



August 23, 2006

Chief Justice J. Derek Green
Canadian Judicial Council
Ottawa ON K1A 0W8

Dear Chief Justice,

The Canadian Bar Association (CBA) appreciates this opportunity to comment upon the Canadian Judicial Council (CJC) Judicial Independence Committee's Draft, "International Judicial Activities: Statement of Principles" (Statement of Principles). The CBA is a national association representing over 36,000 lawyers, notaries, law students and teachers, and our mandate includes seeking improvements in the law and the administration of justice. The CBA's International Development Committee (IDC) has founded numerous international legal programs since 1994, with a goal to "promote the rule of law in developing countries and countries in transition". The expertise of that Committee of the CBA has informed our response to the Statement of Principles.

The CBA supports the continued involvement of Canadian judges in international legal programs. Judges are ideal candidates to share their knowledge of broad concepts such as the rule of law or judicial independence, and to provide information about the daily challenges in making the justice system work effectively.

We appreciate the purpose for the Statement of Principles outlined on page 2, specifically, "to provide guidance to judges and their Chief Justices in making decisions regarding whether to participate or to authorize the participation, and the subsequent manner and scope of participation, in international juridical activities". Certainly, judges who participate in international activities should be well selected, well trained and well prepared for these projects. We also appreciate the desire to track the involvement of Canadian judges in international activities through a central office. We have reviewed the Statement of Principles with these core objectives in mind.

General Considerations

Given the underlying intent of the proposed Statement of Principles, we suggest that it should not apply only to federally appointed judges. An effective Canadian solution should address the involvement of all Canadian judges in international activities, including those appointed by a province or territory. We urge the CJC to work with organizations representing provincial/territorial court judges to finalize a policy that applies to all of Canada's judiciary.

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Some projects involve only judges, while others also involve lawyers, court administrators and others. A statement of principles should not, in our view, restrict the participation of judges to projects designed for judges only. The CBA's experience in organizing such projects through our IDC has proven that many of the most successful projects are those that demonstrate the capacity of Canadian judges, lawyers and court administrators to work together to bring about significant reforms.

The judiciary has played a very important role in the implementation of the CBA's international programs. Judge members of the IDC have provided valuable policy guidance, substantive knowledge, experience and program advice in a wide range of overseas and Canadian-based program activities, and brought authority and respect that further enhances the value of their participation in the programs. Importantly, judges' participation, often together with Canadian lawyers, academics and government officials, has demonstrated to our international colleagues the value of fostering mutual respect and collaboration between legal institutions to facilitate the development of a healthy, balanced, functioning legal system.

The Statement of Principles focuses on the benefits to our overseas colleagues of Canadian judicial engagement. However, they do not mention the corresponding personal and professional benefits for Canadian judges and for Canada's legal system as a whole. Evaluations, reports and ongoing discussions among judges who have participated in CBA international activities clearly prove that such experiences are also personally stimulating and fulfilling. Canadian judges and judicial officers have welcomed the opportunities to engage with both judges and lawyers from developing countries. They often report that exposure to the huge challenges facing actors in the legal systems of developing and transitional countries has deepened their understanding of the fragility of judicial independence and critical importance of the rule of law, not only for developing countries but for our own. When judges return to Canada with a broader appreciation both for the values of our own legal system and the work being done to build capacity and enhance access to justice in other parts of the world, it can only enrich their perspectives and abilities.

As a minor point, there appears to be a typographical error at point 14, third bullet, where it should read "affirming" rather than "firming".

Judicial Independence and Impartiality

Under point 15, we believe that clarification is required regarding the clause, "shall not allow their name to be associated with a particular project promoter in a competitive bidding process". When point 8 is read with point 15, it could be interpreted as allowing a judge to be named in a bid, but not on an exclusive basis.

We have concerns about judges being named in competitive bids, whether on an exclusive basis or not. While there may be unique circumstances where the participation of a judge could be sanctioned in a competitive bid process, this should be the exception, rather than the rule. Certainly, more precise guidance is needed.

