

June 4, 2019

The Honourable Chief Justice Popescul
The Honourable Associate Chief Justice Smith
c/o Norman Sabourin
Canadian Judicial Council
Via email: norman.sabourin@cjcccm.ca

Dear Chief Justice Popescul and Associate Chief Justice Smith:

On behalf of the Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ), I write to thank you for meeting with our representatives to discuss the Canadian Judicial Council's (CJC) proposed revision of its *Ethical Principles for Judges (EPJs)*. We appreciate the opportunity to provide our input and to hear more about this important project.

At the meeting, it was suggested that it would be helpful for CALE/ACEJ to provide further elaboration on the issues of substance included in our March 14, 2019 letter and to indicate our position on post-retirement return to legal practice. Below, we provide more detail on CALE/ACEJ's perspective on each of these issues.

The EPJs should be reconstituted as a binding Code

We remain committed to our suggestion that the *EPJs* be reconceptualized as a code of conduct, for the following reasons.

First, many other jurisdictions around the world have enforceable judicial codes of conduct and there is no reason to believe that they are a threat to judicial independence. Most civilian countries have such codes, as do several of our common law cousins including the United States, South Africa and Nigeria. Quebec's provincial court judges have a Code of Conduct and it can hardly be claimed that they lack independence.

Second, even though the *EPJs* explicitly state that "they are not and shall not be used as a code or as a list of prohibited behaviours," that is not the reality. In at least two cases – those involving Justices Theodore Matlow and Patrick Smith – the *EPJs* have been deployed as part of the disciplinary process. Such an inconsistency is unfair and confusing to both judges and the general public and does not promote public confidence in the administration of justice.

Third, it has frequently been claimed that a principles approach allows the setting of high aspirational standards, on the understanding that they may not be met in all circumstances, while a code approach necessarily reduces the standards to weaker levels of minimum compliance. This is a false dichotomy. Proper drafting, such as

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distinguishing between “shall” and “should”, can allow a code to both establish minimum standards and also contain more aspirational language. This has been achieved in other statements of judicial ethics that are binding and also in many lawyer codes of conduct. Moreover, there are many elements of the current statement that in no way could be considered merely aspirational – they set out a standard of conduct that all Canadians have a right to expect from their judges.

Fourth, it may be that the CJC is reluctant to adopt a code because there may be situations where two principles are perceived to be contradictory, and that it would be unfair to potentially discipline a judge who chooses one rather than the other. But the success of judicial codes in other jurisdictions, and the experience with other professions such as lawyers, shows that this concern is not well founded. Codes can be drafted that achieve proper balancing of obligations.

Fifth, although the Canadian judiciary is trusted by the public, there is room for improvement. The increasing number of self-represented litigants has resulted in heightened scrutiny of the judiciary and concern about judicial behaviour. We would suggest that, in response, a code of conduct would help to reinforce public confidence in the judiciary.

The *EPJs* should include a duty of judicial confidentiality

We continue to support the introduction of explicit language about an obligation of confidentiality. The absence of such an obligation raises certain risks such as a judge or former judge disclosing or making use of private information for personal benefit or revealing confidential information about judicial deliberations. Including such an obligation guards against these risks, promotes clarity and enhances public confidence in the judiciary and the administration of justice. Once a draft of the revised *EPJs* is prepared, we would be pleased to comment on the specific language you develop about confidentiality. As you know, there is some language proposed in the article on this topic by Pitel & Ledgerwood and it draws on the language used in other leading statements of judicial ethics.

The *EPJs* should explicitly reference reconciliation with Indigenous peoples

We continue to suggest that the CJC consider including an explicit reference or references to reconciliation with the Indigenous peoples of Canada, for the following reasons.

First, we acknowledge that the Truth and Reconciliation Commission (TRC) did not specifically identify the Canadian judiciary in its Calls to Action. However, our understanding is that the TRC took this position out of respect for the principle of judicial independence and not because the TRC believed that the Canadian judiciary does not have a crucial role in reconciliation. In our view, the process of revising the *EPJs* provides a timely and important opportunity for the judiciary to reflect on, acknowledge and define its role in reconciliation.

