

Session 7.2

The Impact of Technology on Courts and Judicial Ethics: an Overview

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- 1 Lightstone: I see that a lot of the people have been at some of the programs that have been offered by the NJI team. So, what we are going to do today is, we are going to hustle through this PowerPoint fairly rapidly, and skip over a few bits and head right to the ethical meat of the matter.

- 2 This is what I call the 'no sticks, just carrots' slide [refers to visual presentation]. Education is not mandatory, of course, in Canada so we have to make it fairly appealing, and I think we have with our Judicial Ethics programs. Just to let you know, there is another issue on this slide that I think is one of interest, or at least one that became of interest to Justice Kent and myself last week. We talk about all education respecting the principles of judicial independence, and that means so very many things for us at the NJI. Of course, it means that education is judge-led. It has to be balanced. It has to be non-prescriptive. Justice Kent and I delivered a very interesting lecture at University of British Columbia last week to Canadian educators and academics who teach legal ethics in all of the law schools across Canada. It was very interesting to us, given what we perceive when we are training the judges, is that there is often no right answer in ethics. Rather, there is a process of thinking through something. A few of the professors were quite stumped by the fact that they just could not quite come to terms with the fact that we, when we were doing our education, did not insist on a correct answer. We really were quite amazed by that, given our natural inclination towards teaching about accepting the whole concept of judicial independence.

- 3 NJI programming is divided between national- and court-based programming. The judicial ethics program that Justice Kent and I work on is a national program. Every eighteen months or so we design and develop, in conjunction with a planning committee of judges and academics, a new program on ethics. For example, in our last program, last September, we crammed, we shoe-horned a whole bunch of topics into it, one being technology. Professor Eltis was one of the lecturers during the Judicial Ethics and Technology session. At that ethics program we also had sessions on judges and the media, alternative dispute resolution, judgment writing, and controlling the courtroom. We somehow squinched all of that into about two and a half days. The beauty of these national programs is that we now have two and a half days of programming that lands up in our court-based programming so the courts, when they are doing their individual programming, will also often take a bit, or piece, of the National Ethics Program. I see Judge Crabtree is here and I know that he took his court, a provincial court of British Columbia, to the technology session.

- 4 Nothing gets wasted. Everything gets reused and everything gets reused several times over, and that is the beauty of our national programming. It is sort of like the 'mother tree' off which lots of little sessions grow.

- 5 I think you have already heard that we take a three-dimensional approach to judicial education. Justice Martin referred to this in the social context session that preceded this one. Maybe it is time for us to add a fourth dimension, that being ethical awareness.
- 6 We have a collection of twenty principles that guides our judicial education. That is the source of all the materials that support all of the NJI programs this week. One of the documents that you will find at that site is what we call our Judicial Education Guides. This is our cookbook. This is our recipe book. This is what we give to faculty members. This is what we use within the NJI as our collection of guides to designing judicial education. Our set of twenty principles is the foundation of all our education. Our guiding principles that have come down from our board of governors is contained in this set of guides. These are really useful and really good.
- 7 Every area of the curriculum asks judges to develop knowledge, ability to act within a legal and social context, in a judicial manner. At one point, we had stand-alone programs, programs that would just deal with social context. You might think our judicial ethics is sort of a stand-alone program but it is not, because we integrate so many other things. Well, you just heard what we had crammed into the September 2008 program, for instance.
- 8 Kent: What skills do judges use? The NJI has identified a number. I and our planning committees in ethics use these two slides to determine the kinds of ethical issues that arise when judges are using the skills that we have identified.
- 9 Lightstone: One of the other principles that is contained in our, sort of, twenty guiding principles is, of course, implementing adult learning principles. That means that we are looking at judges as learners, considering their attributes, their concerns and their expectations. Adult learners, judges in particular, are accustomed to processing a great deal of information in a very short period. This is a difficult thing for us because we tend to cram a lot into our sessions and when we look at our evaluations, often the criticism is, too much information. We have had a really difficult time as an organisation, and I think that all of the people that I see in the room who have sat on planning committees will know. It is a very difficult dilemma for us. One just cannot get it quite right. Too much, too little. Our decision always is to err on the side of too much but we feel that given our collection of clients, if you will, they can usually handle too much and they would probably be more upset if there was too little. That is always an issue for us.
- 10 Other attributes [refers to visual presentation]. Well, this gets us straight on to the judge-led education. Judges like to be in control, and they are sceptical, so if they are in control that scepticism is kept, is harnessed, in a very positive way in which they bring in a variety of views and a real diversity of ideas. So, judge-led education is certainly the way that we go.
- 11 The one thing that I really underestimated when I started at the NJI about ten years ago was the importance of having fun. I guess I was not a really fun individual but I had not understood how isolated the profession of judging is and how it is important to encourage collegiality, and it is important just to have a good time. Judges are natural learners and most of them really actually liked school, so it is a pretty easy recipe to put the learning process in with what we are doing in terms of judicial ethics.

