher* 2013 SCC 39

Questions to Ponder

1. What are the relevant interests at stake in cases involving conflicts?
2. Has the Supreme Court achieved the right balance between the competing interests?
3. How does a lawyer resolve conflicts between the SCC jurisprudence and the rules where there are inconsistencies?
4. Have the rules governing conflicts become too complex?
5. What limits are there on the ability of a lawyer to use his or her client's case for promotional purposes? Writing a book or movie script?

Scenarios

We will watch a video on Conflicts and work through questions on the conduct of the lawyer

March 2/9 [Weeks 8-9]
Ethics in Advocacy
Specific Topics
Pleadings
Discovery
Negotiations
Advocacy and Civility
Social media
Readings
Chapter 6 (pp. 357-409)/Chapter 7 (pp. 411-431)
Blackboard Reading: Excerpts from *Groia v LSUC* 2015 ONSC 686
Questions to Ponder
1. What ethical principles should guide a lawyer's decision to send a "demand" or "libel" letter?
2. Is it ethical to lie or mislead during negotiations?
3. Where is the ethical line between witness preparation and coaching? Should it matter in criminal cases whether it is a Crown or defence witness?
4. What authority must be disclosed to the Court by lawyers?
5. Is there a legitimate concern that the "civility movement" will quell resolute advocacy? What constitutes uncivil conduct? How should it be regulated?
6. What are the boundaries for lawyers accessing social media to prepare for their case?

Scenarios
We will take up #2(page 365); #4 (page 373); #(a)-(j) (page 376)
We will also watch a video on Civility and work through questions on the conduct of the lawyers.

March 16 [Week 10]
Ethics and Criminal Law Practice
Specific Topics
Crown Counsel
Defence Counsel
Readings
Chapter 8 (pp. 435-482)
Blackboard Reading: Freedman, Munroe, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 *Michigan L Review* 1469
Questions to Ponder
1. What are the general ethical obligations owed by prosecutors?
2. How would you respond to Professor Freedman's three hardest ethical issues?
3. When do you know your client is guilty? What limitations are imposed?
4. How do you advise a client who tells you that he intends to lie in the stand in order to ensure he is acquitted?

March 23 [Week 11]
Lawyers in Organizations
Specific Topics
Corporate Lawyers
Government Lawyers
Readings
Chapter 9 (pp. 510-519); Chapter 10 (pp. 527-559)
Questions to Ponder
1. What are some of the unique challenges to lawyers working within organizations?
2. Who is the client?
3. Do government lawyers owed a heightened ethical duty?
4. What professional rules of responsibility apply?
5. Where should the regulation of lawyers within organizations take place?

Scenarios
We will take up #2 (page 513); #1 (page 552); #3 (page 558)

March 30 [Week 12]
Judges' Ethics, Lawyers' Dilemmas
Specific Topics
Judicial Ethics
Readings
Chapter 11 (pp. 561-618)
Questions to Ponder
1. Should there be an enforceable Code of Conduct for judges?
2. What are the basic ethical foundations of judging?
3. What are the ethical boundaries of talking about judges in public statements?
4. What guidelines exist (should exist) for judges who return to practice after retiring?

Scenarios
We will take up #1 (page 575); #4 (page 583); #5 (page 584); #9 (page 594); #3(d) (page 616); #3(f) (page 617)

April 6 [Week 13]
Issues in Regulation
Specific Topics
Good Character
Extra-Professional Misconduct
Sanctioning Lawyers
Readings
Chapter 13 (pp. 663-706)
Questions to Ponder
1. What is the nature of the good character requirement? Should it be abolished/reformed?
2. When should the LSUC care about extra-professional misconduct by lawyers? What standards are used for discipline?

What were the prosecutors thinking?

Tanovich, David
The Ottawa Citizen [Ottawa, Ont] 19 Nov 2010: A.15.

By now most people are familiar with the horrific experience of Stacy Bonds, the young woman who was arrested for effectively asking why she had been stopped and questioned by the police and then assaulted, strip-searched and detained half-naked for over three hours in a police cell. Her charge of assaulting police was stayed by Justice Richard Lajoie who concluded that there was no lawful authority for any of the conduct of the police that night and that what had happened to Bonds was an "indignity towards a human being."

