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# Judicial Ethics in a Digital Age

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# ARTICLES

## JUDICIAL ETHICS IN A DIGITAL AGE

LORNE SOSSIN<sup>†</sup> & MEREDITH BACAL<sup>‡</sup>

One thing seems to me to be clear. In facing the reality of the modern communications revolution, it is crucial that we understand the technology and how it is being used—something lawyers and judges, often castigated as Luddites, may not find easy. And having understood the new technology and its uses, we must do what we are doing today—discuss, reflect, and share experiences and best practices.

Chief Justice Beverley McLachlin<sup>1</sup>

### I. INTRODUCTION

Is there anything distinct about the judicial engagement with social media that would constitute an ethical concern? If judges engage in improper communication, for example, we tend to focus on the substance of the communication, not whether it was in person, in print, over the phone, or through some other medium. With social media,<sup>2</sup> however, we confront

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<sup>‡</sup> Osgoode JD, 2014.

<sup>1</sup> “The Relationship Between the Courts and the Media” (Speech delivered at Carleton University on 31 January 2012), online: <<http://www.scc-csc.gc.ca/court-court/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

<sup>2</sup> Social media is discussed further below. For the purposes of this paper, in short, social media will refer to social-networking websites such as Facebook, Twitter, and MySpace.

the question of whether the medium in some real sense may become the message as well.<sup>3</sup> In other words, in this context, there are really two issues—one is a question of engagement itself (e.g., should a judge have a Facebook page or a blog?) while the second question is one of substance (e.g., what kinds of tweets are acceptable or unacceptable for members of a court to post?). This brief study is devoted to addressing the question of whether social media represents a field of judicial ethics in Canada or simply a new venue for existing ethical guidelines to be applied. Further, if there are new and distinct ethical quandaries to which social media gives rise, we explore how those issues should be resolved, building on the existing ethical templates both in and out of the courtroom.

Ethical guidelines in the context of Canadian judicial conduct are advisory in nature, and designed so that they may be adapted to various scenarios. Unlike fixed and precise rules, the guidelines are meant to be both enduring and evolving. The guidelines ought to be adaptable to developments in law, culture, and technology. That said, it is equally true that guidelines may become outmoded (indeed, the Canadian Judicial Council announced a review of the Guidelines in 2011).<sup>4</sup> For example, rules provide judges with the tools to control the flow of information in the courtroom—to close a hearing or issue a publication ban, etc. Those rules cease to have meaning in an era when “citizen journalists” may publish information on trials in their blog, or live tweet a motion, or use their cell phones to record the events transpiring in the courtroom. “Crowdsourcing” justice has the potential to make the judge just a participant in a connective community, rather than the person in control of a legal process. Technology, in this sense, has disruptive potential in the justice system (just as it does in every other system).

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<sup>3</sup> The phrase “the medium is the message” was first coined by Marshall McLuhan in 1964. See Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: Mentor, 1964).

<sup>4</sup> Cristin Schmitz, “Ethics, judges, and mediation”, *The Lawyers Weekly* 31:16 (2 September 2011), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1487>>.

The rise of social media will provide an unprecedented level of access by the public into the lives of judges, and by judges into the lives of everyone else. Ethical implications of social media include not simply whether judges choose to engage with various new media for connectivity, but also how they respond when they become the subject of interest and scrutiny in those media. The recent tabloid judicial investigation into the conduct of Justice Lori Douglas represents, in this sense, a particular kind of canary in a particular kind of coal mine. Soon, it will be hard to imagine a judicial appointee who does not bring significant social-media baggage of one kind or another. We believe the rise of social media represents one of those occasions where the existing guidelines are insufficient to adapt to the disruptive potential of new technology.

This analysis has two parts. In the first part, we explore the current ethical guidelines for federally appointed judges in Canada and how these may be adapted to the realities of social-media connectivity.<sup>5</sup> We also highlight what we believe to be the gaps in the current ethical framework. This analysis is complemented by selected comparative insights from peer jurisdictions that face similar challenges. In the second section, we suggest some forward-oriented considerations for reform and further development both of judicial ethics and judicial discretion in the context of social media.

## II. JUDICIAL ETHICS IN CANADA

Before delving into the provisions in the Canadian Judicial Council's (CJC) *Ethical Principles for Judges*,<sup>6</sup> it is important to reiterate that these guidelines are advisory in nature and not binding per se. In fact, as is stated at the outset in *Ethical Principles*, "[t]hey are not and shall not be used as a code or a list of prohibited behaviours."<sup>7</sup> As for the guiding principles that may be used to assist judges, judges may look to broad

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<sup>5</sup> While our focus is on federally appointed judges and the ethical principles governed by the Canadian Judicial Council, similar principles apply to the various provincially appointed judiciaries throughout Canada.

<sup>6</sup> (Ottawa: CJC, 2004) [*Ethical Principles*].

<sup>7</sup> *Ibid* at 3.

principles such as impartiality, which is assessed on the standard of a reasonable apprehension of bias. That said, the *Ethical Principles* form the basis for investigations and inquiries under the *Judges Act*,<sup>8</sup> which can result in the CJC recommending the removal of a judge.<sup>9</sup>

With this principle in mind, judges face countervailing guidance from the *Ethical Principles*: while “[j]udges should organize their personal and business affairs to minimize the potential for conflict with their judicial duties”,<sup>10</sup> they also “[administer] the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments.”<sup>11</sup>

In order to achieve the first principle, that of impartiality, having no presence at all on social media might at first glance appear well-justified. However, avoiding a medium so integral to social life in the 21st century might constitute “unnecessary isolation” from the community and violate another vital principle. Would we be better off if judges had not adapted to the telephone or did not use email?

The CJC’s specific response to social media has been very limited. On the CJC’s website, there are papers on Skype,<sup>12</sup> Facebook and Social Networking Security,<sup>13</sup> and other “technology issues”. These articles, however, “do not represent any official position or views of the Canadian Judicial Council.”<sup>14</sup> The articles posted do little beyond defining and explaining these tools. Beyond basic explanation and a warning cautioning use, they provide little guidance as to what the CJC considers to be

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<sup>8</sup> RSC 1985, c.J-1.

<sup>9</sup> See Philip Bryden & Lorne Sossin, “Judges” in Adam M Dodek & Jeffrey G Hoskins, eds, *Canadian Legal Practice: A Guide for the 21st Century*, loose-leaf (Markham, Ont: LexisNexis, 2009) ch 16 at 89–91.

<sup>10</sup> *Supra* note 6 at 44.

<sup>11</sup> *Ibid* at 34.

<sup>12</sup> Martin Felsky, “Is Skype Safe for Judges?”, *Canadian Judicial Council* (6 July 2010), online: <<http://www.cjc-ccm.gc.ca>> [Felsky, “Skype”].

<sup>13</sup> Martin Felsky, “Facebook and Social Networking Security”, *Canadian Judicial Council* (November 2009), online: <<http://www.cjc-ccm.gc.ca>> [Felsky, “Facebook”].

<sup>14</sup> Felsky, “Skype”, *supra* note 12 at 1, n 1.

acceptable use. This is in stark contrast to the response of other jurisdictions where court policies on social-media use are now commonplace.

#### A. THE NATURE AND SCOPE OF SOCIAL MEDIA

Social media is defined as “mobile and web-based technologies [which] create highly interactive platforms via which individuals and communities share, co-create, discuss, and modify user-generated content.”<sup>15</sup> There are different types of social media: collaborative projects (e.g., Wikipedia), blogs (e.g., TheCourt.ca), content communities (e.g., YouTube), social-networking websites (e.g., Facebook), virtual game worlds (e.g., *World of Warcraft*), and virtual social worlds (e.g., *Second Life*).<sup>16</sup> This paper focuses on social-networking websites, though each type of social media may have particular and important impacts on the judicial process. Social media may also be understood as a branch of the broader world of “digital media and courts” which may include the blogs, Facebook pages, and Twitter feeds by which information on a major trial might be disseminated. “Digital media and courts” would also extend to subscription RSS feeds, websites that aggregate information on particular topics, and other online platforms for circulating reports and commentary on a court’s docket and activities.

