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

Dear Chief Justice Popescul and Chief Justice Smith:

On behalf of the Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ), I write in response to Mr. Sabourin's letter of November 22, 2019 inviting CALE/ACEJ to provide comments on the Canadian Judicial Council's (CJC) draft revised *Ethical Principles for Judges* (*EPJs*).

Our Board of Directors has now reviewed the draft *EPJs.* It was clear to us that the CJC's Judicial Independence Committee has put great thought and effort into preparing revised ethics guidance that takes account of contemporary realities and addresses gaps in the current *EPJs.* The draft *EPJs* are impressive. We commend the Committee for its hard and fruitful work.

CALE/ACEJ was particularly pleased to see several of the issues raised in our previous correspondence of March 14, 2019 and June 4, 2019 addressed in the draft *EPJs.* The draft *EPJs* include discussions of obligations in relation to judicial confidentiality, access to justice, technology and post-judicial careers. These are important issues to address in ethics guidance for judges.

We were disappointed to see that two issues raised in our previous correspondence were not addressed, namely our submissions that the *EPJs* should (1) be constituted as a binding Code and (2) explicitly reference reconciliation and the judiciary's role in establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples in Canada. We address each issue below.

At the end of this letter is a detailed Appendix which contains suggested in-text edits to the draft *EPJs*. These address a wide range of issues, some quite substantive and others more matters of form or style.

Additional submissions on why the *EPJs* should be constituted as a binding Code

In our two previous submissions we advanced several arguments as to why the *EPJs* should be constituted as a binding code of conduct. A similar position was adopted by the Canadian Bar Association in its submission dated April 11, 2019. As a consequence, we were disappointed with paragraph 3 of the current draft. While there are some subtle differences in the wording of this paragraph from paragraph 2 (on page 3) of the original *EPJs*, the premise remains the same – the *EPJs* are advisory only and are not intended to be binding.

We will not reiterate the five arguments we made in our submission of June 4, 2019. There is, however, one additional point. As *Roncarelli v. Duplessis* made clear, all holders of public power must be subject to the principles of the rule of law. This applies to members of the judiciary as much as it applies to others who exercise public power. If the *EPJs* do not establish the standards by which judges can be assessed in their exercise of public power, then what are the standards, and where can they be found? How can the public have confidence in the judiciary if there are no clearly articulated and enforceable standards by which to assess judicial behaviour? In a mature democracy in the twenty-first century, a binding code of conduct is a vital mechanism that provides public accountability and enhances the legitimacy of the judiciary as an independent and self-regulating institution. Moreover, judges themselves also need clearly articulated standards which can guide their behaviour and on which they can rely to avoid allegations of misconduct, as demonstrated by the case of Justice Patrick Smith. Thus, our first submission on this point is that paragraph 3 should be redrafted to indicate that the *EPJs* do constitute a binding Code of conduct. This does not mean that it cannot also fulfill the other three functions identified in the paragraph. A single document can fulfill multiple functions that are complementary rather than contradictory.

In the alternative, given the reality that the *EPJs* have been used in discipline proceedings involving judges (such as those involving Justices Theodore Matlow and Patrick Smith) and the perception by many judges that *de facto* the *EPJs* are being deployed as a binding Code, we propose that the *EPJs* explicitly acknowledge this. In this regard, our alternative submission is that the *EPJs* include wording modelled on the recently revised (March 2019) *Guide to Judicial Conduct* for England and Wales. This states, at page 5, under the heading "Discipline":

> "While the JCIO in handling complaints, and the Lord Chancellor and Lord Chief Justice in exercising their disciplinary powers, may choose to have regard to this Guide, they are not obliged to follow it."

The adoption of such an acknowledgment reinforces our contention that an articulated set of ethical principles can serve a variety of functions: aspirational, hortatory and, when appropriate, regulatory.

Reconciliation

While the draft *EPJs* refer to Indigenous peoples, they do not refer to the important contextual issue of reconciliation and the judiciary's role in establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples in Canada. For example, there is no mention of the importance for judges to be mindful of the recommendations of the Truth and Reconciliation Commission, which is regrettable. The Appendix below suggests some language to fill this gap. CALE/ACEJ also continues to urge the CJC to carefully consider any submissions received from the Indigenous Bar Association.

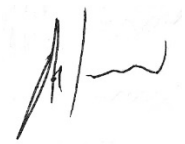
Next Steps

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

We have limited our comments to the English draft. If we have any additional comments on the French draft, we will provide them to you in a separate letter by your deadline of February 14, 2020.

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,



Amy Salyzyn
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Appendix A:
In-Text Feedback on Ethical Principles

1

Replace "At the same time, all members" with "All members".

Reasons:

1. The transition language seems to suggest some level of tension or incompatibility between the idea in the previous sentence and this sentence. But there is no tension or incompatibility.