While the focus has quite properly been on the conduct of the police officers involved, less attention has been placed on the Attorney General, the Crown Attorney's Office and the prosecutor, all of whom it seems believed that prosecuting Bonds for a minor offence in these circumstances was in the public interest.

It bears repeating that the purpose of a prosecutor is not to secure a conviction but to serve as a minister of justice. To ensure that the administration of justice is not tainted by conduct that subverts the rule of law.

Well before the trial, the Crown had seen the videotape. What did it show him? In addition to having a hand shoved down Bonds' pants and twice violently kneed in the back, she was strip-searched in the presence, and with the assistance, of male officers, one of whom forcibly cut her shirt and bra off with a pair of scissors. She was then left half-naked in a cell for over three hours. When she was found, her pants were soiled.

In *R.v. Golden*, the leading constitutional case on strip-searches, the Supreme Court of Canada recognized that "[w]omen and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault." Indeed, as Bonds puts it, "I was mentally and verbally raped."

The trial judge concluded that the only reasonable explanation for the officers' conduct was "vengeance and malice." He didn't link it to any prior event but presumably it was for Bonds' questioning the authority of the police earlier on the street. As Bonds is a black woman, there is also the lurking question of whether race and/ or gender were a factor not only in their decision to stop her on the street, but also to subsequently humiliate her. Given what we know about racism in policing and given that one of the officers was earlier temporarily demoted for assaulting and repeatedly Tasering a young woman in a cell less than a week before this incident, this is a very real likelihood.

Any reasonable Crown viewing the videotape would have concluded that the only offence it revealed was the assault and sexual assault of Bonds by the officers. Any reasonable Crown would have realized that Golden prohibits strip-searches of women by male officers absent extraordinary circumstances, and that without lawful authority, the non-consensual touching of a female suspect that interferes with her sexual autonomy or

dignity is a sexual assault. As the trial judge pointed out, there was no lawful authority for any of the officers' conduct in this case.

Had the Crown Attorney's office properly examined this case and identified it as a serious incident, the case would have come to the attention of the chief of police. It is hard to criticize Chief Vern White or his executive for inaction when not only was the matter not brought to their attention but an independent agency was prepared to prosecute and defend the officers' conduct. Even during the trial, the Crown prosecutor was given the opportunity to do the right thing and withdraw the charges but presumably after getting instructions from his superior, he persisted.

In staying the proceedings against Bonds, the trial judge held that to continue the prosecution would be a "travesty" and that "I certainly would not be a party to such an action." The question is why the prosecutor and his office permitted itself to be a party.

What remains to be seen is how our system responds. One officer has been banned from dealing with the public and an internal investigation has been launched. But will the province's Special Investigations Unit investigate the case as this conduct should be deemed to fall squarely within their mandate? Will these officers be charged with assault causing bodily harm and/or sexual assault? And finally, will the public find out why the Attorney General continued to prosecute Bonds in these circumstances and failed to denounce what happened to her?

David M. Tanovich is a professor of law at the University of Windsor and academic director of the Law Enforcement Accountability Project (LEAP).

Credit: David Tanovich; Citizen Special

Word count: **785**

The Crown should align with justice, not the police

Tanovich, David M
The Ottawa Citizen [Ottawa, Ont] 11 Dec 2010: A.19.

With heightened public concern over the recently revealed treatment of Stacy Bonds, Terry Delay, Adam Nobody (G-20) and other high-profile cases, people are likely wondering whether police violence is on the rise. The answer is probably no. But that answer is of little comfort. The critical question is why we have not seen a reduction in the unjustified use of violence given the number of positive developments in policing.

Over the last 20 years, there has been a greater move toward civilian oversight of policing including the creation of the Special Investigations Unit (SIU) in Ontario. The video camera is now a staple in police stations and so the police know they are being watched. We have seen a new breed of police chiefs who are reflective and thoughtful leaders. As well, police services have begun to focus on ensuring a diverse force, community outreach, sensitivity training and developing a culture of professionalism.

So why have these developments not had the desired effect? That is a complex question. One explanation is that there remains a police culture of impunity that has yet to be penetrated. It is a culture which leads otherwise good and well-meaning individuals to believe and act as if they are "the law" or "above the law." This is the power of culture over individual will. Until this culture is addressed, any accountability reforms will ultimately fail to have their desired effect.

