TO PARTICIPATE OR NOT TO PARTICIPATE: JUDICIAL INVOLVEMENT IN THE COMMUNITY*

The Honourable Mr. Justice Malcolm Rowe, QC, & Dahlia Shuhaibar+

I. Introduction

Judges have long had to grapple with the limits of their community involvement. Few professionals would ask themselves whether they are to "behave like a monk [or] be a eunuch [or] live in silent solitude [or] embark…to live on a planet other than the earth."[1] Yet, for many years, judges have, in effect, been asking such questions of themselves. Often, judges are chosen in recognition of their significant contributions to their communities. Yet, upon appointment, many have been concerned with whether continuing to make these same contributions would call into question their impartiality, their independence, and even their integrity.

In considering the proper limits of judges' involvement in the community, we will not focus on a judge's public behaviour. That is simple; judges should never undermine the offices they hold by their behaviour in public. Instead, this paper examines the degree to which judges should engage, if at all, in voluntary associations, in political organizations, in matters of public controversy, and in advocating their private interests. Guidance is available, usually in written codes of conduct put in place by bodies overseeing judicial conduct. As well, there is the less formal but quite important guidance provided by one's chief justice. But, much is left to one's own good judgment. Judges have much to offer their communities, but a "line"… however difficult to draw…exists between acceptable and unacceptable community involvement. This line is "not capable of mathematical determination"[2]—yet, each judge must take care not to cross it.

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* Adapted from a speech presented by Justice Malcolm Rowe at the Commonwealth Magistrates' and Judges' Association Annual Conference in Port Moresby, Papua New Guinea, in September 2019.

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[1] Simon H Rifkind, "The Public Concern in a Judge's Private Life" in George H Williams & Kathleen M Sampson, eds, *Handbook for Judges: An Anthology of Inspirational and Educational Readings* (Chicago: American Judicature Society, 1984) 59 at 62.

[2] *Ibid* at 66.

We will proceed in three stages, beginning with a brief overview of judges' security of tenure in Canada. Next, we will describe key elements of the ethical principles established by the Canadian Judicial Council (CJC). Finally, we will examine various types of community involvement through case studies.

II. Security of Tenure

For the sake of simplicity, we will focus on superior courts. However, the discussion applies with slight modifications to other courts, notably provincial courts.

Canadian judges have security of tenure. This has a long history, dating back to the *Act of Settlement* of 1701[3] and the *Commissions and Salaries of Judges Act* of 1760.[4] These statutes established that judges would remain in office "during good behaviour," rather than at the pleasure of the monarch, and that judges would continue to hold office notwithstanding the death of the monarch.[5] Security of tenure allows judges to decide cases independently, notwithstanding government or public disapproval.[6] This independence allows judges "to stand above the political fray, immune to the pushes, pulls, and swings of popular opinion."[7]

Superior court judges can be removed only by a vote of the Senate and the House of Commons.[8] No judge since 1867 has been removed by this process, albeit a few have resigned in the face of this eventuality.[9]

In recent decades, Parliament has made clear that it will act only on the recommendation of the CJC. This body is composed of chief justices from the superior courts in all the provinces and is chaired by the Chief Justice of Canada.[10] The CJC is created by the *Judges Act* and derives its authority to investigate complaints and

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[3] *Act of Settlement* (UK), 1700 & 1701, 12 & 13 Will 3, c 2.

[4] *Commissions and Salaries of Judges Act*, 1760, 1 Geo 3, c 23.

[5] J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law)* (London, UK: The British Institute of International and Comparative Law, 2015) at 59–60; Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (New York: North-Holland Publishing, 1976) at 10–11.

[6] Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995) at 41.

[7] Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 251.

[8] Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 99(1), reprinted in RSC 1985, Appendix II, No 5.

[9] Martin L Friedland, "Appointment, Discipline and Removal of Judges in Canada" in HP Lee, ed, *Judiciaries in Comparative Perspective* (New York: Cambridge University Press, 2011) 46 at 58–59.

