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A Mixed Bag: Critical Reflections On The Revised Ethical Principles For Judges

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A MIXED BAG: CRITICAL REFLECTIONS ON THE REVISED ETHICAL PRINCIPLES FOR JUDGES*

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In 2021 the Canadian Judicial Council completed a multi-year review and update of Ethical Principles for Judges (EPJ), the ethical and professional guidance for all federally-appointed judges in Canada. The revisions address issues such as case management and settlement conferences, technological competence and the use of social media, interactions with self-represented litigants, professional development for judges, confidentiality, and the return of former judges to the practice of law. In this article, five directors of the Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique analyze the revised EPJ and offer their observations.

The article covers five important topics. On impartiality, it explains the ways in which the revised EPJ represents a significant evolution in the understanding of this important concept. The article then critically examines the absence of any reference to Reconciliation. On judicial involvement with the community, it argues that the revised EPJ may lead judges to disengage from community activities to an unwarranted degree and critiques the scope of new provisions requiring judges to avoid visible signals of support for causes or views. On judicial technological competence, the article endorses new obligations but cautions that these developments will have to be supported by significant resources to provide appropriate training and guidance on best practices. On confidentiality and return to practice, the article welcomes the new provisions while highlighting some additional issues including avenues for enforcement.

* Thanks to Anna Doyle, Deanna Kerry, Rebecca Parker, Hannah Stanley, and two anonymous reviewers for their assistance with this article.

En 2021, le Conseil canadien de la magistrature a terminé son examen pluriannuel et sa modernisation des Principes de déontologie judiciaire, qui régissent tous les juges de nomination fédérale au Canada sur les plans éthique et professionnel. Les révisions touchent des questions comme la gestion des instances et les conférences de règlement, les compétences technologiques et l'utilisation des médias sociaux, les rapports avec les parties non représentées par un avocat, le perfectionnement professionnel, la confidentialité et les carrières post-judiciaires. Dans cet article, cinq administrateurs de l'Association canadienne pour l'éthique juridique/ Canadian Association for Legal Ethics analysent la version révisée des Principes et présentent leurs observations.

L'article porte sur cinq questions importantes. À propos de l'impartialité, les auteurs expliquent en quoi cette version révisée représente une évolution substantielle dans la compréhension de cette notion importante. Vient ensuite un regard critique sur l'absence de toute mention de la réconciliation. Quant à la participation des juges à la vie communautaire, ils soutiennent que les Principes révisés peuvent conduire des juges à se désengager des activités communautaires dans une mesure injustifiée et critiquent la portée de nouvelles dispositions exigeant des juges qu'ils évitent tout signe visible de soutien d'une cause ou opinion. Au sujet des compétences technologiques, les auteurs se disent d'accord avec de nouvelles obligations, mais adressent une mise en garde : ces développements devront être soutenus par des ressources importantes pour que la formation et les directives sur les pratiques exemplaires soient suffisantes. Pour ce qui est de la confidentialité et du retour à la pratique, ils applaudissent les nouvelles dispositions tout en soulignant certaines autres questions, notamment les solutions de mise en application.

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1. Introduction

In 1998, as part of its mandate to regulate federally appointed judges and to promote public confidence in the judiciary, the Canadian Judicial Council (CJC) issued *Ethical Principles for Judges* (*EPJ*).[1] As it emphasized at the time, this 52-page document was not a code of conduct for judges but rather an articulation of five principles (independence, integrity, diligence, equality and impartiality) supported by commentaries designed to be "advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role."[2]

For more than two decades the *EPJ* remained in their original form. The extent to which Canadian judges have had recourse to the *EPJ* for assistance is unknown, but it has served as a touchstone for the Advisory Committee on Judicial Ethics when called upon to provide confidential

1 Canadian Judicial Council, *Ethical Principles for Judges*, (Ottawa: Canadian Judicial Council, 1998), online (pdf): <cjc-ccm.ca> [perma.cc/V8YL-D386] [CJC, *EPJ* 1998].

2 *Ibid* at 3.

opinions to judges seeking advice, a reference point for some judicial decisions dealing with allegations of potential bias by judges,[3] an element of some CJC disciplinary decisions,[4] and a foundation for judicial education programmes delivered by the National Judicial Institute and other provincial judicial education committees.

In 2018, in response to "evolving expectations of the public, societal developments and understandings of issues relevant to the judiciary,"[5] the CJC embarked on a process to revise the *EPJ*. To get the ball rolling, it issued a background paper, *Modernizing the Ethical Principles for Judges*.[6] The process took significantly longer than originally anticipated, in large part because the committee in charge of the revisions, the Judicial Independence Committee, decided that it was important to engage in consultations and a survey with not only members of the judiciary but also the legal profession and the public more generally.[7] The pandemic also contributed to this delay.

The Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ) welcomed these consultations and provided submissions, related to both process and substance, to the Judicial Independence Committee on several occasions.[8] The final version of the revised *EPJ* was released on June 9, 2021. As an initial response, some of the authors (Salyzyn and Pitel) issued a brief statement on behalf of CALE/ACEJ, highlighting that overall, the revised *EPJ* was a job well

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3 See e.g. *Rondo Drugs Ltd v Scott,* 2007 ONCA 553 at paras 20-22 [*Rondo Drugs*].

4 See e.g. Canadian Judicial Council, "Canadian Judicial Council concludes its inquiry into the conduct of Justice Matlow" (3 December 2008), online: *Canadian Judicial Council* <cjc-ccm.ca> [perma.cc/R48A-GQJV] [CJC, "Inquiry into Justice Matlow"]; Canadian Judicial Council, *Report of the Review Panel Constituted By The Canadian Judicial Council Regarding The Honourable Patrick Smith* (Ottawa: Canadian Judicial Council, 2018) [CJC, "Report Regarding Patrick Smith"].

5 Canadian Judicial Council, *Ethical Principles for Judges,* (Ottawa: Canadian Judicial Council, 2021) at 6, online (pdf): <cjc-ccm.ca> [perma.cc/Z5RK-ANRP] [CJC, *EPJ* 2021].

6 Canadian Judicial Council, *Modernizing the Ethical Principles for Judges*, (Background Paper), (Ottawa: Canadian Judicial Council, 2019), online (pdf): <cjc-ccm.ca> [perma.cc/VC3H-J37H] [CJC, "Modernizing the Ethical Principles for Judges"].

7 Canadian Judicial Council, *Consultation on Ethical Principles for Judges*, (Report), (Ottawa: Canadian Judicial Council, 2019) at 7-8, online (pdf): <cjc-ccm.ca> [perma.cc/2LLD-RZHB].

8 See Letters from Amy Salyzyn to Canadian Judicial Council (14 March 2019, 4 June 2019, 20 December 2019, 14 February 2020) [on file with the authors]. There was also one in-person consultation with some members of the CALE/ACEJ Board of Directors. All of the authors are members of the Board.

done, with several positive changes.[9] They also noted ongoing concerns: first, that the revised *EPJ* is still not a code of conduct but merely an aspirational document and second, that it does not adequately address the issue of Reconciliation with Indigenous peoples. This paper builds upon that initial response to provide a more in-depth and constructively critical analysis of some of the more significant changes in the revised *EPJ*. Part 2 unpacks some of the subtle adaptations to the principle of impartiality. Part 3 interrogates why the CJC continues to invisibilize Reconciliation with Indigenous peoples. Part 4 assesses the strengths and weaknesses of the principles which engage with judicial involvement in the community. Part 5 endorses the new provisions addressing judicial technological competence and considers some future challenges. Finally, Part 6 celebrates the articulation of a confidentiality obligation and considers the new principles regarding the return to practice by former judges.[10] We do not revisit the issue of whether it should be a code of conduct, as we have fully canvassed that argument elsewhere,[11] but remain disappointed that the CJC remains obdurate on this issue.

2. Impartiality

A) Preliminary Comments

The revised impartiality chapter continues to make up nearly half of the entire *EPJ,* signalling the fundamental importance of the principle but also its complexity. The revision brings some very welcome additions to the impartiality chapter. For example, the chapter now includes guidance on newer and contentious issues like social media (see Part 5) and assistance to self-represented litigants. However, the chapter revisions go beyond filling lacunae. They represent an important shift in conceptualizing impartiality. Significantly, they also respond to the changes in the functioning of the justice system over the past two decades and the expanded and evolved role of the judiciary.

This Part first addresses the changes to the very understanding of impartiality. It then considers the contributions of the revision to the difficult question of how to conceptualize the relationship between

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9 Amy Salyzyn & Stephen Pitel, "The Updated Ethical Principles for Judges: Reaction from the Canadian Association for Legal Ethics/Association canadienne pour l'ethiques juridique" (10 August 2021), online: *Slaw: Canada's online legal magazine* <www.slaw.ca> [perma.cc/PME6-82T5].

10 While this is a co-authored article, the primary authors for each of the following sections are Hughes, Parmar, Devlin, Salyzyn and Pitel.

11 See Amy Salyzyn & Richard Devlin, "Judges Need Ethics Rules, Not Just Ethical Guidance" (28 January 2020), online: *Slaw: Canada's online legal magazine* <www.slaw.ca> [perma.cc/D7ZG-V8KF].

the ethical duty of impartiality and the law of recusal and judicial disqualification, and discusses some ongoing challenges and tensions. Next, it addresses revisions related to changes in the administration of justice and the role of the judiciary. It concludes with some comments about areas of continued uncertainty.

B) The Understanding of Impartiality

At the time of the original *EPJ*, the document did not include its own definition of impartiality and instead quoted from Justice LeDain's decision in *Valente*: "The word 'impartial' … connotes absence of bias, actual or perceived."[12] This approach to impartiality was consistent with the majority view of the Supreme Court of Canada in *RDS* as articulated in the opinions of Cory and Major JJ.[13] It equated impartiality with neutrality. The concurring opinion of L'Heureux-Dubé and McLachlin JJ approached the relationship between neutrality and impartiality differently:

> In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.[14]

The revised *EPJ* follows the concurring opinion in *RDS* and the more recent Supreme Court jurisprudence,[15] and takes an approach more informed by social context. It states in 5.A.4:[16]

> This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind.

This represents a significant evolution in the understanding of impartiality. It acknowledges that every judge is positioned somewhere and that their positionality will affect how they see the cases that come before them,

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12 CJC, *EPJ* 1998, *supra* note 1 at 8, citing *Valente v Queen*, [1985] 2 SCR 673 at 687, 52 OR (2d) 779.

13 *R v S (RD)*, [1997] 3 SCR 484 at para 104, 151 DLR (4th) 193 per Cory and Iacobucci JJ and at para 3 per Major J [*S (RD)*].

14 *Ibid* at para 29.

15 *Yukon Francophone School Board, Education Area #23 v Yukon (AG)*, 2015 SCC 25 at para 33.

16 CJC, *EPJ* 2021, *supra* note 5 at 39.

consciously or unconsciously. It also takes into account the importance of becoming more aware of one's own biases and appreciating the need to avoid improperly speedy conclusions based on stereotypical reasoning. Finally, it seems to recognize that an open mind is not a state of being, an attitude, or a personality trait, so much as the result of ongoing work on careful self-reflection and deliberate curiosity.

The changed approach is not only a philosophical shift. It has important implications for judges whose identity, life and pre-appointment work are not mainstream. It has long been clear that judges benefit from a presumption of impartiality, but the strength of the presumption has at times appeared diluted for judges from equity-deserving groups.[17] The new definition of impartiality supports a more equal application of the presumption of impartiality.

C) Impartiality and Recusal

During the consultations surrounding the revision of the *EPJ*, the CJC was at pains to avoid a binding code of conduct. As we have noted, CALE/ACEJ among others had urged the CJC to create a binding code rather than an aspirational document.[18] The CJC rejected the notion of a binding code, as is specifically emphasized in the context of disqualification and recusal law in Art. 5.A.3:[19]

> While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.

The new language notes that there may be a difference between the ethical and legal duties of judges, but does not give examples of any differences, nor does it address how to resolve any conflict between the two, or determine to what degree judges are legally bound by the *EPJ*.

