

“Teaching” Judicial Ethics: the Canadian Methodology¹

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1. Introduction

The purpose of this brief paper is to describe the Canadian experience in “teaching” judges about ethics. We have placed the word “teaching” judicial ethics in quotation marks because the National Judicial Institute does not “teach” judicial ethics in the usual sense of that word. Instead, as will be seen, it provides a forum in which issues surrounding judicial ethics may be raised and discussed.

So what are judicial ethics? It’s not possible to define judicial ethics without defining ethics. Our working definition of ethics is that well-known phrase “ethics are morals in action.” Judicial ethics are the morals which guide the comportment of judges. While we recognize that there is no one source to determine what is the standard behind an ethical principle, for the purposes of this brief paper our source is the *Ethical Principles*.²

2. Exposé of the *Ethical Principles for Judges*

The *Ethical Principles* booklet was published in 1998 by the Canadian Judicial Council to “provide ethical guidance for federally appointed judges.”³ Since then, the Canadian Association of Provincial Court Judges has endorsed the *Ethical Principles* for its members.

¹ Part of this paper will be published in the Spring edition, 2004 of *The Saskatchewan Law Review*.

² *Ethical Principles for Judges*, Canadian Judicial Council, 1998.

³ *Ibid.* at p. 3.

The *Ethical Principles* booklet is not a code in the sense that it is not intended to be an exhaustive document purporting to control the conduct of judges. Instead, the *Ethical Principles* set out the main principles and provide commentary and examples intended to sustain what is already an ethical judiciary.

The principles are:

- (i) judicial independence,
- (ii) impartiality
- (iii) integrity,
- (iv) diligence, and
- (v) equality.

(i) Judicial Independence

This principle states “[a]n independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.”⁴ The Commentary accompanying this statement reminds us that high standards of conduct are a part of judicial independence.

It states:

Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence....⁵

(ii) Impartiality

The principle reads: “[j]udges must be and should appear to be impartial with respect to their decisions and decision making.”⁶ As will be seen, the ethical principle of impartiality is the most wide-reaching of all the principles.

(iii) Integrity

According to this principle, “[j]udges should strive to conduct themselves with

⁴ *Ibid.* at p. 7.

⁵ *Ibid.* at p. 5.

⁶ *Ibid.* at p. 27.

integrity so as to sustain and enhance public confidence in the judiciary.”⁷ Commentary 3 states, “[t]he judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety.”⁸ This comment makes it clear that the principle of integrity is extended, unlike most professional codes of conduct, to a judge’s life away from the court house.

(iv) Diligence

This principle states “[j]udges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.”⁹ Commentary 1 adds, “[d]iligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.”¹⁰

(v) Equality

The principle is: “[j]udges should conduct themselves and proceedings before them so as to enhance equality according to law.”¹¹ It is directed to ensuring that cultural and other differences are handled with sensitivity by the judge and suggests that the judge has a role to play with respect to the conduct of others. It states that “[j]udges, in the course of proceedings before them, should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge’s direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.”¹² Commentary 4 provides that “[j]udges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone.”¹³

⁷*Ibid.* at p. 13.

⁸*Ibid.* at p. 14.

⁹*Ibid.* at p. 17.

¹⁰*Ibid.* at p. 18.

¹¹ *Ibid.* at p. 23.

¹²*Ibid.*

¹³*Ibid.* at p. 24.

3. Application of the *Ethical Principles*

Much of the *Ethical Principles* is exhortative. It directs the judge to consider the ethical principle before embarking on a particular course of action. It does not speak to the application of the disciplinary standard to past conduct. Instead, judges are urged to aspire to a principle, the application of which will not necessarily be obvious. The language of the *Ethical Principles* is not directive. The language is in the form of advice. The operative words are “should” or “may” rather than “shall” or “must.” This makes “teaching” judges about judicial ethics an important part of the judicial curriculum.

The best way to understand what is meant by this is to give some examples. These examples refer initially to lawyers and not judges.

Every busy lawyer and his or her spouse is asked to play an active role in the community. For example, a lawyer or spouse might be asked to run in a marathon to raise money to combat cancer; or to attend a dinner where the Prime Minister of Canada and other politicians are speaking; or if the lawyer is an artist, he or she might be asked to sell their artwork and donate the money to charity. Lawyers are asked every day to serve on volunteer boards: the symphony, a parish council or the board of any number of groups including boards like the food bank or a local battered woman’s shelter. Lawyers are also frequently asked to lobby for or against change. An example might be to write a letter to his or her member of parliament urging increased funding for university education.