[10] *Judges Act*, RSC 1985, c J-1, s 59(1) [*Judges Act*].

recommend removal from that statute.[11] It has authority over more than 1100 federally appointed judges.[12]

Through a committee structure, the CJC investigates complaints made against federally appointed judges; such complaints can be made by a member of the public or by the Attorney General.[13] Most complaints are ill-founded and are speedily dismissed. Those that warrant investigation trigger procedures aimed at ensuring fairness to the judge. In serious cases, the committee can recommend to the CJC that a judge be removed for reasons of (a) infirmity; (b) misconduct; (c) failing to undertake his or her duties; or (d) otherwise having been placed in a position incompatible with the due execution of his or her office.[14] The CJC has interpreted its task as involving two steps:

1) Determining if the judge has become "incapacitated or disabled from the due execution of their office"; and
2) Determining if public confidence in the judge's ability to discharge the duties of his or her office has been undermined to such an extent that a recommendation for removal is warranted.[15]

The test at the second step is the following: "Is the conduct so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"[16] Given the stringency of that test, it is difficult to imagine how a judge's involvement in a community organization or the like could warrant a recommendation for removal—however, as we will see, reasonable disagreements can easily arise as to the appropriateness of extra-judicial involvement, and some judges have come close to being removed.

While the *Judges Act* does not contemplate lesser sanctions than recommending a judge's removal, in practice such sanctions are imposed. These can be quite mild, in effect words of guidance or caution set out in correspondence from the CJC. It may call for counselling or additional training. In more serious circumstances, a reprimand may issue. In almost all instances, the goal is to restore the judge to the proper conduct of his or her role. The approach is strongly oriented to be

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[11] *Ibid*, ss 59–70.

[12] "Our Mandate", online: *Canadian Judicial Council* <cjc-ccm.ca/en/about>.

[13] *Judges Act, supra* note 10, s 63.

[14] *Ibid*, s 65(2).

[15] "Review of the Judicial Conduct Process of the Canadian Judicial Council: Background Paper" (25 March 2014) at 18–19, online (pdf): *Canadian Judicial Council* <cjc.gc.ca/cmslib/general/CJC%20Background%20Paper%20on%20Judicial%20Conduct%202014-03.pdf>.

[16] *Ibid* at 19.

supportive and remedial, while at the same time providing clear guidance as to conduct.

Of course, the vast majority of situations where conduct may be questioned never get to the CJC. They are dealt with informally by the chief justice. But, if more formal measures appear warranted, they are undertaken by the CJC as a group and not by the individual chief justice.

III. Ethical Guidelines and Principles

Guidance for federally appointed judges is provided in the *Judges Act* and in a set of principles developed by the CJC called *Ethical Principles for Judges* ("*Principles*").[17] The *Principles* are currently under review, and a revised set was initially expected to be released in the spring of 2020.[18] A draft set of revised principles was released in November 2019 ("*Draft Revised Principles*").[19] Provincial judicial councils operate in a parallel way for provincially appointed judges; they have adopted similar principles to guide conduct (see, e.g., Ontario Court of Justice, *Principles of Judicial Office*;[20] Provincial Court of British Columbia, *Code of Judicial Ethics*[21]).

Section 55 of the *Judges Act* contains an overarching rule:

> No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.[22]

The CJC's *Principles* effectively expand on what this rule means. The *Principles* are advisory: they are not a list of prohibited behaviours.[23] However, they

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[17] Canadian Judicial Council, *Ethical Principles for Judges*, Ottawa: CJC, 1998, online (pdf): <cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf> [CJC, *Principles*].

[18] "Update on Ethical Principles for Judges" (22 November 2019), online: *Canadian Judicial Council* <cjc-ccm.ca/en/news/update-ethical-principles-judges>.

[19] "Draft Ethical Principles for Judges" (22 November 2019), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/EPJ%20-%20PDJ%202019-11-20.pdf> [CJC, *Draft Revised Principles*].

