A REFLEXION ON DISCIPLINARY PARDON

By Mme Julie de Gongre, professional and legal affairs officer of the Conseil interprofessionnel du Québec (CIQ)

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Focus group on disciplinary pardon
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SUMMARY

In January 2012, the Conseil interprofessionnel du Québec (CIQ) set up a focus group on disciplinary pardon. This focus group’s mandate was to examine the notion of “disciplinary pardon.” This report presents certain findings stemming from the focus group’s work.

Contrary to Québec’s professional system, other professional systems in both Canada and the United States set out various forms of pardon. Certain systems borrowed on penal law to introduce the notion of the pardon into disciplinary law. Thus, this report explains the particular nature of disciplinary law and attempts to situate the notion of pardon in Canadian penal law.

After having identified professional orders outside of Québec or similar organizations that have introduced this notion in disciplinary law, the report presents some of these experiences.

Finally, the report provides a brief summary of different complementary reflections, namely with respect to the Canadian approach to pardons and labour mobility, the particulars of Québec’s professional system, emerging values in Québec society and access to information.
INTRODUCTION

In January 2012, the Conseil interprofessionnel du Québec (CIQ) set up a focus group on disciplinary pardon. This focus group’s mandate was to examine the notion of “disciplinary pardon.” Although this notion does not exist in Québec’s professional system, it does exist in other professional systems. This report presents certain findings stemming from the focus group’s work.

Firstly, the report explains the particular nature of disciplinary law and attempts to situate the notion of pardon in Canadian penal law, seeing as certain systems borrowed on penal law to introduce this notion in disciplinary law.

Next, the report presents certain experiences of professional orders outside of Québec or similar organizations that have introduced the notion of pardon into disciplinary law.

Finally, the report provides a brief summary of different complementary reflections, namely with respect to the Canadian approach to pardons and labour mobility, the particulars of Québec’s professional system, emerging values in Québec society and access to information.

1. NATURE OF DISCIPLINARY LAW

Given the fact that disciplinary law is sui generis (of one’s own class or kind) law that borrows on civil and penal law in addition to having its own elements, it could be tempting to emulate penal law and introduce the notion of pardon into disciplinary law.

However, given the particular nature of disciplinary law, caution must be exercised in this regard. The Québec Court of Appeal has stated this position in these terms: “En droit disciplinaire, « la faute s’analyse comme la violation de principes de moralité et d’éthique propres à un milieu et issus de l’usage et des traditions » [...] Ensuite, les lois d’organisation des ordres professionnels sont des lois d’ordre public, politique et moral ou de direction qui doivent s’interpréter en faisant primer les intérêts du public sur les intérêts privés.”

Regarding the specific nature of disciplinary law, we also cite the Professions Tribunal:

“Or, le droit professionnel obéit à des règles qui lui sont propres et qui requièrent des nuances et des adaptations, d’où l’étiquette sui generis qu’on lui confère depuis longtemps.

Il en découle que le droit disciplinaire est d’une nature hybride, s’inspirant, à la fois, des règles de droit civil et criminel pour fonder son propre corpus.

Dans cette perspective, la prudence s’impose face à l’importation de règles conçues pour satisfaire au fonctionnement et aux exigences d’un autre type de droit. Il ne faut pas perdre de vue la finalité singulièrê du droit professionnel qui vise la protection du public. La conduite d’un professionnel est donc évaluée par des pairs...”

2 Tremblay c. Dionne, 2006 QCCA 1441, para. 42.
© All rights reserved (2013). This document is the property of the Conseil interprofessionnel du Québec. It was requested by and prepared for the CIQ.
Lastly, we cite Professor Hélène Ouimet on the same subject:

"Le droit disciplinaire est autonome ou sui generis, c’est-à-dire qu’il obéit à ses propres règles. Bien qu’il s’y appelle, le droit disciplinaire se distingue du droit criminel, notamment parce qu’il ne régit pas les relations entre les citoyens et l’État : il s’assure d’abord du maintien de standards au sein d’une profession. Ainsi, la sanction qui en découle ne vise donc pas, comme le droit criminel, à punir un acte qui porte atteinte à l’ordre social en général, mais plutôt à réprimer des comportements qui portent atteinte à l’éthique professionnelle dans un but de protection du public."

With respect to the nature of the disciplinary sanction, the Québec Court of Appeal stipulates that it must meet the following objectives:


Le Comité de discipline impose la sanction après avoir pris en compte tous les facteurs, objectifs et subjectifs, propres au dossier. Parmi les facteurs objectifs, il faut voir si le public est affecté par les gestes posés par le professionnel, si l’infraction retenue contre le professionnel a un lien avec l’exercice de la profession, si le geste posé constitue un acte isolé ou un geste répétitif, [...] Parmi les facteurs subjectifs, il faut tenir compte de l’expérience, du passé disciplinaire et de l’âge du professionnel, de même que sa volonté de corriger son comportement. La délicate tâche du Comité de discipline consiste donc à décider d’une sanction qui tienne compte à la fois des principes applicables en matière de droit disciplinaire et de toutes les circonstances, aggravantes et atténuantes, de l’affaire."

2. THE PARDON IN PENAL LAW

Both in Canada and the United States, certain professional systems have drawn on penal law to introduce the notion of pardon into disciplinary law. It is therefore important to situate this notion in Canadian penal law.

We will begin with a quote from Professor Hélène Dumont concerning this notion:

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6 For this reason, a professional who declares bankruptcy is released of all fines and other pecuniary penalties imposed by the disciplinary council, contrary to penalties imposed under criminal or penal law: Chambre des notaires c. Dugas, (2003) R.J.Q. 1, REJB 2002-35787 (C.A.) (leave to appeal to the Supreme Court refused).
7 Hélène OUIMET, La discipline professionnelle, Montréal, Conseil interprofessionnel du Québec, 2009, p. 32.
“[…] On ne saurait terminer cet ouvrage sans discuter de la notion de pardon qui est associée à la punition dans la plupart des sociétés, et cela, depuis des temps immémoraux. Le pardon est aussi un pouvoir amplement discuté par les philosophes au cours des âges, mais qui semble avoir fait l’objet d’un moindre intérêt au XXe siècle. Dans la société moderne, le pardon est exercé plus fréquemment qu’on ne se l’imagine et il est souvent octroyé dans la discrétion. La société canadienne, à l’instar d’autres sociétés d’ailleurs, mis à part quelques cas qui suscitent la sympathie collective, n’est pas spécialement disposée à octroyer facilement le pardon aux criminels.

Le criminel qui paie sa dette à la société n’est pas pour autant pardonné après avoir exécuté la peine qui lui a été imposée. Le pardon n’est pas une conséquence de l’exécution de la peine. Le pardon est plutôt conçu, dans l’ordre politique et juridique, comme étant l’expression d’une faveur exceptionnelle. […]”

(Our emphasis)

It should be kept in mind that Canadian penal law is derived from English written and common law. However, as Professor Dumont points out, the pardon is a power that is intimately connected with the monarchy:

“En common law, le pardon a toujours été intimement associé au pouvoir de punir et d’infliger un châtiment. Le pardon est d’abord un instrument royal; il est une manifestation de la suprématie du roi et l’expression de sa souveraineté. Par la suite, l’autorité royale déléguera cet élément de sa prérogative royale à quelques-uns de ses représentants, mais il s’agit encore d’un pouvoir intimement lié à la monarchie.”

(Our emphasis)

In Canada, the pardon “also derives its source from royal authority and is the object of legislative provisions that simply give expression to certain ways of exercising it.”

As indicated by the authors Béliveau and Vauclair, Canadian penal law “sets out two types of pardon, i.e., to employ the terminology used by the Supreme Court’s holding in Therrien, the type that derives from the exercise of royal clemency and the administrative type.”

A. Pardon that derives from the exercise of royal clemency

A pardon derived from the exercise of royal clemency “may be exercised under the royal prerogative or by virtue of law.” Section 749 of the Criminal Code stipulates that: “Nothing in this Act in any manner limits or affects Her Majesty’s royal prerogative of mercy.”

