

Submission of the Canadian Association for Legal Ethics (CALE) in Response to Justice Canada's Consultation on Judicial Discipline Process Reform

Overview

The Canadian Association for Legal Ethics (CALE) believes that the judicial discipline process is in need of significant reform beyond that proposed in Justice Canada's Consultation. CALE believes that any serious consideration of reforms to this process must consider fundamental principles before focusing on specific parts of the judicial discipline process. We identify these fundamental principles below. CALE has four key recommendations for reform to the judicial discipline process: (1) due consideration should be given to best practices for other self-regulating professions; (2) members of the public should be full members of the Canadian Judicial Council with full right to participate in all activities of the Council; (3) members of the public should be involved in all steps in the judicial discipline process; and (4) the composition of various panels or committees of the CJC should attempt to reflect the diversity of Canadian society.

We also respond to selected questions posed in the Consultation document where we believe we have a valuable perspective to offer.

The Canadian Association for Legal Ethics (CALE)

The Canadian Association of Legal Ethics (CALE) is a federal not-for-profit company whose members are academics, lawyers, and regulators with expertise in topics related to ethics and professionalism in the Canadian legal profession. CALE seeks to encourage and facilitate debate on issues of ethics and professionalism in Canada, and to increase awareness about those issues in the public, the profession and the judiciary. CALE was founded in 2012 and hosted the International Legal Ethics Conference (ILEC 4) at Banff in July 2012 with over 225 participants from more than nineteen countries. Its members regularly participate in activities of national organizations such as the Canadian Bar Association and the Federation of Law Societies of Canada as well as provincial law societies.

The directors of CALE are Mariette Brennan (Lakehead University), Brent Cotter, QC (University of Saskatchewan), Richard Devlin, FRSC, (Dalhousie University), Adam Dodek, LSM (University of Ottawa), Julia Hughes (University of New Brunswick), Jasminka Kalajdzic (University of Windsor), Helena Lamed (McGill University), Marie-Claude Rigaud (Université de Montréal) and Alice Woolley (University of Calgary).

The current officers of CALE are Chair of the Board, Richard Devlin; President, Alice Woolley; Vice-President: Adam Dodek; Corporate Secretary and Treasurer: Stephen Pitel (Western University); Chief Information Officer: Amy Salyzyn (University of Ottawa); Conference Co-ordinator: John Law (University of Alberta). CALE will hold its annual meeting and conference at the University of Alberta in October 2016. More information about CALE is available on its website <https://ethicsincanada.com/about/>

General Principles

CALE believes that in undertaking reforms to the judicial discipline process consideration must be given to the context in which that process operates. CALE believes it would be a mistake to simply focus on particular parts of the judicial discipline process without giving due consideration to fundamental principles. Some of these principles are identified on pp. 6-7 of the Consultation Document: judicial accountability; judicial independence; fairness; efficiency; transparency and accessibility. These principles are identified as specific to the judicial discipline process.

However, the judicial discipline process is one part of a larger system of regulation of judges. The judicial discipline process is part of a system of self-regulation of the judiciary. The judiciary is a constitutional actor and constitutional considerations of judicial independence and separation of powers certainly impact its regulation. However, the judiciary is also a professional institution and therefore it is relevant to consider best practices in modern approaches to regulation for other comparable professionals such as lawyers, doctors, engineers, etc. For these reasons:

1. CALE believes that in considering reforms to the judicial discipline process, consideration should be given to best practices for other self-regulating professions.

All of the protections, privileges and obligations of the judiciary are justified in terms of the public. The Canadian Judicial Council has stated that “[p]ublic confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.”¹ It has also stated that “[j]udicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians.”² Supreme Court case law is replete with similar such statements.