Social networking differs from traditional media in its ability to connect users at any time, any place. It allows for a continuous stream of communication. Consider newspapers: Until recently, a writer would research and publish an article the day after the event occurred. Those who read the article were those who purchased and, more likely, subscribed to the particular paper that carried that article. If readers had any interest in commenting, they would need to send in their comments to the publication carrying that particular article, understanding that the

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<sup>15</sup> Jan H Kietzmann et al, “Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media” (2011) 54:3 Business Horizons 241 at 241.

<sup>16</sup> See generally Andreas M Kaplan & Michael Haenlein, “Users of the World, Unite! The Challenges and Opportunities of Social Media” (2010) 53:1 Business Horizons 59 at 60.

physical space in the paper limited the publisher's capacity to publish comments. The article existed in one period of time; to find that article required going to the archives. Even when posted online under a "paywall" or newspaper website, the way in which information is conveyed is static.

Social media, on the other hand, allows for multiple and non-linear discourses. An article is published online. Readers may view it because someone posted a link to the article on their Twitter or Facebook page, recommending the article for friends and followers, while others may explore the author, her previous publications, favourite restaurants, and political-campaign donation history. The article itself may have embedded links to other sources or commentary. If readers like the article, they too may re-tweet or share it on their respective pages so that their friends and followers may be directed to it. If they wish to comment, they may do so at the click of a button beneath the article posting their comments in real time (or sometimes with a slight delay because of a website moderator). Individuals from all over the world can access and comment on the article.

Connectivity is also a unique feature in social media. Readers can access these pages and conversations through their cellphones, laptops, and tablets at all times of the day. Social media, effectively, is a platform for selective listening in a very large conversation. You can see the many conversations your friends or colleagues are engaged in and can choose whether to join actively or simply observe passively. On Twitter or LinkedIn, for example, users constantly update their status. Thousands of conversations take place at the same time, and a user can scroll down their page to see which, if any, conversations they wish to join, or organize a live feed on particular topics, people, or events they wish to see.

Unlike social clubs or civic groups that one must join and maintain membership in, being a part of a social-media network does not imply any particular commonality or shared values. For example, if a judge joins a civil-liberties association, that may be taken to imply sympathy with the association's goals and activities. If a judge instead follows that organization on Twitter, or receives a feed from its Facebook page, however, it is unclear whether and in what circumstances this might be taken to imply support or "membership". Such connections do constitute a digital profile—what we term a judge's "digital baggage"—and may well

constitute a new and uncharted aspect for the regulation of ethical conduct.

## B. DIGITAL BAGGAGE

A judge's "digital baggage" often is accumulated prior to appointment, and over time, the scope and significance of this baggage will doubtlessly grow. For example, we have yet to confront the spectre of a judicial candidate for appointment having to account for Facebook postings two decades earlier as a law student.

One of the most significant ethical issues for judges occurs prior to appointment—that is, what to disclose on their application form to be considered for the judiciary. According to the Commissioner of Federal Judicial Affairs, when lawyers seek judicial appointments, candidates must be "prepared to make full disclosure of any matter that would reflect upon their ability to perform the functions of judicial office, or upon the credibility and repute of the judiciary as a whole."<sup>17</sup> The purpose of disclosure is to maintain the high reputation of the judiciary. If there is anything in a judge's history that may tarnish the reputation of the judiciary—either by indicating a potential bias or a prior transgression that may diminish the public's respect for the judiciary, it must be disclosed. While it is something of a rarity today for a judicial candidate to have a significant digital profile, this soon will be commonplace. For instance, most law students and young lawyers have active online accounts on LinkedIn, Facebook, Twitter, and Instagram, in addition to the blogs they have commented on, articles they have published, photographs they have been tagged in, etc.

Members of the public can perform a search of a judge on any search engine, any blog, article, journal, petition, or tweet that the candidate, prior to his or her appointment, penned at any point in his or her career. Information on group memberships and charitable donations are available at the click of a button. Such searches may impact the public perception of impartiality. Photos taken of sitting judges may also be seen by the public.

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<sup>17</sup> Office of the Commissioner for Federal Judicial Affairs Canada, *Considerations Which Apply to an Application for Appointment*, online: <<http://www.fja-cmf.gc.ca>>.



Moreover, photographs taken prior to appointment—whether to the knowledge of the candidate or not—may be uploaded to the Internet after being appointed.

In the ongoing case involving Madam Justice Lori Douglas, this question has taken centre stage in the debate around judicial ethics. Nude photographs of Douglas were taken and uploaded to the Internet by Douglas's husband, Jack King. The photographs were allegedly used to harass Alex Chapman, a former client of King.<sup>18</sup> Should the photos be understood in the private zone of a judge's life, or is it appropriate to view it in the context of public confidence in the judiciary? A live issue in the CJC inquiry into Justice Douglas is whether or not she disclosed the existence of the photographs as part of her application to join the judiciary.<sup>19</sup>

Justice Martin Freedman of the Manitoba Court of Appeal chaired the committee that screened Douglas during her appointment. He testified during the inquiry that he and the Council were aware of the photographs.<sup>20</sup> The Douglas Inquiry raises broader questions about the disclosure of digital baggage. If the standard is whether a particular matter could reflect poorly on the judiciary or the administration of justice, it is not clear why digital baggage or personal or intimate relationships which have no bearing on the lawyer's professional competence or personal qualities (e.g., integrity, honesty, compassion, etc.) should qualify. In a sense, however, while the ethical issue for the CJC may focus on disclosure, the conversation about this case has focused on whether judges should be entitled to a "private life" in an era where privacy extends more

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<sup>18</sup> Steve Lambert, "Manitoba judge steps aside amidst complaint about nude photos", *The Globe and Mail* (1 September 2010), online: <<http://www.theglobeandmail.com>>.

<sup>19</sup> The inquiry is currently on hold as it deals with several issues including judicial review and the status of various parties involved. See Cristin Schmitz, "The Douglas inquiry: It gets curiouser and curiouser", *The Lawyers Weekly* 32:29 (30 November 2012), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1791>>.

<sup>20</sup> "Man. judge disclosed nude photos, inquiry hears", *The Canadian Press* (27 July 2012), online: CTV News <<http://www.ctvnews.ca>>.

than ever into domains over which an individual has little or no control over the flow of information.

The question now turns to whether a judge's digital baggage may reasonably be said to influence judicial impartiality. The ethical standard for judicial impartiality is not determined in relation to community standards on morality, but rather mirrors the test for a reasonable apprehension of bias under which a decision of the court may be challenged. The CJC's *Ethical Principles* states that "[j]udges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty."<sup>21</sup>

While appointees undoubtedly will come with more digital baggage in the future, it is possible that such baggage will be seen to tarnish the candidate's reputation (and, potentially, the judiciary's reputation) less. What might have shocked the public a generation ago (an openly gay or lesbian judge, judges with children out of wedlock, etc.) today barely attracts notice. Similarly, the scenario of groups or individuals who are parties to litigation and who come before the court with Facebook connections to the judge may cause anxiety today but may well appear quaint a generation from now. In other words, if the ability to adjudicate free from bias is the standard, social media has the potential to reshape the relevance of a judge's background to the perception of his or her impartiality.

The point of departure for the reasonable-apprehension-of-bias standard applicable to judges remains the *R v RDS*<sup>22</sup> decision of the Supreme Court of Canada. In that case, the Court divided on the question of whether it constituted a reasonable apprehension of bias for Justice Sparks, an African-Canadian judge, to indicate that in her experience, police may overreact when dealing with non-white groups. Justice Cory cast the deciding vote for the view that her comments did not cross the line into the reasonable apprehension of bias, but he was clearly

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<sup>21</sup> *Ethical Principles*, *supra* note 6 at 29.