10 The Grand dictionnaire terminologique of the Office québécois de la langue française defines common law as follows: [TRANSLATION] “The set of non-written rules that make up English law, which rules were established over time by the courts in their rulings.”
11 H. DUMONT, prev., note 9, p. 540.
12 H. DUMONT, prev., note 9, p. 541.
13 Pierre BÉLIVEAU and Martin VAUCLAIR, Traité général de preuve et de procédure pénales, 18e édition, Montréal, Les Éditions Thémis, 2011, p. 1194, para. 2857.
14 P. BÉLIVEAU and M. VAUCLAIR, prev., note 13, p. 1194, para. 2858.
In the first case, the pardon derived from the exercise of royal clemency may be exercised under the royal prerogative. This power, known as the “Royal Prerogative of Mercy (RPM)”, is set out in section XII of the Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada and is defined as follows on the website of the Parole Board of Canada:

“[…is a discretionary power based on the ancient right of the British monarch to grant mercy. In Canada it is exercised by the Governor General or the Governor in Council (i.e., Federal Cabinet). It relates to forms of clemency, granted in exceptional circumstances in deserving cases involving federal offences.

The Governor General or the Governor in Council grants clemency upon recommendation from the Minister of Public Safety Canada or at least one other minister.”

The Supreme Court describes this prerogative as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”\textsuperscript{16}; “The royal prerogative of mercy is the only potential remedy for persons who have exhausted their rights of appeal and are unable to show that their sentence fails to accord with the Charter.”\textsuperscript{17}.

In the second case, a pardon may be granted under law, as set out in the Criminal Code. To this end, there are three types of pardon: free pardon, ordinary (partial) pardon and conditional pardon. The effects vary depending on the type of pardon granted:

“De même, l'article 748 [of the Criminal Code] permet à Sa Majesté, par le gouverneur général en conseil, d’accorder un pardon à une personne qui a été déclarée coupable d’une infraction. Dans l’arrêt Therrien, la Cour suprême a indiqué qu’il y a trois types de pardon, outre celui qui peut découler de la procédure de révision prévue à l’article 690. Premièrement, le pardon absolu. Dans un tel cas, le paragraphe 748(3) précise qu’une personne qui a reçu un pardon absolu du gouverneur général en conseil est réputée n’avoir jamais commis l’infraction qui en a fait l’objet. […]

Le deuxième type de pardon est celui qui est ordinaire et partiel, prévu par les paragraphes 748(1) et 748.1(1), « qui comporte la remise d'une sentence ou d'une partie de celle-ci sans remettre en question la culpabilité de la personne ». Enfin, le pardon peut être conditionnel, en vertu du paragraphe 748(2). Cette disposition permet de modifier la peine en l’assortissant de certaines conditions.”\textsuperscript{18}

(Our emphasis)

\textsuperscript{18} P. BELIVEAU and M. VAUCLAIR, prev., note 13, p. 1194 and 1195, para. 2859 and 2860.

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B. Administrative pardon

Penal law provides for another type of pardon: the administrative pardon. This type of pardon is referred to in the first paragraph of section 3 of the *Criminal Records Act* as “record suspension”:

« Sous réserve de l'article 4, toute personne condamnée pour une infraction à une loi fédérale peut présenter une demande de suspension du casier à la Commission à l'égard de cette infraction et un délinquant canadien — au sens de la Loi sur le transfèrement international des délinquants — transféré au Canada par application de cette loi peut présenter une demande de suspension du casier à la Commission à l'égard de l'infraction dont il a été déclaré coupable. »

“Subject to section 4, a person who has been convicted of an offence under an Act of Parliament may apply to the Board for a record suspension in respect of that offence, and a Canadian offender, within the meaning of the *International Transfer of Offenders Act*, who has been transferred to Canada under that Act may apply to the Board for a record suspension in respect of the offence of which he or she has been found guilty.”

(Our emphasis)

Professor Dumont explains the intent of the *Criminal Records Act* as follows:

“[…] la réhabilitation des condamnés qui se sont réadaptés après avoir exécuté leur sentence et à cet effet, elle crée un mécanisme qui permet à une personne condamnée d’obtenir un acte de réhabilitation et la radiation de son casier judiciaire.”

Section 2.1 of this Act grants the Parole Board of Canada “exclusive jurisdiction and absolute discretion to order, refuse to order or revoke a record suspension.”

Note that the *Safe Streets and Communities Act* (Bill C-10), assented to on March 13, 2013, amended the *Criminal Records Act*, in particular by replacing the term “réhabilitation” with “suspension du casier” in the French version of the Act, and the term “pardon” with “record suspension” in the English version.

On June 22, 2010, the Minister of Public Safety explained this substitution in the following terms during his testimony before the Senate Standing Committee on Legal and Constitutional Affairs:

“[…] the issue of personal forgiveness is not something for the state to do on behalf of victims. […] that is something victims do. The state has certain roles in assisting…”

20 H. DUMONT, prev., note 9, p. 555.
21 Short title of *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, S.C. 2012, c. 1.
the rehabilitation of convicted individuals, and I believe the term ‘record suspension’ more appropriately reflects the role of the state in that process.”

(References omitted, our emphasis)

In addition to this change, the Criminal Records Act was amended to extend the period of ineligibility for applying for record suspension. Section 4 of the Act stipulates a period of ineligibility ranging from 5 to 10 years (instead of 3 to 10 years), depending on the nature of the indictable offence, whether an offence punishable on summary conviction or a service offence.

The Safe Streets and Communities Act also made certain offences ineligible for record suspension.

As for the effects of a record suspension, section 2.3 of the Criminal Records Act stipulates that it:

“(a) is evidence of the fact that

(i) the Board, after making inquiries, was satisfied that the applicant was of good conduct, and

(ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant’s character; and

(b) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the Criminal Code, subsection 147.1(1) or section 227.01 or 227.06 of the National Defence Act or section 36.1 of the International Transfer of Offenders Act.”

(Our emphasis)

This section is substantially the same as section 5 of the Act, which was repealed by the Safe Streets and Communities Act and stipulates the effects of a pardon. Thus, we think that Professor Dumont’s remarks concerning these effects still apply:

“L’acte de réhabilitation est d’abord une attestation de bonne réputation; il est ensuite un « petit pardon » parce qu’il efface seulement les conséquences post-pénales d’une condamnation, et qui sont de nature d’une incapacité juridique créée par une loi fédérale. Il donne enfin lieu à la radiation du casier judiciaire.”

(Our emphasis)

22 Legislative Summary of Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts – Revised, Library of Parliament of Canada, Ottawa, Publication No. 41-1-C10-E, October 5, 2011, Revised 1, February 7, 2012.

23 H. DUMONT, prev., note 9, p. 564.
In this respect, here is an excerpt of the Supreme Court ruling in Therrien (Re):

“Accordingly, I find, as did the Court of Appeal, that an objective analysis of the Act does not support the appellant’s argument that the pardon retroactively wipes out his conviction. Professor Dumont accurately summarizes the essence of what I have said:

[TRANSLATION] It seems clear that the Criminal Records Act grants a pardon which is designed only to put an end to the negative effects of a conviction. An administrative pardon, which adopts the features of a partial and conditional pardon, is not equivalent to a retroactive acquittal, as a free pardon may be, by virtue of the Royal prerogative or the Criminal Code; accordingly, an administrative pardon does not logically result in retroactive annulment or neutralization of the conviction. [Emphasis in original.]”

(Our emphasis)

C. Discharge

Section 730(1) of the Criminal Code also provides a sui generis institution called discharge, [TRANSLATION] “which is characteristic of both acquittal and conviction”:

“Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2) [of the Criminal Code].”