[20] "Principles of Judicial Office" (9 January 2017), online: *Ontario Court of Justice* <ontariocourts.ca/ocj/ocj/principles-of-judicial-office/>.

[21] Provincial Court of British Columbia, *Code of Judicial Ethics*, Vancouver: BCPC, 1994, online (pdf): <provincialcourt.bc.ca/downloads/pdf/codeofjudicialethics.pdf>.

[22] *Judges Act*, *supra* note 10, s 55.

[23] CJC, *Principles*, *supra* note 17 at 3, principle 2. The CJC, *Draft Revised Principles*, *supra* note 19 further explain the following at 3, purpose 3:

> The ethical principles are to be applied in light of all the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in *Ethical Principles* does not preclude reasonable disagreements about their application or imply that

are a "useful touchstone of generally accepted ethical standards in the judicial community guiding judges in how they should act on and off the Bench" and set out a general framework that is relevant to assessing allegations of improper conduct.[24]

The limitations set out in the *Judges Act* and the *Principles* stem from the twin requirements of independence and impartiality. As a former Chief Justice of Canada put it, judicial independence is not a privilege that appertains to the holder of a judicial office; rather, it is a guarantee to citizens that there is an impartial adjudicator to resolve their disputes or hear their challenges to abuse of authority.[25] The limitations on judicial conduct call for a higher standard than is expected from other citizens. A judge's conduct must be "free from impropriety or the suggestion of impropriety; it should be, as far as is humanly possible, beyond reproach."[26] Judges are expected to tolerate restrictions on the rights of the individual that other citizens do not.[27] However, they are entitled to expect as few restrictions on their freedoms as is possible and consistent with proper conduct, given their office.[28]

IV. The Tension Underlying Community Involvement

When it comes to community involvement by judges, two competing considerations are at play. On the one hand, a judge should not be isolated from his or her community. On the other hand, community involvement must be modulated so as to avoid negatively affecting the standing of the judge and the judiciary. Striking the right balance is somewhat contextual.

In 2015, in the context of an allegation of judicial bias, the Supreme Court of Canada wrote that judges can and should participate in their communities: "Membership in an association affiliated with the interests of a particular race,

> departures from them necessarily warrant disapproval… [*Ethical Principles*] is not intended to be a code of conduct that sets out minimum standards of behaviour.

[24] *In the Matter of Section 65 of the Judges Act, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Theodore Matlow of the Ontario Superior Court of Justice: Report of the Canadian Judicial Council to the Minister of Justice* (Ottawa: CJC, 3 December 2008) (Catherine A Fraser, Chairperson) at paras 95, 99, majority reasons, online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/Final%20Report%20En.pdf> [CJC, *Matlow Report*].

[25] Le très honorable Gérald Fauteux, *Le livre du magistrat* (Ottawa, Ministre des Approvisionnements et Services Canada, 1980) at 4.

[26] JO Wilson, *A Book for Judges* (Ottawa: Minister of Supply and Services Canada, 1980) at 4.

[27] CJC, *Principles*, *supra* note 17 at 15, commentary 5.

[28] Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville: Les Editions Yvon Blais, 1991) at 8 [CJC, *Commentaries*].

nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise." [29]

Indeed, the Supreme Court recognized the value of such experiences:

> A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life"—their own and those whose lives reflect different realities.[30]

Withdrawal from the community can actually *hinder* a judge's ability to carry out his or her duties. Judging is not "an abstract or mechanical process. … [It] is an intensely human process."[31] Judges are called on to make decisions mindful of the standards of the community; thus, to render decisions regarding fundamental freedoms requires an understanding of societal attitudes and competing interests.[32] Assessing damages, sentencing offenders, and giving effect to the "public interest" all require knowledge of the community.[33] A judge who is withdrawn from the community would undertake all these tasks with less understanding. Put another way, isolation can result in "judicial shortsightedness and unresponsiveness to the changing needs of society."[34] The *Draft Revised Principles* also recognize that judges are often called upon to make decisions in areas in which they have little or no familiarity; consequently, judicial isolation "does not promote wise or just judgments."[35] They therefore encourage judges "to take up opportunities to engage with and learn from the wider public, including communities with which the judge has little or no life experience."[36]