<sup>22</sup> [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS* cited to SCR].

troubled by her comments nonetheless. He held that, “[a]lthough her remarks were inappropriate they did not give rise to a reasonable apprehension of bias.”<sup>23</sup> Judges legitimately may have these beliefs, he concluded, but ought to be extremely cautious if expressing them. The Court also established in *RDS* that the reasonable apprehension of bias standard for judges in Canada is dynamic rather than static, and will be assessed contextually.<sup>24</sup>

Moreover, subsequently, in *Wewaykum Indian Band v Canada*,<sup>25</sup> the Supreme Court considered the potential conflict of Supreme Court of Canada Justice Ian Binnie, who had earlier served as an Associate Deputy Minister for the Government at the time a land-claim case was being litigated, which eventually was decided by Justice Binnie once he was on the Court. In deciding that no reasonable apprehension of bias existed, given the long passage of time between the justice’s role in government and the matter reaching the Supreme Court, the Court held that bias “is an inquiry that remains highly fact-specific.”<sup>26</sup>

The Court in these cases found that what occurred in a person’s past, either personal or professional, is a matter over which there will often be only circumstantial evidence (for example, Ian Binnie’s signature on an earlier document) or associational evidence (for example, Justice Sparks’s race implying a greater awareness of systemic racism in the province where she grew up). Social media may usher in an era where precise and detailed personal and professional data will be readily available. Sifting through this data to separate the relevant information for a standard of judicial impartiality and propriety from information that is not relevant will grow in importance as a matter of judicial ethics. In this sense as well, the Douglas Inquiry is a harbinger of the judicial ethics controversies to come.

At the end of the day, the only observation about bias that is enduring is that, as a standard of conduct, it is in constant flux. Phillip Bryden has

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<sup>23</sup> *Ibid* at 546.

<sup>24</sup> *Ibid* at 509.

<sup>25</sup> 2003 SCC 45, [2003] 2 SCR 259.

<sup>26</sup> *Ibid* at para 77.

argued that “the conceptual tools we use in addressing issues of judicial impartiality tend to fail us precisely in the marginal cases where reasonable people could disagree on whether or not a judge ought to be disqualified.”<sup>27</sup> In furtherance of this submission, Bryden and Jula Hughes conducted a survey on the application of reasonable apprehension of bias.<sup>28</sup> Their study confirmed that there is indeed a large divergence among respondents in their attitudes towards recusal in a number of scenarios that fall in the margins.<sup>29</sup> With respect to social media, the centre remains elusive—all appears to fall in the margins. Over time, however, this unfamiliarity with digital baggage will disappear. We think it will be only in the most egregious cases that a judicial nominee’s digital baggage will be disqualifying (for example, where it contains evidence of unlawful activity). There is no reason to think that the judicial oath will be any less significant as a rite of passage with respect to a candidate’s digital baggage than with other roles they have taken on in the past (as lawyers, speakers, writers, etc.). Still, widespread public access into the private lives of judges (both in their pre- and post-appointment lives) has never been greater, and is posed to grow. Judges, more than ever, will be and be seen to be full members of the community.

### C. INVOLVEMENT IN THE DIGITAL COMMUNITY

A digital presence becomes even more of an ethical issue once a judge is appointed. In the inquiry involving Justice Matlow’s involvement in a neighbourhood campaign to oppose the redevelopment of a site near his house, the CJC confirmed that by agreeing to be appointed to the bench, judges’ freedom of expression is diminished.<sup>30</sup> In that case, the ethical

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<sup>27</sup> Philip Bryden, “Legal Principles Governing the Disqualification of Judges” (2003) 82:3 Can Bar Rev 555 at 557.

<sup>28</sup> Philip Bryden & Jula Hughes, “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification” (2011) 48:3 Alta L Rev 569.

<sup>29</sup> *Ibid* at 609.

<sup>30</sup> *Report of the Canadian Judicial Council to the Minister of Justice* (3 December 2008) at para 82, online: Canadian Judicial Council <<http://www.cjc-ccm.gc.ca>>.

obligation of judges to “conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment” was found to be consistent with Justice Matlow’s involvement in the neighbourhood association and in his taking steps to oppose the redevelopment of the site near his house (though the CJC took issue with his signing correspondence opposing the redevelopment as “Justice Ted Matlow”).<sup>31</sup> In other words, the CJC demarcated a distinction between a judge’s activities as a private citizen and a judge’s activities as a judicial officer. Further, the CJC concluded that Justice Matlow’s actions in promoting media coverage of the neighbourhood-development issue also were not incompatible with the *Ethical Guidelines* (so long as the judge does not use his or her position to attract the media attention).

While judges are free to comment as private citizens about social, economic, and political issues, there are important limits on such comments, including the use of inappropriate and intemperate language and any suggestion that the judge is providing legal advice through such comments. These limits, moreover, while fixed in principle, continue to evolve in their application. In the context of Justice Matlow’s activities, for example, while the majority of the CJC panel expressed reservations about some of the impugned conduct, they stopped short of recommending removal.

In light of the CJC’s recommendation concerning Justice Matlow, it is clear that judges who use social media to express their engagement in the community and to further their involvement in community affairs are not in violation of any ethical guideline per se. The CJC’s recommendation also suggests that it may be relevant whether a judge uses his or her name for social-media posts rather than his or her judicial office. Beyond the form of connectivity, the focus of judicial ethics will remain on what is said and on the context in which it is said (that is, the distinction between a judge communicating as a private citizen and a judge seeking to use the influence of his or her office or imply that he or she is speaking in that capacity).

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<sup>31</sup> *Ibid* at paras 107–08.

While the distinction between a judge communicating as a judge and communicating as a private citizen may be challenging in any context, we suggest it is particularly difficult if not impossible to sustain in the context of social media. A personal email is not public, but may of course be forwarded or replied to while copying others, which will quickly make it so. A blog post may have 5 views or 5000. A post to Judicom (the Canadian judiciary's internal email and intranet portal, discussed below) may be a public communication but is intended only for other judges—does this make such a communication public or private? A post to a Facebook wall with privacy settings in place is a particularly apposite grey zone. It is intended to be shared but to a limited number of people, although that number may in the thousands. The *Ethical Guidelines* in their current form, beyond the general obligation to act in a way that will lead to public confidence, provide little insight as to the distinction between public and private communications and the implications of each.

With respect to judges' online profiles, the *Ethical Guidelines* further provide scant guidance as to what judges should and should not do in these contexts. Perhaps because of this uncertainty, or simply due to the generational gap and personal preference, in Canada, few judges have searchable Facebook accounts,<sup>32</sup> and the ones that do have limited profiles (like Ontario Court of Appeal Justice Russell Juriansz) such that only his friends can see his profile.

Federally appointed Justice Jeffrey Oliphant<sup>33</sup> has a Twitter account, (with the handle @joliphant),<sup>34</sup> and follows a mix of journalists, politicians, and the Governor General. Would it ever be problematic for a judge to follow politicians from one party but not the others? Should it be

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<sup>32</sup> On Facebook, users have the ability to change their security settings so that they cannot be found by searching. They can only search for, and therefore add, "friends" by seeking them.

<sup>33</sup> Justice Oliphant was appointed in 1985, and so all social-networking accounts were done after his being appointed. See his Twitter account here: *Jeffrey Oliphant*, online: Twitter <<https://twitter.com/joliphant>>.

<sup>34</sup> Although he only has three tweets and none of them were political in nature, one does reference the Mulroney/Schreiber Inquiry over which he presided.

a matter of public concern as to who follows a judge (or, put differently, who a judge allows to follow him or her)?

There is a public Facebook page associated with Chief Justice McLachlin. At the time of writing, 107 people “like” this page.<sup>35</sup> Even though this is not a personal page, at what point does that distinction blur in the public mind? Is it appropriate for a lawyer or a party appearing before a judge to “like” or share the page with his or her friends? In that sense, is the party promoting or complimenting the judge’s page? Does it make a difference if the judge is not at all involved in the making of the page, or is it sufficient that a reasonable apprehension of bias will be raised?

In the United States, in 2010, 40% of judges engaged in social networking,<sup>36</sup> although this number today is undoubtedly higher. The United States has already had to confront far more ethical scenarios involving social media, including whether judges ought to delete friends who may appear in front of them in hearings, untag pictures of themselves, leave groups that they are members of, and unfollow political figures.

Because this standard depends on a judge’s understanding of how a reasonable person would perceive his or her actions, it is necessarily both subjective and subject to evolution over time. For example, there was a time when judges were expected not to appear or speak in public. Justice Sopinka, when describing the monastic nature of the judiciary noted in 1989, and then again in 1996, that

[s]ome had withdrawn completely from society. They would not be seen in a public place such as a bar, would not speak in public and even refrained from socializing with counsel. Often these same judges would complain about the difficulty of adjusting to this monastic lifestyle. At the same time, other judges behaved more or less like ordinary citizens. In

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<sup>35</sup> See *Beverley McLachlin*, online: Facebook <<https://www.facebook.com/pages/Beverley-McLachlin/108104015877672?rf=110948695596620>>.