(Our emphasis)

Béliveau and Vauclair define it in the following terms:

“L’absolution signifie qu’en dépit du verdict de culpabilité, aucune condamnation n’est enregistrée, de sorte que le prévenu est réputé ne pas avoir été condamné à l’égard de l’infraction. Toutefois, la déclaration ou le plaidoyer de culpabilité subsiste néanmoins; la personne devra donc répondre positivement à une question portant sur ce point plutôt que sur l’existence d’une condamnation. Dans le cas d’une absolution conditionnelle à une ordonnance de probation, si le contrevenant est trouvé coupable d’une nouvelle infraction commise pendant la période de probation, le juge pourra annuler l’absolution et infliger au contrevenant une peine pour l’infraction originale en plus de toute autre peine.”

(Our emphasis)

It should be noted that in the case of a discharge, files become confidential after a specific time period that ranges from one to three years, depending on the type of discharge granted:

26 H. Dumont, prev., note 9, p. 439.
27 P. Béliveau and M. Vauclair, prev., note 13, p. 1012, para. 2415.
“La personne qui fait l’objet d’une absolution, inconditionnelle ou conditionnelle, n’a pas à demander sa réhabilitation. […] En effet, l’article 6.1 [de la Loi sur le casier judiciaire] prévoit la confidentialité des dossiers un an après l’absolution si elle est inconditionnelle et trois ans après si elle est conditionnelle, alors que l’article 6 comporte une telle mesure dans le cas d’une personne réhabilitée. Toutefois, même si le paragraphe 730(3) du Code [criminel] précise qu’une personne absoute est réputée ne pas avoir été condamnée, elle bénéficie des effets de la réhabilitation uniquement après les délais prévus.”

(Our emphasis)

Lastly, given that a discharge does not wipe out a finding or plea of guilt, the Administrative Tribunal of Quebec recently held that:

“[13] Donc, l’absolution ne fait pas disparaître le fait d’avoir été reconnu coupable de l’infraction en cause, mais seulement la condamnation.

[14] Aussi, l’article 748(3) du Code criminel spécifie la conséquence du pardon :

748.(3) Lorsque le gouverneur en conseil accorde un pardon absolu à une personne, celle-ci est par la suite réputée n’avoir jamais commis l’infraction à l’égard de laquelle le pardon est accordé. (soulignement du Tribunal)

[15] En soi, l’absolution n’équivaut donc pas au pardon”.

(Our emphasis)

D. Effects of a pardon

Being granted a pardon can have consequences in professional law. Section 45 of Québec’s Professional Code stipulates that:

“The board of directors may refuse to issue a permit or to enter an applicant on the roll, or refuse any other application preceding admission to the profession, if the applicant

(1) has been the subject of a decision of a Canadian court finding him guilty of a criminal offence which, in the reasoned opinion of the board of directors, is related to the practice of the profession, unless he has obtained a pardon;

(2) has been the subject of a decision of a foreign court finding him guilty of an offence which, if committed in Canada, could have led to criminal proceedings and which, in the reasoned opinion of the board of directors, is related to the practice of the profession, unless he has obtained a pardon; […]

(Our emphasis)
Further, section 55.1 of the Code stipulates that: “The board of directors may, after giving the professional concerned an opportunity to submit observations, provisionally strike the professional off the roll or provisionally restrict or suspend his right to engage in professional activities if the professional has been the subject of a judicial decision described in subparagraph 1, 2, 5 or 6 of the first paragraph of section 45.”

It should be noted that the Professions Tribunal, in Grenier c. Avocats (Ordre professionnel des), 2008 QCTP 177, concluded that an absolute discharge is not equivalent to a pardon in the meaning of section 55.1 of the Code:

“[114] Par ailleurs, elle réitère ce qu’elle avait déjà énoncé dans Therrien (Re)[32]: ni l’absolution ni la réhabilitation ne permettent de nier l’existence d’une déclaration de culpabilité.

[115] Dans Therrien (Re) la Cour d’appel du Québec écrit :

« [76] En définitive, si le législateur fédéral avait voulu que la condamnation soit effacée, il l’aurait affirmé aussi clairement que dans l’article 748 (3) C.cr. [...] »[33]

[116] Que faut-il retenir de tout cela en application aux faits du présent dossier?

[117] L’article 55.1 (1°) du Code confère compétence au Bureau (ici le Comité) de faire enquête sur le cas d’un professionnel ayant fait l’objet d’une décision d’un tribunal canadien le déclarant coupable d’une infraction criminelle et non à l’égard d’un professionnel ayant fait l’objet d’une condamnation criminelle.

[118] Au plan des principes, il n’y a évidemment rien qui justifie de distinguer autrement que ne le fait l’état du droit sur la question de la distinction entre une déclaration de culpabilité et une condamnation.

[119] La même disposition crée une exception qu’il faut lire et comprendre comme suit : le Comité n’a pas compétence pour enquêter sur un professionnel ayant fait l’objet d’une décision d’un tribunal canadien le déclarant coupable d’une infraction criminelle s’il a obtenu le pardon.

[120] Or, le pardon résultant de l’absolution en vertu de l’article 730 du Code criminel n’a que des effets prospectifs et n’efface pas la déclaration de culpabilité.

[121] Par conséquent, il ne peut s’agir que d’un pardon ayant pour effet de porter atteinte à la déclaration de culpabilité elle-même.

[122] Dans l’arrêt Ville de Montréal, précité, la Cour suprême postule que le concept de pardon, à moins d’indication contraire, s’entend du pardon selon l’état du droit au moment de son application.

[123] Dans l’état actuel du droit, seul le pardon absolu en vertu de l’article 748 (3) du Code criminel a un effet sur la déclaration de culpabilité en ce que celui qui en bénéficie est réputé n’avoir jamais commis l’infraction.
[124] Il se peut qu’une telle interprétation s’avère peu satisfaisante en raison particulièrement des cas rares où l’exception s’appliquera. Il n’en demeure pas moins que c’est ainsi que le législateur, présumé connaître l’état du droit, choisit de s’exprimer notamment lorsqu’il modifie l’article 55.1 en 2004[34], trois ans après l’arrêt de la Cour suprême du Canada dans Therrien.”

(Our emphasis)

Furthermore, with regard to the effects of such a pardon in professional law, the Québec Court of Appeal held in what is commonly referred to as the Brousseau ruling:

“Rappelons, par exemple, que depuis le 15 janvier 2001 le mis en cause peut faire une demande de pardon. Même si on ne sait s’il le fera ou, le cas échéant, s’il l’obtiendra, il est certain que l’obtention d’un pardon constitue une preuve importante de réhabilitation sociale. Certes la Loi sur le Barreau n’en fait pas une exigence pour être admis à l’École du Barreau. Un candidat ne devrait donc pas voir sa demande rejetée pour la seule raison qu’il possède un casier judiciaire. [...] À l’inverse, toutefois, dans l’état actuel de la loi, l’obtention d’un pardon ne constitue pas une garantie que la demande d’admission d’un candidat sera automatiquement acceptée.”

(Our emphasis)

3. PARDON IN DISCIPLINARY LAW

Although it does not exist in Québec’s professional system, the pardon does exist, in different forms, in other professional systems, both in Canada and the United States. Thus, certain professional orders or similar organizations borrowed on penal law to introduce the pardon into disciplinary law.

A. Orders or organizations having introduced the pardon into disciplinary law

1. In the United States

In the United States, certain professional orders and similar organizations grant various forms of disciplinary pardons.

The Kentucky Board of Nursing is a pioneer in terms of disciplinary pardons in the United States and grants a form of pardon known as an expungement. Richard Steinecke, of the Ontario law firm Steinecke Maciura LeBlanc, describes the approach in these terms:

“The Kentucky Board of Nursing permits a member to obtain the removal of their disciplinary findings ten years afterwards if it resulted in only a reprimand and twenty years afterwards for all other findings. So long as the member has had no disciplinary history since the finding (including those dealt with informally), the member will be able to clear his or her record. The expungement provision is intended to promote fairness to members and to facilitate rehabilitation. This approach is similar to that taken by some US states in criminal courts.

Expungement is far reaching. Not only is the information removed from the public registry, it is removed from all files held by the regulator. This involves some administrative effort to locate all paper and electronic references to the finding. One copy of the finding is put in a sealed envelope in a secure location and cannot be opened, even by the regulator, without a court order.