Community involvement has other positive effects. First, it fulfils the public's expectation that professionals should be active members of their communities. Second, it "personalize[s] judges as sincere and caring family members, volunteers, and community leaders." Finally, it contributes to a judge's well-being and consequently to improved judicial demeanour and performance.[37]

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[29] *Yukon Francophone School Board, Education Area #23 v Yukon (AG)*, 2015 SCC 25 at para 61 [*Yukon Francophone School Board*].

[30] *Ibid* at para 34.

[31] Sharpe, *supra* note 7 at 264.

[32] CJC, *Commentaries*, *supra* note 28 at 8–9.

[33] Justice JB Thomas, *Judicial Ethics in Australia*, 2nd ed (Sydney: LBC Information Services, 1997) at 93.

[34] Shetreet, *supra* note 5 at 324.

[35] CJC, *Draft Revised Principles*, *supra* note 19 at 37, commentary 5.B.9.

[36] *Ibid*.

[37] Raymond J McKoski, *Judges in Street Clothes: Acting Ethically Off-the-Bench* (Madison: Fairleigh Dickinson University Press, 2017) at 4–6.

Nonetheless, inappropriate involvement can be detrimental. The overarching concern is to ensure an independent and impartial judiciary. The range of issues that can come before the courts is as diverse as is life; judges must be careful not to indicate predispositions on potential controversies. As a result, involvement in causes or organizations likely to be involved in litigation is to be avoided.[38] Similarly, judges should avoid involvement in groups whose purposes include exerting pressure on government or attempting to effect social change.[39] Community involvement also runs the risk of causing frequent recusals.[40] Additionally, it may lead to improper use of the prestige of the judge's office.[41]

In practice, how does one decide which activities are acceptable and which are not? The case studies that follow illustrate inherent difficulties in this demarcation; they demonstrate that new and unforeseen situations continue to arise.

V. The CJC's *Principles* and Case Studies

The CJC's overarching guidance on extra-judicial activity is this: subject to limitations imposed by the *Judges Act* and the nature of the office, judges can participate in activities that do not detract from the performance of their duties.[42] The *Principles* then provide advice on various types of community involvement.

A. *Political activity*

The most definitive of the principles relates to political activity: it is prohibited. Judges must not be members of political parties; engage in political fundraising; attend political events; make contributions to political parties or campaigns; take 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; or sign petitions to influence a political decision.[43] This is an absolute ban; judges can have no association with any political

[38] CJC, *Principles*, *supra* note 17 at 28, principle C.1(c); CJC, *Draft Revised Principles*, *supra* note 19 at 37, commentary 5.B.11.

[39] Wilson, *supra* note 26 at 8; Thomas, *supra* note 33 at 97.

[40] McKoski, *supra* note 37 at 46–47; CJC, *Principles*, *supra* note 17 at 34, commentary C.3.

[41] McKoski, *supra* note 37 at 48.

[42] CJC, *Principles*, *supra* note 17 at 18, commentary 2; CJC, *Draft Revised Principles*, *supra* note 19 at 21, commentary 3.A.3.