For example, a bid that responds to a request for proposal by the Canadian International Development Agency (CIDA) will usually require the bidder to identify all members of the proposed team. All named individuals, including judges, are required to submit a detailed resume. Generally, points are then awarded to the proposal based on the organization's experience, the methodology and the proposed personnel, with the largest number of points being



allocated to the proposed personnel. Where judges are included on competing bids, the reality is that CIDA staff and consultants compare them against each other and award points. In our view, this ranking of judges is generally inappropriate, and has a potentially negative effect upon the reputation of the judiciary as a whole. If a bidder does not provide the name of the judge, a detailed resume and a signed undertaking that the judge will participate in the project should the bidder be selected, the bidder receives no points for that position. The institutional capacity of the bidding organization to draw on the required personnel is given little, if any weight.

Point 15 does not distinguish between for-profit and not-for-profit entities, and we believe that distinction would be useful. Further, we would suggest adding as a bullet that a judge should consider whether the nature of the proposed event, accommodations, or any other aspect of the international judicial activities would render participation inconsistent with the independent and impartial discharge of the judge's duties. This would prevent the appearance of impropriety that might arise if a judge were to participate in activities that had a significant element of personal benefit (for example, a stay in luxury accommodations, or recreational establishment with all expenses paid), or if the proposed event included providing private individuals/organizations with, apart from any educational component, access to judges in front of whom they might appear as litigants. Thus, it would further clarify the first bullet requiring judges not to accept "any payment or benefit except reimbursement of reasonable expenses", and the last bullet requiring judges to make inquiries as to the sponsors or promoters of the project.

Administration and Coordination

Point 20 states that a national database shall be established by the CJC or authorized by it to help facilitate the identification of judges who are interested and available to engage in international judicial activities. It is presumed, although not absolutely clear, that the database will only include judges. More detail is required to explain how the database would actually work. For example, whether web access would be available for some or all of the information contained, or who would actually make the selection or determination are issues not addressed.

We appreciate that a database may be useful to organizations outside the legal sector. It could well be invaluable to match appropriate judges who have opted to register with international organizations seeking a particular skill set.

However, while the database would be useful as a tool with a specific purpose, it should not have an exclusive or gate-keeping role. It is not obvious that the best participant will only be found among those who have indicated their interest in international cooperation. Often the best expert to send abroad will be a judge closely involved in a given aspect of court administration, who may not have registered with the database. Judges who wish to engage in international activities may choose not to register in the database as generally available. They may wish to only work with one specific type of project, or one specific organization, rather than to indicate general availability. Similarly, organizations that have access to judges through their own internal organizations, such as the CBA Judges' Forum and its institutional connections, should be able to access judges for international programs without resort to the national database.

We recommend that the Statement of Principles and any database should include judges of all levels of appointment. We suggest that the CJC consult with the Chief Judges' Association and/or CAPCJ, as ideally, the database should be managed by a group that can serve all judges, both federally and provincially/territorially appointed. Certainly, the CJC, given its mandate, is



the organization best positioned to establish and manage a national database of only federally appointed judges. If a national database were to be administered by an organization other than the CJC itself, the CBA believes that organization should not itself be involved or engaged in international programming, to avoid the perception of a conflict of interest or unfair competitive advantage.

Training

What is considered an “educational body” under point 22 should be clarified. For example, the CBA’s IDC has significant experience with preparing participants for international programs. We recognize the importance of broad intercultural and contextual training for the specific project at hand. Our experience suggests that effective training to properly prepare judges and lawyers for their missions and work requires different delivery formats, including internet-based modules and research, mentoring and materials. It is not always practical or possible for judges participating in international programs to physically attend extensive training programs or to design comprehensive programs that deal with not only the broader areas of development, project work and cross cultural learning but also the contextual issues relating to the specific project. We recommend that the CJC sanction a variety of training approaches. Registration and any prerequisites should not either entitle or eliminate a judge from participating. For example, time constraints may not allow a judge to obtain all the required training. The Statement of Principles should also set out the possibility of obtaining a waiver in appropriate circumstances.

Point 18 requiring a judge to receive prior approval by a Chief Justice or Chief Judge before participating in international judicial activities will be a matter of local application, and its wording is somewhat ambiguous. Obtaining a leave of absence may well involve the approval of a Chief Justice or Chief Judge, but clarification is required as to whether actual participation should always be subject to such approval, and also whether such approval concerns sitting time, some allowance for sitting time, or whether the assumption is that judges would use their own vacation time for international activities.

We trust that these comments will be helpful in continuing your work on the Statement of Principles, and welcome any questions or further discussion of the points we have raised.

Yours truly,

J. Parker MacCarthy, Q.C.