The other thing that I think that we have really made strides in overcoming is the reluctance to learn new things in new ways, and our ethics program is all small-group driven. There is very little of it, I would say, that is not. Virtually every session that I highlighted here [refers to visual presentation] was discussion-based and driven by the experiences of the judge.

- 12 Canada, like Australia and like many of the countries here, has a wide variety of judges working in rural and urban settings, regionally distinct and differing multicultural contexts. That means that particularly with our national programs there is quite a challenge in meeting the needs of all of the judges who are sitting in front of us.
- 13 Kent: Another principle of the NJI is that judicial education needs to reflect the character and profile of the judiciary in Canada, and there is a number of expectations. One that I think is particularly relevant when we do our teaching in ethics is, judges want to share their experiences. I taught at the Federal New Judges Program just a couple of weeks ago and we started out asking the judges, in small groups, to reflect on an ethical issue that had presented itself in the very short months that they had been judges. One always worries when one starts a modular session with a small group that one is going to have a little trouble getting the conversation going. I had barely got the sentence out in my small group before one of the judges jumped in and said, 'well let me tell you what happened to me'. We had a very full discussion about the ethical challenges that they had already had to face.
- 14 Another one of the expectations is to have people who are not only academically sound but have a broad range of experience. From an ethical perspective, one of the best things we do is have some of our senior and sometimes retired judges come and talk about things that in some respects might be very personal, but they are senior enough, have the gravitas, that the judges listen and I think it adds a lot of value to the sessions.
- 15 Judges have concerns as well. In terms of the methodology we use in teaching ethics, there is never any right answer. The ethical dilemmas that confront a Canadian judge go beyond what are easy questions. They are hard situations: ex parte communications, taking bribes. They are very difficult issues. We are lucky in Canada that those do not tend to be ethical issues we have to address. We have to address more nuanced questions and we make a point of starting all our sessions by advising the judges that no one is going to have the right answer at the end of the session.
- 16 Lightstone: Another principle, and the thing to look at here, of course, is the bottom line: we always take an experiential and skills-based approach to our work. In terms of implementing adult learning principles, ethics is almost too easy in terms of using the learner's experiences as resources. As Justice Kent was mentioning, how long were they sitting on the bench, a month? And you have got issues that they are ready to discuss, and of course issues that tip from the personal to the professional, in court, out of court, writing judgments. The profession is a minefield of ethical issues so it is very, very straightforward for us to come up with the experiences that we can draw from.

- 17 In terms of contextualising those learning experiences, the one thing that we have found is that judges have absolutely no hesitation in talking about the ethical issues that they have encountered. We use a lot of videos, and you are going to see a couple of them, in setting up the discussion. Role-playing is very suitable to an ethics program, portraying courtroom scenes for example. This is a perfect topic in which to use an experiential skills-based approach.
- 18 We favour, of course, an independent-learning model rather than a teacher-centred model. We spend a lot of time with the planning committee creating formats where learners are going to generate the knowledge, in other words creating problems, and it is a very interesting thing that, in terms of the process, often we can show the problem and immediately the learner will know an answer. We are very careful to take them through an analytical format to teach them about a process for analysing these ethical issues so that instead of the gut reaction we get a considered approach.
- 19 Kent: This slide talks about the need to provide a safe space to learn. I wanted to highlight that in terms of ethics, because maybe you can help me out with a problem that I have not quite figured out yet. I have been involved in ethics teaching at the NJI for about six years. We try to create a safe space for judges to talk about issues because sometimes they are, as I say, very, very personal. This summer we put on a new program we called Sophomore Judging. It is part of Lifelong Learning for Judges. It is for judges who have been on the bench five to seven years, a good time to check in on their judgment writing, on their decision-making, a variety of issues. It was also thought that it would be a good time to check in on their ethical development.
- 20 We had a half-day program that went very well until the very last session, that Deborah McCawley and I chaired. We decided to have an open-mike session. After we had discussed some structured issues in small groups, and had role-plays. We thought we had created a safe environment and invited questions. The first question came from one judge who said, 'well, you know, I decided after I got on the bench that I had to resign from the Rotary Club but I thought about it some more and decided, no, it was okay, and so I was going to continue on in the Rotary Club and I have, and I just wondered if anybody has any thoughts'. So, he opened it up to the room. Another judge put up his hand and said, 'I resigned from the Rotary Club the day after I was appointed to the bench and I don't think [judges] should [be members]'. It shut down the room. I have tried to identify why in that particular setting the judges did not feel safe anymore. I expect it is because we had a judge there who was very prescriptive in terms of what he was saying and I think I am going to have to go back to the drawing board when we have those kinds of sessions to ensure that people do not get too prescriptive when they give their opinions.
- 21 Another of our twenty principles, of course, is Accommodating Different Learning Styles for Adult Learners. As you probably know or may know, we ascribe to the principles that David Kolb, the American educator, has outlined, that is, that learners, generally speaking, fall into one of four categories. The learner will take either reflective approach or a conceptual approach or a more experimental approach or an experiential approach. What we have learnt in terms of all the different learners is that it appeals to everyone in the room to have a little bit from each type of learning or teaching. So, for instance, someone who tends toward reflective observation does well with a lecture. Someone who tends toward active experimentation does well