<sup>36</sup> See Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) at 91, citing “New Media and the Courts: The Current Status and a Look at the Future: A Report of the New Media Committee of the Conference of Court Public Information Officers”, *Conference of Court Public Information Officers* (26 August 2010), online: <<http://www.ccpio.org>>.

particular, they accepted some public speaking engagements and even appeared to be interviewed on television. . . . The old school adhered to the maxim that a judge should speak only in reasons for judgment. The more modern school admitted of no such restriction.<sup>37</sup>

Judges are less monastic than ever. Judges now routinely teach, write, give speeches, and lend their name to worthy causes (particularly in relation to access-to-justice-oriented activities). In these activities, judges in Canada are provided the benefit of the doubt in most instances. There is a “presumption of judicial integrity” and judges are “assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”<sup>38</sup>

A concern touched upon in the Douglas Inquiry is that while you can control what you post, you cannot control the conduct of others, and what they post online about you. For instance, a judge at a party may make a remark that can become permanent. Even if not in a speech and simply made during cocktail conversation, the person at the party may go home, write about it, and post it online. This person can do so moments after the conversation and can even post from the party. The judge is then confronted with having to confirm, deny, or ignore the post, each of which could give rise to significant ethical implications.

Still, the primary concern with respect to social media and judicial conduct is what judges themselves post. In 2007, for example, a part-time judge in North Las Vegas lost his position for making hostile comments on his MySpace page. Under personal interests, Jonathan MacArthur, a 34-year-old criminal-defense lawyer, listed “Breaking my foot off in a prosecutor’s ass . . . and improving my ability to break my foot off in a prosecutor’s ass.”<sup>39</sup> A District Attorney found the page and went to the North Las Vegas Justice Court administrator requesting MacArthur’s recusal on all criminal cases as he was perceived to have a bias against

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<sup>37</sup> John Sopinka, “Must a Judge be a Monk—Revisited” (1996) 45 UNBLJ 167 at 167.

<sup>38</sup> Eltis, *supra* note 36 at 84 citing *RDS*, *supra* note 22 at paras 28, 32, and *United States v Morgan*, 313 US 409 at 421 (1941).

<sup>39</sup> “MySpace judgment: Guilty”, *Las Vegas Review-Journal* (13 August 2007), online: <<http://www.reviewjournal.com>>.



prosecutors. Despite defending the interests as a joke, and that the Nevada Code of Judicial Conduct applies to “substitute jurists” only when they are sitting on the bench, the perceived bias that may interfere with his ability to rule fairly from the bench was sufficient for the Justice of the Peace for whom MacArthur was substituting to cease using MacArthur’s services.<sup>40</sup>

Increasingly, the issue for judicial ethics will not simply be what was or was not posted, but what reasonable efforts a judge has undertaken to limit communications intended to be private from becoming public. For instance, several social-networking sites have the capability to limit the ability of others to publically comment on one’s page. For example, it is possible to disable one’s Facebook wall,<sup>41</sup> and change security settings to limit who can see tagged pictures. However, such action renders Facebook a private-messaging forum, minimizing the utility of the website. A judge’s contact information is often public (e.g., work address or office phone number). Thus, judges who have Facebook or other social-media accounts likely will be expected to take proactive steps to ensure a greater degree of privacy and security than others.

Similarly, Karen Eltis suggests that since the purpose of online forums such as blogs and Twitter is to express opinions, judges eschew such networks.<sup>42</sup> This approach is as difficult to imagine as being sustainable as encouraging judges to avoid email in the 1990s would have been. Others have recommended judges limit their social-media activities on Facebook and use internal networks such as Judicom,<sup>43</sup> a secure and private messaging community designed to “facilitate and enhance communication, collaboration and knowledge sharing by connecting all members within a trusted online environment.”<sup>44</sup> 800 federal judges and 950 members of the Canadian judicial community use Judicom.<sup>45</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> The Facebook wall is a forum for “friends” to publically post.

<sup>42</sup> Eltis, *supra* note 36 at 96.

<sup>43</sup> Felsky, “Facebook”, *supra* note 13 at 10.

<sup>44</sup> See *Judicom Portal*, online: <<http://www.judicom.ca/home-eng.html>>.

<sup>45</sup> *Ibid.*

Beyond the challenges posed by how judges choose to engage with social media, there is an additional danger that judges will have their personal information posted without their knowledge or consent.<sup>46</sup> If personal information is posted, judges run the risk of someone creating a fake profile and fraudulently posting on the judge's behalf. In a facetious example, Lord Denning has a twitter handle, @LordDenndeezie.<sup>47</sup> Even if creating a false online account is contrary to the user agreements of the social-networking website,<sup>48</sup> once an account is made, the damage may already be done. Comments may be misattributed to the judge, and once they are publicly available, they may tarnish the judge's reputation in the community, or it may be increasingly difficult for members of the public to distinguish between posts that purport to be from a judge and those that actually are from a judge.

Here again, the issue is not so much the fact of a judge's personal information being made available through social media, but what obligations on the judge arise as a result. Judges have a duty to disclose any information that may tarnish the integrity of the judiciary, so Eltis suggests that judges perform frequent search-engine checks, ensuring that nothing turns up involving their information or activities that could tarnish the perception of the judiciary.<sup>49</sup> Leaving aside whether this is a reasonable obligation to impose on judges, it is unclear what a judge could be expected to do in the face of such a situation other than to disclose it to others.

## 1. THE ALTERNATIVE: EMBRACING A CYBER-JUDICIARY

Much of the discussion thus far has focused on the assumption that social media is a threat and that the purpose of judicial ethics is to limit and

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<sup>46</sup> See Eltis, *supra* note 36 at 75.

<sup>47</sup> See *Lord Denning MR*, online: Twitter <<https://twitter.com/LordDenndeezie>>.

<sup>48</sup> See *Facebook*, Facebook's Statement of Rights and Responsibilities, online: <<https://www.facebook.com/legal/terms>>. "4(1) Registration and Account Security" states, "You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission."

<sup>49</sup> Eltis, *supra* note 36 at 98.

regulate a judge's interaction with social media. Social media is also an incredibly effective communicative tool, and for some, a virtual way of life. Some judges, of course, have embraced social media, and their activities raise the question of whether there is such a thing as a judge who is too connected to the community.

Justice Harvey Brownstone of the Ontario Court of Justice, for example, is trying to change the judicial culture, harnessing the Internet and social media to improve public awareness of family-law issues, and as a consequence, access to justice. Arguably, Justice Brownstone has deployed social media more broadly and more deeply than any other judge in Canada in order to advance his cause. Justice Brownstone launched his career in the public eye when he first published *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*.<sup>50</sup> The book cautions readers about entering family court and explains the negative effect such litigation has on children and families.

Despite any anxieties Judge Brownstone may have felt after publishing his book, he received letters praising his book from the Chief Justice of the Ontario Court of Justice, Annemarie Bonkalo and Ontario Superior Court Judge Heather Smith. Both justices supported the book and insisted that it be distributed widely. Though one anonymous judge explained that the only reason Brownstone was able to avoid criticism was because he turned all profits from book sales to children's charities, the response has been overwhelmingly positive.<sup>51</sup> The blogosphere's response to the publishing of the book has been for the most part positive, with one blogger urging individuals considering going to family court to read it first.<sup>52</sup> One practicing lawyer refers to the book as an easily understandable

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<sup>50</sup> (Toronto: ECW, 2009).

<sup>51</sup> See Kirk Makin, "Insider look at family court lauded; Judge wins unexpected praise from colleagues for book on perils of divorce litigation", *The Globe and Mail* (28 February 2009) A8.