Ethical duties of judges in the context of impartiality, as found in the *EPJ*, go beyond what is captured in the law of recusal. Importantly, the ethical duties include proactive as well as remedial duties. Judges have an obligation to avoid conduct that could reasonably cause others to question their impartiality.[20] By contrast, the law of recusal is remedial and deals with situations where judicial conduct has caused a party to question the

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17 Constance Backhouse, "Turning the Tables on RDS: Racially Revealing Questions Asked by White Judges" (2021) 44:1 Dal LJ 181.

18 *Supra* notes 8 and 11.

19 CJC, *EPJ* 2021, *supra* note 5 at 39.

20 *Ibid* at 38: Principle B.

judge's impartiality. Additionally, recusal may be required to remedy circumstances outside of the judge's control. For example, Commentary 5.B.5 notes that recusal may be appropriate in situations where a family member's political activity has potentially cast doubt on the impartiality of the judge.

It is less clear what the new language means for judges who face a bias motion. Presumably judges should refer to the EPJ when determining whether they should sit in a case where their impartiality has been questioned, but the impact of an "aspirational" document on the legal decision to sit or recuse is less than obvious. It suggests a separation of the legal and ethical obligations that is also not reflected in the judicial experience in recent years. Litigants have increasingly used complaints to the CJC in tandem with recusal motions or have sought to piggy-back recusal motions on CJC complaints,[21] further requiring judges to think about their ethical and legal obligations together.

Clarification on the precise legal status and the relationship between the *EPJ* and recusal law would have been helpful as appellate courts have varied subtly in their approach to the original *EPJ*. In *Yukon Francophone School Board*, the Supreme Court of Canada relied on the *EPJ* as providing guidance.[22] Earlier, in the *Wewaykum* case, the Court had referenced the *EPJ* as an authority.[23] A similar approach to *Wewaykum* appears in the Alberta Court of Appeal in *Carbone v McMahon*, where the *EPJ* is referenced alongside caselaw.[24] More recently, the Alberta Court of Appeal appears to have treated the *EPJ* as an authority.[25] The Ontario Court of Appeal in *Rondo Drugs* relies on the *EPJ* alongside caselaw as a "source" informing its decision on recusal.[26] However, in its analysis, the Ontario Court of Appeal went on to emphasize the advisory nature of the *EPJ* noting that a judge could not be faulted for recusing when the *EPJ* Commentary so advised, but a deviation from the guideline was not necessarily in error, particularly when the guideline was at variance with the leading jurisprudence.[27]

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21 For a recent example of this see *Cosentino v Canada (AG)*, 2020 FC 884.

22 *Supra* note 15 at para 60.

23 *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 59.

24 2017 ABCA 384 at paras 96, 102. See also: *Hawkes v AG (Canada) et al*, 2013 PECA 6 at para 5.

25 *Cartwright v Rocky View County Subdivision and Development Appeal Board*, 2020 ABCA 408, nn 47, 57.

26 *Supra* note 3 at paras 20–22. See also *Liszkay v Robinson*, 2003 BCCA 506 at para 52.

27 *Rondo Drugs, supra* note 3 at para 24. See also *Jans Estate v Jans*, 2020 SKCA 61 at para 144.

The cases can be reconciled by understanding the *EPJ*, and in particular the commentaries, as a (partial) restatement of the law that can be treated as authoritative as long as the caselaw does not direct otherwise. Places where the *EPJ* varies from the caselaw are therefore particularly important. It is also noteworthy that there are at least two potential sources of disagreement between the *EPJ* and the caselaw. One, the *EPJ* is updated very infrequently, and so the commentaries may simply become outdated. Two, the CJC may take a different view than the courts.

In light of the prolific, evolving and ever refining jurisprudence in the area of judicial disqualification and recusal, and considering the generational nature of revision of the *EPJ*, it makes sense to treat the *EPJ* as a starting point rather than a complete code of the law of recusal.[28] As one might expect, at the time of adoption much of the commentary in the revised *EPJ* tracks, but falls far short of fully capturing, the current recusal jurisprudence.

However, it is apparent that in a few places, the new *EPJ* may reflect what chief justices might like the law of recusal to be rather than what it is. Most strikingly, the new *EPJ* recommends consultation with one's chief justice in several situations, while the caselaw tends to treat decisions on recusal as falling within the absolute autonomy of the judge whose recusal is sought. Consultation with the chief justice is now recommended regarding public statements, giving speeches, and participating in conferences. It is interesting that the recommendation for consultation with one's chief justice occurs in contexts of extrajudicial expression where the recusal jurisprudence tends to be rather permissive.[29] The situations treated by the *EPJ* and the caselaw are not entirely analogous in that the *EPJ* is dealing with decisions designed to avoid potential future recusal motions rather than the decision on a motion. Nonetheless, the *EPJ* now seems to contemplate a greater role for chief justices in providing advice to judges.

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[28] For an overview, see Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82:3 Can Bar Rev 555. An updated edition of the paper can be found here: Philip Bryden & Jula Hughes, "Legal Principles Governing the Disqualification of Judges" (29 July 2014), online: *SSRN* <papers.ssrn.com> [perma.cc/YPB3-4UBC] [Bryden & Hughes, "Legal Principles"]. See also Jula Hughes & Philip Bryden, "Refining the reasonable apprehension of bias test: Providing judges better tools for addressing judicial disqualification" (2013) 36:1 Dal LJ 171 [Hughes & Bryden, "Refining the test"].

[29] *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851, 267 NR 386. See: Gabrielle Appleby & Stephen McDonald, "Pride and prejudice: a case for reform of judicial recusal procedure" (2017) 20:1 Leg Ethics 89 at 94-95 for a thoughtful critique of the Canadian approach.

There is at least one area where the *EPJ* is in some tension with a relatively recent decision from our highest court. On the complex question of civic engagement by judges (dealt with in more detail in Part 4), the *EPJ* appears to run counter to the approach to recusal in the Supreme Court of Canada in *Yukon Francophone School Board*.[30] In *Yukon*, the Court had emphasized the importance of civic engagement, while the *EPJ* cautions judges to refrain from taking on membership or leadership roles in civic organizations.[31] This is more in line with the earlier decision of the House of Lords in *Pinochet* than Canadian authority.[32]

Pinochet concerned the participation of Lord Hoffmann as a member of a panel of the House of Lords that had heard an appeal from an extradition application involving Senator Pinochet, the former Chilean dictator. Amnesty International was granted leave to intervene in the case and took a position that was contrary to the interests of Senator Pinochet. Lord Hoffmann was the chairman and a director of Amnesty International Charity Limited, the charitable arm of Amnesty International in the United Kingdom. The House of Lords, by a 3-2 majority, decided the appeal against Senator Pinochet, with Lord Hoffmann joining in the conclusion of the majority. In Senator Pinochet's subsequent application to set aside the House of Lords decision in the extradition appeal, Lord Hoffmann's participation in the extradition case was considered to invalidate the decision because his links with Amnesty International were such as to effectively make him the judge in his own cause. Thus, UK law supports the idea that leadership in a civic organization may require recusal, while Canadian law does not.

The disagreement between the *EPJ* and recusal caselaw on civic engagement is also apparent in the context of university service. The *EPJ* urges caution in relation to serving universities in leadership positions despite *Smith v Canada (AG)*.[33] In *Smith*, a judge of the Ontario Superior Court had taken on the interim deanship of the law school at Lakehead University with the approval of his Chief Justice. The CJC proceeded against Justice Smith. A review panel found that Justice Smith had violated both his ethical duties and the *Judges Act*. The Federal Court issued a declaration that Justice Smith had not done anything wrong, stating that "a sitting judge is permitted to engage in non-commercial activities that do

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30 *Supra* note 15.

31 Thank you to Phil Bryden for our discussion on this point.

32 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)*, [2000] 1 AC 119.

33 2020 FC 629.

not impair his or her ability to perform judicial duties".[34] The Court also held that the CJC's proceeding against Justice Smith had been abusive.[35]

The enhanced role of chief justices in the revised *EPJ* and the cautionary approach to civic engagement both support the idea that judges should proactively avoid future recusal motions by steering clear of any cause or organization that might come before the courts. While this is sound in principle as excessive recusals do impact the efficiency and timeliness of the administration of justice,[36] it is doubtful that this future litigation focus is ultimately helpful because it is impossible to predict what causes or organizations will come before the courts.

D) Impartiality and the Administration of Justice

Several revisions were made to the EPJ to reflect the evolution and expansion of judicial duties and the changed realities in the administration of justice. Chief among these are commentary on the application of the impartiality principles to matters outside conducting trials and rendering decisions, as well as challenges arising from the prevalence of self-represented litigants.

The changes to the judicial role were considered momentous enough to deserve reference in Chief Justice Wagner's foreword as well as in the context analysis that precedes the chapters on individual principles. In the context analysis, the *EPJ* now states in its relevant part:

> 8. Today, judges' work includes case management, settlement conferences, judicial mediation, and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance.[37]

Even though these changes are relevant to other principles, we will focus here on the implications for impartiality. The impartiality chapter does not specifically address bias issues that may arise in the context of case management. Case management is only dealt with under the Diligence and Competence principle. This is unfortunate because judges need to be alert to problems that can arise regarding the reasonable apprehension of bias in case management.[38] The most significant concerns arise from the fact that litigants under case management will appear before the same judge multiple times, have an opportunity to observe, and be subject to various procedural decisions by, the same judge over time. The same party

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34 *Ibid* at para 180.

35 *Ibid* at para 168 and Order, Declaration 5.

36 Hughes & Bryden, "Refining the test", *supra* note 28 at 177.

37 CJC, *EPJ* 2021, *supra* note 5 at 11.

38 Jula Hughes & Philip Bryden, "Implications of case management and active adjudication for judicial disqualification" (2017) 54:4 Alta L Rev 849.

may experience repeated or even consistent losses in these decisions. It is of course true that the mere fact that a party has been unsuccessful on a series of motions is not, in itself, a basis for a reasonable apprehension of bias. That said, the perception of a litigant may well be that the judge is biased against them. Some repeat appearances and litigation conduct may also strain a judge's patience and affect their demeanour.

For these reasons, case management judges need to be very careful about maintaining control over the proceedings and exercising a high degree of self-regulation to avoid bias perceptions. The prevalence of case management in family court heightens these obligations in cases involving high conflict families. Also, litigants from equity-deserving groups frequently have pre-existing trust deficits in the administration of justice. In case management, they can observe a judge's conduct over time. Research shows that scrupulous adherence to procedural fairness can enhance the confidence of people from marginalized communities in the justice system, while procedural fairness lapses can have disproportionate impacts.[39] Therefore, case management provides judges with opportunities for enhancing the confidence of a diverse public in the administration of justice, but also demands very high standards of judicial conduct. It might have been helpful to judges to address these impartiality implications of case management directly.

The revised impartiality chapter is much more fulsome and helpful in the context of settlement conferences and judicial mediation. In 5.A.10 the chapter highlights the importance of ensuring processes and outcomes that are acceptable to the parties, informed decision-making by the parties and transparency of the process (while making it clear that caucusing is acceptable). It also alerts judges to the risks of arriving at negotiated outcomes that are coercive, unconscionable, or illegal or that disregard the legitimate interests of known non-involved third parties.

The revised impartiality chapter also specifically addresses ethical obligations in relation to self-represented litigants. Drawing on the *2006 Statement of Principles on Self-represented Litigants and Accused Persons of the Canadian Judicial Council*, it recognizes the appropriateness, and indeed the obligations of judges to provide assistance to self-represented litigants.[40] Commentary 5.A.8 expressly notes the need to take measures

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[39] Tom R Tyler, "Legitimacy and Criminal Justice: The Benefits of Self-Regulation" (2009) 7:1 Ohio State J Crim L 307 at 319, 321.

