



December 20, 2013

Via email: consultations@flsc.ca

Marie-Claude Bélanger-Richard
President, Federation of Law Societies of Canada
World Exchange Plaza
1810 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Dear Me Bélanger-Richard:

Re: National Suitability to Practice Standard Consultation Report

The Canadian Bar Association supports the efforts of the Federation of Law Societies of Canada to develop a common standard and process for determining the suitability of applicants for bar admission that is clearly articulated, consistent and fair. Thank you for the opportunity to provide input on the Federation's proposals.

The CBA agrees that the focus of assessment should be on behaviour rather than character traits and, to the extent that is reflected in the change in terminology from "good character" to "suitability to practice", we support that change. We also agree that the assessment of current character, or suitability to practice, has little predictive value as to future behaviour but that the process of assessing past behaviour is worthwhile if it conveys to the profession and the public that the profession is held to certain standards and is, therefore, worthy of the public's trust.

However, to assist in meeting the Federation's goals, the CBA offers several recommendations to strengthen the suitability to practice standard, as follow:

1. In addition to assessing past misconduct that casts doubt on the applicant's respect for the rule of law, honesty, governability and financial responsibility, law societies delineate specific categories of misconduct which create a rebuttable presumption of ineligibility for admission.
2. The process for making the determination of suitability to practice be undertaken with particular care to the reliability of the evidence relied upon to establish past misconduct.
3. Law societies make an adverse character determination based on group membership only in exceptional circumstances.
4. Law societies undertake rigorous and consistent independent investigation of applicants for admission, as proposed by the Federation, including additional recommended sources of information.

The bases for the CBA's recommendations are set out in detail below.

Rebuttable presumption of ineligibility based on categories of past misconduct

The Federation recognizes in its Consultation Report that public confidence in the legal profession is critical to the effective administration of justice and that ensuring the ethical integrity of lawyers, and suitability to practice, is challenging to achieve through the assessment of applicants for admission. The "good character" assessment is cast as the first, not the last, opportunity to assess the competence and suitability of individual lawyers. The CBA agrees with these positions, and adds that a clearly articulated and consistently applied standard for admission to the bar is essential to ensure fairness to potential applicants.

The inconsistent application of the good character standard, the increase in the admission of applicants who have committed serious unlawful acts and the small number of individuals actually excluded¹ creates the impression for the public that the good character standard is not a meaningful barrier to admission.² Further, the current approach creates uncertainty for individuals considering entry into the legal profession. Applicants cannot know whether they will be considered to be of good character until after completion of their legal education and, in some cases, after their period of articles. For those applicants excluded from admission, the consequences are very severe. This may explain, in part, why law societies have been reluctant to exclude applicants in individual cases.

The CBA supports the assessment of past behaviour in the areas identified by the Federation - respect for the rule of law, honesty, governability and financial responsibility - and its efforts to provide more clarity in the development of a common standard. However, in our view, even more specificity in the rules is needed to protect the public and the reputation of the legal profession and to offer some certainty to applicants as to the case they have to meet. We recommend that specific categories of past misconduct be set out that give rise to a rebuttable presumption of ineligibility, absent independent and persuasive evidence of reform and rehabilitation, amongst other factors that the Federation determines. Expressions of remorse by the applicant, while an essential factor, should, alone, be insufficient to rebut the presumption of ineligibility. The CBA encourages the Federation to consult broadly with the public, legal profession and law societies when delineating the categories giving rise to the presumption of ineligibility and the relevant factors (and sufficiency of evidence) in rebutting that presumption.

Attention to reliability of evidence

We support the Federation's attention to procedural fairness in the application of the proposed standard. However, we recommend that more attention be paid to the type of evidence required to establish unsuitability for admission. In some good character cases, the applicant's past improper conduct has not been proven in criminal or regulatory proceedings and the applicant denies the conduct in whole or in part. In those cases, the law society must determine whether the bad conduct occurred and, from that, assess whether the applicant is currently of good character.

In some of these cases, law societies have admitted hearsay and similar evidence against the applicant. This is common in administrative proceedings, but can be problematic given the nature of the hearsay evidence in good character cases (e.g., police or prosecutorial reports which tend to be weighted against

1 For example, that between 2006 and 2012, 575 applications to the LSUC raised issues of character. Twenty-four hearings were held. Two applicants were denied admission. The cost and effort associated with reviewing and investigating 575 applications and holding 24 hearings, resulting in only two applicants precluded from admission. (Email from Diana Miles, LSUC, to CBA, dated Dec. 17/13)

2 See, e.g., James Maurice Melnick v. Law Society of Upper Canada, 2013 ONLSAP 0027 (L.S.U.C. Hearing Panel); Smithen v. Law Society of Upper Canada 2011 ONLSHP 44 (L.S.U.C. Hearing Panel); Bornmann v. Law Society of Upper Canada 2011 ONLSHP 130 (LSUC Hearing Panel)

the applicant's position) and because the applicant will be required to testify, with the applicant's credibility at issue. Further, applicants who dispute the allegation of past misconduct will, by necessity, be unable to demonstrate remorse. That means that if they fail to persuade the law society that they did not commit the past misconduct, they are almost certain to be denied admission.³

If seeking to rely on past misconduct to exclude an applicant for admission, law societies may legitimately rely on past judicial or quasi-judicial decisions directly adjudicating that misconduct. Where, however, no such prior determination exists, law societies wanting to rely on past misconduct bear the onus of proving that the misconduct occurred. The CBA recommends that the Federation's national standard include guidance cautioning adjudicators to take particular care where the only evidence of past misconduct would be inadmissible in a court of law.⁴

Caution when making character determination based on group membership

The Federation recommends that an applicant's participation in "an organization that advocates violence or unlawful discrimination" is relevant to suitability for the practice of law (para. 23). This recommendation raises concerns in the context of the historical application of the good character requirement to applicants associated with groups, like the Communist party, for example, which might have been considered a group advocating violence or unlawful conduct.⁵ The CBA urges law societies to adopt a more contextual approach and to proceed with caution in excluding applicants on the basis of group membership, restricting adverse character determination based on group membership to exceptional circumstances (such as criminal convictions associated with that membership).

Additional sources of information for independent investigation of applicants

The Federation has recommended the adoption of a more rigorous investigative process, which calls for law societies to collect information from independent sources, including criminal record checks, court registry databases, certificates of standing and reports of disciplinary history from other regulatory bodies, references from third parties and reports from articling principals. The CBA supports this recommendation and suggests additional independent sources of information to ensure the accuracy of applicant self-reporting of past misconduct, including reports from academic institutions about prior academic or non-academic misconduct by the applicant and records of the Office of the Superintendent of Bankruptcy.

Conclusion

The CBA recommends that the Federation adopt a more comprehensive reform of the good character requirement for the reasons set out above. We would be pleased to discuss our recommendations and analysis with you in more detail. We encourage you to consult broadly with the public, the legal profession and amongst provincial and territorial regulators to ensure all relevant input is received before the rules are adopted. Thank you for seeking the feedback of the Canadian Bar Association.

Yours truly,

(original signed by Fred Headon)

Fred Headon

³ See, e.g., *Re Applicant 4 2013 LSBC 3*; *Re Applicant 3 2010 LSBC 23*

⁴ *New Brunswick v. Bond*, 1992 CanLII 2434 (NB CA)

⁵ *Martin v. Law Society of British Columbia* [1950] 3 D.L.R. 173