The Kentucky Board of Nursing advises members that expungement means the member is in the same position as if the finding had never been made. If the member is asked on an application or renewal form if they have ever been the subject of a finding, they can answer ‘no.’

One problem that has not yet been resolved is that a federal database refuses to remove the information about the finding. Discussions are still ongoing.”

(Our emphasis)

The expungement granted by the Kentucky Board of Nursing is an original and innovative concept aligned on the concept of “Just Culture.”

Based on penal law, the expungement is meant to facilitate the pardon of a professional having received a disciplinary sanction, specifically in the case where the professional has maintained a clean disciplinary record for a certain number of years.

Stipulated in federal legislation, this form of pardon has been available since 1995. It should be noted that the law was amended in 2003 and 2008:

“The regulation was recently amended again in 2008 to include all Agreed Orders and Decisions that were at least 20 years old, with the same provisions as before: no subsequent disciplinary actions and all terms had been met. This includes cases that resulted in probation, suspension, denial of reinstatement, or revocation. I believe it is safe to say that the motivation for this change came from our comfort level with expungements over the previous several years. We were ready to take the plunge on expunging the more serious cases if the nurse had maintained a clean record for so long. […]

We also changed the time frame to expunge Consent Decrees from 7 years to 5 years.”

(Our emphasis)

This pardon is granted in certain cases, once a given period of time has elapsed, regardless of the type of infraction or sanction. It is automatic, a form of non-discretionary power, and is granted when the applicable conditions have been met. Namely, these conditions are to have maintained a clean record since 10 or 20 years (depending on the type of infraction), to not have been condemned for a subsequent disciplinary infraction and to have met all of the conditions imposed by the order.

32 Richard STEINECKE, Grey Areas, Steinecke Maciura LeBlanc, Toronto, September 2010, no. 149.
34 Excerpt from a presentation given by Mr. Nathan Goldman, General Counsel of the Kentucky Board of Nursing, in 2009 before the National Council of State Boards of Nursing (NCSBN) during the Attorney/Investigator Symposium.

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An expungement seals all disciplinary files, which are consequently considered to have never existed. However, access may be granted to the files if ordered by a court and the information remains recorded in the database of the National Federation of Licensed Professional Nurses. This pardon may therefore be considered as a form of “absolute pardon.”

It should be noted that expungements are rarely granted. There were only three cases between 1995 and 2003, 15 between 2003 and 2008 and seven from 2008 to 2009. Most applications involved reprimands or drug use.

Moreover, other orders and similar organizations in Kentucky grant expungements, as pointed out in 2009 by Mr. Nathan Goldman, General Counsel of the Kentucky Board of Nursing:

“We at the Board of Nursing pioneered the concept of expungements in Kentucky, but it’s being picked up by other boards. In 2002, a bill was passed that allowed expungement of minor violations for pharmacists, dentists, optometrists, and physicians.”

(Our emphasis)

It should be noted that these professional boards are authorized to grant expungements under Chapter 311 Physicians, Osteopaths, Podiatrists and Related Medical Practitioners of the Kentucky Revised Statutes 311.275.

A number of orders and similar organizations in other American states also grant expungements. Here are a few examples:

- The Louisiana State Board of Dentistry has granted expungements since December 2007. Section 322 of the Louisiana Dental Practice Act stipulates:

  “A. A dentist may apply for the expungement of a first time advertising violation provided:
  1. a period of three years has elapsed from the date the consent decree was executed by the board president or order issued after a disciplinary hearing;
  2. the dentist has not had any subsequent disciplinary actions of any kind taken against him by the board or any other licensing or certifying agency since the initial advertising violation in question;
  3. has no disciplinary actions or investigations pending at the time of request;
  4. the board will retain all records relative to the first advertising violation, and it may use same in connection with future disciplinary proceedings, if any.
  AUTHORITY NOTE: Promulgated in accordance with R.S. 37:760(8).
  HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Dentistry, LR 33:2562 (December 2007).”

  (Our emphasis)

- The Delaware Lawyers’ Rules of Disciplinary Procedure stipulates expungements in Rule 9:

  “(i) Limited expungement of disciplinary record. – A lawyer who has received a single private admonition and has received no other disciplinary sanction for a period of 10 years after the imposition of that sanction may request that the

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35 Excerpt of a presentation given by Mr. Nathan Goldman, General Counsel of the Kentucky Board of Nursing, in 2009 before the National Council of State Boards of Nursing (NCSBN) during the Attorney/Investigator Symposium.

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sanction be expunged from the lawyer’s disciplinary record, for the sole purpose of precluding reference to that sanction in any future disciplinary proceeding. Any such request shall be in writing and shall be directed to the Administrative Assistant, who shall take the appropriate steps in having the sanction expunged from the lawyer’s disciplinary record; provided, however, that no request for expungement shall be granted when there is a disciplinary matter relating to the lawyer that is pending at any stage of the proceedings described in these Rules.”

(Our emphasis)

- The Act to amend the Clinical Social Work and Social Work Practice Act and the Optometric Practice Act of 1987 of Illinois also stipulates expungement;

- The Maryland Board of Physicians took part in a study on this question and concluded:

  “The Board participated in the study of possible expungement of disciplinary actions by the health occupations licensing boards; all concluded that expungement is not appropriate.”

- The Ohio Occupational Therapy, Physical Therapy, and Athletic Board also discussed the notion of expungement:

  “The Section discussed the Executive Director’s findings on whether other state physical therapy boards allow for the expungement of discipline. Based on the findings, the Section was in agreement to not allow for expungement of disciplinary records.”

- According to a comparative study conducted among the professional nursing boards by the Texas Board of Nursing, 28 out of 34 boards surveyed have no expungement process. The study also reported:


36 Texas Board of Nursing Feasibility Study on Deferral of Final Disciplinary Actions, Texas Board of Nursing, January 2010.

2. In Canada

The Canadian approach

In Canada, a few orders and similar organizations grant a form of disciplinary pardon, but it appears that none grant an “absolute” pardon such as the expungement of the Kentucky Board of Nursing. Richard Steinecke describes the Canadian approach in this regard:

“Generally where pardons are offered in Canada, it is usually restricted to the less serious matters and often still leaves some discretion in the regulator to decline the request. Even then, the finding is still usually publicly accessible (e.g., if one
searches the newsletters or databases of previous decisions). Such ‘pardons’ do not involve the removal of the information from the regulator’s files, which may still be used if a similar concern arises in the future. And such pardons do not change the fact that a finding was made.

There are a number of reasons for the Canadian approach. Transparency of the disciplinary process is an important value. Public access to findings helps ensure informed client choice of practitioners. Indeed, many members of the public would view themselves as having a ‘right’ to this information. It is difficult to remove all records of the finding, particularly in the internet age.

Expungement is rare, and may even be non-existent, in Canada. In fact, the trend among many Canadian regulators is to put more, not less, information about disciplinary findings in increasingly accessible media (e.g., websites) for longer periods of time (often forever). A few regulators permit the removal of some findings from the public register after a suitable period of time. In fact, as recently as September 29, 2010, the Professional Regulation Committee of the Law Society of Upper Canada saw no need to introduce a system of pardons for its members.”  

(The Law Society of Upper Canada (Ontario)

With respect to the position of The Law Society of Upper Canada, here is an excerpt from the Report of September, 2010 of the Society’s Professional Regulation Committee (para. 37 and 40–42), and an excerpt from Appendix 5 (para. 38–40) of this report that provides their position in this regard:

“37. At the May 27, 2010 Convocation, during discussion of the enhanced licensee directory on the Law Society’s website, benchers Bradley Wright and Gary Gottlieb raised the issue of whether a discipline record of a lawyer or paralegal should exist forever, or whether, after some time, a pardon, for example, could be issued upon application by the licensee. Mr. Gottlieb asked whether the Committee could consider this issue. The Chair agreed, and the matter was referred back to the Committee.

[...]