[40] Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons of the Canadian Judicial Council*, (Ottawa: Canadian Judicial Council, 2006), online (pdf): <cjc-ccm.ca> [perma.cc/KAD7-3Z5G].

to ensure fair process to self-represented litigants, but also cautions about potential unfairness to an opposing represented party. Most helpfully, the revised chapter in 5.A.9 addresses the need to be attentive to the possibility that assistance may be perceived as bias against the represented party, and emphasizes that the answer to this problem is not to abandon the self-represented party in need of assistance, but suggests instead that judges should communicate clearly and transparently to avoid perceptions of bias.

The revised language has benefited from the now extensive body of caselaw addressing these questions. The law in the area has matured, the key issues have been developed, and the resulting ethical guidance is improved as a result.

E) Some Uncertainties

There are at least two areas where the *EPJ* revisions missed an opportunity to clarify how judges should deal with high-frequency problems giving rise to recusal motions: waiver and cooling off periods. On the first, the relationship between impartiality and waiver, judges would have benefitted from more guidance. Instead, the *EPJ* may have further muddied the waters. Canadian caselaw is clear, both in the administrative and judicial contexts, that parties may waive any perceived bias either expressly or implicitly (by failing to object to the judge's sitting once the arguably disqualifying circumstance is known to the parties).[41] Judges have an obligation to disclose any facts about a disqualifying circumstance.[42] The failure to fully comply with the disclosure obligation constitutes a reversible error.[43]

This puts judges in a very difficult situation. On the one hand, disclosing a fact that in the view of the judge does not disqualify them from sitting, but that might be the subject of argument about whether recusal is appropriate, may lead to unnecessary delays, tactical recusal motions and waste of judicial resources. On the other hand, not disclosing a potentially disqualifying fact risks appellate intervention and a new trial, wasting even more resources and also negatively affecting the reputation of the judge. To make matters trickier still, when disclosure is required and made, it must be fulsome. It would have been useful for the CJC to offer some guidance on when to let sleeping dogs lie and when ethical considerations favour disclosure.

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41 Hughes & Bryden, "Legal Principles", *supra* note 28 at 36-40.

42 *Lambert v Lacey-House*, 2013 NBCA 48.

43 *Ibid*.

The revised *EPJ* addresses this broad area as follows:

> 5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.[44]

This surely raises more questions than it answers. What are the "certain situations" where disclosure is appropriate? Do they go beyond the situations articulated in the caselaw (e.g., prior relationships with lawyers, matters, parties or witnesses)? Is the standard "potential conflict" or "reasonable apprehension of bias"? What does it mean that judges may not "necessarily" be able to rely on the consent of the parties for ethical purposes? Could a party consent to a judge proceeding with a hearing, to then turn around and file a complaint with the CJC? The final sentence is the most vexing and important. Does it mean that a judge may have an *ethical* obligation to recuse because circumstances exist that reasonably call into question their ability to be impartial despite a clear *legal* ability to rely on the consent of the parties to proceed as long as adequate disclosure is made? The revised *EPJ* therefore not only fails to provide guidance on the crucial question of when disclosure should be made, but also adds to the existing uncertainty by suggesting a cleavage between legal and ethical obligations in this area.

The second missed opportunity is with respect to cooling off periods. The revision maintains the language from the 1998 version in 5.C.7:[45]

> (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years

Since judges are almost invariably appointed from the practicing bar, cooling off periods perform an essential function in clarifying when judges may sit on cases involving clients and lawyers of their former law firm. Empirical research demonstrates that local law or tradition (as the *EPJ* so quaintly describes it) does not exist in any objective sense, though some judges have firm subjective beliefs about the applicable norms in their jurisdiction.[46] Unlike the waiver problem, this could have been

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44 CJC, *EPJ* 2021, *supra* note 5 at 55.

45 *Ibid* at 53.

46 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" (2010) 48:3 Alta L Rev 569 at 602 [Bryden & Hughes, "Tip of Iceberg"].

readily addressed. The best answer is that cooling off periods should be standardized and short (two years being entirely acceptable). This is because it promotes the efficient use of judicial resources and clarity for litigants and their counsel. It should be remembered that judges can always recuse where special circumstances support recusal beyond the standard cooling off period.

3. Reconciliation

A) The Colonial Context

The revised *EPJ* includes two specific references to Indigenous peoples. The first is under Context in the introductory section:

> Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to enhance public confidence and to expand its own knowledge of the diversity of human experiences in Canada today.[47]

The second reference appears under Professional Development in the chapter on Diligence and Competence:

> Professional development describes formal and informal learning activities that include education, training and private study. It also covers education on social context issues affecting the administration of justice. Social context encompasses knowledge and understanding of the realities of the lives of those who appear in court. This includes the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background.[48]

These references are a welcome addition, especially since the original *EPJ* did not include any mention of Indigenous peoples. However, there is no mention of the *Truth and Reconciliation Report* (*TRC Report*) or of reconciliation in the revised EPJ.[49] This is a serious and unfortunate omission because of the questions the *TRC Report* raises about Indigenous

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47 CJC, *EPJ* 2021, *supra* note 5 at 11.

48 *Ibid* at 31.

49 The Truth and Reconciliation Commission published its report in six volumes in 2015. These volumes are collectively referred to as the TRC Report. See the summary of the final report Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) online (pdf), <publications.gc.ca> [perma.cc/M8C8-3UL9] [TRC, "Honouring the Truth"]

peoples' experience of law and justice in Canada. Chapter Five in Volume 5 of the *TRC Report* titled 'A Denial of Justice' documents the ways in which the civil and criminal justice systems in Canada have failed Indigenous people either by not recognizing or by being slow to recognize the "profound injustices" the residential schools inflicted on Indigenous people: upon the children, their parents, the survivors, their families and descendants.[50] These failures continue to impact Indigenous peoples' lives to this day. The volume specifically notes that the "justice system was a barrier to their efforts to bring out the truth of their collective experience," and that the "justice system denies Aboriginal people the safety and opportunities that most Canadians take for granted".[51] Among the system's ongoing failures are the inadequate responses to disproportionate imprisonment of Indigenous peoples as well as to missing and murdered Indigenous women and girls. The Report clearly highlights the urgent need for significant reform of Canadian law and the legal system more generally.

There are several specific references in chapter five of the *TRC Report* to judges and the particular roles individual judges played in not only failing to prevent abuse of children, but also accounts of racist ideas about Indigenous peoples they held.[52] Other references to judges appear in the context of rulings on mandatory minimum sentence, and the need for judges to be better educated on the application of the *Gladue* decision,[53] the use of Gladue reports and the symptoms of Fetal Alcohol Spectrum Disorder (FASD). While there are some notable references to decisions that indicate some judges do understand how colonial legacies continue to impact Indigenous peoples' lives and their experiences with law,[54] the larger story is clearly one of systemic failures, lack of understanding of colonialism, racism, and as signaled by the title of the chapter itself, of 'denial of justice'. And this is all just in the context of the *TRC Report*. The story of Indigenous peoples' encounters with Canadian law and with a justice system that resulted in their marginalization in a settler colonial state is a longer one and has been thoroughly documented.[55] It is therefore

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along with the six volumes, "Reports", online: *National Centre for Truth and Reconciliation* <nctr.ca> [perma.cc/EB3X-9CZ9].

50 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy*, vol 5 (Montreal: McGill-Queen's University Press, 2015) at 185 (Denial of Justice) [TRC, "Denial of Justice"].

51 *Ibid* at 186.

52 *Ibid* at 187.

53 *R* v *Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

54 See e.g. TRC, "Denial of Justice", *supra* note 50 at 225, 236-237.

55 For early contestations and resistance to application of settler law to Indigenous peoples, and Indigenous peoples' experience of this imposition see e.g. Hamar Foster, "'The Queen's Law is Better Than Yours': International Homicide in Early British

not surprising that the section titled 'The Challenge of Reconciliation' in the Executive Summary of the *TRC Report* specifically mentions judges (along with lawyers, teachers, politicians, and doctors) as a group that "need[s] to learn […] how to be more inclusive and more respectful, and how to engage more fully in the dialogue about reconciliation."[56] In failing to reference either the *TRC Report* or reconciliation, the CJC has missed an important opportunity to begin that much-needed dialogue both within the judiciary, and with Indigenous peoples.

The inclusion of references to Indigenous peoples in the revised *EPJ*, and of an expectation for judges to "be alert to" the history, circumstances and experiences of Indigenous peoples in Canada certainly matters, and in fact reflects recent judicial pronouncements.[57] Why then does a document drafted with the explicit purpose of being "read by judges and the public as an expression of the judiciary's highest ethical aspirations in the service of justice and the rule of law"[58] not include a single reference to the need for a 'dialogue about reconciliation'? What explains this exclusion when the importance of reconciliation has been recognized by the highest court in the country as well as by at least two of its Chief Justices?[59] These questions are also worth considering in light of the fact that in its submission to the CJC, the Indigenous Bar Association specifically drew attention to the TRC Calls to Action Nos. 27, 28 and 50, and the critical need for judges

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Columbia" in Jim Phillips, Tina Loo & Susan Lewthwaite eds, *Essays in the History of Canadian law, Volume V Crime and criminal justice* (Toronto: Osgoode Society for Canadian Legal History, 1994); Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995); Mark D Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakiskie Case (1822-26)" (1996) 46:2 UTLJ 273; Constance Backhouse, *Colour Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999); Shelley Gavigan, *Hunger, Horses & Government Men: Criminal Law on the Aboriginal Plains, 1870-1905* (Vancouver: UBC Press, 2012); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); Debra Komar, *The Court of Better Fiction: Three Trials, Two Executions, and Arctic Sovereignty* (Toronto: Dundurn Press, 2019).

56 TRC, "Honouring the Truth", *supra* note 49 at 364.

57 See e.g. *R* v *Barton*, 2019 SCC 33 at paras 198-234 [*Barton*].

58 CJC, *EPJ* 2021, *supra* note 5 at 6.

59 See e.g. *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193; *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44. In his remarks to Ontario Superior Court Justices, Wagner, CJ emphasized the need to "redouble our efforts of Reconciliation with the First Peoples of Canada." See the Right Honourable Richard Wagner, PC Chief Justice of Canada, "Ethical Principles and Cultural Competence: a duty to learn", Remark, (6 May 2021), online: <www.scc-csc.ca> [perma.cc/29SH-5TQF]. See also the Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "Defining Moments: The Canadian Constitution", Remark, (5 February 2013), online: <www.scc-csc.ca> [perma.cc/9N4T-VBYA].

to learn and respect Indigenous laws.[60] Further, CALE/ACEJ had also in its submission to the CJC advocated that a reference to reconciliation be included in the revised principles.[61]

A closer look at the text of the revised *EPJ* reveals that at least one reason why the CJC chose not to include a reference to reconciliation is a misplaced concern about judicial impartiality. This concern over impartiality arises due to an inadequate understanding of both indigeneity and the role of empathy in legal reasoning.

B) Indigenous Peoples in Canada

In the two places where the revised *EPJ* mentions Indigenous peoples, there is a recognition of the fact that judges are expected to be alert to the history, experiences, circumstances, and the "social context" of Indigenous peoples.[62] In both instances, however, there appears to have been a rush to clarify that Indigenous peoples are not being singled out to receive any special treatment that may be seen as unfair by others, but rather are one of several equity seeking groups in Canada. Both references to Indigenous people appear in longer sentences that speak of the "diversity of cultures and communities that make up this country" and "matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background." Indigenous peoples appear in the text as part of the "wider public" with which Canadian judges are expected to engage as they "expand their knowledge of the diversity of human experiences in Canada today."[63] There is no doubt that the recognition of the significance of knowledge of social and economic contexts, history, and identities in thinking about judicial competence in these passages serves an important and desirable purpose. However, the two references to Indigenous peoples appear to be nothing more than a nod to the importance of cultural competence, which in its current form and conception within the legal profession, is an inadequate response to Indigenous peoples' experiences with the legal system.[64] The choice to use the assimilationist phrase "Canada's Indigenous peoples" and to place them alongside minority groups and diverse identities and experiences itself reveals significant gaps

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60 Letter from Indigenous Bar Association to the Canadian Judicial Council (18 March 2019). [On file with authors].