Second, to the extent that the CJC is concerned that the inclusion of a reference to reconciliation with Indigenous peoples would necessitate that the revised *EPJs* also contain explicit mention of other equity seeking groups in Canada, we suggest that there are several key differences: Indigenous peoples are the first peoples of Canada; their rights are constitutionally acknowledged in s. 35 of the Constitution Act 1982; the former Chief Justice of Canada has accepted that Indigenous Peoples have experienced cultural genocide; and a former Chief Justice of British Columbia has argued that all of us have a duty to learn about Indigenous cultures and laws. We further note that among the many Calls for Justice contained in the recently released Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls is a call for mandatory intensive and periodic training in the area of Indigenous cultures and histories, including distinctions-based training, for all who participate in the criminal justice system, including the judiciary.

Third, if the CJC is unsure where to locate a reference to reconciliation in *EPJs* we would suggest that it aligns with at least three principles – Impartiality, Equality and Diligence. It dovetails with Impartiality and Equality because Indigenous people are significantly over-represented in the Canadian justice system, including our courts. It aligns with Diligence because increasingly courts are recognizing that Indigenous legal traditions and laws are a legitimate part of our legal order and that they need to be both respected and understood. Again this parallels former Chief Justice Finch’s endorsement of a “duty to learn.” As a consequence this is not just a requirement for “cultural competency” (although that is of course important) but a more comprehensive juridical competency.

In considering this issue, we urge the CJC to carefully consider the submissions that you have received from the Indigenous Bar Association.

The *EPJs* should contain greater discussion of judges’ obligations to promote access to justice

Judges have “a responsibility to promote access to the justice system for all persons on an equal basis,” according to the CJC’s Statement of Principles on Self-represented Litigants and Accused Persons (which was endorsed by the unanimous SCC in *Pintea v. Johns*). This statement reflects an essential aspect of the judicial role, and one which is very important to Canadians. Thus, we suggest that the *EPJs* include this phrase. In our view, the “Diligence” chapter would be an appropriate place to include this language.

The proposed theme of “social media” should be expanded to the broader concept of “technology”

We agree with the position taken in the CJC’s Background Paper *Modernizing Ethical Principles for Judges* that it would be helpful to provide ethical guidance regarding social media in the revised *EPJs*. However, in CALE/ACEJ’s view, it

would also be helpful for the revised *EPJs* to engage with the issue of judicial competency in relation to technology more broadly.

As the CJC is aware, technology is increasingly being used in court proceedings either to assist with discrete processes – such as receiving witness testimony through video-conferencing or receiving submissions in an electronic format rather than in a paper format – and also more broadly in the case of e-trials.

As such technologies become more ubiquitous, it will be essential that the judiciary have a basic level of understanding and familiarity in relation to them.

Additionally, the emerging use of risk-assessment algorithms to assist courts in reaching bail and sentencing decisions has given rise to human rights concerns in the United States and will require informed judicial scrutiny if and when such algorithms are proposed for use in Canadian courts.

The use of new technologies by litigators, such as e-discovery and legal research tools that use artificial intelligence, will also put new pressures on courts to be able to understand and evaluate the appropriate use of technology in court processes. We note that Justice Whitten's November 2018 decision in *Cass v. 1410088 Ontario Inc.*, received international attention for its suggestion that time billed for legal research could have been reduced "if artificial intelligence sources were employed."

CALE/ACEJ therefore proposes that the revised *EPJs* mention the need for judicial competence in relation to technology. For greater clarity, in making this suggestion we do not mean to propose that judges need to become experts in relation to any type of technology that appears in their courts. Rather, we suggest language similar to that under consideration for inclusion by the Federation of Law Societies of Canada in relation to its Model Code of Professional Conduct for lawyers, namely that "judges should develop and maintain a facility with technology relevant to the nature and area of their judicial duties." This could be included in the "Diligence" chapter.

Post-retirement return to legal practice

In 2017, CALE/ACEJ and one of our directors, Stephen Pitel, each submitted comments in response to the Federation of Law Societies' request for feedback on its January 31, 2017 *Consultation Report on Former Judges Returning to Practice*. We attach both sets of comments as an appendix to this letter in the event that they are helpful to you in considering the CJC's position on this issue in its revised *EPJs*

Next Steps

We would be pleased to answer any questions or provide any clarification regarding the feedback contained in this letter.