40. The Committee’s recommendation adopted by Convocation in 2007 was that there are no circumstances in which a discipline or conduct record should be vacated after some period of time. The motion carried by a vote of 33 to 9.

41. On September 15, 2010, the Committee concluded that the issues raised in the May 2007 report supporting Convocation’s 2007 decision continue to support that decision, and that nothing in the professional regulation landscape has changed that would require this issue to be revisited. Moreover, as noted in the 2007 report, the Law Society Act now requires the Law Society to maintain a register available for public inspection that contains a variety of regulatory information about a licensee. The Committee acknowledged that the trend among professional regulators is to

37 Richard Steinecke, Grey Areas, Steinecke Maciura LeBlanc, Toronto, September 2010, no. 149.
make disciplinary decisions available through a public register as a matter of increased transparency.\textsuperscript{13}

42. The Committee could see no reason to change Convocation’s 2007 decision and determined that no further examination of this issue is required.

“At a time when there are increased expectations that professional regulation will be effective, transparent, and accountable, the Committee views a policy by which discipline or conduct records may be vacated as untenable. As the Supreme Court of Canada noted in Finney, a lawyer’s discipline history is a relevant factor in assessing risks to the public.

39. On those occasions when the Law Society is scrutinized for its effectiveness as a regulator, it should be prepared to justify its policies in light of its public interest mandate. In the Committee’s view, the Society will not be criticized in the public realm for maintaining a record of those members who have breached professional conduct, but may well be criticized for qualifying the fact of the breach or removing it entirely from its public records.

40. Membership in the Law Society is a privilege, not a right. With that privilege comes responsibilities collectively and individually to accept regulation and the consequences that follow when breaches occur. Maintaining disciplinary records without qualification or amendment, as is currently the practice, is the responsible way for the Law Society to deal with this information. A transparent approach to regulation, including a complete and accessible record of members’ discipline, will help to support effective self-regulation of the legal profession.”

(Our emphasis)

Regulated Health Professions in Ontario

The \textit{Regulated Health Professions Act, 1991}, S.O. 1991, c. 18, that governs the 23 regulated health professions in Ontario, stipulates—in Schedule 2, \textit{Health Professions Procedural Code}\textsuperscript{38}—a form of “administrative pardon” or a pardon-like process.\textsuperscript{39}

Section 23 of the \textit{Health Professions Procedural Code} stipulates that the “Registrar” maintains a register that contains the following disciplinary information:

(2) The register shall contain the following:
[...]
6. A notation of every matter that has been referred by the Inquiries, Complaints and Reports Committee to the Discipline Committee under section 26 and has not been finally resolved, until the matter has been resolved.
7. The result, including a synopsis of the decision, of every disciplinary and incapacity proceeding, unless a panel of the relevant committee makes no finding with regard to the proceeding.

\textsuperscript{38} Under section 4 of the Regulated Health Professions Act, 1991, the Code is deemed to be part of each health profession Act: “4. The Code shall be deemed to be part of each health profession Act. c. 18, s. 4.”

\textsuperscript{39} Term employed by Mrs. Debbie Tarshis, WeirFoulds LLP, during the Publication: Transparency vs. Privacy conference presented as part of the Annual Convention of the Council on Licensure, Enforcement and Regulation (CLEAR).

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8. A notation of every finding of professional negligence or malpractice, which may or may not relate to the member’s suitability to practise, made against the member, unless the finding is reversed on appeal.

9. A notation of every revocation or suspension of a certificate of registration.

10. A notation of every revocation or suspension of a certificate of authorization.

11. Information that a panel of the Registration, Discipline or Fitness to Practise Committee specifies shall be included.

12. Where findings of the Discipline Committee are appealed, a notation that they are under appeal, until the appeal is finally disposed of.

13. Where, during or as a result of a proceeding under section 25, a member has resigned and agreed never to practise again in Ontario, a notation of the resignation and agreement.

14. Information that is required to be kept in the register in accordance with the by-laws. 2007, c. 10, Sched. M, s. 28.”

(Our emphasis)

Paragraph 11 of this section stipulates that the Registrar shall refuse to disclose information of a disciplinary nature if the listed conditions are met:

“(11) The Registrar shall refuse to disclose to an individual or to post on the College’s website information required by paragraph 7 of subsection (2) if,
(a) a finding of professional misconduct was made against the member and the order made was only a reprimand or only a fine, or a finding of incapacity was made against the member;
(b) more than six years have passed since the information was prepared or last updated;
(c) the member has made an application to the relevant committee for the removal of the information from public access because the information is no longer relevant to the member’s suitability to practise, and if,
(i) the relevant committee believes that a refusal to disclose the information outweighs the desirability of public access to the information in the interest of any person affected or the public interest, and
(ii) the relevant committee has directed the Registrar to remove the information from public access; and
(d) the information does not relate to disciplinary proceedings concerning sexual abuse as defined in clause (a) or (b) of the definition of ‘sexual abuse’ in subsection 1 (3). 2007, c. 10, Sched. M, s. 28.”

(Our emphasis)

Therefore, a member who is the subject of a finding of professional misconduct and has been reprimanded or fined may, if over six years have elapsed since the information was prepared or last updated, apply to have certain disciplinary information removed from public access.

It should also be emphasized that section 94 of the Health Professions Procedural Code stipulates that the “Council may make by-laws relating to the administrative and internal affairs of the College.” Thus, section 50.1 of the College of Physicians and Surgeons of Ontario’s General By-Law stipulates that the information contained in the register is public, except as specified:

“50.1 (1) All information contained in the register, other than a member’s,
(a) preferred address for communications from the College,
(b) e-mail address,

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(c) date of birth, and
(d) place of birth,
is designated as public except that,
(e) if,
(i) a finding of professional misconduct was made against a member,
(ii) the penalty imposed was a reprimand or a fine, and
(iii) at least six years have elapsed since the penalty order became final, the finding
of misconduct and the penalty are no longer public information; and
(f) if,
(i) terms, conditions or limitations were directed to be imposed upon a member’s
certificate of registration by a committee other than the discipline committee, and
(ii) the terms, conditions or limitations have been removed, the fact and content of
the terms, conditions or limitations are no longer public information
(2) The information contained in the register which is designated as public shall be,
(a) capable of being printed promptly; and
(b) available in printed form to any person during the normal hours of operation of
the offices of the College.
(3) The registrar may give any information contained in the register which is
designated as public to any person in printed or oral form.”

(Our emphasis)

Ontario College of Teachers

As concerns the teaching profession, the Ontario College of Teachers Act, 1996, S.O. 1996, c. 12, sets out the regulation:

“23. (1) The Registrar shall maintain a register. 1996, c. 12, s. 23 (1); 2009, c. 33, Sched. 13, s. 2 (9).
(2) Subject to any by-law respecting the removal of information from the register,
the register shall contain,
(a) each member’s name and the class of certificate of qualification and registration
and any certificates of additional qualifications that the member holds;
(b) the terms, conditions and limitations imposed on each certificate of qualification
and registration;
(c) a notation of every revocation, cancellation and suspension of a certificate of
qualification and registration;
(d) information that a committee required by this Act directs shall be included; and
(e) information that the by-laws prescribe as information to be kept in the register.
1996, c. 12, s. 23 (2); 2001, c. 14, Sched. B, s. 3 (1); 2004, c. 26, s. 3 (1); 2009,
c. 33, Sched. 13, s. 2 (3, 10).”

(Our emphasis)

Furthermore, section 25.01 of the College’s Bylaws stipulates that the register of the College must also include:

“25.01 In addition to the information prescribed by section 23 of the Act, the
register shall contain:
(a) each member’s College registration number
(b) subject to any order of the Discipline or Fitness to Practise Committees, if a
finding of professional misconduct, incompetence or incapacity has been made:
(i) that fact

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Pursuant to paragraph 5 of section 30 of the *Ontario College of Teachers Act, 1996*:

“Where the Discipline Committee finds a member guilty of professional misconduct, it may, [...], make an order doing one or more of the following:  
1. Requiring that the member be reprimanded, admonished or counselled by the Committee or its delegate and, if considered warranted, directing that the fact of the reprimand, admonishment or counselling be recorded on the register for a specified or unlimited period.