with small-group work. What we have learned from informal polling of judicial audiences, and from asking people where they identify themselves, is that we end up with what we call ‘an awful lot of number fours’. Number Fours are the kind of people who like to get right at it, like to problem-solve; they are the kind of people who like to work in a small group. So, we are weighted towards – and it is quite astonishing when you take the poll of the room – lots of Number Fours. Almost two thirds of the group will be Number Four, and you will have little dribs and drabs that fit into the other three categories.

- 22 We have been talking to a number of professional educators at one of the universities in Toronto. We have been talking to a professor at OISE university, and she has been saying to us, ‘we used to take, kind of, a very organised route around the circle where we might start with a lecture and then we’d go into a little bit of feedback, and then we’d go into some small-group work and then we’d go into more feedback ...’ Her suggestion is that we need to be mixing it up more, and mixing up the order a little bit more. So, I think that is something that we are going to be trying, in our next phase of design and development of education. It always keeps things interesting, I suppose. Again, with teaching ethics, it is very easy to go around those four quadrants and come up with problems.
- 23 Kent: I am going to move right to how we outline or design our ethics courses, or have in the past – I suspect there may be some changes as we move forward. Let us look first of all on a macro basis. Generally, our programs start with introducing the topic of ethics. In Canada we have a bit of an unusual history of ethical development. We do not have a code. We have something called ‘ethical principles’. The words ‘shall’ and ‘shall not’ are nowhere to be found in our ethical principles. It is an aspirational document. We start with our judges by explaining that the way we like to look at ethics is not, here’s the rules and don’t go below those rules. It is aspirational, trying to be the best judge you can. We hope that that frames for the judges the whole notion that there are not right and wrong answers to most of the problems that they face but there is hopefully a best choice in the situation they face.
- 24 We then go through the ethical principles. There are in our Principles five defined principles and we talk a bit about them: impartiality, equality, dignity, integrity and independence. We then set up the framework, and spend the rest of the time looking at some specific scenarios. Then, in a micro setting, once we get to the scenarios, we generally have videos. Some of our judgment-writing questions are obviously in writing but most of our problems are set up by videos. We start to do a little bit of role-play when we have some more complex ethical problems. The judges are then asked to reflect in the context of a framework and then to determine what the best answers are as a result of their discussions in small groups.
- 25 Lightstone: Three pillars of education. One of the keys, of course, is to create a space for exchange of ideas between judges and non-judges and one of our guiding principles, of course, is to include academics and community members in our planning and delivery of programming. Ethics has been one of those areas that where it has been a bit challenging for our planning committees to bring in community members, because discussing ethics tends to be such a personal thing and of such concern to the judges that they really do want to maintain that safe space for a really thoroughgoing and intense exchange of ideas. So we have been a little bit late on including community members in our planning. We did, in our last program, involve

members of the media, which sounds really unsafe if you are going to include a community member. That has real potential, I suppose, but we did it in a very discreet way. A couple of editors from our national newspapers came and spoke in an evening session. They were involved in no other parts of the program. We feel we may have given short shrift to one of our principles here, and this is something that we would actually appreciate some guidance from the audience on. We just have not been great on involving community members in our ethics stuff.

26 Kent: Our planning committee involves judges, lawyers and academics. We generally have been able to find an academic who is interested in the philosophy and ethics of judging, and he or she will help guide us through developing and modifying the framework that we have.

27 Lightstone: And, of course, learning objectives are important. I think, if you attended the session yesterday afternoon, moderated by George Thomson and Mark Rosenberg, they made that very, very clear. We have received comments that the final point, the learning objectives, allows educators to assess whether the content is complete and relevant, and advances the program, but also to evaluate how the program has gone and whether the judges have actually taken away anything, have learned anything from it. We cannot comfortably say, in many situations, that we can evaluate what the judges have taken away, and that is another challenge that we would like to address as we move forward in our programming on judicial ethics.