As discussed at our meeting, CALE/ACEJ would also be pleased to provide feedback on the Committee's draft revised *EPJs* once they are prepared. We continue to believe that it is vital that there be an opportunity to comment on the specific language being proposed and that CALE/ACEJ is well-positioned to provide meaningful feedback on the draft revised *EPJs*

Thank you again for the opportunities that you have provided CALE/ACEJ to share both written and in-person feedback in relation to the proposed revision of the *EPJs*. We look forward to further collaboration.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. Salyzyn', with a stylized flourish at the end.

Amy Salyzyn
President, Canadian Association for Legal Ethics/Association canadienne pour
l'éthique juridique (CALE/ACEJ)

APPENDIX A:
CALE/ACEJ Submission to FLSC on Post-Retirement Return to Practice

**JUDGES RETURNING TO PRACTICE
SUBMISSIONS OF THE CANADIAN ASSOCIATION FOR LEGAL
ETHICS**

Introduction

The Canadian Association for Legal Ethics (CALE) submits these comments in response to the Federation of Law Societies' request for feedback on its January 31st, 2017 Consultation Report on Former Judges Returning to Practice. CALE is pleased that the Federation of Law Societies (the Federation) has recognized the significance of this issue, and supports the general direction of the Federation's proposed amendments to the Model Code. CALE's submission addresses five points. It cross-reference analysis by Professor Pitel, CALE's Corporate Secretary and Treasurer, submitted on March 6th, 2017, where appropriate.

i) Appearances in Court

7.7.1. Judge Returning to Practice

CALE agrees with the Federation's decision to recommend that judges be precluded from appearing as a lawyer before "any Canadian court of tribunal." It also agrees with Commentary [1].

CALE acknowledges the position of Professor Pitel suggesting that this is overbroad, but agrees with the Federation's justifications that "it is artificial to distinguish between types of judges" and that "today judges interact with each other at all levels", and with the several examples you provide. CALE would add: that the Canadian judiciary is, in fact, a relatively small community; that in the future, with technological advances, there is likely to be even greater judicial interaction; and that in light of recent developments with the Canadian Judicial Council and the current Government there will likely be intensified judicial education initiatives. Furthermore, CALE supports the Federation's decision to draft a rule that addresses anticipatable problems, and not simply one that is reactive to recent developments. It was the adoption of such a reactive mentality that, in part, resulted in the situation in which we currently find ourselves.

Moreover, given the rule the Federation has proposed, CALE agrees that it is not necessary to have a "temporal prohibition on returning to practice." However, if the Federation were to adopt a narrower rule, we would urge you to seriously reconsider a temporal prohibition of at least five years. CALE is, however, worried about proposed Rule 7.7.1 Comentary [2]. While at first blush the explicit wording of the Commentary seems laudatory, CALE is concerned by comments in

paragraph 21 of the Consultation Report re “behind the scenes help” and “ghost writing.” There is a significant difference between generic “mentoring, support and coaching” and specific assistance such as “ghost writing” because the latter activity might rely on inside knowledge.

This seems to send a message that covert involvement is acceptable, but overt is not. This, in fact, intensifies ethical concerns that are based upon a transparency norm. To some degree, this concern might be addressed by the proposed confidentiality rule, addressed further below, but CALE strongly objects to any encouragement of “ghost writing” or “behind the scenes help.”

Further, CALE is unsure as to the purpose and focus of Commentary [3]. As it understands the text, this new rule is, in fact, meant to interfere with the lawyer-client relationship by stipulating that a lawyer who was a former judge may provide legal advice to a client etc, but cannot appear in court on behalf of the client. And the second and third sentences seem to address other discrete issues. Professor Pitel has also raised concerns about this Commentary and makes some suggestions that echo the conflicts of interest rules. If this is the intent of the Commentary, CALE suggests it needs to be redrafted. In its current form CALE suggests that it is unclear and even inaccurate. CALE would be happy to provide further feedback if the paragraph is redrafted.