[...]”  
(Our emphasis)

Section 26 of the College’s Bylaws stipulates that certain disciplinary information shall be removed from the register if at least three years have elapsed since the order became final:

“26.01 Notwithstanding section 23 of the Act, and other provision of the bylaws:  
a. if:  
i. a finding of professional misconduct was made against a member, and  
ii. the penalty imposed was limited to a reprimand, admonishment, counselling, or a fine, and  
iii. at least three (3) years have elapsed since the order became final, the finding of professional misconduct and the order shall be removed from the register, subject to any order of the Discipline Committee;  
b. if:  
i. a finding of professional misconduct, incompetence or incapacity was made against a member or conditions were imposed by the Registration Appeals Committee or the Registrar;  
ii. the order imposed was limited to terms, conditions or limitations imposed upon a member’s certificate, and  
iii. the terms, conditions, or limitations have been fulfilled or removed from the certificate the content of the terms, conditions, or limitations and related finding if applicable shall be removed from the register, subject to any order of the Discipline, Fitness to Practise, or Registration Appeals Committees.”  
(Our emphasis)

The Honorable Patrick J. LeSage, C.M., O.Ont., Q.C. conducted an independent examination of the inquiry and disciplinary procedures, consequences of decisions, and Dispute Resolution Program of the Ontario College of Teachers. In a report titled *Review of the Ontario College of Teachers Intake, Investigation and Discipline Procedures and Outcomes, and the Dispute Resolution Program*, published on June 7, 2012, the former Ontario Chief Justice specifies in this regard:

40 Titled *Review of the Ontario College of Teachers Intake, Investigation and Discipline Procedures and Outcomes, and the Dispute Resolution Program*.  
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“The College of Physicians and Surgeons of Ontario (“CPSO”) by-laws provide that a finding of professional misconduct and a penalty of reprimand or fine is not removed from the register until at least six years have elapsed since the penalty order became final.¹⁴¹

The Ontario College of Teachers’ by-laws provide for removal from the register after three years (subject to the order of a committee) and applies to matters of professional misconduct, incompetence or incapacity where a reprimand, admonishment, counselling or fine have been imposed. On the other hand, the CPSO removal applies only to a reprimand or fine and all other matters remain recorded on its register.

I recommend that unless the Committee orders a longer period, the finding is to be removed from the register if at least three years have elapsed, from the date of a finding of professional misconduct, incompetence or incapacity, if a penalty of reprimand, admonishment, counselling or fine have been imposed.

If a suspension or revocation is imposed, it shall remain on the register.

[...]

Recommendation 38: College by-law s. 26.01 and s. 30(5)(#1) of the Ontario College of Teachers Act should be amended to provide that at least three years must elapse from the date of a finding of professional misconduct, incompetence or incapacity, if a penalty of reprimand, admonishment, counselling or fine have been imposed, before the finding is removed from the register. Suspensions and revocations shall remain on the register. (Page 60).”

Other law societies in Canada

Other law societies and similar organizations in Canada have also begun contemplating the notion of the disciplinary pardon.

For example, the Law Society of Manitoba grants a form of “administrative” pardon.

A pardon is evidence of the fact that the Society no longer considers the censure or conviction to reflect adversely on the member’s character (Rule 5-101.1(2) of the Law Society of Manitoba).
The Society’s **Rule 5-101.1(3)** sets out rehabilitation conditions:

> “At the time a member makes an application under subsection (1), the following criteria must be satisfied:
> a) ten years have passed since the date of the censure or conviction;
> b) since the date of the censure or conviction the member has not accepted any other formal cautions and has not been found guilty of any charges of professional misconduct, conduct unbecoming a lawyer or student or incompetence;
> c) there are no charges pending against the member;
> d) there are no complaints about the member under investigation;
> e) the member has paid the society all money owing by the member to the society; and
> f) a discipline panel has not granted any previous application by the member under this rule.”

(Our emphasis)

A member can apply for a pardon to the Society’s Discipline Committee under certain circumstances (Rule 5-101.1(1) of the Law Society of Manitoba):

> “a) a member’s conduct was censured by the Complaints Investigation Committee and the member accepted a formal caution; or
> b) a discipline panel found a member guilty of professional misconduct or conduct unbecoming a lawyer or student or incompetence and imposed a reprimand or fine, with or without an order of costs, and no other order, action or penalty was imposed on the member by the discipline panel as a result of that conviction […]”

(Our emphasis)

Rules 5-101.1(4) and (5) of the Society prescribe that: “Where the chairperson of the discipline committee is satisfied that the applicant has met the criteria set out in subsection (3), the chairperson must establish a discipline panel to hear the application” and “A panel may grant a pardon if it determines that: a) the member has met all the criteria set out in subsection (3); and b) under all the circumstances, a pardon is appropriate.”

With regard to the effect of a pardon, Rule 5-101.1(7) of the Society stipulates:

> “A determination by a discipline panel to grant a pardon does not set aside the censure or conviction or relieve the society of any obligation to disclose the censure or conviction under the Act or these rules. Any disclosure of a censure or conviction that has been pardoned must also disclose that the member has received a pardon and that the Society no longer considers the censure or conviction to reflect adversely on the member’s character.”

(Our emphasis)

To this day, few pardon applications have been filed with the Law Society of Manitoba. Only three such applications were filed in 2012.

Finally, it should be noted that other law societies and similar organizations in Canada have begun reflecting on the access to disciplinary information and the disclosure of such information.
B. What can we draw from these experiences?

In the United States, a certain number of professional orders and similar organizations grant various forms of disciplinary pardon. One of these—the expungement—is automatic, or a form of non-discretionary power, that may in certain cases apply to all types of infractions and sanctions.

Despite efforts made by the order or organization with respect to the removal of information or destruction of pertaining documents once an expungement has been granted, data may remain accessible and be disclosed.

In Canada, a few orders or similar organizations grant a form of disciplinary pardon, but none of them would appear to grant “absolute” pardons such as the expungements granted by the Kentucky Board of Nursing.

In Canada, a few professional orders and similar organizations have begun reflecting on the notion of “disciplinary pardon,” one of which has declared its opposition to the idea. It is a factor to take into consideration, specifically when it comes to labour mobility in a context characterized by the liberalization of trade and recognition of prior learning and credentials\(^4\). Indeed, increased labour mobility necessitates a higher degree of information sharing among the professional orders and similar organizations in Canada.

As for the Regulated Health Professions in Ontario, it is neither automatic nor a form of non-discretionary power. It is up to a committee to decide whether or not to enjoin the “registrar” to refuse public access to disciplinary information.

The discipline committee of the Ontario College of Teachers may order—once it has concluded that a member has committed professional misconduct and ordered the issue of a reprimand, warning or counsel by the committee or its delegate—that the disciplinary action be entered on the roll for a determined or indeterminate period of time. Thus, the College’s discipline committee may determine the period during which the disciplinary action is entered on the roll.

As for the “administrative” pardon granted by the Law Society of Manitoba, note that members themselves must apply for a pardon. The application is made to the Law Society’s discipline committee rather than to the Law Society directly. Furthermore, it is up to the chairperson of the discipline committee to decide to set up a discipline panel to hear the application, if he considers that the applicant meets the criteria. In addition, the discipline panel’s decision is appealable.

Finally, this type of pardon does not set aside the censure or conviction or relieve the Law Society of any obligation to disclose the censure or conviction. Indeed, when the Law Society communicates this information, it must also disclose that the member has received a pardon and that the Law Society no longer considers that the censure or conviction reflects adversely on the member’s reputation.

Ultimately, professional orders and similar organizations approach the notion of “disciplinary pardon” in strikingly different manners.