61 Letter from Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique to Canadian Judicial Council (4 June 2019) at 2–3, online (pdf): <ethicsincanada.files.wordpress.com> [perma.cc/A54Z-EECL].

62 CJC, *EPJ* 2021, *supra* note 5 at 11, 31.

63 *Ibid* at 11.

64 See Pooja Parmar, "Reconciliation & Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 526.

in knowledge. Indeed, in its submissions CALE/ACEJ had highlighted this concern, so the choice appears to be intentional. This not only reinforces "structural settler denial"[65] but also serves to further a problematic liberal politics of recognition that disregards the centrality of self-determination in Indigenous claims. The manner in which Indigenous peoples are included in the revised *EPJ* therefore ends up undermining much of the of the work that the inclusion of references to Indigenous peoples seeks to achieve.

C) Empathy and Bias

The passages where the 'wider public' and 'diverse peoples' appear as a reminder and a reassurance that Indigenous people are not to receive advantage over any other litigant that appears before Canadian courts betray a concern about creating an apprehension of bias that is based on an inadequate and impoverished understanding of the role of empathy in judicial reasoning.[66] While judicial impartiality is one of the core principles of judicial ethics, any apprehensions that an acknowledgment of the imperative of reconciliation will compromise the value are misplaced. The concerns over bias in this context show why it is in fact crucial for the judiciary to develop a robust understanding of what reconciliation means for its members.

Reconciliation is not easy to define. To the Truth and Reconciliation Commission, it is "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."[67] Reconciliation therefore requires "awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour."[68] Acknowledgment, atonement and structural change are undoubtedly challenging, complicated and generational processes. But to begin with, reconciliation calls attention to the nature of the very specific relationships between Indigenous and non-Indigenous peoples, laws and institutions in this specific place. For those engaged in the difficult work of law, it requires thinking about ways of undoing colonial violence, including the epistemic violence that is foundational to Canadian laws and legal systems. It is a call to grapple with

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65 Anna Cook, "Recognizing Settler Ignorance in the Canadian Truth and Reconciliation Commission" (2018) 4:4 Feminist Philosophy Q 1 at 11.

66 For the role of empathy in legal reasoning, see Lynne N Henderson, "Legality and Empathy" (1987) 85:7 Mich L Rev 1574; Susan A Bandes, "Empathetic Judging and the Rule of Law" (2009) Cardozo L Rev 133. For the importance of judicial empathy for objective adjudication, see Rebecca K Lee, "Judging Judges: Empathy as the Litmus Test for Impartiality" (2013) 82:1 U Cin L Rev 145.

67 TRC, "Honouring the Truth", *supra* note 49 at 6–7.

68 *Ibid.*

the challenges faced by Indigenous peoples as they were made subject to foreign laws and legal systems, often to their disadvantage. Reconciliation therefore calls for much more than recognizing Indigenous peoples as one of the many diverse peoples in Canada.

The competence required of a judge in Canada is not simply a matter of judges meeting Indigenous peoples and learning about their history and culture to gather what is described as the social context of Indigenous peoples in *EPJ*. Competence has to be conceived as an ability to recognize and understand the complex truths that are in the *TRC Report*, the truths that are in the unmarked graves being discovered across Canada, the truths of the *Indian Act*,[69] and the truths of being an Indigenous person in court[70] in light of the fact that not too long ago Indigenous persons were denied the right to enter a court of law as lawyers, or to engage counsel, or to a hearing in Canadian courts. There are also the truths in the individual and collective trauma that results from loss of life, loss of children, loss of ways of living and thinking, loss of land and sustenance, loss of knowledges, and the loss of legal systems and practices. By excluding any mention of reconciliation in *EPJ*, the CJC has lost a vital opportunity to signal the importance of learning these particular histories, and of reading the *TRC Report* and the many other previous reports in order to acquire the competence to adjudicate difficult issues that are inseparable from these histories.

Acknowledging the fact of settler colonialism and displacement of Indigenous laws and legal systems does not in itself signal bias or an abandonment of legal reasoning. If anything, learning about past injustices, naming wrongs, and treating this knowledge as relevant to independent adjudication of specific issues would allow judges to understand why courts are seen as colonial institutions by many Indigenous peoples, and lead to more awareness of the ways in which legal analysis is informed by ideas and practices of law that enable dispossession of Indigenous peoples. It could also lead to better answers to persistent legal issues. A reference to reconciliation in *EPJ* would have signalled that an institution that is meant to dispense justice (but has often failed Indigenous peoples) in fact seeks to redesign the legal system in order to make it more responsive. This does not introduce bias into the process of judging or compromise judicial impartiality and independence, but rather involves a "mode

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69 RSC 1985, c I-5.

70 See e.g. observations made by the SCC in *Barton, supra* note 57 about "widespread racism against Indigenous people" within Canada's criminal justice system (paras 198-199) and about the need for trial judges to be "acutely attentive to the undisputed reality of pervasive prejudice" against Indigenous peoples while instructing juries (paras 7, 200–234).

of interpretation" that is essential to judicial reasoning and decision-making.[71]

On the other hand, the failure of the CJC to acknowledge that a judiciary that is overwhelmingly non-Indigenous needs to begin a conversation about reconciliation could be seen as bias, that is, a predetermination that reconciliation is not an ethical imperative before it has even turned its mind to it. Even as specific claims are contested and tried in courts, the judiciary, just like other institutions in this country, has to figure out in conversation with Indigenous peoples what kinds of ethical considerations reconciliation invokes. However, the process of reflection and engagement necessary cannot begin until judges find the courage to say the word out loud and find a place for it in the document that purports to proclaim the Canadian judiciary's "highest ethical aspirations."

4. Judicial Involvement in the Community

The issue of judicial involvement in the community has garnered the attention of many people: senior judges,[72] legal academics[73] and the general public.[74] Examples of involvement include: Justice Theodore Matlow and his altercations with the Toronto Transit Commission;[75] Justice Patrick Smith and his brief tenure as interim Dean of Law at Lakehead University;[76] Justice Frank Newbould and his desire to protect his family cottage from a nearby development involving local Indigenous

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71 For an argument that empathy is not personal bias but rather a "mode of interpretation" and that cognitive empathy or the "intellectual work of contextualizing, identifying with and coming to conclusions about situations and people different from ourselves" is essential element to judicial decision making and "embodies core principles of common law reasoning" see Kris Franklin, "Empathy and Reasoning in Context: Thinking about Anti-gay Bullying" (2014) 23 Tulane JL & Sexuality 61. For the relationship between diversity on the bench and independence of the judiciary, see Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" in Adam Dodek, & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193.

72 John Sopinka, Must a Judge be a Monk: Address, (Montreal: Association du jeune barreau de Montréal, 1989) [unpublished] [on file with author]; John Sopinka, "Must a Judge be a Monk—Revisited" (1996) 45 UNBLJ 167; Malcom Rowe & Dalia Shuhaibar, "To Participate or not to Participate: Judicial Involvement in the Community" (2020) 71 UNBLJ 275.

73 See e.g. Patricia Hughes, "Do We Need to Think About Judge's Roles Differently?" (11 Dec 2018), online: *Slaw: Canada online legal magazine* <www.slaw.ca> [perma.cc/2MG5-F4AU].

74 See e.g. Sean Fine, "Canadian Judicial Council finds judge's intervention in university hiring process was 'an error' but should not cost him his job", *Globe & Mail* (21 May 2021), online: <www.globeandmail.com> [perma.cc/4TUK-8EGU].

75 CJC, "Inquiry into Justice Matlow", *supra* note 4.

76 CJC, "Report Regarding Patrick Smith", *supra* note 4.

communities;[77] Justice David Spiro's intervention in a hiring decision at the Faculty of Law of University of Toronto;[78] Justice Graeme Mitchell's visit to the campsite of an Indigenous protester,[79] and Justice Donald McLeod's decision to play a leadership role in supporting groups that sought to tackle systemic racism experienced by African Canadians.[80] It has also attracted the attention of the Supreme Court of Canada in cases such as *RDS*[81] and *Yukon Francophone Schoolboard*.[82]

The topic is difficult for several reasons. First, it raises fundamental questions about our expectations of judges. Do we want them, as we did in the days of yore, to be a class apart, distanced, and removed from the general populace? Or do we want them to be part of us, to emerge from, and reflect the understandings, identities and experiences of a diverse general populace? Second, community engagement certainly seems to be a significant factor in the judicial appointments process,[83] so the question is to what extent can, or should, it continue post appointment? Third, the concept of "community" itself is indeterminate and subject to both narrow and broad interpretations. Do we mean the legal community (i.e., practitioners, law schools, bar associations)? A judge's social, cultural, or religious community? Their family, nuclear or extended?

The revised *EPJ* engages with all three of these challenges, if not explicitly then implicitly. This can be analysed in three stages: an inquiry into the tone of *EPJ*, the identification of several improvements, and a highlighting of two potentially worrisome additions.

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77 Canadian Judicial Council, "Canadian Judicial Council constitutes a public inquiry into the conduct of the Honourable FJC Newbould" (13 February 2017), online: *Canadian Judicial Council* <cjc-ccm.ca> [perma.cc/NPZ5-XKSM].

78 Canadian Judicial Council, "Report of the Review Panel Constituted by the Canadian Judicial Council regarding the Honourable DE Spiro" (21 May 2021), online: *Canadian Judicial Council* <cjc-ccm.ca> [perma.cc/U5SR-687E].

79 Canadian Judicial Council, "Report of the Review Panel Constituted by the Canadian Judicial Council regarding the Honourable Graeme Mitchell" (13 April 2021), online: *Canadian Judicial Council* <cjc-ccm.ca> [perma.cc/CFR6-Q8RR].

80 Ontario Judicial Council, "Notice of Hearing into a Complaint about the Conduct of the Honourable Justice Donald McLeod" (20 December 2018), online: *Judicial Conduct* <www.ontariocourts.ca> [perma.cc/QFC3-C5SN].

81 *Supra* note 13.

82 *Supra* note 15.

83 Office of the Commissioner for Federal Judicial Affairs Canada, "How to Apply—Questionnaire" (09 February 2021), online: *Government of Canada* <www.fja.gc.ca> [perma.cc/2R5H-WDQP].

A) Tone

If one compares the original *EPJ* with the revised version, it is more concise and less discursive. While it retains the same structure, "a statement, followed by a set of Principles and then a series of Commentaries aligned with each principle,"[84] the approach is significantly different insofar as "[w]ith occasional exceptions, the Statements and Principles are stated in 'declarative' language—essentially statements of what an ethical judge does or how an ethical judge acts, consistent with attributes of an ethical judge."[85] This declarative approach certainly has the benefit of being somewhat clearer (although not so clear as to be mandatory, in the sense of a Code)[86] and helps to fulfill the three core objectives of "i) describing exemplary behaviour which all judges strive to maintain; ii) assist[ing] judges with the difficult ethical and professional issues that confront them; iii) help[ing] members of the public understand the judicial role."[87] However, when it comes to the issue of judicial community involvement there may be a risk of slipping from the declarative to the didactic.

To elaborate, the original *EPJ* explicitly acknowledged that "[t]he precise constraints under which a judge should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary."[88] However, the new *EPJ* does not acknowledge the reality of this controversy. While it recognizes that judges "may lead a normal life in the community"[89] and that there are some potential benefits of community involvement,[90] the overall tone is that judges should be extremely careful about engaging in community related activities. Consider for example the following Commentary:[91]

> **2.A.5** A judge's conduct, in and out of court, may be the subject of public scrutiny and comment. At the same time, judges have private lives and are entitled to enjoy, as much as possible, the rights and freedoms generally available to all. Nevertheless, judges accept some restrictions on their activities—even activities that would not elicit adverse notice if carried out by other members of the community. For example, judges should exercise caution in their use of social media. Judges should strive to strike a balance between the expectations of judicial

84 CJC, *EPJ* 2021, *supra* note 5 at 11.
85 *Ibid.*
86 *Ibid* at 7.
87 *Ibid.*
88 CJC, *EPJ* 1998, *supra* note 1 at 34.
89 CJC, *EPJ* 2021, *supra* note 5 at 20.
90 *Ibid* at 45.
91 *Ibid* at 20.