<sup>52</sup> See e.g. Nicole Garton-Jones, "New Book: Tug of War by Harvey Brownstone", *Heritage Law Blog* (9 June 2009), online: <<http://www.bcheritagelaw.com>>.

resource on how family court works, which provides case examples and proffers alternatives to litigation.<sup>53</sup>

Justice Brownstone also hosts the TV show *Family Matters*.<sup>54</sup> The program educates viewers on legal issues within the family-law sector. In addition, Justice Brownstone has a Facebook page linked to the show (the page is associated to the show and not the judge personally).<sup>55</sup>

Before each episode of *Family Matters*, a disclaimer appears stating that Justice Brownstone does not endorse the opinions of those on the show and further stipulates that the judge is not providing legal advice. This is a very fine line that Justice Brownstone acknowledges: “I am walking a tightrope because I am now in an entertainment medium. Still, I think the world is ready for a different kind of TV judge. A real judge. I think the world is ready.”<sup>56</sup> The show itself generates revenues. There are advertisements before the program begins, although Justice Brownstone is not keeping any of the money himself. The website explains that the proceeds go to charity.<sup>57</sup> From the standpoint of judicial conduct, however, if either the show or website generates income, or has links to paid advertisers, does it matter that the proceeds go to non-profit or for-profit ventures?

Justice Brownstone’s online persona has raised many eyebrows in the legal community.<sup>58</sup> That said, there is no indication that Justice

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<sup>53</sup> See Michael Rappaport, “Tug of War: A judge testifies on family law”, *Michael Rappaport Barrister & Solicitor*, online: Mr Legal <<http://www.mrlegal.ca>>.

<sup>54</sup> See *Family Matters with Justice Harvey Brownstone*, online: Family Matters <<http://www.familymatterstv.com/about>>.

<sup>55</sup> See *Family Matters with Justice Harvey Brownstone*, online: Facebook <<https://www.facebook.com/FamilyMattersTV>>.

<sup>56</sup> “Ontario judge hits airwaves to sate appetite for legal info”, *Vancouver Sun* (14 September 2011), online: Canada.com <<http://www.canada.com>>.

<sup>57</sup> *Supra* note 54.

<sup>58</sup> Professor Adam Dodek posted the following comments to the *Canadian Legal Ethics* listserv on 18 April 2012:

This is only what I can describe as strange on several levels: Justice Harvey Brownstone of the Ontario Court of Justice wrote a (great) book called ‘Tug of War: A Judge’s Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court’. All

Brownstone's presence on either television or social media has compromised his integrity or independence. Indeed, the fact that Justice Brownstone has not been subject to any sanction suggests others may be emboldened to pursue a similar path.

#### D. JUDICIAL ETHICS IN DIFFERENT JURISDICTIONS

Should judicial ethics be focused on regulating and limiting a judge's engagement in social media, or facilitating such engagement? Because the sphere of judicial ethics involving a judge's digital activities in Canada remains embryonic, it is helpful to consider how peer jurisdictions have addressed this phenomenon. Below, we canvass the development of rules, guidelines, and practices relating to judicial online conduct with a view to the relevance of such approaches in the Canadian context.

Personal use of social media in the Canadian judiciary cannot be easily equated to the American judiciary. This is because in many state jurisdictions, judges are elected or subject to retention votes. Such judges may legitimately use social-media connectivity in order to raise campaign funds, seek endorsements, and advertise in ways that would all constitute unethical conduct in any Canadian jurisdiction. More to the point for our purposes, friends and followers serve different purposes, and so the considerations regarding impartiality are not the same.

As for policies regulating the US judiciary, prior to the American Bar Association (ABA) coming out with a formal opinion in February 2013 on "Judge's Use of Electronic Social Networking Media",<sup>59</sup> the relevant policy considerations were at the state level. Before this opinion was rendered, there was a patchwork of conflicting ethical guidelines. While

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royalties are donated to charity. He did interviews about his book. He now has a TV show called Family Matters. That show has a Twitter account which promotes the TV show. It only sends messages and does not follow anyone else on Twitter—see @FamilyMatters\_ [https://twitter.com/#!/FamilyMatters\\_I](https://twitter.com/#!/FamilyMatters_I) am one of his 881 followers. Saw this tweet today which I thought was strange...The link is to an external lawyer advice / advertising site. Just seems a bit strange...

<sup>59</sup> American Bar Association, "Judge's Use of Electronic Social Networking Media" (21 February 2013), online: <[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf)>.

the ABA does not exercise authority over judicial conduct, it is hoped that this opinion will create clarity in acceptable judicial conduct.

The ABA's opinion recognizes that interactions made on electronic social media (ESM) are not static. Comments, images, and personal information can be widely disseminated quickly and easily. Such dissemination can compromise the "independence, integrity, and impartiality of the judge, as well as . . . undermine public confidence in the judiciary."<sup>60</sup>

The ABA recommends that a judge who engages in ESM should do so while considering the relevant provisions in their Model Code of Judicial Conduct (which is analogous to the CJC *Ethical Principals*). They too must consider the requirement to act in a manner that promotes confidence in the judiciary. Judges must be cognizant that ESM communication may be deemed to be *ex parte* communication, and must behave in a way that does not elevate such communication to that level.<sup>61</sup>

Interestingly, the ABA recognizes that ESM connections may be so casual so as not to require disclosure. If, however, the connection contains current and frequent communication, there is a larger impetus for disclosing such a relationship.<sup>62</sup> Unlike the Canadian reasonable-apprehension-of-bias standard, the standard in the United States is whether the judge has a personal bias or prejudice concerning a party or lawyer.<sup>63</sup> The same analysis must be conducted when such an ESM connection exists as when the judge has a professional or personal connection with a party before the judge in court. The ABA does not require a judge to do a search of all of his or her ESM connections if a judge does not have specific knowledge that such an ESM connection exists and would rise to the level of an actual or perceived problematic relationship.<sup>64</sup> The opinion also provides guidance to judges with respect

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<sup>60</sup> *Ibid* at 1–2.

<sup>61</sup> *Ibid* at 2.

<sup>62</sup> *Ibid* at 3.

<sup>63</sup> *Ibid* at 3, referencing Rule 2.11 of the Model Code.

<sup>64</sup> *Ibid* at 3.

to judicial campaigns and elections, which has less relevance in a Canadian context.

As indicated above, the ABA opinion seeks to offer a coherent approach to judicial conduct in the context of social media in contrast to the existing patchwork quilt of federal and state approaches. Until and unless jurisdictions adopt the ABA standards, those existing measures will remain in force.

While it is beyond the scope of this study to detail all varied approaches in US jurisdictions, a few examples will illustrate how the field has developed to date. Many jurisdictions have remained silent on the matter. Other jurisdictions have attempted to subsume social media under existing rules. The California Judges' Association Committee on Judicial Ethics, for instance, has stated that social networking is analyzed under the "same rules that govern a judge's ability to socialize and communicate in person, on paper and over the telephone."<sup>65</sup>

At a judicial conference in the United States in April 2010, a Code of Conduct Committee designed a resource packet to help courts and judges consider whether and how to develop policies and guidelines for the use of social media by judicial employees. The council provided sample provisions that could be used in various jurisdictions.<sup>66</sup> Perhaps the CJC may wish to come out with similar guidelines so to provide more clarity.

While the interaction between social media and judicial ethics remains relatively novel, there is already a significant body of judicial discipline cases in the United States exploring some of the questions raised above.

For example, a magistrate judge in South Carolina was Facebook friends with several law-enforcement officers and employees of the Magistrate's office. The Magistrate was concerned about the possibility of

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<sup>65</sup> Eltis, *supra* note 36 at 93, citing California Judges Association Judicial Ethics Committee, "Online Social Networking" (23 November 2010) at 3, online: <[www.caljudges.org/files/pdf/Opinion66FinalShort.pdf](http://www.caljudges.org/files/pdf/Opinion66FinalShort.pdf)> [California Judges Association].

<sup>66</sup> Committee on Codes of Conduct Judicial Conference of the United States, "Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees", *Judicial Conference Committee on Codes of Conduct* (April 2010), online: <<http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>>.

an appearance of impropriety, and so the Magistrate proactively inquired into the propriety of being a member of Facebook. In October 2009, an Advisory Committee on Standards of Judicial Conduct concluded that “[a] judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrates as long as they do not discuss anything related to the judge’s position as magistrate.”<sup>67</sup>

North of the state border in North Carolina, Judge Terry presided over a child-custody and child-support hearing in the fall of 2008.<sup>68</sup> On 9 September 2008, while in the judge’s chambers, Judge Terry and Charles Schieck, the defendant’s attorney, were discussing Facebook. Though the plaintiff’s attorney, Jessie Conley, was present during the conversation, she stated her ignorance and absence from the social network.<sup>69</sup> Shortly after, Schieck posted on Facebook with respect to whether his client had an affair, asking “how do I prove a negative”. Judge Terry responded by posting that he had “two good parents to choose from”. Judge Terry indicated in another post that the case was not settled. Schieck also posted, “I have a wise Judge.”<sup>70</sup> Judge Terry told Conley about the Facebook exchanges between himself and Schieck.<sup>71</sup> There were subsequent back and forth Facebook posts between Terry and Schieck on the determination of the final days of trial.<sup>72</sup>

Judge Terry also performed Google searches on Schieck’s client. The judge’s decision was impacted by the information he found during these

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<sup>67</sup> Advisory Committee on Standards of Judicial Conduct, “Opinion No. 17-2009: Re: Propriety of a magistrate judge being a member of a social networking site such as Facebook”, *South Carolina Judicial Department* (October 2009), online: <<http://www.judicial.state.sc.us>>.