What often gets overlooked in the discussion of this issue is the role that lawyers, criminal justice academics, judges and juries play in enabling a culture of police impunity.

I want to focus here on the role of one such actor -- the Attorney General of Ontario.

The Attorney General has an ethical and constitutional obligation to ensure that his prosecutors remain independent and do not "align" themselves with the police. In some jurisdictions, this line has been crossed. This sends a powerful message to the police to carry on and not to worry because the Crown "has our back" to put it in the vernacular. Consider the following cases.

Last year, the Ontario Privacy Commissioner released her report which examined the practice of Crown jury vetting. Her review found that one-third of Crown offices had asked police to violate our privacy laws and to conduct computer checks of prospective jurors, beyond the required criminal record check. In Barrie, for example, the police were asked to provide any information to ensure that jurors "we" would not want could be removed. As the Ontario Court of Appeal observed two weeks ago, "[t]his use of police resources and attempt to align the Crown with the police is inconsistent with Crown counsel's obligation to ensure that the accused receives a fair trial."

In *R.v. Tran*, the Crown failed to distance itself from the police misconduct. In that case, the Crown invited an officer to sit with him during the trial and to assist with witness preparation. The officer had gratuitously assaulted the accused when he turned himself in and then destroyed evidence and committed perjury to hide the abuse. In June, the Ontario Court of Appeal stayed the accused's conviction for conspiracy to commit robbery. It issued a stern reprimand observing that the Crown's conduct reflected an "indifference to, if not approbation of, the police abuse and attempted coverup" and that the "Crown's conduct was evocative of an alignment with the police, notwithstanding the abuse."

And most recently in the Bonds case, we see perhaps one of the most egregious instances of "police alignment." As we now know, this was not a case of a young prosecutor making an error in judgment. We have been told that a case management team as well as senior Crowns in the Ottawa office approved her prosecution. So why, upon considered reflection, did they reach their decision when the shocking videotape evidence revealed that she was the victim, not the police? Why did they ignore the very real possibility that Bonds was sexually assaulted by the officers? And why did they ignore that there was, in fact, no offence committed since individuals are entitled to use reasonable force (such as kicking) to resist an unlawful arrest and assault by police? There is no reasonable explanation other than they stepped out of their shoes as ministers of justice to protect the officers.

Who knows how many other cases involving trumped up charges such as public intoxication, assault police or cause disturbance are out there where the Crown is acting out of a concern for the officers and not the public interest? For example, why is it only now that the Ottawa Crown's office has exposed the two most recent cases of videotaped police misconduct? Would it have done this without the chief's request or the public attention?

Ultimately, the conduct of prosecutors is the responsibility of the Attorney General of Ontario who has the power to discipline them and set policy on when a prosecution should be stopped. Where is he on this issue of the crossing of the line? Why hasn't he had the courage we have seen exhibited last week by Deputy Chief Gilles Larochelle to acknowledge that there is a "problem" with many of his prosecutors?

Why has the Attorney General not yet addressed whether or not he will discipline the prosecutors engaged in unlawful jury vetting? Why has he not publicly acknowledged the misconduct in Tran? Why has he taken the extraordinary step of defending the prosecutors in the Bonds case, suggesting that there was a reasonable prospect of conviction?

It would seem that in this province, at least, the Attorney General is the lawyer for the police, not the public interest. And until he fulfils his constitutional role, the culture of impunity will grow.

Are the lawyers pursuing Jian Ghomeshi's lawsuit acting unethically?

Is Jian Ghomeshi's suit against the CBC another example of the complicity of lawyers in the silencing of sexual assault complainants?

By: David Tanovich Published on Thu Nov 06 2014

As a law professor and one who teaches legal ethics, one of the most troubling parts of the Jian Ghomeshi story for me is the question of the ethics of the civil lawsuit filed by his lawyers against the CBC for a staggering $55 million.

There are serious systemic problems in our justice system surrounding the treatment of sexual assault complainants. There is a culture of intimidation, denial and blaming by police, lawyers, judges and juries that plays a significant role in explaining why so many women do not report their assault and why there are more acquittals in sexual assault cases than for any other offence.