CALE believes that because public confidence and public perception is both the touchstone and the justification for judicial independence and for judicial discipline, it is essential that members of the public be part of all aspects of the regulation of judges. Our understanding is that members of the public are involved as full members of other self-regulatory independent professions such as lawyers and accountants. While incorporation of best practices for other self-regulating professional bodies in the context of judicial discipline must be viewed through the lens of judicial independence, we believe that judicial independence mandates public involvement rather than militates against it. We note that many provincial judicial councils have public members. Therefore:

2. CALE recommends that members of the public be full members of the Canadian Judicial Council with full rights to participate in all activities of the Council.

and

¹ Canadian Judicial Council, *Ethical Principles for Judges* (1998), c. 3, cmt 1.

² Canadian Judicial Council, *Ethical Principles for Judges* (1998), c. 2, cmt 1.

3. *CALE recommends that members of the public be involved in all steps in the judicial discipline process.*

CALE believes that representativeness is an important value in the regulation of the judiciary, including in the discipline process. It is important that the judiciary reflect the society of which it is a part in order to maintain public confidence. The Canadian judiciary is not, at present, representative of many groups in Canadian society. This is all the more reason why it is critical to include public members as full members of the CJC and as full members in each stage of the discipline process. Public members can increase the representativeness of the CJC and bring a diversity of experiences and perspectives to the work of the discipline process. For these reasons:

4. *CALE recommends that the composition of various panels or committees of the CJC should attempt to reflect the diversity of Canadian society.*

CALE believes that the *Judges Act* should be amended to clarify that judges owe a duty of confidentiality which derives from the common law rule of deliberative secrecy recognized by the Supreme Court of Canada in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796. Recently, in *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, the Supreme Court declared (at para 64): “Judges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so.” This duty of confidentiality continues after judges have left judicial office. The *Judges Act* should be amended therefore to provide the CJC with jurisdiction over former judges for misconduct relating to their past judicial service. For these reasons:

5. *CALE recommends that the Judges Act be amended to explicitly recognize that judges owe a duty of confidentiality that continues indefinitely after the judge leaves office*

and

6. *CALE recommends that the Judges Act be amended to authorize the Canadian Judicial Council to exercise jurisdiction over former judges for misconduct relating to their past judicial service.*

Finally, we believe that the *Judges Act* should contain the framework for the judicial discipline process and the specifics should be provided for in CJC by-laws.

CALE has elected not to respond to every question posted in the Consultation document. Below we respond to the questions that we believe are most salient.

The Judicial Discipline Process

3.1 Who May Complain and Screening Out of Complaints

- Should the fact that anyone may complain to the CJC be clearly set out in the *Judges Act*?

- Should the grounds for screening out of complaints be set out in the *Judges Act*?
- Should paragraph (c) of these grounds be retained in its existing form?

3.2 Anonymous Complaints

- Should anonymous complaints continue to be accepted?
- Should the approach to anonymous complaints be set out in the *Judges Act*?

CALE believes that anonymous complaints should continue to be accepted.

3.3 Role of Complainants

- Does the current process strike the right balance in terms of the role of complainants?
- Could current practices and procedures related to keeping complainants informed be improved? How?
- Should current practices and procedures related to keeping complainants informed be incorporated into the *Judges Act*?

CALE believes that a modern judicial discipline process should be responsive to complainants. Current practices and procedures related to keeping complainants informed can be improved by ensuring that complainants are notified at each step of the process. CALE also believes that complainants should be given the opportunity to make written submissions at various stages of the judicial discipline process.

3.4 Complaints from Attorneys General

- Should s. 63(1) of the *Judges Act* be amended so that the right of AGs to oblige the CJC to hold an inquiry into a complaint made by them is triggered only if the CJC dismisses the complaint?
- Should each provincial and territorial AG be limited to being able to require an inquiry into the conduct of superior court judges of their own jurisdiction and the judges of the Supreme Court of Canada?