<sup>68</sup> State of North Carolina Judicial Standards Commission, “Inquiry No. 08-234: Public Reprimand: B. Carlton Terry, JR, District Court Judge, Judicial District 22” (1 April 2009) at paras 1–2, online: <[http://www.aoc.state.nc.us/www/public/coa/jsc/public\\_reprimands/jsc08-234.pdf](http://www.aoc.state.nc.us/www/public/coa/jsc/public_reprimands/jsc08-234.pdf)>.

<sup>69</sup> *Ibid* at paras 2–3.

<sup>70</sup> *Ibid* at para 5.

<sup>71</sup> *Ibid* at para 6.

<sup>72</sup> *Ibid* at para 7.



independent searches. Judge Terry did not disclose to either party that he was conducting this independent research. He disclosed his behavior after orally entering his order.<sup>73</sup> Conley filed an order requesting Judge Terry's order be vacated, a new trial, and that Judge Terry be disqualified.<sup>74</sup> The judge disqualified himself and agreed that he would not repeat such conduct in the future as he recognized that such action threatens public confidence in the integrity and impartiality of the judiciary. He also agreed to read the North Code of Judicial Conduct which he disregarded by engaging in *ex parte* communications with counsel in a matter being tried before him, and he was influenced by information he independently gathered by viewing a party's website, despite the contents of the website not being entered into evidence.<sup>75</sup>

Recognizing the growing popularity of social-networking sites, a California ethics opinion explained that the same rules that govern a judge's ability to socialize in person are the same as those that apply on paper, over the telephone, and on the Internet.<sup>76</sup> Jurists may participate in social media, but must be cautious about what they post, who can see what they post, and what types of connections they make. In this way, judges can be friends with lawyers who *may* appear before them; however, it is not permissible to interact with attorneys who have matters before the judge. Once a member of the judge's online social-networking community has such a case pending, the judge must cease online interaction and unfriend counsel. It is irrelevant what type of online relationship they have; the appearance of such a relationship is detrimental.<sup>77</sup>

In Georgia, Chief Justice Ernest Woods of the Mountain Judicial Circuit Superior Court resigned from the bench after questions regarding a Facebook relationship with a defendant, Tara Elizabeth Black, were

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<sup>73</sup> *Ibid* at paras 8–13.

<sup>74</sup> *Ibid* at para 14.

<sup>75</sup> *Ibid* at 4.

<sup>76</sup> California Judges Association Judicial Ethics Committee, "Opinion 66: Online Social Networking" (23 November 2010) at 3, online: <<http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>>.

<sup>77</sup> *Ibid* at 10–11.

publicized. The judge explained the reason for his resignation by saying, “I just got tired of living under a microscope.”<sup>78</sup> District Attorney Rickman learned of the emails after the parents of Black’s friends brought them to his attention. Facebook emails between Woods and Black were turned over to the circuit’s district attorney and then written about in local newspapers.<sup>79</sup>

The emails disclosed that Woods initiated the relationship. He said that he was looking for a new person to cut his hair and noticed she worked at a hair salon. Black offered to refer him to a colleague. Over the course of their relationship, the two met in person and exchanged emails. Black asked to borrow money for rent and Woods provided Black with strategies to tackle her charge of theft and a case regarding one of Black’s friends.<sup>80</sup>

In light of the cases sampled above, it should not be surprising that in April 2010, the Committee on Codes of Conduct provided a resource packet to court administrators to assist courts in the development of social-media policies.<sup>81</sup> The packet includes options that courts might use in crafting their own policies or guidelines.

The United States District Court for the District of Rhode Island social-media policy/guidelines have the following broad guidelines:<sup>82</sup>

1. Think before you post.
2. Speak for yourself, not your institution.
3. Keep secrets secret.
4. Remember the Guide (the Judiciary’s Guide to Policies and Procedures) (i.e., restrictions on partisan political activity).

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<sup>78</sup> Debra Cassens Weiss, “Ga. Judge Resigns After Questions Raised About Facebook Contacts,” *ABA Journal* (7 January 2010), online: <<http://www.abajournal.com>>.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Committee on Codes of Conduct, Judicial Conference of the United States, “Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees” (April 2010), online: <<http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>>.

<sup>82</sup> *Ibid.* at 28–30.

5. Observe security protocol—(i.e., do not post pictures of the courthouse).

While the ABA opinion will now no doubt play a significant role in the development of judicial ethics in the social-media context in the United States, many of the “grey areas” will continue to be developed through fact-specific and incremental judgments. The United States is not the only jurisdiction to address the implication of social media for judicial ethics. In each jurisdiction, particular incidents or media-driven controversy is driving the policy development in this field.

Just as the issue of digital baggage has arisen as a key topic in Canada in the wake of the Douglas incident, so too in the United Kingdom has the social-media debate focused on the blogosphere. A leaked memo issued by Senior Presiding Judge Lord Justice Goldring warned judicial office holders of the use of blogging.<sup>83</sup> Although the memo does not prohibit the use of blogging, it places stringent limitations on what can be posted and how it can be posted.<sup>84</sup> For instance, the memo states, “[j]udicial office holders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the judiciary.”<sup>85</sup> The memo goes on to warn judges against identifying themselves as members of the judiciary, and against expressing opinions that if known could have damaging effects on public confidence.<sup>86</sup> Those in favour of judicial blogging stress the educational aspect and insist that it can bring the public in better touch with the law. So long as the judge does not blog about topics that question judicial neutrality on a case, and limit expression to professionalism or court history for example, why should judges be so limited?<sup>87</sup>

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<sup>83</sup> Trevor Coultart, “Guidance from the Senior Presiding Judge”, *A Work in Progress* (10 August 2012), online: <<http://trevorcoultart.wordpress.com>>.

<sup>84</sup> Lucy Reed, “Judiciary silenced out of court”, *The Guardian* (14 August 2012), online: <<http://www.guardian.co.uk>>.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> See “Social Media and the Judiciary”, *The IT Country Justice* (18 August 2012), online: <<http://thecountryjustice.wordpress.com>>.

As the above discussion illustrates, social media is a global phenomenon but may affect different courts in different systems in different ways. Just as the ABA opinion discussed the use of social media in judicial elections in a way that is not relevant for Canada, Canada's developing approach to digital baggage prior to appointment may have less relevance in a system of judicial election. That said, developments in judicial ethics in one part of the world will shed light on possibilities and dangers in another. The question as to whether social media will overcome judicial isolation, or create new barriers for judges who wish to maintain privacy, will be a central one for all judges irrespective of jurisdictional boundaries.

### III. SOCIAL MEDIA IN THE COURTROOM

The issue of judicial ethics and conduct in relation to social media is bound up in a broader question engaging the relationship between social media and the justice system. One aspect of this issue will be the evolution of the *sub judice* principle which governs media coverage of pending and actual litigation.<sup>88</sup> Another aspect relates to how publication bans and other restrictions on media will interact with social media and "citizen journalists" who seek to communicate (often instantly) both facts and opinions about what is transpiring in a courtroom. The issue of whether it is appropriate for a judge to initiate a Twitter account to share ideas and comments about life in court may be affected by that court's approach to social media more generally—for example, whether Twitter feeds are permitted, or whether the court as an institution is engaged in social media.