> office and their personal lives. In finding this balance, judges should be guided by these Ethical Principles.

This cautionary tone is amplified in Commentaries 5.B.11 and 5.B12:[92]

> **5.B.11** On the other hand, the judge's civic involvement may, in some cases, jeopardize the perception of impartiality. Judges should exercise caution when considering their involvement in community activities and be attentive to the limits that judicial appointment places upon their freedom to undertake these activities. Community involvement on the part of the judge should be assessed in light of the form of public service under consideration, the activities and goals of the organization, the role to be played by the judge within it, the risk that the organization may become engaged in litigation and any other relevant factor.
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> **5.B.12** Generally speaking, judges should refrain from membership in or association with groups or organizations or participation in public discussion which, in the mind of a reasonable and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. In service to their communities, judges must not give legal or investment advice, and should avoid involvement in causes or organizations that are likely to be engaged in litigation. Judges should use even greater caution in considering whether to become officers or directors of community organizations.

These are worrisome because for the last three decades, certainly since the adoption of the *Charter*, and as exemplified in a case like *Yukon Francophone*,[93] there has been hope that judges could be more in tune with diverse community experiences and realities.[94] The concern is that such declarations may lead judges to disengage from community activities. One example of this is a comparison of the old Commentary which addressed judges participating in church organizations, universities, hospitals with the new Commentary:[95]

> **C.9** Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member

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92 *Ibid* at 46.

93 *Supra* note 15.

94 Richard Devlin, Adèle Kent & Susan Lighthouse, "The Past, Present … and Future of Judicial Education in Canada" (2013) 16:1 Leg Ethics 1.

95 CJC, *EPJ* 1998, *supra* note 1 at 37; CJC, *EPJ* 2021, *supra* note 5 at 46.

> may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.
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> **5.B.13** While, in the past, Canadian judges have served in leadership positions with organizations such as universities and religious bodies, this service is potentially problematic. The risk that such organizations will become involved in litigation or be the subject of public controversy creates the possibility that the judge will be placed in an awkward position, both in relation to public confidence in the judge's impartiality and in the judiciary as a whole. While judges may consider accepting such positions, they should reflect on issues of perceived or actual conflict before doing so, all with a view to determining whether the role can be structured in such a way so as to avoid conflicts and appearances of conflict.

While this is not a prohibition, the tenor, when coupled with the Justice Patrick Smith saga[96] might incentivize many judges to decline involvement due to an abundance of caution.

B) Improvements

Notwithstanding the foregoing concerns, it is important to highlight some positive clarifications in the revised *EPJ*. Five issues have come onto the radar in the past few decades where *EPJ* now provide some helpful guidance.

1) Fundraising Activities

Eyebrows have sometimes been raised with regards to some of the fundraising activities pursued by judges.[97] While the original EPJ did caution against soliciting funds (6.C.1.B) the new Commentary 2.F.2 is unvarnished:[98]

> **2.F.2** Judges should not allow the prestige of judicial office to be used in aid of fundraising for particular causes, however worthy. They should not solicit funds (except from judicial colleagues or from family members) or lend the prestige of their judicial office to such solicitations.

In particular, the language of "however worthy" makes it clear that good intentions are not enough when the concern is the "prestige of the judicial office." However, there remains some ambiguity in this Commentary. Is the phrase before "or" i.e., "they should not solicit funds" categorical, in the sense that every fundraising activity in which a judge might participate

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96 CJC, "Report Regarding Patrick Smith", *supra* note 4.

97 Stephen GA Pitel & Michal Malecki, "Judicial Fundraising in Canada" (2015) 52:3 Alta L Rev 519.

98 CJC, *EPJ* 2021, *supra* note 5 at 25.

endangers the prestige of the judicial office (for example, a judge in their private capacity being a member of a cycling team riding the Cabot Trail to fundraise for breast cancer survivors)? Or is it only when they do so in a manner indicating that they are a judge, thereby endangering the prestige of the office?[99]

2) Social Media

Social media engagement is discussed more fully in Part 5. In this context, it is cautioned against in Commentaries 2.A.5 and 5.B.15/16. Indeed, such is the concern about the dangers of social media that 5.B.15 suggests that "judges should also be attentive to and may wish to inform family members of the ways in which their social media activities could reflect adversely on the judge." While some commentators and some judges might argue that such a position is antiquated,[100] the point is that the CJC is obviously apprehensive about engagement with social media.

3) Speeches and Conferences

There is a long, respectable, and beneficial history of judges participating in conferences and giving speeches, etc.[101] But again, in recent years there has been controversy that has caught the attention of the general public. For example, Justice Ronald Babcock of the Tax Court was criticized for participating in a conference in Madrid and attending a high-end cocktail party sponsored by a law firm involved in a case which he was managing.[102] Similarly, Justice Brown of the Supreme Court of Canada has also caught the attention of the media for giving a keynote speech to an avowedly libertarian organization.[103] South of the border this has been a recurring challenge.[104] Again the Commentaries are helpful. Commentary 5.B.20 begins by celebrating the benefits of delivering speeches; "it is common

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99 Pitel & Malecki, *supra* note 97. Pitel & Malecki would have liked additional reforms.

100 Lorne Sossin & Meredith Bacal, "Judicial Ethics in a Digital Age" (2013) 46:3 UBCL Rev 629.

101 Stephen GA Pitel, "Ethical Issues for Judges Attending and Presenting at Conferences" (2019) 50:1 Adv Q 1.

102 Frédéric Zalac & Harvey Cashoe, "Tax Court judge recuses himself from KPMG-linked trial after CBC revelations", *CBC News* (14 March 2017), online: <www.cbc.ca> [perma.cc/3LMS-M7NN].

103 Sean Fine, "Libertarian student group Runnymeade Society seeks to shake up Canada's Legal Culture", *Globe & Mail* (10 September 2019), online: <www.globeandmail.ca> [perma.cc/NR6W-XKZY].

104 See e.g. United States Courts, "Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs" (19 September 2006), online: *United States Courts* <www.uscourts.gov> [perma.cc/7J6F-TT9T].

for judges to be asked to speak in public. Judges' public engagement aimed at educating others is a benefit to the judiciary and the public they serve." But unsurprisingly, this is followed by an "However": "… speaking in public carries risks to the public perception of the judge's impartiality and must be approached with care." Consequently, the Commentary proceeds to provide guidance by outlining seven factors to be considered:

> Judges should give careful consideration to a range of factors when deciding whether to accept a speaking invitation and, if so, what the judge may properly address in a speech. These include: (i) the organization inviting the judge to speak; (ii) the anticipated audience; (iii) the topic or general theme to be addressed in the speech; (iv) the degree to which the topic relates to matters concerning the judiciary or the courts; (v) whether the topic or the judge's remarks relates to a matter of public policy or public controversy; vi) the likelihood that the speech will be reported on, recorded or made available to a broader public; and (vii) the value of the judge's remarks in informing or educating the intended audience.[105]

And to drive the point home it concludes; "if judges have any doubts regarding the appropriateness of accepting a speaking engagement they should seek the advice of their Chief Justice." It is an engaging thought experiment to imagine if the Advisory Committee on Judicial Ethics[106] were to be approached by a judge in the position of Justices Babcock or Brown seeking advice on whether to accept an invitation, how they would deploy Commentary 5.B.20. Equally engaging is the question of whether judges should accept invitations, for example, from the Women's Legal Action Fund (LEAF), the Indigenous Bar Association (IBA), the Canadian Association of Black Lawyers (CABL), the Canadian Bar Association (CBA), or even the Canadian Association for Legal Ethics (CALE/ACEJ).

4) Events

This raises similar concerns as conferences, although the Commentary is much shorter:

> **5.B.21** Judges may attend social or public events, or conferences provided that such attendance does not compromise their impartiality and the nature of the event, or host, does not raise other concerns related to Ethical Principles.[107]

The same sort of factors identified in 5.B.20 would presumably also be pertinent for events.

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105 CJC, *EPJ* 2021, *supra* note 5 at 49.

106 *Ibid* at 9.

107 *Ibid* at 49.

5) Education (Equity, Diversity, and Inclusion)

As a result of Justice Camp's decision in a sexual assault case,[108] and his eventual resignation as a judge, there has been controversy over mandatory social context education for judges culminating in *An Act to Amend the Judges Act and the Criminal Code*.[109] The revised *EPJ* approaches this topic with hesitation.

In the Equality Chapter, there is a subsection entitled "Avoidance of Stereotypes." This is an important addition. However, the Commentaries do not explicitly invoke the language of diversity and inclusion, nor do they embrace social context education. Rather what they do is to advance four "shoulds":

> **4.C.3** Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. *They should take up opportunities to engage with cultures and communities that are different from their own life experiences to expand their knowledge and understanding.* In doing this, judges should take care that these efforts enhance and do not detract from their independence and impartiality. In addition, judges should take advantage of educational opportunities and selfstudy that will assist them in this regard.[110] [Emphasis Added]

This Commentary signals at least some awareness on the part of the CJC of the gap between the worldview and experiences of some/many judges and the larger Canadian society. It is an acknowledgement that judges should strive to be more aware of the diversity of Canada's various communities. While it is a far cry from mandatory social context education, not to mention anti-oppression education, it is a tentative start which hopefully can be built upon in further revisions to *EPJ*.

C) Worrisome Additions

The revised *EPJ* includes two new provisions that are particularly worrisome in the context of community involvement. The first is 5.A.6, Signaling Support:[111]

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[108] Canadian Judicial Council, *Inquiry into the conduct of the Honourable Robin Camp*, (Report to the Minister of Justice), (Ottawa: Canadian Judicial Council, 2017), online (pdf): <cjc-ccm.ca> [perma.cc/RT4V-P36J].

[109] SC 2021, c 8.

[110] CJC, *EPJ* 2021, *supra* note 5 at 36.

[111] *Ibid* at 40.

> **5.A.6** While judges may wish to signal support for causes or viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings.

It might well be that this Commentary was included as a response to Justice Bernd Zabel who came to court wearing a Make America Great Again baseball cap.[112] But, this Commentary might have some (un)intended consequences that should give us pause. For example, what is a "symbol of support"? Clearly a MAGA cap would qualify, as might a pin supporting a political party or candidate for political office. But what about a beaded bracelet? Would that be a symbol of support for Indigenous peoples? What about a green, black and red tie? Would that be a symbol of support for African Nova Scotians? Would pink triangle earrings be a symbol of support for members of the 2SLGBTQ+ community? Can a judge who is Indigenous or African Canadian, or 2SLGBTQ+ not wear any of these items "particularly in the context of court proceedings"? If these are seen to be problematic, what about wearing a red poppy in November? Or, given Canada's recent experiences of "Freedom Convoys," what about wearing a pin with the Canadian flag? Are these not equally "symbols of support"?

The wording of the Commentary also seems to indicate that a judge should not wear such symbols of support even when they are not performing their judicial functions. At first blush that might seem incontrovertible. But on further reflection this might be problematic. For example, does it mean that a judge could not wear a World Cup soccer t-shirt that says "Respect" when they go with their family to watch a soccer game? Or, on the 30 September, when the courts in most provinces are closed, would it be inappropriate for a judge to wear an orange t-shirt? Or a t-shirt that says, "Every child matters"? Alternatively, could a judge ever wear a BLM t-shirt? Some might suggest that the wearing of such t-shirts might fall within 5.B.2, Political Activity:[113]

> **5.B.2** Judges must cease all partisan political activity upon the assumption of judicial office. Moreover, judges refrain from conduct that, in the mind of a reasonable and informed person, could give rise to the appearance that the judge is engaged in political activity. For this reason, judges must refrain from: (i) membership in political parties and political fundraising; (ii) attendance at political gatherings and

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112 CityNews Toronto, "OJC Hearing Re Justice Zabel Summary of Hearing Panel's Decision" (11 September 2017), online: *Scribd* <www.scribd.com> [perma.cc/DBT6-Z33J].