CALE believes that Commentary [6] is probably appropriate, at this time. As noted in paragraph 19 of the Report, part-time and international judges generate their own discrete set of issues. This may be a topic for future consideration.

ii) Marketing

CALE agrees with Commentary [4]

However, CALE shares Professor Pitel’s concerns that Commentary [5], which deals with honorific titles, is too narrow and supports his recommendations for revisions.

iii) Protecting the Confidentiality of the Judicial Process

CALE is very pleased with the new proposed Rule 7.7-2. However, because of our previously expressed concerns about “ghost writing” or “behind the scenes help”, CALE strongly endorses Professor Pitel’s suggested addition of “or use.” The fundamental problem is not just “the appearance of relying on confidential judicial information, discussions or deliberations”; it is the actual and covert use of such information. Consequently, the reference in paragraph 20 of the Report to “comment on decisions, to advise clients” needs to be more carefully tailored.

iv) Exceptional Circumstances

CALE agrees with proposed Rule 7.7-3 on Exceptional Circumstances, and with the comment in paragraph 22 of the Report that this sets a “very high standard.”

v) Recruitment of Judges

CALE agrees with the proposal for a new Rule 5.6-4 as this has been an issue of significant concern. However, CALE also agrees with Professor Pitel that there should be a reciprocal rule for the former judge.

Conclusion

Thank you, once again, for taking up this issue and for inviting our organization to provide feedback. This is a sensitive and controversial topic and CALE congratulates the Federation and your committee for providing much needed leadership in this area.

APPENDIX B:
Stephen Pitel Submission to FLSC on Post-Retirement Return to Practice

Kristin Dangerfield
Chair, Standing Committee on the
Model
Code of Professional Conduct
Federation of Law Societies of Canada
World Exchange Plaza
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March 7, 2017

Dear Kristin,

Re: Consultation Report on Post-Judicial Return to Practice

I write in response to your request for feedback on your January 31, 2017 consultation report. In general, I am pleased that the Federation is moving forward with these reforms. The current provisions of the Model Code on judges returning to practice are in need of significant reform along the lines you now propose. However, I do have some suggestions on the specifics of the reforms.

I know that you are aware of my article, Stephen G.A. Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2012) 34 Dal LJ 483. I continue to hold the views expressed in that article and I ask that you treat it as an integral part of my feedback. In particular, detailed references and authority for the views I express below can be found in the article and I have not repeated them here.

Appearances in Court

In my view, your preclusion on former judges appearing in court (proposed rule 7.7-1) goes further than is required to safeguard the proper administration of justice. I accept that a former judge should not appear as a lawyer in any province in which the former judge previously exercised a judicial function before: (i) the court of which the former judge was a member; or (ii) any courts of inferior jurisdiction to the court of which the former judge was a member or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction, unless the law society so approves on the basis of exceptional circumstances. But under that approach, a former judge would be able to appear in courts above his or her former court in the judicial hierarchy. A former judge of the Ontario Superior Court of Justice, for example, would be able to appear in the Court of Appeal for Ontario and the Supreme Court of Canada. That former judge would also be able to appear in all courts of another province.

As argued in my article, these are the essential restrictions required to preserve respect for the proper administration of justice. My view is that additional restrictions of this nature, such as the proposed more absolute preclusion on appearances, are not required. Furthermore, a more limited restriction adopts an incremental approach, addressing the specific situations which have recently arisen in Canadian courts. I am not aware of any cases in which concern has been expressed about a former judge appearing in a court higher than the one on which he or she served or in another province. The proposed rule is thus purporting to address some problems which have not yet arisen and may not arise.

It is possible that a former judge will challenge new provisions which preclude his or her appearance in court. In the face of such a challenge, it will be important to be able to justify the scope of the restrictions as being closely tailored to what the administration of justice requires. Overly broad restrictions could leave the entire rule vulnerable to challenge.