All these are good things for a lawyer to do. Indeed, a lawyer’s participation in these things Canada may have played a role in commending him or her as a judge. But after a judge is appointed, these seemingly innocuous activities can raise ethical concerns that will affect the judge’s reputation and, more importantly, the administration of justice, if the judge does not answer the ethical question raised by this examples correctly.

Teaching ethics to judges is one means to assist a judge in choosing the most prudent course of action.

4. “Teaching” Judicial Ethics

The model that has been developed for teaching judicial ethics in Canada can be summed up in three words: local, participatory and fluid. As mentioned, the *Ethical Principles* provide guidelines only. The seminars on judicial ethics follow a similar approach, in that they are not intended to “teach” ethics in the formal sense of the word, but to provide a forum for judges to consider a variety of ethical problems and discuss appropriate responses. The goal is to leave the judges with a framework for analyzing ethical issues and options for future issues that may arise.

5. The Process of developing a curriculum

In Canada, the first national conference was developed last year under the guidance of Mr. Justice Michel Proulx of the Quebec Court of Appeal. With the assistance of the National Judicial Institute (the “NJI”), a group of judges and lawyers who had an interest in legal and judicial ethics was formed. That group divided the kinds of ethical issues that judges confront into three broad areas - ethical issues in the courtroom, judicial conduct outside the courtroom and judgment writing. Scenarios which give rise to ethical issues were written in each of those areas. At the same time, Mr. Justice Proulx developed an analytical framework to use in considering the hypothetical scenarios. That framework is fundamental to teaching judicial ethics. Most judges will have an intuitive response almost immediately when an ethical problem is presented to them. Often that response is the correct one, but other times it is not. The framework forces the judges to work through the problem before arriving at the most appropriate response.

The steps of the framework are:

- (i) Define the ethical dilemma
- (ii) Identify any specific rules, codes, guidelines that are relevant
- (iii) Preferred course of conduct for counsel (this is for in-court issues)
- (iv) Step for judge to take prior to identifying options
- (v) Identify permissible options, outlining strengths and weaknesses of each
- (vi) Identify preferred option

The agenda for the first national conference began with a talk about judicial ethics, the intent being to provoke some discussion and thought about the concept of judicial ethics and why it is necessary to discuss ethical issues amongst colleagues. That was followed by a comparative look at how the topic of judicial ethics is addressed in several countries. Then the judges began their work. The analytical framework was presented to the judges, the first time in blank. Then the presenter took the judges through the framework again, analysing a problem. The judges then worked through a number of hypothetical scenarios in small groups, with a report back at the end of each segment; ie, after in-court issues, out-of court issues and judgment writing issues. The seminar ended with a discussion led by senior judges of some of the recurring themes that arose during discussions.

With that outline, courses using some or all of the material developed for the national conference and using the same structure are now taking place. It is here that the important characteristics of the model become obvious.

6. The Model

(a) Local

Although many ethical problems are common for all judges, particularly out-of-court issues, the curriculum needs to take into account the court involved. For example, some courts write very little while some issue almost every decision in writing. Some do not conduct jury trials, some do not do much trial work, but rather do a great deal of judicial review. For example, a court that does little trial work would not be interested in scenarios that address problems arising from difficult witnesses. And, of course, all of

this must be assessed in the Canadian context which sees the appointment of senior lawyers to the bench after having spent a minimum of 10 years as a member of a Law Society.

In planning a programme, a judge or group of judges from the court involved meets with NJI organizers. Those judges will design the programme, relying upon the experience and advice from NJI. It is helpful to have a mix of judges on the court committee to ensure that a variety of views are expressed when designing the programme. For example, a senior judge may not see some ethical issues that are more obvious to a junior judge. Although the court committee has the ultimate say on what ethical issues to address, it is important to guide them in their choices. Sometimes, members of a court are reluctant to address a particular issue because it is a real and thorny ethical issue for the court. To take an example, some members of the court may be engaging in what other members of the court see as political activity. The easy route is to avoid the issue, but the task of the NJI organizer is to help the court determine whether in fact a discussion of the problem would be helpful to the court.