In my view, lawyers have played a significant role in the silencing of sexual assault. Anyone familiar with the criminal justice system will tell you, if they are honest, that lawyers appear willing to be more zealous in defending a client charged with sexual assault than for any other offence. Indeed, one prominent Ottawa lawyer once told a group of young budding lawyers that their role in cross-examining a sexual assault complaint is to "whack the complainant … if you destroy the complainant … you destroy the head … you've got to attack the complainant hard with all you've got." More recently, a senior member of the bar told a group of lawyers that their job was to "kill" the complainant in cross-examination.

That then brings me to the Ghomeshi lawsuit. Is it another example of the complicity of lawyers in the silencing of sexual assault complainants? If yes, is it ethical for lawyers to follow the instructions of a client to accomplish that purpose?

A number of leading employment lawyers in Canada have been quoted as saying that the lawsuit is frivolous and has no chance of success. Brian Radnoff of Lerners has said that "the document reads more as a publicity stunt than a serious legal challenge." Howard Levitt of Levitt & Grosman is quoted as saying that "as a unionized employee, [Ghomeshi] has no recourse to sue — and that he and his lawyers must know that." In other words, the law only grants Ghomeshi the right to seek a remedy pursuant to his collective agreement and not through the civil courts.

So why was it filed? Levitt gets it right, in my opinion, when he notes that the lawsuit is about "intimidating women from going public with allegations of assault at Ghomeshi's hands" and that "his interest lies in doing his best to ensure both that his narrative prevails and that those with a different tale to tell are silenced. This multi-million-dollar action, however frivolous legally, might just accomplish both."

None of these senior lawyers, however, have publicly questioned the ethics of the lawsuit notwithstanding their recognition of its chances of success and purpose.

While it is true that lawyers owe a duty of loyalty to their client, lawyers also owe a duty to the profession and the public and to ensure that their conduct does not bring the administration of justice into disrepute.

In Ontario, all lawyers must swear an oath (like the Hippocratic oath doctors swear) before they are eligible to practice law. Part of the oath contains the following commandment: "I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretenses." The Rules of Professional Conduct also prohibit a lawyer from "instituting … proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party."

Now thinking about ethics rarely permits a definitive conclusion on any set of facts. For example, notwithstanding the prohibition on filing frivolous lawsuits, there may be a broader social purpose in doing so. A test case is one example. Another might be to draw attention to a systemic problem. None of those appear to be the case here.

If the purpose was to silence, in my view, the lawyers should have refused to accept the brief. This is a fundamental issue and an important part of our public discourse surrounding this case.

Lawyers and the public need to hear from our regulatory bodies about whether the profession is prepared to accept this as business as usual.

White, male lawyers should say 'no' to judicial appointments

David Tanovich
Contributed to The Globe and Mail
Published Wednesday, Feb. 18, 2015 9:36AM EST

The latest round of federal judicial appointments in Ontario has further entrenched inequality in our courts and has led me to think about the following provocative question: Should white male lawyers have an ethical duty to say no the next time the federal justice minister comes calling, in order to force systemic change? In my view, the answer is yes.

It is not an understatement to say that we are in the midst of a crisis of representativeness in our federal judiciary.

For example, since 2012, 46 practising lawyers (including three professors) have been appointed to the Ontario Superior Court of Justice or Court of Appeal by Conservative justice ministers. Just over three quarters (78 per cent) of the appointments have been men (36/46). Only one of the appointments appears to be from a racial minority, although an exact number cannot be discerned because of the government's refusal to collect this necessary information. Things aren't much better in the other provinces or in the elevation of judges from the provincial to federal courts.

Despite repeated calls by organizations such as the Canadian Bar Association, Indigenous Bar Association, Canadian Association of Black Lawyers, South Asian Bar Association and the Federation of Asian Canadian Lawyers, academics and lawyers for more representativeness in appointments, and thoughtful recommendations to accomplish that end, the government of Stephen Harper refuses to act.

It continues to demonstrate what University of Ottawa professor Rosemary Cairns Way has referred to in a recent paper as "deliberate disregard" for representativeness.

This "deliberate disregard" has serious consequences in individual cases for accurate fact-finding and law reform and, more systemically, for the legitimacy, fairness, impartiality and repute of the administration of justice.

A drastic solution is needed, and one would be to place an ethical obligation on white male lawyers to say no.

Lawyers act in the public interest and we serve as important guardians of the administration of justice and the rule of law. Indeed, lawyers have professional obligations to "encourage public respect for and try to improve the administration of justice."