\(^4\) Brief produced by the CIQ on labour mobility and recognition of prior learning and credentials, October 2006, p. 12.
4. ADDITIONAL CONSIDERATIONS

A. Values, perceptions and expectations of Québec society

What can be said of Quebeckers’ values, perceptions and expectations regarding professionals and professional orders? To this effect, it is interesting to refer to a presentation given by Mr. Sylvain Gauthier, vice-president of CROP, in which he described the findings of an omnibus survey carried out in September 2012 on the emerging values of Quebeckers from the perspective of the following major trends concerning Quebeckers’ values:

- ethical consumption;
- daily ethics;
- cynicism and criticism of institutions;
- criticism/trust with respect to big business;
- government involvement;
- lack of and need to exert control (fatalism).

Mr. Gauthier starts off by presenting the following “main findings”:

[TRANSLATION] “We note that there is little public awareness of the different professional orders in Québec;

The level of public knowledge of the role of professional orders is limited and relatively weak.

We also observe a lack of knowledge about the system that regulates the professions in Québec.”

Mr. Gauthier affirmed that: [TRANSLATION] “Quebeckers’ opinions and perceptions of professionals and professional orders are influenced by their values.”

With regard to the measures taken to increase ethical professional practice, the survey reveals that 80% of Quebeckers believe that the penalties issued to professionals who are found guilty of professional misconduct are not sufficiently severe (65%) or not at all severe (15%). In addition, the survey shows that professional misconduct affects the trust of 86% of Quebeckers; they affirmed they would be less trusting of a professional who had committed professional misconduct than a professional with no disciplinary history.

With regard to daily ethics, Mr. Gauthier stated that: [TRANSLATION] “Quebeckers appear to be less and less interested in adopting ethical behaviour in their everyday lives. On the other hand, they expect strict compliance with all the moral principles when it comes to the professional orders.”

The survey also reveals that 39% of Quebeckers believe that the professional orders protect their members, 11% believe they protect the public, while 50% believe they protect both. As for their trust in the professional orders, 78% of Quebeckers are quite trusting (70%) or entirely trusting (8%) of the orders. A quarter of Quebeckers (25%) state that they usually check whether a professional they intend to consult is a member of a professional order.

With regard to Quebeckers’ sense of fatalism, Mr. Gauthier concluded that: [TRANSLATION] “The professional orders can be perceived as among the forces that shape their lives because of their involvement in vital areas such as health, law and legislation, science, engineering, etc. The CIQ
and the professional orders would do well to highlight their role of representation and defence of the public; this would reassure Quebeckers about certain social forces they perceive as threatening."

It is important to reflect on the evolution of Quebeckers’ values as well as their perceptions and expectations toward professionals and professional orders.

B. Access to information

Since September 14, 2007, professional orders in Québec are governed by a “hybrid” access to information system. Indeed, sections 108.1 and 108.2 of the **Professional Code** stipulate:

"108.1. The Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), except sections 8, 28, 29, 32, 37 to 39, 57, 76 and 86.1 of that Act, applies to documents held by a professional order for the purpose of supervising the practice of the profession in the same way as it applies to documents held by a public body.

It applies in particular to documents concerning professional training, admission, the issue of permits, specialist’s certificates or special authorizations, discipline, conciliation and arbitration of accounts, the supervision of the practice of the profession and the use of a title, professional inspection and indemnification, as well as to documents concerning the adoption of standards relating to those matters.

108.2. The Act respecting the protection of personal information in the private sector (chapter P-39.1) applies to personal information held by a professional order, other than information held for the purpose of supervising the practice of the profession, in the same way as it applies to personal information held by a person carrying on an enterprise.”

(Our emphasis)

However, sections 108.7 and 108.8 of the **Professional Code** stipulate that certain types of disciplinary information are considered as public information:

"108.7. The information contained in the following documents of an order is also public information:

[...]

(4) the hearing roll of a disciplinary council; and

(5) the record of a disciplinary council, from the date on which the hearing is held, subject to any order banning disclosure, access to or the publication or release of information or documents issued by the disciplinary council or the Professions Tribunal under section 142 or 173.

The name of a member against whom a complaint has been made and the subject of the complaint is also public information as of service of the complaint by the secretary of the disciplinary council.

108.8. The following is also public information:
(1) the information referred to in sections 46.1 and 46.2;

[...]"

Also, section 180 of the *Professional Code* provides for the publication of certain decisions of disciplinary councils. In the case where a professional is temporarily or permanently struck off his order’s roll and said professional’s right to practise is restricted or suspended or his permit or specialist’s certificate is revoked, said order must send a notice of the final decision of the disciplinary council or the Professions Tribunal, as the case may be, to each member of the order to which a professional belongs.

Furthermore, the same section stipulates that where the professional has been permanently struck off or has had his right to practise permanently restricted or suspended or his permit or specialist’s certificate revoked, the secretary of the disciplinary council must publish the notice in a newspaper having general circulation where the professional’s professional domicile is located. A notice may also be published in a newspaper having general circulation in any other place where the professional has practised or could practise.

In addition, on April 6, 2011, the draft *Regulation respecting the distribution of information and the protection of personal information applicable to professional orders* was published in the *Gazette officielle du Québec*. The purpose of this bill, which is not yet been passed, is:

“[...] The draft Regulation promotes access to information held by professional orders and establishes special measures to protect personal information.

To that end, the draft Regulation identifies the documents or information made accessible by law that must be distributed through a website by professional orders. It also provides measures to protect personal information in particular in connection with computer systems, systems to provide services electronically, surveys and video surveillance. Lastly, it designates the persons in charge of implementing those obligations.”

(Our emphasis)

Section 3 of the bill specifies that orders must publish particular disciplinary information through a website:

“3. A professional order must distribute the following documents and information through a website, insofar as the documents and information have been made accessible by law:

[...]

(9) for each person entered on the roll of the order, taking into account the restriction imposed by the second paragraph of section 108.8 of the Professional Code:


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(a) the information referred to in subparagraphs 1 to 6 and subparagraph 9 of the first paragraph of section 46.1 of the Code;

(b) the information referred to in subparagraphs 7 and 8 of that section, for every suspension or limitation of the right to practise or declaration of disqualification that is in effect at the time of distribution;

[...]

(17) the hearing roll of the disciplinary council;

(18) notice of a decision imposing a temporary or permanent striking off the roll, a temporary or permanent restriction or suspension of the right to practise or a revocation of the permit or specialist’s certificate during the period in which the penalty is effective;

[...]

(Our emphasis)

By virtue of the system governing access to information that applies to Québec’s professional orders, the latter are subject to strict obligations when it comes to the access, publication and eventual disclosure of disciplinary findings.

It should also be noted that some orders already publish the decisions of their disciplinary councils on their websites, while others publish them on the Canadian Legal Information Institute’s website at http://www.canlii.org/en/qc/index.html. In addition, the decisions of all the orders are available on the website of the SOQUIJ (Société québécoise d’information juridique) and accessible for a fee via a database, the [TRANSLATION] “database of the Office des professions, created in partnership with the Office des professions du Québec”43, that contains the decisions of the professional orders’ disciplinary councils since June 1, 200144, those of the Professions Tribunal, and decisions of judicial tribunals that have been appealed or subject to judicial review. Last, the decisions of some orders are freely accessible in a database on SOQUIJ’s website at http://www.jugements.qc.ca.

In Québec’s professional system, decisions of the disciplinary councils can be appealed at the Professions Tribunal. The Tribunal may “confirm, alter or quash any decision submitted to it and render the decision which it considers should have been rendered in first instance” (section175 of the Professional Code). Similarly, the Superior Court may, under certain exceptional circumstances, review the decision of the Professions Tribunal. In addition, the decision of the Superior Court may be appealed before the higher courts.

The decisions of all these bodies are published on a variety of websites. For instance, the Tribunal’s website announces that since 2001, all of its decisions are available at http://www.jugements.qc.ca.

The information that has been made available in this way, and the decisions of the different aforementioned jurisdictions cannot be made to disappear completely and definitively, especially

43 Excerpt from the SOQUIJ’s website: http://soquij.qc.ca/tr/services-aux-professionnels/catalogue-des-produits-et-services-soquij/14-banques-de-decisions.