CALE recommends that s. 63(1) of the Judges Act be maintained in its current form. The Attorney General is recognized as the “guardian of the public interest” and has a historic and constitutional role as representing the public interest. CALE believes it is appropriate for the Attorneys General to continue to have the right to automatically trigger an inquiry. Limiting a provincial or territorial AG to being able to require an inquiry into the conduct of superior court judges of their own jurisdiction only leaves out mention of Federal Court and Tax Court judges. Section 63(1) serves the value of efficiency which is identified in the Consultation document. It does not make sense to require an Attorney General to await the outcome of an investigation before triggering an inquiry.

3.5 Involvement by Lay Persons, Lawyers and *Puisne* Judges in the Discipline Process

Lay persons

- Should every review panel and inquiry committee include a lay person, defined as someone who is neither a lawyer nor a judge?
- If lay persons serve on review panels and/or inquiry committees, who should designate them? The CJC? The Minister of Justice?
- Should the role of lay persons be set out in the *Judges Act*?

CALE believes that lay persons (public members) should participate in every stage of the judicial discipline process so that their participation is effective and not just symbolic. CALE recommends that public members be appointed to the CJC by the federal Minister of Justice. CALE recommends that the role of public members be set out in the Judges Act in establishing the composition of the CJC.

Lawyers

- Should one of the members of every review panel be required to be a lawyer? Or is having a lay (non-lawyer) member sufficient?
- Should lawyers continue to sit on inquiry committees? How many should sit on each committee?
- Who should designate the lawyer members of review panels and/or inquiry committees?
- Should any requirement that lawyers sit on review panels be set out in the *Judges Act*? Should the current *Judges Act* provision regarding the participation of lawyers on inquiry committees be changed?

CALE believes that lawyers play an important role in the administration of justice and bring a unique perspective to the judicial discipline process. CALE believes that the participation of lawyers is important on inquiry committees but is not necessary on review panels if members of the public are part of that process. Lawyer members should continue to be designated by the Minister of Justice and should be set out in the Judges Act.

Puisne judges

- Should one of the judicial members of every inquiry committee be required to be a *puisne* judge?
- Should *puisne* judges be represented on the CJC's Judicial Conduct Committee?
- If *puisne* judges are required to be represented on review panels, inquiry committees and/or the Conduct Committee:
 - Who should select them? The CJC? The Canadian Superior Court Judges' Association?
 - Should the role of *puisne* judges in this regard be set out in the *Judges Act*?

3.9 Council of the Whole

- Should Council of the Whole remain as a stage of the discipline process?
- If so:
 - How should its purpose be defined or clarified?
 - Would a smaller body be able to discharge the same or similar functions more easily or efficiently?
 - Are the Council of the Whole's powers adequate? Should it have the power to have a new inquiry committee inquire into a particular matter where appropriate in light of the requirements of procedural fairness?
 - Should Council of the Whole's powers be consolidated in a single provision and incorporated into the *Judges Act*?
 - What procedures should be adopted by Council of the Whole? Should the judge have the ability to make an oral statement or written submissions only? Should this be left for the CJC By-laws to specify or be incorporated into the *Judges Act*?

CALE believes that Council of the Whole approach no longer accords with modern regulatory approaches to discipline and should be abandoned. It moves adjudication away from a principled assessment of the facts and precedent applicable to a particular case, and risks introducing judicial politics into decision-making. We know that when the CJC adopted the Council of the Whole approach, many law societies had appeals to the benchers as a whole (Convocation). Most law societies have abandoned this approach in favour of having a hearing division and an appeal division. We recommend that the CJC adopt a similar approach.

3.10 Range of Sanctions for Misconduct and Grounds for Removal from Office

Range of sanctions for misconduct

- Should the range of sanctions for misconduct short of removal be expanded? If so:
 - What sanctions should be available? Expressions of concern? Courses of continuing education or counselling? Suspension without pay? Others?
 - Should the range of sanctions be set out in the *Judges Act*, or should the CJC be empowered to impose sanctions short of removal with the specific sanctions left for the CJC to specify by way of By-laws?