113 CJC, *EPJ* 2021, *supra* note 5 at 43.

> political fundraising events; (iii) contributing financially or otherwise to political parties or campaigns; (iv) signing petitions to influence a political decision; and (v) taking part publicly in controversial political discussions, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

But is the wearing of such t-shirts (or bracelets, ties, or earrings) really *partisan* political activity? Is reclaiming the pink triangle from the Nazis, or respect for African Nova Scotians, or the proposition that Black lives and Indigenous children matter, really "controversial" or "partisan political activity"? What is the counterargument: they are not deserving of respect, their lives do not matter? Would the reasonable and fully informed person really think this is engagement in "political activity"? Would such a person not be able to distinguish between these symbols and a "Fuck Trudeau" or MAGA t-shirt? Are they not a statement of our commitment as Canadians to the constitutional principles of equality and multiculturalism? Echoing what has been said previously in Part 3, if *EPJ* had explicitly endorsed the principle of Reconciliation with Indigenous peoples, perhaps there would be less anxiety about such symbols of support, at least in the context of Indigenous peoples.

As should be obvious, the concern is that what might appear to be an innocuous Commentary might have a disparate impact on judges who come from Indigenous, African Canadian, 2SLGBTQ+ or other diverse communities. As previously noted, the judicial appointments process considers community involvement as an asset for an applicant.[114] It also suggests that diversity is important.[115] Many judges from historically oppressed communities have deep and ongoing commitments to their communities. Might this Commentary be encouraging such judges to disengage from their communities and issues that are of existential importance to those communities? Is there still a hidden assumption underlying this Commentary that judges are presumptively white and heterosexual? And finally, is it just a coincidence that this new Commentary is created at the same time when we are appointing more judges from historically oppressed communities?

The second worrisome addition relates to Commentary 4.D.1, Association with Discriminatory Organizations, and perhaps unlike the foregoing discussion, might be characterized as having intended consequences. The new Commentary reproduces text similar to that found in the old Principle 5.3:[116]

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114 Office of the Commissioner for Federal Judicial Affairs Canada, *supra* note 83.

115 *Ibid*.

116 CJC, *EPJ* 1998, *supra* note 1 at 23; CJC, *EPJ* 2021, *supra* note 5 at 37.

> Judges should conduct their personal lives honourably and in ways that would not reasonably be perceived as an endorsement of any invidious form of discrimination. Judges should avoid associations with organizations that engage in or countenance discrimination contrary to law. A judge's membership in such an organization has the potential to call into question the judge's commitment to equality and may erode public confidence in the judiciary. Judges should also be sensitive to the fact that some organizations' activities, policies and public positions, though not unlawful, may still be offensive to legitimate expectations of equality.

This seems uncontroversial, indeed laudatory given our Canadian commitments to non-discrimination and equality. But, what is new is 4.D.2; "Neither the practice of religion nor membership in a religious organization is inconsistent with the *Ethical Principles*." It is not clear what has motivated this new addition. We are not aware of any situations or cases which involved religious commitments that were considered to be a serious issue. But perhaps there were some inquiries to the Judicial Ethics Advisory Committee.

Freedom of religion is of course a foundational constitutional principle. But like all such principles it cannot be absolute. There are competing constitutional principles that might also inform the understanding of judicial ethics. What if a judge is actively involved in a Catholic organization that is vocally and actively opposed to abortion, including through legal protests outside hospitals that provide abortion services? Or what if they are a member of a religious congregation that opposes Covid vaccines, and provides financial and material supports to an illegal occupation of the National Capital? Or a fundamentalist religious community that legally, but viscerally, condemns non-heterosexual marriage? This categorical embrace of freedom of religion is embedded in the chapter on Equality, but what does it say about the principle of Impartiality? What might the fully informed and reasonable person think? And how does it co-exist with the last sentence of 4.D.1 which, as we have seen, states that "(j)udges should also be sensitive to the fact that some organizations' activities, policies, and public positions, though not unlawful, may still be offensive to legitimate expectations of equality"? Given the time and energy put into the development of *EPJ* surely there could have been something more nuanced than 4.D.1.

In sum, the revised *EPJ* does not resolve the challenges of judicial involvement in the community. While it is certainly helpful in some ways, it also generates new questions in a Canada that is increasingly composed of diverse communities. Just because the revised *EPJ* no longer admits that

the topic is "controversial" that does not mean that the controversies no longer exist.

5. Judges and Technology

The revised *EPJ* contains new references to judges' obligations to be technologically competent and multiple cautions regarding judicial social media use. This Part traces the past, present, and future intersections of judges, ethics, and technology. It first notes the significant changes in technology use since the initial publication of the *EPJ* in 1998. This background helps explain why there was a need to recognize a duty of judicial technological competence in the CJC's update. The Part then outlines the new language about judicial use of technology in the revised *EPJ*. Overall, the new language should be viewed as a positive development but also something that will need to be backed by sufficient continuing education and best practices guidance. The Part then addresses the future horizons for judicial technological competence. Now that judges are recognized to have a duty to be proficient with relevant technology, what are some of the emerging issues that should be on their radar?

A) The Need to Explicitly Recognize a Duty of Judicial Technological Competence

In undertaking to revise the *EPJ*, the CJC noted that "the work of judges has changed", "society has evolved", and "new and emerging questions are before us."[117] These observations are especially salient when it comes to the intersection of technology and the judicial role. Since 1998, when the previous version of *EPJ* was released, technology has reshaped our society and the justice system in important ways.

In 1998, approximately 25% of Canadian households were online, now this proportion is over 90%.[118] Similarly, there has been a sixfold increase in Canadians' mobile phone use over this same period.[119] Wi-Fi, as a means of accessing the Internet, was only broadly released to consumers in the late 1990s.[120] Social media did not come on the scene until the mid-

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117 CJC, "Modernizing the Ethical Principles for Judges", *supra* note 6 at 1.

118 CBC News, "One quarter of Canadian households online", *CBC News* (24 April 1999), online: <www.cbc.ca> [perma.cc/E5SS-Z9C5]; Statistics Canada, "Access to the Internet in Canada, 2020" (5 May 2021), online: *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/B7DW-J3UW].

119 Statistics Canada, *Telecommunications in Canada*, 1998 by Minister of Industry, Catalogue No 56-203-XIE (Ottawa: Statistics Canada, 2001), online (pdf): <www150.statcan.gc.ca> [perma.cc/GH8Q-PPJW].

120 "Wi-Fi" (2022), online: *Wikipedia* <en.wikipedia.org> [perma.cc/TF4X-VM3G].

2000s.[121] And, of course, "Zooming" has only recently become part of our lexicon and an everyday reality for many.

For their part, courts in the late 1990s were generally just beginning to come to grips with the idea of using video or teleconferencing in certain limited circumstances. The justice system was largely paper-based. Many judges were only starting to get comfortable with using computers.[122] Things have changed. Over the last two decades, there has been movement towards more digitization of court processes and records.[123] And, with the onset of the COVID-19 pandemic, such trends were rapidly accelerated.[124] Digital became the default, rather than the exception. While there have now been some shifts back to in-person proceedings, an increased presence of digital materials and technological tools in courts is here to stay.

This new reality impacts the work of judges. Efficient and effective court operations depend on judges engaging with technology and doing so competently. To give a simple example, a virtual hearing is not possible if a judge refuses to use a computer. Judicial technological missteps can also undermine public confidence in the courts by impacting trial fairness. For example, in 2021, an Ontario judge had to grant a mistrial after he was captured on Zoom making a disparaging comment to himself in his office about defence counsel after the official court recording had stopped but before he had signed off.[125]

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121 Statistics Canada, *Canadians' assessments of social media in their lives* by Christoph Schimmele, Jonathan Fonberg & Grant Schellenberg, Catalogue No 36-28-001 (Ottawa: Statistics Canada, 2001) at 2, online (pdf): <www150.statcan.gc.ca> [perma.cc/NH4W-36LR].

122 Justice B T Granger, "Using Litigation Support Software in the Courtroom—Better Lawyer, Better Judge, Better Justice—The Need For Judicial Leadership" (Paper presented at the National Center for State Courts, Ninth National Court Technology Conference, Seattle, Washington, 13-15 September 2005) at 4, online (pdf): <www.practicepro.ca> [perma.cc/J2EB-SCYD]: "[w]hen I was appointed to the bench in 1988, there were very few judges in Ontario using computers. For many years thereafter many judges in Ontario appeared to look on computers with disdain, clinging to ancient courtroom traditions".

123 For an overview of such developments, see e.g. Jane Bailey & Jacquelyn Burkell, "Implementing Technology in the Justice Sector: A Canadian perspective" (2013) 11:2 CJLT 253.

124 As the Attorney General of Ontario put it, the justice system was forced to "move forward 25 years in 25 days.": John Lancaster, "How COVID-19 helped push Ontario's low-tech justice system into the 21st century", *CBC News* (4 June 2020), online: <www.cbc.ca> [perma.cc/NL6M-7GNS].

125 Alyshah Hasham, "'I would admit that I lost my temper': Impaired driving case ends in mistrial after Toronto judge uses F-word in Zoom hearing", *Toronto Star* (10 March 2021), online: <www.thestar.com> [perma.cc/A326-BG5S].

Technology use in broader society also affects the judicial role. Increasingly, judges are required to engage with emerging technology arising in the cases over which they preside. As one American commentator observes, "we live and practice in a world where the evidence may come from a tweet or Facebook post; the emoji in an email or text may be subject to different interpretations with varying legal significance; digital evidence from a Fitbit or AmazonEcho could alter the course of a case."[126] While judges should not be expected to become technical experts, literacy about commonly used technologies is coming to be seen as a baseline competence.[127]

Outside the courtroom, the introduction of popular social media platforms in the 2000s quickly gave rise to questions about how judges ought to interact with such tools. While most judges on social media do not run into trouble, some do. Over the past several years, Canadian judges have come under public scrutiny for publishing "crude" posts,[128] creating fake profiles to conduct their own research on a sexual assault complainant,[129] having too many Crown prosecutors as "Facebook friends"[130] and not understanding "readily knowable" facts about how Twitter operates.[131] In

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126 John G Browning, "Should Judges Have a Duty of Tech Competence?" (2020) 10:2 St Mary's J on Leg Malpractice & Ethics 176 at 193.

127 See, for example, Jon Brodkin, "You shall not pinch to zoom: Rittenhouse trial judge disallows basic iPad feature" (11 November 2021), online: *Arstechica* <arstechnica.com> [perma.cc/G6D6-PR7Z] (detailing how the judge presiding over the high-profile Kyle Rittenhouse trial attracted significant criticism for disallowing the prosecution to zoom in on a video displayed on an IPad for fear that the device would use artificial intelligence to artificially "insert" pixels and alter the images. As noted in this report, the incident, "offer[ed] a glimpse into how criminal trials are affected by a judge's unfamiliarity with technology—even when that technology is a common consumer feature that's grasped intuitively by millions of people of all ages").

128 Andrew Seymour, "Ottawa judge who made crude Facebook post retires rather than face disciplinary hearing", *Ottawa Citizen* (1 June 2020), online: <ottawacitizen.com> [perma.cc/GA8W-9B35].

129 CBC News, "Ottawa judge rapped by Ontario's top court for visiting dating website", *CBC News* (16 February 2015), online: <www.cbc.ca> [perma.cc/DE39-YP9M].

130 Luis Millán, "Request for recusal highlights need for judicial guidelines over social media" (5 January 2015), online: *Law in Quebec* <lawinquebec.com> [perma.cc/RBM6-5RNV] (note that this issue came up in a recusal motion and it was reported that the judge "admitted during court proceedings that she had a Facebook page, under a pseudonym, which was inactive ….[but] also said that she had as many defence lawyers as Crown prosecutors who were 'friends' on her Facebook page"; the judge did not recuse herself and it does not appear that this ruling was appealed).