28 One of the exercises that we are going to be doing with you folks is, crafting, thinking about, an ethical issue that you may face in your court and thinking about, maybe, some learning objectives. The characteristics: we have a little acronym for characteristics of good learning objectives. We need to be specific, measurable, achievable, realistic and time-bound. As I mentioned 'measurable', sometimes we are not quite there. Specific: did we address the specific knowledge, skills or behaviour? Measurable: can the learning be measured? Achievable: is it possible to achieve this learning with the resources available? Realistic: is it realistic to expect that we can achieve this learning in the context? Again, this is something we are not so sure of. We think we are, but we are not completely sure that we are. Finally, Time-bound. The one resource that we are always short of is time.

29 Then, describing learning objectives. What education needs or gaps in knowledge or skills will be addressed? What will the participants know or be able to do, or do better, as a result of the session? What will participants take away from the session? That is something that we are constantly working towards in describing our learning objectives. The next slide I will let Justice Kent do and you will see if we did describe the learning objectives for our last program adequately.

30 Kent: The skill we want the judges to take away is the ability to identify ethical issues when they arise, to be able to analyse them using a framework, to apply the ethical norms, which come from our principles, from writings that senior judges and academics have done in Canada and around the world. One of the best books that I use is Justice Thomas' book. And then, the final objective is to select the preferred options when faced with ethical dilemmas. Those are the objectives that we have for the participants.

31 Here is the framework that has been developed. We have been using this framework since 2004. This is a slightly changed version. The original framework was developed by Michel Proulx of the Quebec Court of Appeal. We had an academic look at it in preparation for our last session and then we did a little bit of re-jigging. What we do is we present the problem, show the video, and in small groups with a facilitator we ask the judges first to identify the ethical issue. Sometimes, you can spend the whole discussion on this – is there an ethical problem here!? Once they determine that there is an ethical dimension to the issue, what is that dilemma? Again, sometimes by trying to define it you may go back to the first question and say, well, maybe there isn't an ethical problem here?! So you need to specifically define it. Third, are there any steps you should take before you determine your best option? Obviously it depends on the circumstances. Are you talking to senior members of your bench? Are you asking for submissions from counsel, if it is a courtroom issue? Is there research that needs to be done? Fourth is, what is the preferred course of action? Rather than having a gut reaction to the ethical problem, you have identified the issue, you have thought about what you should do and then you weigh and come up with a preferred action. There is a fifth step, and this is important as well. You have to explain the basis for your preferred action, because if you cannot articulate that, it may well be that what you thought was your preferred action is not your preferred action. So, it requires a judge, again, to reflect more deeply on the choice that he or she has made.

32 Now, what we want to do is show a video, one of our problems, that we use. This is all by way of getting you to do a very short exercise. We were asked when we were at UBC, what is the biggest ethical problem that your judges face? I am not going to tell you what answer I gave but what we want to do after we show one of the problems that we face in Canada is have you spend, in small groups, five minutes to figure out, what is or are the biggest ethical problems facing judges in your courts? Let us start by taking a look at one of our presentations.

33 [excerpt from video presentation: hypothetical case of Mr Jim Stanley, charged with dangerous driving causing death]

34 That is what the judges talk about. This is a phenomenon that has started to occur in Canada in highly charged cases where victims' families come in t-shirts and you have a scenario with somebody running a jury trial. What do you do?

35 We have the judges work through that scenario, using the framework to come up with the preferred option in terms of maintaining impartiality, respecting the feelings of the family members and ensuring that the trial is fair. For purely selfish reasons, and I will explain why in a minute, I would like you all to spend five minutes, perhaps in groups of three or whatever works depending on your seating, in identifying one ethical issue that is a challenge for the judges and the jurisdictions where you work. The reason I say it is selfish is that we put on these programs every two years and I am just dying to have some new ideas. We are going to start by identifying the issues. Take five minutes and then put a couple on the board, and then I want you to spend another five minutes – you do not have to write the script but what would be the facts

of that situation that would help the judges work on that ethical problem? Let us start with Process One: what is the challenging ethical issue for judges in your jurisdiction?

36 [audience discussion]

37 We had hoped, as I said, to move on to a second step. This is typical NJI, with lots on the program. We are not going to be able to get to the second step, which was to ask you to help develop a scenario, which is a very time-intensive part of our programming, but fun. It goes back to having fun as a planning committee, as well. Now we are going to turn it over to Karen Eltis to make her presentation. I cannot believe how much symmetry there is in this room because we are going to start the presentation with one of the videos that we used to introduce the technology session of our last ethics program and I think part of what Karen is going to be talking about is 'Google Judge', which was another one of our scenarios.