(b) Participatory

A seminar on judicial ethics or conduct will not be successful if the judges do not participate actively. Except for very obvious issues like corruption or bribery, there are often no right or wrong answers for ethical issues. Rather there is a range of options that will fit each situation. The purpose of the seminar is to identify those options and discuss the strengths and weaknesses of each. The seminar faculty guides the discussion and ensures that the judges work through the problem in accordance with the analytical framework. Preparation of strong group leaders is essential to ensure that the discussion focuses on the analytical framework rather than the judges giving their reaction to the question in “yes” or “no” terms without any discussion.

(c) Fluid

Ethical issues change. Responses to ethical issues also change. Since the curriculum model chosen by the NJI works off hypothetical scenarios, those scenarios

need to be adjusted and updated from time to time and from court to court to ensure continued relevance.

(d) A caution

Discussion amongst colleagues about ethical issues has the potential to become very heated and personal. To some extent that problem cannot be avoided. However, strong group leaders should try to keep the discussion away from naming names or telling war stories.

7. Working through the Scenarios

Here are some examples of questions that deal with out-of-court conduct. A short form of the analytical framework is provided in each. Because in each case, the fourth step (what steps a judge would take before identifying the options) is the same, namely to consult with senior judges, the Chief or an ethics advisory committee, it has not been repeated in each one.

(a) A judge wants to run in a marathon to raise money to combat cancer

The ethical dilemma is whether this activity involves the solicitation of funds or lending the prestige of the judicial office to such activity. The section of the *Principles* which is engaged is the impartiality section. The preferred option is to participate so long as the judge puts up his or her own money or money from close family members, but if the judge solicits money from others, the judge may appear to be beholden to that person and may not appear to be impartial if that person, or organization, were to be a lawyer or a potential litigant. Thus there is no issue with respect to running in the marathon, but a judge would not be advised to seek pledges.

(b) A judge is asked to attend a dinner where the Prime Minister of Canada and other politicians will be speaking

The ethical dilemma is whether this activity constitutes participation in political activity. The *Ethical Principles* state “all partisan political activity must cease upon

appointment.¹⁴ Attendance at political gatherings might reasonably give rise to a perception of ongoing political involvement or reasonably put in question the judge's impartiality.

(c) A judge who is an amateur artist wishes to sell his or her artwork and donate the money to charity

The concerns with respect to this fact pattern relate to diligence and impartiality.

There are two ethical dilemmas. The first is whether the judge's artistic work is detracting from his work as a judge. The *Ethical Principles* states that a judge will not engage in commercial activities and will devote himself or herself to judicial duties including work associated with the administration of justice. That is the first concern.

The second dilemma has two aspects. First, is the judge taking advantage of his judicial office. For a judge to engage in such an activity runs the risk that he or she will be seen to be seeking to promote the sale of the work by its association with the office of the judge. Second, the offering of such work for sale could be interpreted by prospective customers and others as affording a way to curry favour with the judge for the purposes of potential litigation.

There can be no hard and fast rule, so that the preferred option depends upon a number of factors. The number of paintings, the nature of the charity, who the buyers might be, where this comes in a career of a judge---all these factors and others may play a role. The occasional sale on a private basis by the judge of his or her artistic work to friends and acquaintances either individually or in a venue such as a small charity auction, particularly one that is associated with the administration of justice, might well not run those risks. In such a case, the reasonable understanding might well be that the transaction is merely a personal one to which the judge's holding of judicial office is entirely irrelevant.

¹⁴ *Ibid.* at p. 28.

(d) A judge is asked to serve on the board of a local charity

This is the most commonly asked question. The ethical dilemma it raises depends upon the nature of the board and the board's expectations of the judge. In considering whether a judge should accept to be a board member of a particular organization, these are the questions which must be considered:

- (i) would association with this board reflect adversely on the judge's impartiality?
- (ii) would this activity interfere with the performance of his or her judicial duties?
- (iii) is the judge being asked to join this board to lend the prestige of the judicial office to fund raising?
- (iv) is this a board that is likely to be engaged in litigation?
- (v) is the judge asked in the expectation that he or she will give legal or investment advice?
- (vi) is there something about this board or organization which does not respect the principle of equality?

(e) A judge is asked to write a letter urging a member of parliament to pursue, or not to pursue, a particular course of action

The ethical dilemma is whether the judge is attempting to influence a political decision. The Ethical Principles say that a judge should refrain from "...signing petitions to influence a political decision."¹⁵ Although this is not a petition, it is a similar document. The preferred option is not to write the letter.

¹⁵ *Ibid.* at p. 28.