131 David Reevely, "Aloof judges struggle with cases involving modern life", *Ottawa Citizen* (27 Jan 20216), online: <ottawacitizen.com> [perma.cc/2VCU-V8XC].

the United States, there have been many disciplinary actions taken against judges for improper social media activity.[132]

The deep integration of technology within court processes, the increasing presence of emerging technologies as part of the fabric of many court cases, and social media's impact on judges' public and private lives all point to a need to recognize judicial technological competence as a required skillset.

B) Technological Competence in the Revised *EPJ*

Given the context discussed above, it is a positive development that the revised *EPJ* explicitly acknowledges that "judges should develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties" (3.C.5).[133] There are also updates in relation to judicial use of social media, including warnings that judges need to:

- Avoid improper influences from social media sources (1.B.2.)[134]
- Exercise caution in their use of social media in order to avoid the appearance of impropriety, including such appearances arising from their private lives (2.A.5)[135]
- Avoid engaging in activities on social media that could reasonably reflect negatively on their commitment to equality (4.B.2.)[136]
- Be attentive to and possibly inform family members of the ways in which their social media activities could reflect adversely on them (5.B.15)[137]
- Be vigilant in minimizing reasonable apprehensions of bias arising from any communications and associations on social media. (5.B.17)[138]

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132 A helpful compilation of these disciplinary cases can be found at: Judicial Ethics and Discipline, "Category Archives: Social Media", online: *Center for Judicial Ethics of the National Center for State* <ncscjudicialethicsblog.org> [perma.cc/H4JF-WMKD].

133 CJC, *EPJ* 2021, *supra* note 5 at 31.

134 *Ibid* at 16.

135 *Ibid* at 20.

136 *Ibid* at 34.

137 *Ibid* at 47.

138 *Ibid* at 48.

Although brief, the reference to a judicial duty of technological competence in *EPJ* sends an important signal to the judges that being technologically proficient is a key part of their job. Couching the duty in relation to "relevant" technology, as opposed to attempting to enumerate all the specific tools or technical skills that judges need to have, mirrors language found in lawyers' codes of conduct and is prudent given the fast pace at which technology inevitably changes.[139] This generality, however, does put an onus on the CJC and judicial education organizations, like the National Judicial Institute, to ensure that judges have access to relevant best practices guidance and training. It is one thing to acknowledge that judges need to be technologically competent, but quite a different matter to ensure that they actually are.

Given the relative ubiquity of social media, it was sensible for the CJC to single out this particular technology in *EPJ*. Although, broadly, the ethical issues that arise from social media use—such as avoiding improper influences, appearances of impropriety and associations that can give rise to bias claims—are not new, the technology has unique dynamics that can amplify risk. As *EPJ* explicitly notes in Commentary 5.B.16:[140]

> Communication by social media is more public and more permanent than many other forms of communication. It enables messages to be re-transmitted beyond the originators' control and without their consent. Comments or images intended for a limited audience can be shared, almost instantaneously, with a vast audience and may create an adverse reaction far beyond what one may have considered possible. Social media can also create greater opportunities for inappropriate communications to judges from others.

To be sure, social media has been an area where there has, over the last decade, been regular judicial education and the publication of best practices.[141] In this sense, the discussion of social media in *EPJ* is somewhat by way of catch up.

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139 Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2022, r 3.1-2, Commentaries [4A] and [4B].

140 CJC, *EPJ* 2021, *supra* note 5 at 47.

141 See, *e.g.,* National Judicial Institute, "The Changing Role of the Judge" (2020), online (pdf): *Judicial Education In Review 2019–2020* <www.nji-inm.ca> [perma.cc/R7VT-8UNU] (noting that, during that calendar year, the Institute had webinars on a variety of topics, including "the ways in which social media are used in the courtroom"); National Judicial Institute, "Guidelines for the Use of Social Media Sites" (2015) (note that these Guidelines are referenced in other documents but do not currently appear on the website); Martin Felsky, "Facebook and Social Networking Security" (2014), online (pdf): <cjc-ccm.ca> [perma.cc/8BG5-HCSS] (Guidance prepared for Canadian Judicial Council); National Judicial Institute, "Judicial Education Course Calendar and Education Resources" (2013),

At the same time, there is something new here that is noteworthy. Implicit is an acknowledgement that judges (or at least a significant number of them) will be on social media—even in a public-facing way—and that this is acceptable, albeit that there is a need to be aware of trouble spots. This perspective is different than what was found in earlier discourse about judges and social media where questions tended to focus on whether judges should be using social media at all.[142]

Although *EPJ* does not itself explicitly make the connection, it is also worthwhile considering how judicial use of social media might not only be inevitable but also perhaps positive. It notes at various points, that judges administer the law on behalf of the community and that it is not productive or good for judges to be unnecessarily isolated from the community. The document also recognizes that judges are uniquely placed to make the law and the legal process more understandable to the public. Being on social media is one way that judges can positively engage with the community through making both the judicial office and the law more generally more accessible. As summarized in a 2021 judicial ethics opinion from California, "it is not always practical or preferable [for judges] to avoid social media altogether. Social media is a powerful tool for making and maintaining connections, both personal and professional, and for community participation."[143]

It is also notable that, despite its multiple references to social media, *EPJ* leaves important unanswered questions about how judges should go about using social media ethically and competently. For example, can judges participate in social media using pseudonyms or "fake" accounts? How should judges approach the issue of who to connect with on social media (e.g., who a judge actively "friends" or "follows" and which "friend" or "follower" requests they accept)? Conversely, can or should judges "block" or remove people as connections? Can judges write reviews on crowd-sourced review sites like TripAdvisor or Yelp? All of these issues have been the subject of the judicial ethics opinions or disciplinary

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online: <www.nji-inm.ca> [perma.cc/VD53-MNUD] (noting that there was a course titled "Social Media and the Law" held in 2013).

142 See, e.g. The Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "The Relationship Between the Courts and the Media", Remark, (2012), online: <www.scc-csc.ca> [perma.cc/5SCG-T2GP] (stating "Should judges 'tweet'? Should they be onFacebook?"); Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) at 99 (suggesting judges "avoid tweeting or blogging altogether").

143 California Supreme Court Committee on Judicial Ethics Opinions, "Social Media Posts about the Law, the Legal System, or the Administration of Justice" (28 April 2021) at 4, online (pdf): *CJEO Expedited Opinion 2021-042* <www.judicialethicsopinions.ca> [perma.cc/43LS-Y94S].

decisions in the United States, yet *EPJ* is silent.[144] To be sure, the specific nature of these issues make them likely not well-suited to a principles-based document like *EPJ*. But, the CJC could and should provide more guidance. One option would be to prepare and publish guidelines on social media use. In 2022, the Conseil de la magistrature du Québec (which governs provincially appointed judges in Québec) published *Guidelines on the Use of Social Media by Judges*.[145] Judicial education opportunities are also key. Social media tools are constantly evolving and growing in number, as are potential security and privacy threats associated with them. Judges must be lifelong learners in this area.

C) Future Horizons of Judicial Technological Competence

Not only will judicial ethics vis-a-vis social media evolve, so too will issues relating to the more general obligation found in EPJ for judges to "develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties." Are judges, judicial education organizations and judicial regulators prepared? Unlike other themes canvassed in this article, the discussion of a general judicial ethical obligation in relation to technology in *EPJ* is entirely new and, thus, some reflection on how this obligation might apply in the near and medium term is needed. While it would be foolhardy to purport to have a crystal-ball gaze into exactly how technology will influence the work of courts in the coming years, there are three emerging areas worth highlighting.

The first area is dealing with AI-generated evidence in court. Examples of such evidence include that resulting from the use of probabilistic genotyping (PG) DNA tools and facial recognition tools. Both types of evidence are now being used in Canadian criminal courts.[146] As Gerald Chan has noted, the use of such tools will require judges to be

> "issue-spotting" in cases posing yet unanswered questions, like how a lawyer might meaningfully challenge evidence processed by an algorithm. What disclosure is the other side entitled to when it comes to source code? If an algorithm is evolving

144 See e.g. Cynthia Gray, "Social Media and Judicial Ethics Update" (November 2020), online (pdf): *National Center for State Courts* <www.ncsc.org> [perma.cc/BDC7-TJX6].

145 The Conseil de la magistrature du Québec, "Guidelines on the Use of Social Media by Judges" (2022), online (pdf): *The Conseil de la magistrature du Québec* <conseildelamagistrature.qc.ca> [perma.cc/7VE3-6DAB].

146 For further discussion, see Law Commission of Ontario, "AI Case Study: Probabilistic Genotyping DNA Tools in Canadian Criminal Courts" by Jill Presser & Kate Robertson (June 2021), online (pdf): <www.lco-cdo.org> [perma.cc/33LK-UQB7].

> on its own, rather than functioning the precise way it was developed, is there any cross-examination of a live witness that could really challenge the results?[147]

Judges will also need to be on guard for malicious uses of AI-generated evidence. For example, "concerns about the potential use of deepfake evidence in courts are increasing, with at least one recently reported case of doctored audio being presented in a family law case" in England.[148]

Second, judges may soon need literacy with respect to the use of automated decision-making (ADM) systems in their courtrooms. In short, ADM systems involve "technology that either assists or replaces the judgement of human decision-makers."[149] In the United States, these ADM systems have been used to assist judges with bail and sentencing decisions.[150] Such uses have led to concerns about (and sometimes evidence of) discriminatory outcomes due to algorithmic bias (e.g. disproportionately incorrectly classifying Black defendants as high risk) and worries about compromised procedural fairness.[151] Although such tools have not yet been used in Canadian courts, their use has been explored here.[152]

Third, as legal system processes continue to become more digitized and technology advances, Canada is likely to see the "mainstreaming" of judicial analytics tools in the near to medium term.[153] Such tools use advanced technology to analyze patterns in legal data in order to draw

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147 Anita Balakrishnan, "For Canadian judges, being tech literate is now a matter of ethics", *The Logic* (11 November 2021), online: <thelogic.co> [perma.cc/5TYL-TEHW].

148 Amy Salyzyn, "A Taxonomy of Judicial Technological Competence" (24 June 2021), online: *Slaw: Canada's online legal magazine* <www.slaw.ca> [perma.cc/R6FY-RWJF]. See, also, Rebecca Delfino, "Deepfakes on Trial: a Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery" (2022) Loyola Law School, Los Angeles Legal Studies Research Working Paper No. 2022-02, online: <ssrn.com> [perma.cc/AUW6-MDW9].

149 Canada, Treasury Board Secretariat, *Directive on Automated Decision-Making* (Ottawa: Treasury Board Secretariat, 2019), online: <www.tbs-sct.gc.ca> [perma.cc/R6RH-P5AA].

150 For discussion, see e.g. Harry Surden, "The Ethics of Artificial Intelligence in Law: Basic Questions" in Markus D Dubber, Frank Pasquale & Sunit Das, eds, *Oxford Handbook of Ethics of AI* (Oxford: Oxford University Press, 2020) 719 at 724–735.

151 See, for example, discussion in Ignacio N Cofone "AI and Judicial Decision-Making" in Florian Martin-Bariteau & Teresa Scassa, eds, *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada, 2021), ch 13.

152 Alyshah Hasham, "Soon, intelligent machines could help decide whether to keep people in jail. It's time to prepare", *Toronto Star* (19 July 2019), online: <www.thestar.com> [perma.cc/W4CR-VTJV].

153 Jena McGill & Amy Salyzyn, "Judging by Numbers: Judicial analytics, the justice system and its stakeholders?" 44:1 (2021) 44:1 Dal LJ 250.

insights about judges, such as how likely one's case is to prevail before a given judge or what types of arguments a judge might prefer.[154] Such tools also hold the potential to identify patterns that suggest substantive errors or bias in judicial decision-making. If they can be used in this way, with relative ease and accuracy, to "audit" judicial practices, perhaps judges will start to be expected to use judicial analytics tools to engage in self-reflection or to modify their judging behaviour, where appropriate.

6. Confidentiality and Return to Practice

A) The Need for Revisions

Over the past twenty years an increasing number of former judges have returned to the practice of law. Increased life expectancy and better health, shifting cultural attitudes about retirement and potentially lucrative opportunities have prompted a growing number of former judges to resume work as lawyers, in some cases for more than a decade.