In January 2012, in a landmark speech at Carleton University on the courts and media, Chief Justice McLachlin identified the cultural shift in communication. Specifically, she discussed how information is now packaged, disseminated, and consumed.<sup>89</sup> While she explained that

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<sup>88</sup> For further discussion of this issue, see L Sossin & V Crystal, "A Comment on 'No Comment': The Sub Judice Rule and the Accountability of Public Officials in the 21st Century" 36 Dal LJ [forthcoming in 2014].

<sup>89</sup> McLachlin, *supra* note 1.

members of the judiciary can work with the media to ensure press coverage is accurate, prompt, and appropriate, it is becoming increasingly difficult to do so. She poignantly asked: "How can a medium such as Twitter inform the public accurately or adequately in 140 characters or less?"<sup>90</sup> Despite these concerns, the CJC has still not created guidelines to assist courts and judges with appropriate policies.

While it is important that there is transparency in the courtroom, there is also a conflicting issue of accuracy and adequacy, as the Chief Justice noted. With details of a trial immediately accessible, there is more transparency in the courtrooms. With transparency comes greater public interest in and awareness of the judicial process. Access is also improved by the capability of individuals across the country to follow court proceedings without being limited by location. For example, during the Michael Rafferty trial in the winter of 2012, many journalists, including Melanie Nagy from CTV (Twitter handle: @MelanieNagyCTV), live-tweeted the case.<sup>91</sup>

Consistent with the Chief Justice's concerns, Connie Crosby has observed that Twitter provides no space for clarifying context and giving facts.<sup>92</sup> Uncovering the facts of a case takes time. Quotes tweeted immediately after they are said can be quite damaging. For instance, an inflammatory tweet regarding the Tamil Tigers was mistakenly attributed to Mayor David Miller. In actuality, the comment was made *to* and not *by* the former Toronto mayor.<sup>93</sup> In contrast, Michael Geist has said, "[n]obody would question the right of the public to attend the trial . . . . Nobody would question a reporter taking notes at a meeting. Twitter is nothing more than taking notes, with faster dissemination."<sup>94</sup> With regards to accuracy, if mistakes are made in reporting, market forces will

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<sup>90</sup> *Ibid.*

<sup>91</sup> See *Melanie Nagy*, online: Twitter <<https://twitter.com/MelanieNagyCTV>>.

<sup>92</sup> Luigi Benetton, "Twitter in the courtroom: a fad, or here to stay?," *The Lawyers Weekly* (12 June 2009), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=937>>.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

drive followers to more reliable sources. When the US Supreme Court handed down the “Obamacare” decision in June 2012, CNN mistakenly tweeted the wrong outcome, causing a great deal of embarrassment and reducing CNN’s credibility in the matter.<sup>95</sup>

In contrast, open engagement with these issues among Canadian judges is less common. For example, Ontario Superior Court Justice Douglas Rutherford made open comments in court regarding Twitter:

It seems to me that my concern with administration of justice, and any communication directly out of the courtroom, is with the integrity of the hearing, and the integrity of the [digital audio recording] equipment, and not with the quality of the journalism.<sup>96</sup>

Several Canadian jurisdictions are moving towards a greater emphasis on the accessibility of the courts. Recognizing the importance of social media and its impact on confidence in the judiciary, courtrooms in British Columbia have switched the presumption to allow for social media in the court, which increases transparency. The Supreme and Provincial Courts have allowed the use of electronic communication devices in the public galleries during trials; however, this allowance has been limited to lawyers and accredited members of the media.<sup>97</sup> The new rule tempers some of the concerns of communicating sound bytes while fact finding. At the British Columbia Court of Appeal, presumably where the Court is dealing primarily with issues of law and not issues of fact, members of the public are allowed to text.<sup>98</sup> The BC lower court’s limited allowance to accredited journalists and lawyers is consistent with Connie Crosby’s concerns, as trained journalists are more likely to filter what they post, and

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<sup>95</sup> See Jeff Mason, “Fox News, CNN left red-faced after announcing wrong verdict on Obamacare”, *The National Post* (28 June 2012), online: <<http://news.nationalpost.com>>.

<sup>96</sup> Cristin Schmitz, “Tweeting too trivial for some”, *The Lawyers Weekly* (17 February 2012), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1595>>.

<sup>97</sup> See “Tweeting allowed in B.C. courts, but it won’t be a tweet-for-all”, *CTV News* (2 August 2012), online: <<http://www.ctvnews.ca>>.

<sup>98</sup> See *ibid.*

even fact check during breaks. Sensibly then, in the appellate courts where tweeting is allowed by all members of the public (so long as there is no publication ban), where courts are dealing with law and not findings of fact, the risk of misattributing or mistaking a quotation is not as damaging. Therefore, the need for access and transparency takes priority.<sup>99</sup>

Courts around the world have been grappling with social media in similar contexts. Starting in December 2011, live-texting communications such as Twitter have been allowed in courtrooms in the UK.<sup>100</sup> Representatives of the media and legal commentators are presumed to not pose a danger of interference in the administration of justice. As such, they may send live text-based communications from the court without asking the court's permission. Regular citizens, however, still need to ask permission either formally or informally. The Federal Court in Australia decided in 2009 to grant judges the ability to decide on a case-by-case basis whether they will permit Twitter coverage in their courtrooms.<sup>101</sup>

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<sup>99</sup> See Canadian Centre for Court Technology, "Canada-Wide Summary of Court Policies on Live, Text-Based Communications from the Courtroom" (June 2013), online: <<http://ccct-cctj.ca/wp-content/files/intellaction/Policies-on-Live-Text-Based-communications-June-2013.pdf>>. This report surveys the various policies on social media in select Canadian courtrooms, taken from the Canadian Centre for Court Technology and Social Media Interaction Working Group. The Alberta Court of Queen's Bench requires all devices to be turned off with an exemption for Counsel and members of the media. The Supreme Court of Canada allows the usage of laptops and handheld devices so long as sound is turned off; Wi-Fi is also available. Subject to any exceptions, the New Brunswick Courts prohibit the transmission of texts. The Nova Scotia Courts currently provide for an interim policy allowing tweeting in the Court of Appeal unless directed otherwise. The Manitoba Courts allow members of the public to text or use the web, though Manitoba is currently seeking ways to amend the policies. See also Yamri Taddese, "New guidelines propose letting anyone tweet in court", *Law Times* (5 November 2012), online: <<http://www.lawtimes.com>>.

<sup>100</sup> See Lord Judge: The Lord Chief Justice of England and Wales, "Practice Guidance: The Use of Live Text-Based Forms of Communication (Including *Twitter*) From Court for the Purposes of Fair and Accurate Reporting" (14 December 2011), online: Judiciary <<http://www.judiciary.gov.uk>>.

<sup>101</sup> See Jennifer Van Grove, "Who Needs Cameras? Judges Allow Twitter in the Courtroom", *Mashable* (19 October 2009), online: <<http://mashable.com>>.

The ability of the public to disseminate information also poses new concerns in the court —sometimes referred to as “crowdsourcing justice”. “Crowdsourcing” was coined by Jeff Howe in *Wired Magazine*.<sup>102</sup> By using the term “crowdsourcing”, Howe sought to capture “the act of . . . taking a function once performed by employees and outsourcing it to an undefined (and generally large) network of people in the form of an open call.”<sup>103</sup> An example of crowdsourcing justice arose in the wake of the 2011 Vancouver riot, where the designated agents are journalists and the police; the crowd is comprised of amateur photographers, videographers, bloggers, and social-media participants.<sup>104</sup> For related but distinct purposes, journalists and the police encouraged all those who witnessed the riot to post pictures and accounts, and identify those involved. Further, as some participants were convicted, their identities and pictures were posted as a further kind of punishment. As one report dramatically observed:

In a chilling effect of this new crowdsourced justice, a conviction means an automatic life sentence with no chance of parole. Many of those involved in the [Vancouver] riots were inebriated and immature 20-somethings. In a reckless moment following the final game of 2011 Stanley Cup playoffs, the reputations and lives of hundreds of young Vancouverites were changed forever. As one blogger states, “Public shaming thru the use of social media and blogging shall place them into a world that is engraved into history. It shall be chiselled into the hard stone of the internet and last eternally [sic]”.

Today, your digital reputation defines you. For most employers, reference checks today start with Google and Facebook. The thousands of photos

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<sup>102</sup> Jeff Howe, “The Rise of Crowdsourcing”, *Wired* (June 2006), online: <<http://www.wired.com>>.