4

Replace, in the footnote, "At the time, *Ethical Principles for Judges* built upon" with "That version built upon".

Reasons:

1. The proposed language is clearer and simpler.

7

Replace "the experience of Canada's Indigenous communities" with "the experience of Indigenous peoples, including with Canada's laws and legal institutions,".

Reason:

1. "Canada's Indigenous communities" may be perceived as having a possessive connotation, thereby generating concerns about ongoing implicit colonization.

2. The reference to "experiences" is too generic. The additional language is more specific about what are particularly important concerns.

10

Replace "after judges retire." with "after judges leave office."
Replace "A retired judge" with "A former judge".

Reasons:

1. Use broader language than just retirement, since a judge could also resign or be removed from office.

2.B.3

Replace "past the retirement of a judge." with "beyond a judge's term of office."

Reasons:

1. Use broader language than just retirement, since a judge could also resign or be removed from office.

2.A.4

Remove this entire section.

Reasons:

1. The references to "basic standards" and "precepts" of the community in which the judge serves are vague and are susceptible to problematic application. It could be argued that the "basic standards" and "precepts" of a particular community might be "flouted" or "offended" by private behaviour which is completely legal and consistent with all other content in the draft *EPJs*. For example, a judge's religion or sexuality might offend standards of a community where (s)he presides. We are also concerned that including this wording may encourage what would otherwise be viewed as inappropriate investigations and intrusions into a judge's private life.

2.C.6

In the fourth sentence, replace "duty of" with "duties, including" and delete "the lawyer's duty of".

Remove the words "serious" and "seriously" from the fifth sentence.

Reasons:

1. The amended language in the fourth sentence is intended to recognize that lawyers owe duties in addition to the two that are specified, while recognizing that those two are likely to be most applicable in the context of court appearances.

2. The terms words "serious" and "seriously" are redundant given that "misconduct by a lawyer" or "incompetence that compromises client interests" already captures behaviour that should be taken seriously. By adding the qualifiers "serious" and "seriously", a judge may be overly reluctant to report lawyer behaviour that should be brought to the attention of law societies. Any concerns about judicial overreach are captured by the language "appropriate action." A judge can vary the tone or content of his or her reporting to the relevant law society depending on the severity of the conduct.

3.C.4

Either (i) delete "some" or (ii) replace "some" with "adequate" or "sufficient".

Reasons:

1. The word "some" unduly qualifies and weakens the requirement to develop and maintain proficiency with technology. A standard of competence should not, as a rule, require qualification. If any qualification is thought necessary, "adequate" or "sufficient" convey the standard better than merely "some".

3.C.3

At the end of the sentence "It also includes education on social context issues affect the adjudicative process" add "and relevant skills-based anti-oppression education."

Add the following sentence at the end of this provision: "Judges should develop an understanding of Canada's history, especially as it pertains to Indigenous-Crown relations, and that of the evolving domestic and international law on rights of Indigenous peoples."

Reasons:

1. This additional language is consistent with the TRC Report.

3.D.1

Remove this provision.

Reasons:

This is an unusual provision. It does not appear in other legal codes of professional conduct. It has the potential to appear somewhat self-serving. It is also unclear what analytical work this provision would perform. It should not be something that

could be raised as an explanation for a failure to meet any of the other provisions. It also raises concerns, if retained, that it is too narrow in that it omits other equally important relationships beyond family.

4.A.1

Delete the final sentence.

Reasons:

This sentence is phrased awkwardly and adds little, if anything, to the preceding language.

4.C.1

Delete "grossly".

Reasons:

1. The concern should be for any level of inadequacy in stereotyping, not just a very high level. The concern about stereotypes is warranted because they are often inadequate.

4.C.3

After the first sentence of this provision, add "This is particularly significant in light of Canada's commitment to pursue reconciliation with Indigenous peoples".

Begin the next sentence with "Judges" instead of "They".

Reasons:

1. This additional language is consistent with the TRC Report.

4.D.1

Delete the final sentence.

Reasons:

This sentence is repetitive. This point has been made in the preceding language.

5.A.7

Remove "or vexatious".

Reasons:

It is sufficient to say "challenging" since that term is broad enough to cover a vexatious litigant. Specifically referring to a vexatious litigant could be read as editorializing and having prejudged the issues being raised.

5.A.10

Either (i) delete "hard and fast" or (ii) replace "hard and fast" with "bright-line".

Reasons:

1. This is an overly colloquial and unnecessary modifier.

5.B.3

Replace "and/or" with "or".

Reasons:

1. This is the only instance of the inelegant "and/or" which can be replaced by the conjunctive "or".

5.B.7

Replace "are occasionally" with "might be".

Reasons:

Some judges are never considered for promotion, such as those who do not apply. So the implication that all judges are considered for promotion, if only occasionally, is not accurate.

5.B.14

Replace "from judicial colleagues" with "from judicial colleagues or family members".