The primary responsibility for regulating the ethical and professional issues generated by this phenomenon lies with the law societies. Yet despite repeated calls for reform,[155] the rules of professional conduct in this area have remained "dated, under-analyzed, and generally inadequate".[156] The FLSC did embark on a consultation in 2016 to consider potential reforms to the *Model Code*, and it developed a series of useful reforms that were circulated in 2017,[157] but unfortunately as of the end of 2022 they have not been implemented.

It was therefore welcome to see the CJC identify the issue of former judges returning to practice as one of the key themes it planned to address in the revisions to *EPJ*. Rather than leave this for the law societies, the CJC recognized that it had an important role to play in offering ethical guidance in this area.

The return to practice issue is closely related to the issue of judicial confidentiality. A former judge might choose to reveal information about their own deliberative process or about the deliberative process of another judge. A former judge might reveal private information about a dispute over which they presided. To be sure, the issue of confidentiality is not

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154 *Ibid.*

155 See e.g. Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483.

156 *Ibid* at 485.

157 Federation of Law Societies of Canada, "Model Code of Professional Conduct: Consultation Report" (2017), online (pdf): *Federation of Law Societies of Canada* <flsc.ca> [perma.cc/6QDM-SNMT].

limited to former judges: similar concerns could arise with respect to judges currently in office. But the link between confidentiality and returning to practice is an important one. Surprisingly, the original *EPJ* did not impose an explicit duty of confidentiality on judges, and there had been some academic calls to fill this gap.[158] No matter how implicitly obvious such an obligation might seem, it should not be thought appropriate to have such an important matter left unaddressed. At a minimum, an explicit obligation of confidentiality promotes clarity. Accordingly, the CJC was urged to address the issue of confidentiality as part of the revision process.

B) The Revised Provisions

The new guidance for judges starts with principle 5.E: "[j]udges contemplating retirement and former judges avoid conduct that is likely to bring the judicial office into disrepute or put at risk public expectations of judicial independence, integrity and impartiality". The reference to judges "contemplating retirement" is fleshed out in Commentary 5.E.1 which provides that judges "should refrain" from discussions with a prospective future employer such as a law firm until the end of their time in office. This preclusion aims to avoid the potential for conflicts of interest that could otherwise arise. For example, it would be inappropriate for a judge to be hearing a case argued by a particular law firm while at the same time engaged in discussions with that firm about possible future employment.

Most of the more specific Commentary is directed at former judges. An important general statement in Commentary 5.E.2 is that "former judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary". In that same Commentary, the most specific provision is that "former judges should not appear as counsel before a court or tribunal in Canada". This is more restrictive—considerably more, in some cases—than the current ethical rules for lawyers in most provinces.

On the issue of court appearances, the Commentary notes that "appearance as counsel is broader than physical appearance". This quite likely extends the prohibition to an appearance in writing, such as being named as counsel of record or signing court documents such as a factum. The Commentary goes on to provide that "a former judge should not … sign legal documents that are or may be the subject of proceedings before a court". It is not clear whether this language merely elaborates on the meaning of an "appearance" or covers something different. It would be

158 See Stephen GA Pitel & Liam Ledgerwood, "Judicial Confidentiality in Canada" (2017) 43:1 Queen's LJ 123.

odd to consider a factum as a document that is the "subject of proceedings"; that language seems more likely to describe evidence, such as an affidavit.

The new guidance also advises former judges (in Commentary 5.E.3) that they "should exercise appropriate caution in accepting retainers and providing advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests". Former judges need to be on their guard against acting for a client likely to trumpet the fact that their lawyer is a former judge.

Turning to confidentiality, principle 2.B provides that "[j]udges are discreet and do not use or disclose confidential information acquired in their judicial capacity for any purpose not related to judicial duties." Commentary 2.B.1 notes that "judges receive or come into possession of confidential information" and that they are "entrusted with preserving confidentiality." A possible concern with this guidance is the lack in *EPJ* of a definition of confidential information. There is a reference to certain information being subject to "confidentiality orders" but it would be a very narrow reading to consider that to be the entire ambit of what is covered by this principle. Such an interpretation would leave out private deliberative communications between judges, for example. A preferred interpretation would be to adopt a broad understanding of what is confidential, namely information that is not otherwise public.[159]

In the revised *EPJ* the obligation of confidentiality extends indefinitely. Commentary 2.B.3 states that "[c]onfidentiality and discretion extend past a judge's departure from judicial office". In addition, in the context of providing guidance to former judges, Commentary 5.E.4 provides that they "should not disclose the confidential discussions among judges … or discuss anything that gives the appearance of relying on confidential information or judicial confidences".

C) Some Steps Not Taken

The changes to *EPJ* in the areas of confidentiality and return to practice are welcome. They address important issues and provide key guidance to judges and former judges. However, in two areas the revised *EPJ* chose not to adopt provisions, and it is these absences that could raise some concerns.

The first area concerns the use by former judges of an honorific title. Former judges are not entitled to continue to use the title of "judge" but

159 See the proposal in *ibid* at 145-46.

they are typically allowed to refer to themselves as "the honourable". The use by a former judge of the honorific in marketing services to clients draws, in many situations, specific attention to the fact that the lawyer was previously a judge.[160] While concerns about this sort of marketing could be addressed under general provisions precluding suggestions of superiority or special connections to the legal system, there have been recommendations that former judges not be allowed to use the honorific in connection with marketing their legal services to clients.[161]

A draft of the revised *EPJ* released in 2019 for public consultation addressed this issue. It provided that "[s]hould the retired judge return to private practice, restraint and good taste should be exercised so that attaching the honorific to the retired judge's name does not give the appearance that the judge is touting or using the prestige of the judge's former office to attract business, gain advantage, suggest qualitative superiority over other lawyers, or having any kind of influence or favoured relationship with the judiciary".[162] However, neither this provision nor any similar guidance is included in the final version. One can only conjecture as to who requested its removal and why. However, it would have been useful to include some specific guidance of this nature as to the issues raised by the honorific.

The second area concerns the scope of legal work by former judges beyond appearing in court. In the United States, where it is much more common for former judges to return to the practice of law, a central focus in the ethical rules is that the former judge should not act in any capacity on a matter, or a related matter, in which they were previously involved as a judge.[163] Absent such a prohibition, a judge could hear and decide a summary judgment motion, retire and return to the practice of law, and provide advice to a client on an appeal from that decision, either to the party seeking to uphold it or even to the party seeking to have it reversed as incorrect. This should not be possible under any ethical rules for former judges, for several reasons. One reason is that "perceptions of judicial neutrality will be compromised as a result of the judge's shifting loyalties. … It is difficult to understand how a person could carry out a neutral role in a dispute with absolute conviction one day and then adopt

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160 Not in all situations, since some lawyers are entitled to use the same honorific for different reasons such as having served as a cabinet minister in the federal government.

161 See Pitel & Bortolin, *supra* note 155 at 526.

162 Canadian Judicial Council, *Ethical Principles for Judges: Draft for Discussion Purposes Only*, (Draft for Discussion), (Ottawa: Canadian Judicial Council, 2019) at 49, commentary 5.E.5, online (pdf): <cjc-ccm.ca> [perma.cc/A75T-AYCD].

163 See American Bar Association, *Model Rules of Professional Conduct, 2021 Edition* (Chicago: American Bar Association, 2021), r 112(a). See also the analysis in Pitel & Bortolin, *supra* note 155 at 516-20.

a zealously partisan role the next."[164] Accordingly, the revised *EPJ* should have precluded, cautioned against or at least drawn attention to the issues about a former judge acting as a lawyer on a matter or a related matter in which they were previously involved as a judge.

In the context of this concern, however, it should be noted that one of the key reasons for this sort of preclusion is the potential for the misuse of confidential information about the matter by the former judge.[165] It is therefore possible that former judges will consider the new provisions about ongoing confidentiality as a practical limitation on this sort of involvement as a lawyer. The appearance of acting as counsel in such cases could be that confidential information is at risk of being misused, whether actually the case or not, so that the former judge considers the optics concerns about acting to outweigh the benefits of acting. Still, a former judge who is personally confident that no confidential information is at issue in a particular matter and who is not overly concerned about this sort of indirect perception would be able to claim that the *EPJ* does not preclude, or even caution against, his or her acting on such a matter unless it involves appearing in court. Time will tell whether this is a gap in the ethical guidance that subsequently needs to be filled.

D) Enforcement Issues

These two areas of revision raise important issues of enforcement. Former judges are by definition beyond the regulatory reach of the CJC, so even the most apparently prescriptive guidance such as the prohibition on a former judge appearing in court could not be enforced by the CJC against the former judge. Similarly, the ongoing obligations of confidentiality could not be enforced by the CJC once a judge has left office.[166] A radical and controversial way of addressing this gap would be to amend the relevant statutes to provide a mechanism of enforcement against former judges, perhaps somehow linked to the former judge's ongoing receipt of their pension or other benefits from the office.[167] This seems highly unlikely and may well not even be desirable as a matter of professional regulation.

The best solution, at least for former judges who return to practice, is for the law societies to regulate these issues in a manner that closely aligns with the guidance in *EPJ*. Indeed, some of the changes to the *Model Code* proposed in 2017 are similar to the guidance in *EPJ*. For example, they would preclude a former judge from appearing in court and they would

164 Pitel & Bortolin, *supra* note 155 at 517.

165 *Ibid*.

166 Pitel & Ledgerwood, *supra* note 158 at 142.

167 *Ibid* at 143.

impose an ongoing duty of confidentiality in respect of information obtained in the course of judicial office. With the release of the revised *EPJ*, the FLSC should now implement these proposed revisions to the *Model Code*.

In the absence of direct regulation by law societies, some indirect avenues are possible. Under one such avenue, a current judge might refuse to accept a factum or hear oral submissions from a former judge now engaged in the practice of law because this would be contrary to *EPJ* and at a minimum the current judge bears some obligation to be faithful to that guidance. Under a second such avenue, a law society might consider disciplining a former judge now engaged in practice if their conduct is contrary to the guidance in the *EPJ*, despite the law society itself not having adopted any similar provisions. For example, a former judge who violated the ongoing confidentiality obligation flowing from that office might be thought to have engaged in conduct unbecoming of a lawyer.

7. Conclusion

It should come as no surprise that the CJC is a cautious (if not conservative) institution. Inspired by the common law method that change, if it is to come at all, must be incremental,[168] the revised *EPJ* is very much an exercise of modest reform. Where many would like to have seen something more visionary, more imaginative, and more responsive to the needs of modern-day Canada, half a loaf is better than no loaf at all. The fact that the Judicial Independence Committee took on the task of revising *EPJ* and did so with a significant degree of consultation and engagement is undoubtedly a step in the right direction. While we have identified several concerns and reservations, we have also highlighted changes that deserve acknowledgement. Progress, even if it is cautious, is still progress. It is encouraging that judicial education committees in several provinces have recently embarked on initiatives, in conjunction with the NJI, to bring the revised *EPJ* to the attention of judges. But this leads to one final suggestion.

As noted at the outset, the previous version of *EPJ* was released in 1998 and had not been changed for over twenty years. In that context, the updating of *EPJ* was considered by some to be a generational event. But it is troubling to think that it could be another two decades before any other revisions are made. Most ethics and professionalism codes are not developed in this manner. Rather, they are ongoing documents that are amended as needed, especially in light of the pace of development and social change. Accordingly, as a first priority, the CJC should develop a

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168 *Friedman Equity Developments Inc v Final Note Ltd*, 2000 SCC 34; *London Drugs Ltd v Khuene & Nagel International Ltd*, [1992] 3 SCR 299, 97 DLR (4th) 261.

process that would allow it to make ongoing incremental changes to *EPJ*. The experience in other professions, certainly not least with the FLSC, is that appropriate consultation and reflection remains possible while developing the document on an ongoing basis. If the CJC were to commit to such a process of ongoing modernization it would further its core aspiration of enhancing public confidence in the judiciary.