Lawyers have responsibilities that distinguish us from others. As our Rules of Professional Conduct exhort, "a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and

democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community …"

Lawyers also have a professional responsibility to take measures to prevent discrimination. The appointments process is clearly producing discriminatory results by denying opportunities to all equality-seeking groups in Canada.

It is unfortunate that it appears to have come to this.

Judicial appointments are considered by many to be the pinnacle of one's legal career, and come with tremendous financial rewards and security. Lawyers who apply to the bench want to make a difference and meaningfully contribute to the administration of justice. There is no question that saying no would be hard to do and a lot to ask. But as lawyers we are regularly faced with difficult and challenging ethical decisions. Many of them come with personal and financial costs.

Sadly, nothing else seems to have a chance of changing the status quo, for it is clear that the Harper government does not care; or worse, it appears to actually want to have a judiciary that reflects the face and ideology of its base.

Lawyers, and in particular, white male lawyers can make a difference on this issue. And so we should.

Excerpts: University of Windsor Human Rights Policy (A full copy of the Human Rights Policy can be found at www.uwindsor.ca/hrights)

The University of Windsor is committed to providing an equitable working and learning environment that promotes and supports academic achievement. To this end, the University will strive to ensure the applicability of the rules of natural justice to achieve fair treatment of all members of the University community and will endeavour to create an environment free of harassment and all forms of prohibited discrimination.

By this Policy, the University declares that all members of the University community are obligated to interact on the basis of mutual respect and that the University will not tolerate any form of harassment, sexual harassment or discrimination in any University-related activity involving a member of the University community.

Behaviour constituting a violation of this Policy and/or the Ontario Human Rights Code is considered by the University to be a serious offense and is subject to a range of disciplinary measures up to and including dismissal or expulsion by the University.

The Ontario Human Rights Code prohibits harassment and discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, handicap, age, marital status, family status, receipt of public assistance or record of offences. It is understood that a person may experience discrimination and/or harassment on multiple grounds and that discrimination can be overt or systemic.

Every individual at the University is entitled to work/study in an environment free of discrimination and harassment and in particular to work/study in an environment free of discrimination and harassment including but not limited to discrimination and harassment based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, handicap, age, marital status, family status, receipt of public assistance or record of offences.

Discrimination is defined as a distinction, whether intentional or not, based on grounds relating to personal characteristics of an individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Harassment is defined as vexatious comment or conduct in relation to a person or group of persons which has the effect or purpose of creating a hostile or intimidating working or educational environment when:

- such treatment has the effect or purpose of threatening or intimidating a person; or

- such treatment abuses the power that one person holds over another or misuses authority; or
- such treatment has the effect or purpose of offending or demeaning a person or group of persons on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, handicap, age, marital status, family status, receipt of public assistance, or record of offences.

Harassment may occur during one incident, or over a series of incidents including incidents which, in isolation, would not necessarily constitute harassment. Harassment prevents or impairs the full and equal enjoyment of employment and educational services, benefits and/or opportunities and may occur between people of the same or different status within the University community, regardless of age or sex. Harassment may also be directed at a group as well as at an individual. Harassment may be psychological, verbal or physical or may be all of these.

Prohibited behaviours include but are not limited to:

- ***Verbal Behaviour***
  Using stereotypes to describe a particular group; name calling; insults; threats; slurs; degrading or unwelcoming remarks; jokes or innuendos about a person/persons in relation to the prohibited grounds in the Ontario Human Rights Code.
- ***Written Materials***
  Displaying or distributing racist/sexist derogatory or otherwise offensive materials or graffiti; displaying or distributing derogatory pictures or cartoons.
- ***Physical Behaviour***
  Making threatening or rude gestures; using physical intimidation or assault; leering; unwanted touching, kissing, patting, pinching; insulting actions or practical jokes based on the prohibited grounds in the Ontario Human Rights Code.
- ***Non-Verbal Behaviour***
  Avoidance, exclusion and inaction: refusing to talk or work with another member of the University community because of personal, physical, racial or ethnic characteristics; condescension, paternalism or patronising behaviour; failure to provide accommodation for persons with disabilities or for persons engaged in religious observation unless the accommodation causes undue hardship.