CALE believes that the range of sanctions for misconduct short of removal should be expanded. CALE believes that the lack of intermediate sanctions has led to an all or nothing approach where disciplinary sanction has not been available for findings of misconduct which are thought to fall short of justifying removal. CALE believes that the following powers should be available: warn the judge; reprimand the judge; order the judge to apologize to the complainant or to any other person; order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge; suspend the judge with pay, for any period; suspend the judge without pay, but with benefits, for a period up to thirty days; or recommend the

removal of the judge to the Minister of Justice. We note that these are the powers that are available to the Ontario Judicial Council under the Courts of Justice Act, RSO 1990, c C-43.

3.11 Role of the Minister of Justice

- Should the Minister's role in receiving the CJC's report and recommendation be clarified in the *Judges Act*? If so, in what terms?

CALE believes that the role of the Minister of Justice should be clarified in the Judges Act by adding a provision that captures the spirit of the words of the Federal Court of Appeal in Cosgrove v. Canadian Judicial Council, 2007 FCA 103 at para 64.

3.12 Judicial Review

- Should judicial reviews be expedited by having them proceed directly to the FCA? Directly to the Supreme Court with leave?
 - Should judicial reviews of the Council of the Whole proceed directly to the Supreme Court with leave, with other judicial reviews proceeding directly to the FCA?
- Should judicial reviews by judges facing inquiries be expressly precluded until Council of the Whole has reported? What would this entail for the Council of the Whole stage?
- Should timeframes for hearing and determination of judicial reviews be established? At the FCA? At the Supreme Court?
- If the two-counsel model is reinstated, should presenting counsel be precluded from applying for judicial review?

CALE believes that judicial reviews should be expedited by having them proceed directly to the Federal Court of Appeal. CALE does not believe that judicial reviews should proceed directly to the Supreme Court of Canada with leave because this could put undue pressure on the Supreme Court to accept such judicial review applications as the only avenue of review of decisions of the CJC. The Supreme Court has repeatedly expressed its displeasure with appeals that proceed directly to the Supreme Court because they deprive the Supreme Court of the benefit of a lower court's examination of the matter.

3.13 Legal Fees

- Should a judge be required to repay the costs of bringing a judicial review application if the reviewing court finds that the application is frivolous or vexatious?
- Should a reviewing court also be empowered to impose costs payable by the judge even if the application was not found to be frivolous or vexatious?
 - If so, should the reviewing court be expressly required to consider factors such as the need to deter unnecessary litigation, and the importance of not

detering judges facing inquiries from raising legitimate matters on judicial review?

- Should a judge be initially required to pay his or her own legal fees on judicial review, with the reviewing court empowered to award the judge all or part of those costs should it deem it appropriate in the circumstances?
 - If so, should full cost recovery by the judge be the rule unless the application was found by the reviewing court to be frivolous or vexatious?
- If the range of non-consensual sanctions for misconduct is expanded, should the policy of paying a judge's legal fees exclude judicial review applications brought after it has been determined that a complaint is not serious enough to warrant removal from office?

CALE believes that the normal rules regarding fees should apply to judicial review applications. A judge should be initially required to pay his or her own legal fees on judicial review and the reviewing court empowered to award the judge all or part of those costs should it deem it appropriate in the circumstances. CALE does not believe that a special rule of 'full recovery' for a successful judicial review application should be created. Rather, CALE believes that the regular costs rules should apply.

3.14 Timeframes

- Should timeframes be established in respect of certain stages of the process, such as review by the Chair of the Conduct Committee, review by a review panel, completion of the inquiry committee's report once hearings have concluded, and/or review by Council of the Whole?
- How should they be established? In the *Judges Act*? In a regulation? In the CJC's By-laws?

CALE believes that timelines should be established for all stages of the process and that these timelines should be set out in the CJC's By-laws to provide the necessary flexibility for the CJC to change them over time as necessary.