44 Excerpt from the SOQUIJ’s website: http://soquij.qc.ca/tr/services-aux-professionnels/catalogue-des-produits-et-services-soquij/14-banques-de-decisions.
when they have been published on the Internet, even if the Order were to invest considerable effort to this end. This should therefore be examined as part of a reflection on the “disciplinary pardon.”

CONCLUSION

As part of a reflection on disciplinary pardon, several factors must be taken into consideration. This report describes some of the factors identified by the CIQ’s focus group on disciplinary pardon.

From the onset, one finding emerges: Québec’s professional system does not recognize the notion of disciplinary pardon. On the other hand, various forms of disciplinary pardon are granted by other professional systems in both Canada and the United States. In fact, certain systems borrowed on penal law to introduce this notion into disciplinary law. As the saying goes, you need to know where you come from to know where you are going. Consequently, this report deals with the particular nature of disciplinary law and attempts to situate the notion of pardon in Canadian penal law.

Outside of Québec, the professional orders and similar organizations that have introduced the notion of pardon into disciplinary law deal with this notion in very different ways. It is interesting to examine these various experiences, specifically in the context where increased labour mobility necessitates a higher degree of information sharing among the professional orders and similar organizations.

In Canada, a few orders and organizations grant a form of disciplinary pardon, but in no case does the form of pardon granted appear to be “absolute” as in the case of an expungement, i.e., an automatism or a form of non-discretionary power that may apply in certain cases to all types of infractions or penalties.

A professional regulatory body undertaking a reflection on disciplinary pardon should also take into account the evolution of societal values, perceptions and expectations as well as the applicable access to information regime.
APPENDICES


APPENDICE 1 – Diagram

PARDON IN CANADIAN PENAL AND CRIMINAL LAW

Prérogative royale (pouvoir basé sur un droit de la monarchie royale, lettres patentes) vise la condamnation

Pardon en vertu de la loi (Code criminel, par le Gouverneur général en conseil)

Absolu vise la condamnation (pendant du Kentucky Board of Nursing)
Ordinaire ou partiel vise la peine

Conditionnel

Avant l’admissibilité à la libération sous condition vise la peine
Avant l’admissibilité à une réhabilitation vise le casier judiciaire

Pardon administratif (suspension du casier, anciennement « réhabilitation ») (Loi sur le casier judiciaire, pouvoir dévolu à la Commission des libérations conditionnelles) (pendant de la Law Society of Manitoba) vise le casier judiciaire

AUTRE NOTION N’ÉQUIVALANT PAS AU PARDON

Absolution (anciennement « libération ») (en vertu du Code criminel, par un tribunal) vise la condamnation
APPENDICE 2 – Summary table
PARDON IN CANADIAN PENAL AND CRIMINAL LAW

<table>
<thead>
<tr>
<th>3 types de pardon</th>
<th>Quoi</th>
<th>Qui</th>
<th>Effets</th>
<th>Conditions particulières</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Prérogative royale de clémence (PRC)</strong></td>
<td>Pouvoir basé sur un droit de la monarchie</td>
<td>Gouverneur général en conseil</td>
<td>CONDAMNATION Assimilable à une déclaration d’innocence rétroactive (à rebours); réputée n’avoir jamais commis l’infraction</td>
<td>Principes généraux qui visent à assurer une démarche juste et équitable; cas exceptionnels; personnes qui le méritent vraiment</td>
</tr>
<tr>
<td>Pardon absolu</td>
<td></td>
<td></td>
<td>CONDAMNATION Assimilable à une déclaration d’innocence rétroactive (à rebours); réputée n’avoir jamais commis l’infraction</td>
<td>Avoir eu recours à tous les autres mécanismes d’appel; nouveaux éléments de preuve</td>
</tr>
<tr>
<td>Pardon ordinaire et partiel</td>
<td>Pouvoir prévu au Code criminel</td>
<td></td>
<td>PEINE Annule, intégralement ou en partie, une peine imposée par un tribunal sans remettre en question la culpabilité de la personne</td>
<td>Prouver qu’il y a eu une erreur de droit, grande injustice ou châtiment trop sévère</td>
</tr>
<tr>
<td>Pardon conditionnel</td>
<td>Avant l’admissibilité à libération sous condition</td>
<td></td>
<td>PEINE Modifie la peine et l’assorti de certaines conditions; permet de mettre un détenu en liberté, sous surveillance et sous réserve de conditions, jusqu’au terme de la peine</td>
<td>Pas être admissible à aucune autre forme de mise en liberté; pas risque de récidive; preuve substantielle d’une grave injustice ou d’une sévérité excessive du châtiment</td>
</tr>
<tr>
<td><strong>2. Pardon en vertu de la loi</strong></td>
<td></td>
<td></td>
<td>CASIER JUDICIAIRE Mêmes effets que le pardon administratif</td>
<td>Être condamné pour une infraction à une loi fédérale ou à ses règles; délai d’éligibilité (5 à 10 ans de l’expiration légale de la peine)</td>
</tr>
<tr>
<td>Pardon administratif</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>3. Pardon administratif (suspension du casier anciennement « réhabilitation »)</strong></td>
<td>Mécanisme créé par la Loi sur le casier judiciaire (LCJ)</td>
<td>Commission des libérations conditionnelles du Canada</td>
<td>CASIER JUDICIAIRE Casier judiciaire classé à part, gardé confidentiel; fait cesser toute incapacité juridique ou obligation; efface les conséquences post pénales d’une condamnation; n’entraîne pas la négation ou neutralisation rétroactive de la condamnation; attestation de bonne réputation</td>
<td>Pas être admissible à une réhabilitation; bonne conduite; preuve substantielle d’un châtiment trop sévère</td>
</tr>
<tr>
<td>Autre notion qui n’équivaut pas au pardon</td>
<td>Institution prévue au Code criminel</td>
<td>Tribunal devant lequel comparait l’accusé</td>
<td>CONDAMNATION Aucune condamnation enregistrée; réputé ne pas avoir été condamné; déclaration ou le plaidoyer de culpabilité subsiste; confidentialité des dossiers après un délai (1 à 3 ans, selon le type d’absolution)</td>
<td>Pas être une organisation; plaider coupable ou être reconnu coupable d’une infraction; intérêt véritable, pas nuire à l’intérêt public</td>
</tr>
</tbody>
</table>

**LE PARDON EN DROIT DISCIPLINAIRE**

<table>
<thead>
<tr>
<th>Deux exemples</th>
<th>Quoi</th>
<th>Qui</th>
<th>Effets</th>
<th>Conditions particulières</th>
<th>Pendant...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Réhabilitation de la Law Society of Manitoba</td>
<td>Mécanisme prévu aux règles de la Société</td>
<td>Comité de discipline</td>
<td>DOSSIER DISCIPLINAIRE DU MEMBRE Fait foi du fait que la Société ne considère plus que le blâme ou la déclaration de culpabilité porte atteinte à la réputation; annule pas le blâme ou la déclaration de culpabilité et ne libère pas la Société de l’obligation de communiquer leur existence, mais doit préciser que l’objet d’une réhabilitation</td>
<td>Délai d’éligibilité (10 ans du blâme ou de la déclaration de culpabilité); aucun blâme ou déclaration de culpabilité; aucune accusation en instance; aucune plainte objet d’une enquête; payé sommes dues; pas déjà réhabilité</td>
<td>Pardon administratif</td>
</tr>
<tr>
<td>Expungement (radiation) du Kentucky Board of Nursing</td>
<td>Mécanisme prévu à la loi fédérale</td>
<td>Ordre</td>
<td>CONDAMNATION Dossiers scellés, procédures afférentes réputées n’avoir jamais existées; dossier disciplinaire vierge</td>
<td>Délai d’éligibilité (10 ou 20 ans de toute ordonnance ou décision, selon le type de sanction, 5 ans de tout décret); pas d’action disciplinaire subséquente; tous les termes ont été respectés</td>
<td>Pardon absolu</td>
</tr>
</tbody>
</table>