Add, at the end, the following:

However, judges may: (i) assist in fundraising planning for a civic, charitable or religious organization or an organization concerned with the law, the legal system or the administration of justice, and (ii) appear or speak at or receive an award or other recognition at a fundraising event for an organization concerned with the law, the legal system or the administration of justice, and in connection with that event be featured in its promotion.

Reasons:

1. This additional language is supported by the analysis in Stephen G.A. Pitel & Michal Malecki, "Judicial Fundraising in Canada" (2015) 52 Alta. L. Rev. 519. It is unclear whether that analysis has been considered as part of these revisions.

5.B.16

Remove "and perhaps more importantly,".

Reasons:

The claim that this additional aspect is more important than the prior aspects is not supported and not self-evident. This claim is not necessary.

5.B.18

Replace "In addition, in" with "In".

Reasons:

There is no need for this transitional language when the obligations being described in this comment are not very closely and directly linked to the ones in the prior comment. Otherwise such language could precede many of the comments.

5.B.22

Replace "Judges may attend social or public events in their communities" with "Judges may attend conferences and social or public events".

Reasons:

1. While 5.B.21 deals with speaking at conferences, there are ethical issues involved simply in attending conferences. So the language here needs to address attending conferences.

2. The modifier "in their communities" is unnecessary and unduly narrows the scope of the provision. If the event is a conference or public event in a foreign country, it is arguably not in the judge's community but the provision should still apply.

5.B.24

Replace "Judges' attendance at social events" with "Judges' attendance at conferences and social events".

Reasons:

1. The concerns raised in this provision should apply with equal force to attending a conference sponsored by businesses or for-profit organizations.

5.C.3

Replace "may arise from:" with "may arise from, among other circumstances,". Delete "(e.g. one's personal physician)".

Reasons:

1. It should be clear that this is not a closed list of circumstances that may give rise to a conflict of interest.

2. The specific example is, in the context of the overall provision, too detailed. In addition, it would appear equally problematic to have one's personal physician appear as a witness rather than only as a party.

5.C.5

Delete the first sentence and replace "Nevertheless, judges" with "Judges".

Reasons:

1. The first sentence replicates 3.A.5 and seems an oddly specific point to make in two distinct places.

5.C.8

Replace ", spouse, son, daughter or other" with "or" in the first sentence.

Reasons:

These examples are redundant as caught by "member of the judge's immediate family". They are not used throughout the remainder of the comment.

5.E.1

Replace "retirement or resignation." with "leaving judicial office."
Replace "pre-retirement planning for one's" with "a judge's planning for his or her".
Replace "Pre-retirement discussions" with "Discussions".

Reasons:

1. Use broader language than just retirement or resignation, since a judge could also be removed from office.

2. Use broader language than pre-retirement, since a judge could resign or be removed from office.

5.E.2

Replace "after retirement or resignation" with "upon leaving judicial office".
Replace "after their retirement or resignation from the bench" with "after leaving judicial office".
Replace the final sentence with "This constraint may be subject to exceptions, such as in cases in which a judge has left the judiciary after a very short time."

Reasons:

1. Use broader language than just retirement or resignation, since a judge could also be removed from office.

2. A judge leaving office after a very short time should be the main, but not the only, possible exception to the preclusion on appearances. Another example would involve considering the access to justice needs of a small and remote community.

5.E.3

Replace "in high profile or politically contentious matters" with "in high profile, politically contentious, or any other matters".
Replace "the judge's former status" with "the former judge's status".

Reasons:

1. The appropriate caution should not be limited only to high profile and politically contentious matters. Any matter in which the client may be expected to make use of the former judge's status to advance his or her interests warrants caution.

2. At this point, the individual is a former judge rather than a judge and so should be described as such.

5.E.5

This provision should be reworded as follows:
In Canada, the title "The Honourable" is an honorific given to a judge upon appointment. Upon leaving judicial office, in most circumstances, the former judge is granted the right to retain the title. When granted, care should be exercised in the use made of that honorific. In general terms, referring to a former judge as "The Honourable" is recognized as acceptable. Should the former judge return to private practice, restraint should be exercised so as to not give the appearance, by attaching the honorific to the former judge's name or otherwise, that the former judge is touting or using the prestige of the former judicial office to attract business, gain advantage, suggest qualitative superiority over other lawyers, or suggest any kind of influence or favoured relationship with the judiciary.

Reasons:

1. Remove the initial word "Finally". While this happens to be the last comment, it seems odd to label it as such.

2. Use the language of a former judge rather than a retired judge. A judge who resigns has not retired.

3. Make it clear that the obligation not to give the appearances that are described in the final sentence extends more generally, beyond solely in terms of using the honorific.

4. Remove the reference to "good taste" due to both its vagueness and potential social and cultural biases.

Miscellaneous

Use a consistent spelling for “behaviour”.