<sup>103</sup> Jeff Howe, “Crowdsourcing: A Definition”, *Crowdsourcing* (2 June 2006), online: <<http://crowdsourcing.typepad.com>>.

<sup>104</sup> See David Finch, Sharon McIntyre & Kelly Sundberg, “The Vancouver Riot Hangover: Crowdsourced Justice and Public Shaming”, *The Centennial Reader* (Summer 2012), online: <<http://www.thecentennial.ca/shaming-and-crowdsourcing>>.



and videos tagged with people's names will define their digital reputations.<sup>105</sup>

Thus, the concern regarding social media in the courtroom extends beyond that of reporting facts and commentary but extends also to the possibility of interfering with the administration of justice.

More challenging examples have emerged in the US context. For example, after it was discovered that a juror tweeted about a trial, an Arkansas firm tried to overturn a multi-million dollar judgment. Because the juror published the comments after the verdict was delivered, the judge did not grant a new trial.<sup>106</sup> In a 2011 Louisville case, a teenager who was sexually assaulted said she discovered that her attackers pled guilty to first-degree sexual abuse and misdemeanor voyeurism only moments before it was announced in court.<sup>107</sup> Contrary to the judge's order forbidding everyone at the hearing from speaking about what happened in the court or about the crime, the victim tweeted the names of her attackers and explicitly stated her dismay with the order, tweeting, "[p]rotect rapist is more important than getting justice for the victim in Louisville."<sup>108</sup> She now faces charges of contempt.<sup>109</sup>

Publication bans are easier to enforce when the court is dealing with accredited media, as they have the resources to pay a sufficient fine that would deter the publication from encouraging such illegal conduct. When it is a citizen journalist or blogger, the traditional model of judicial control over courtroom communications breaks down. Social media makes the narrative of a judicial proceeding, in effect, beyond the effective control of the presiding judge. By the same token, however, a judicial or court

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<sup>105</sup> *Ibid* [footnotes omitted].

<sup>106</sup> Benetton, *supra* note 92.

<sup>107</sup> "Savannah Dietrich, 17-Year-Old Sexual Assault Victim, Faces Charge for Naming Attackers", *Huffington Post* (21 July 2012), online: <<http://www.huffingtonpost.com>> [*Huffington*].

<sup>108</sup> "Thanks for Ruining My Life': A teen tweets against her attackers—and upends the courts", *Newsweek Magazine* (10 December 2012), online: The Daily Beast <<http://www.thedailybeast.com>>.

<sup>109</sup> See *Huffington*, *supra* note 107.

presence on social media may have the effect of countering fragmented, partial, and sometimes misleading accounts with an “official” stream of appropriate information. The judicial presence on social media could similarly act within social media as a reliable, impartial, and authoritative voice within a cacophony of views and perspectives. At a minimum, judicial literacy in social media will allow judges themselves to better understand, filter, and respond to information reaching them via social media.

The judicial literacy in social media may similarly become of increasing importance in carrying out judicial functions within the courtroom. We have already alluded to the challenges of conventional publication bans in the social-media context.<sup>110</sup> Social media also is coming to play a more significant role in the commission of criminal and regulatory offences. The Canadian Bar Association lists stalking, criminal harassment, and cyberbullying as potential offences that can be committed through social media.<sup>111</sup> Depending on the facts of the case, stalking may be criminal harassment under section 264 of the *Criminal Code of Canada*. Cyberbullying may be criminal harassment (section 264) or defamation (section 300). Moreover, there has been a 780% rise in social-media crimes in the last four years in the United Kingdom (there is not yet comparable data in Canada, but with the rising popularity of social-media websites, it is likely to have grown exponentially as well).<sup>112</sup>

For all of these reasons, attempting to sidestep the phenomenon of social media is untenable for judges. Rather, we believe it is important to develop a new generation of guidelines and practices that respond to the

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<sup>110</sup> See Andrew Bernstein & Rebecca Wise, “Conducting Litigation in the Social Media Age”, *Torys* (31 July 2012), online: <<http://www.torys.com/Publications/Publications/AR2012-23.pdf>> (originally delivered at the Law Society of Upper Canada’s Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age program on 25–26 April 2012).

<sup>111</sup> “Stalking, Criminal Harassment and Cyberbullying”, *The Canadian Bar Association: British Columbia Branch* (January 2011), online: <<http://www.cba.org>>.

<sup>112</sup> See “Social media-related crime reports up 780% in four years”, *The Guardian* (27 December 2012), online: <<http://www.guardian.co.uk>>.

disruptive potential of social media, rather than guidelines that attempt to insulate judges from the rapidly changing world around them.

#### IV. CONCLUSIONS

The *Ethical Principles* guide judges in their own personal conduct but assume a static and defined context for judicial communications. The nature of social media is dynamic and interconnected, where fictional comments can take on real implications, and real comments can be shared and manipulated in ways over which the initiator has no control. In short, does a 20th century set of ethical principles need to be updated in order to adapt to the realities of 21st century life?

A number of judges worry about the trend toward more precise rules. Justice Sopinka captured this sentiment when he observed:

In the absence of any legal restriction, or indeed well-defined guidelines, judges must determine for themselves what is appropriate. Surely judges who daily make decisions affecting the lives of others can be trusted to determine this matter for themselves.<sup>113</sup>

Judges and prospective judges do not require precise rules respecting how to navigate the world of social media and developing technologies. Rather, they need information, insight, and guidance about the nature and implications of social media and developing technologies. Social networking has changed the way in which information is disseminated. Without clarity and consistency in the standards judges are expected to abide by, the public's confidence in the judiciary and the justice system may be jeopardized.

Developing guidelines ought never to be a "top-down" exercise in rule making. As with the first iteration of the *Ethical Principles*, it will be advisable to engage in a consultative process first, gathering data on judicial use of social media and judicial views on social media. Such a process may result in an iterative and educative set of reflections and commentaries (housed, of course, online) that judges could consult, and to which they could contribute as new situations arise.

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<sup>113</sup> Sopinka, *supra* note 37 at 169.

In our view, without presupposing the precise form or wording that a guideline might take, it may be helpful to identify key content that would address the gap we have highlighted.

A social-media guideline for Canadian judges should, we believe, include the following:

- A definition of social media;
- A general principle that judges should be free to participate in social-media platforms subject to a series of precautions:
  - Judges who engage in social media have a responsibility to understand the implications of social media—for example, judges who wish to maintain a Facebook page should consider available privacy settings and take reasonable steps to protect communications intended to be private;
  - Judges have a special responsibility to be informed about and responsive to their court’s social-media policies and practices;
  - Judges should be accountable for their conduct on social media, whether in the sense of the content they write/post (the provisions of the existing *Ethical Principles* dealing with political speech, etc., would have equal application in this context) and in their expressions of support (a “like” of a Facebook page, a re-tweet of a Twitter post, etc.);
  - Judges should be vigilant to avoid the specific variety of conflicts to which social media can give rise—for example, neither sending nor replying to any direct social-media contacts from counsel who have or are likely to have a matter before the judge, and exercising caution in the “follows” and “likes” in which they participate;
  - Judges may choose to establish a “personal” or “professional” presence on social media but they should understand that, in the eyes of the public, all of their activity will be measured against the standard of public confidence in the justice system. All home

pages for judges should indicate clear caveats as to the nature and purpose of the judges' presence. However, while a journalist or member of a company may indicate that the views expressed in a blog or on a Twitter feed are "my own", this distinction is not applicable in the same way for judges. The scope for judges to demarcate a social-media presence that is personal is necessarily circumscribed by the nature of the judicial role, the evolving expectations of the public, and the overarching commitments all judges must make to the administration of justice.

Ethical rules and guidelines work when there is a consensus on whether certain kinds of conduct are appropriate or not. For the grey area, such as the majority of social media at this stage, the better approach may be to aim for principled engagement and dialogue to determine where the consensus exists, and how to build towards it where it does not yet exist. While the judiciary ought to have a significant voice in shaping this process, the need for a process is apparent. Indifference and indecision in the evolution of judicial ethics in the context of social media is the mischief that needs to be addressed. A failure to consider the distinct challenges of judicial ethics in the digital age will almost certainly make further high-profile complaints and investigations more likely, and ultimately lead to an erosion of public confidence in the judiciary and in the administration of justice.