Recruitment of Judges

I note that in addressing recruitment of judges (rule 5.6-4) you focus only on the conduct of the lawyer or law firm and not on the conduct of the former judge. Particularly in light of the fact that you have proposed an absolute preclusion on recruitment while the future lawyer is still a judge, it seems odd to regulate (and perhaps sanction) the lawyer or firm and not the former judge. To address this, the rule might also reciprocally provide that “A former judge shall not have a business or employment relationship with any lawyer or law firm he or she solicited or engaged in any discussions with concerning that relationship while a judge.”

Marketing

In my view, your proposed commentary on the use of judicial titles (commentary 7.7-1[5]) is too narrow. It only applies in the exceptional circumstances in which a former judge is allowed to appear in court. The implication is that in all other practice activities the former judge can use a judicial title or honorific. I suggest that in this particular commentary you delete “use a judicial title or honorific or” and that you then add an additional commentary restricting the use, by any former judge who returns to practice, of a judicial title or honorific.

No former judge should be allowed to use a title such as “Justice”, “Former Justice”, “Justice (Retired)” or the like. The commentary should make clear that no judicial title should be used. Of course as part of a biography the former judge can make mention of that office, but that is quite a different thing from using a title.

The use of an honorific is more challenging. However, to the extent that a former judge is entitled to use the honorific “Honourable” solely by virtue of having been a judge (as opposed to for some other reason), he or she should be willing to forego using it for marketing purposes if he or she chooses to return to practice. The sole reason for using it in that context is to call attention to having previously been a judge. The commentary

should preclude, or alternatively caution strongly against, using an honorific while engaged in the practice of law.

Confidentiality

I welcome the inclusion of a rule dealing with judicial confidentiality (rule 7.7-2). However, I suggest that you add “or use” after “must not disclose”. As you know, rule 3.3-2 provides that a lawyer “must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.” This restriction is on both disclosure and use of confidential information. Both should also apply to judicial confidentiality. It would not be consistent with reasonable expectations in Canada for judges to be allowed to make use of information, obtained solely through holding judicial office, outside the scope of that office.

I have proposed that the Canadian Judicial Council revise its *Ethical Principles for Judges* to provide that “Information that is not public and that is acquired by a judge in his or her judicial capacity or office shall be confidential and shall not be used or disclosed by the judge, during or subsequent to his or her term of judicial office, for any purpose that is not related to the performance of his or her judicial duties.” This might inform your phrasing of rule 7.7-2.

Additional Issues

I wonder whether commentary 7.7-1[6] is sufficiently clear that the reference to “This rule” is not limited to rule 7.7-1 but also covers rules 7.7-2 and 7.7-3. It could instead say “Rule 7.7”.

I find commentary 7.7-1[3] difficult to understand. I am uncertain as to what the commentary is intended to address, which makes it hard for me to comment or offer suggestions for improvement. The final sentence seems unnecessary and unduly technical. A proposed rewording could be “Former judges who return to practice cannot control what their clients may do with the results of legal services or opinions provided to them. Former judges should therefore be wary that their legal services or opinions could, as used by their clients, give rise to the perception that they are seeking to influence a court or tribunal.”

In my view, a provision should state that a former judge cannot act (as distinct from and broader than appearing in court) in any matter in which the former judge participated as a judge or, unless all parties consent, act in any matter related to a matter in which the former judge substantially participated as a judge. These provisions should be subject to a further provision which would allow a partner or associate of the former judge to act in the matter but only if (a) all parties consent to the former judge’s partner or associate acting or (b) the former judge’s partner or associate establishes that it is in the interests of justice to act in the matter, having regard to all relevant circumstances. The latter aspect of this provision would be based on appropriate screening mechanisms between the former judge and the partner or associate. These provisions are similar to ABA Model Rule 1.12. Consideration

of this issue should not be omitted, and yet thus far it does not appear to have been discussed in your analysis.

All rules adopted in this area should not be retroactive but they should take immediate effect. No prior conduct by former judges should be exempted, going forward, from their scope.

I appreciate the opportunity to provide this feedback on your consultation report. This process is an important step forward in the modernization and ongoing development of Canadian ethical rules for lawyers. If I can be of any additional assistance, please contact me.

Yours truly,

Professor Stephen G.A. Pitel
Faculty of Law, Western University
Treasurer and Corporate Secretary, Canadian Association for Legal Ethics