"**Sexual harassment**" includes:

a) any unwanted sexual attention or behaviour by a person who knows or ought reasonably to know that such conduct is unwanted; or
b) any implied or expressed promise or reward for complying with a sexually oriented request; or
c) any implied or expressed threat of reprisal, in the form either of actual reprisal or the denial of opportunity for the refusal to comply with a sexually oriented request; or
d) any inappropriate verbal or physical conduct that has a focus on sexuality or sexual identity in what reasonably may be perceived as a hostile, intimidating or offensive manner; or
e) the communication or display of material with a focus on sexuality or sexual identity which has the effect or purpose of creating a hostile or intimidating working or educational environment.

Examples of sexual harassment:

- *verbal abuse including but not limited to graphic commentaries on the victim's body and sexual remarks which demean a person and are known or ought to have been known to be unwanted;*
- *using sexually degrading words to describe a person;*
- *insulting and offensive gestures, innuendoes, language, joking and or taunting about another person's body which causes awkwardness and or embarrassment;*
- *leering (suggestive staring) or other gestures;*
- *asking inappropriate questions about the person's sexuality or any sexual relationships past, present or future;*
- *unnecessary physical contact such as brushing up against a person's body, touching, patting, pinching and invasion of personal space for the purpose of sexually harassing a person;*
- *demanding sexual favours accompanied by implied or overt threats concerning a person(s)' employment (economic livelihood) grades (academic failure hence loss of future livelihood), reputation and/or letters of recommendation;*
- *sexual solicitation or advance made with implied reprisals if rejected;*
- *backlash or the threat of backlash, or retaliation or the threat of retaliation, for the lodging of a complaint or participation in an investigation;*
- *behaviour including but not limited to attention and/or conduct that is known or ought to be known to be unwanted after the end of a consensual relationship; and*
- *inappropriate display of sexually offensive material and /or pornography such as pin up posters (of any size), magazines etc.*

UNIVERSITY OF WINDSOR (FACULTY OF LAW)

POLICY STATEMENT ON STUDENT DISCIPLINE PLAGIARISM

Plagiarism is defined by Black's Law Dictionary (revised 4th edition):

> The act of appropriating the literary composition of another of parts or passages of his writing, or the ideas or language of the same, and passing them off as the product of one's own mind.

The Oxford English dictionary defines plagiarism:

> the wrongful appropriation or purloining, and publication as one's own, of the ideas or the expression of the ideas (literary, artistic, musical, mechanical, etc.) of another.

Comment: Merely taking the ideas or expression of another is not in itself plagiarism. The substance of plagiarism is that the plagiarist passes off the ideas or expression of another as his or her own. Thus, the application of the precepts and practices learned in legal writing, particularly the full acknowledgement of sources, is the best safeguard against plagiarism. *When a student is in doubt as to the proper treatment and acknowledgement of the ideas or expressions of another, the best course of conduct is to consult the professor for whom the work is being prepared.* **Plagiarism will be presumed in any case of appropriating the expression or ideas of another without full acknowledgement of sources.**

Examples:

(a) submitting as his or her own work an exam or other piece of academic work which has been authored or prepared either wholly or partly by someone else;

(b) submitting academic work containing passages taken either verbatim or with occasional word changes from the works of others where such passages are not properly acknowledged;

(c) submitting a paper or other academic work which adopts the ideas of other authors without giving appropriate acknowledgement.

The following examples of plagiarism have recently been the subject of disciplinary complaints:

1. Failure to use quotation marks or offset the paragraph when directly quoting a source even when the source is footnoted;
2. Failure to cite a source when the source is paraphrased;
3. Failure to attribute a directly quoted or paraphrased passage to the correct source (e.g. quoting directly from or paraphrasing material from a textbook, treatise, article, etc., and reproducing the footnotes appearing in this source rather than footnoting the source itself);
4. Reproduction of another student's table of authorities, bibliography, footnotes, etc.;
5. Failure to cite a passage quoted or paraphrased from a website;

In addition, the *Policy Statement on Student Discipline* identifies as improper conduct a student submitting his or her own academic work in a course without disclosing to the professor that this academic work was authored or prepared, either wholly or partly, for another course or purpose.

The *Policy Statement on Student Discipline* also:

1. addresses improper conduct relating to exams (cheating),
2. provides the sanctions that can be imposed by the Discipline Committee for improper conduct.

Copies of the *Policy* are available in the General Office.