[43] CJC, *Principles*, *supra* note 17 at 28–29, principle D.3; CJC, *Draft Revised Principles*, *supra* note 19 at 34–35, commentary 5.B.2.

group, nor can they publicly express any political opinions.[44]

This prohibition stems from concerns relating to the separation of powers between the three branches of the state: the legislature, the executive, and the judiciary. The judiciary "provide[s] an impartial check to other powers at work in the rule of law."[45] The recurring concerns of impartiality and independence are in play. A judge who engages in partisan political activity or makes out-of-court statements on issues of public controversy is "by definition…choosing one side of a debate over another."[46] Moreover, if the judge's activities attract criticism and/or rebuttal, judicial independence is undermined.[47] Political activity of any kind is to be avoided.[48]

B. *Civic and charitable activities*

The *Principles* approve of involvement in civic and charitable activities, with certain limitations:

> Judges are free to participate in civic, charitable and religious activities subject to the following considerations:
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> a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.
> b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.
> c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.
> d) Judges should not give legal or investment advice.[49]

This guidance provides useful parameters within which judges can organize their affairs. Yet, it is not always clear, as the cases of Justices Ted Matlow and Donald McLeod demonstrate.

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[44] Wilson, *supra* note 26 at 7.

[45] Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Surrey: Ashgate Publishing, 2009) at 94.

[46] CJC, *Principles*, *supra* note 17 at 39, commentary D.2; CJC, *Draft Revised Principles*, *supra* note 19 at 35, commentary 5.B.3.

[47] CJC, *Principles*, *supra* note 17 at 39, commentary D.2; CJC, *Draft Revised Principles*, *supra* note 19 at 35, commentary 5.B.3.

[48] The *Draft Revised Principles* also advise judges to recuse themselves when their close family members are politically involved in such a way as to "adversely affect the public perception of [the] judge's impartiality." See CJC, *Draft New Principles*, *supra* note 19 at 35, commentary 5.B.5.

[49] CJC, *Principles*, *supra* note 17 at 33, commentary C.1. The *Draft Revised Principles* expand on these points: see CJC, *Draft Revised Principles*, *supra* note 19 at 36–40, commentaries 5.B.8–14.

Justice Matlow was a judge of the Ontario Superior Court of Justice. In 1999, he became involved in a public controversy relating to a municipal development project (the "Thelma Road Project") near his home in Toronto. Justice Matlow and his neighbours formed a neighbourhood community group called The Friends of the Village (the "Friends") whose purpose was to oppose the project. Justice Matlow became one of the group's leaders. He sought standing in a hearing before the Ontario Municipal Board with respect to the legality of the proposed development. He also engaged in email correspondence and meetings with elected officials and city employees. He made comments to the media setting out his reasons for opposing the project; in these, he expressed his views on legal issues relating to the project. His correspondence indicated he was a judge. His language could be considered inflammatory.[50] He continued these activities for several years.

In 2005, a development project was being contemplated elsewhere in Toronto relating to streetcars (the "St. Clair Project"). The project was controversial; a community organization called SOS-Save Our St. Clair Inc. ("SOS") formed in opposition to it. SOS applied to the Divisional Court for a declaration that the project breached municipal planning laws and failed to accord with environmental assessments.[51]

Justice Matlow was assigned to the panel hearing the application. The panel unanimously granted the application, in effect stopping the project. The City of Toronto became aware of Justice Matlow's involvement in the Thelma Road Project, which was quite similar to the St. Clair Project. The City brought a motion requesting that Justice Matlow recuse himself and that there be a new hearing. The court granted the motion, with Justice Matlow dissenting. The City then made a complaint to the CJC.[52]

An inquiry committee of the CJC found that Justice Matlow had placed himself in a position incompatible with the office of judge, that he was guilty of misconduct, and that he had failed in the due execution of his office. It found that, taken together, Justice Matlow's actions had rendered him incapable of executing his judicial office and recommended his removal.[53]

The report of the inquiry committee was considered by the full CJC. The majority of the CJC found that Justice Matlow's involvement in the Friends, his meetings with officials on behalf of the Friends, and his interactions with the media

[50] CJC, *Matlow Report*, *supra* note 24 at paras 4–8, 16–25, majority reasons.

[51] *Ibid* at paras 27–28, majority reasons.

[52] *Ibid* at paras 29–30, 35–37, 39, 41, majority reasons.

[53] *Ibid* at para 45, majority reasons.

were not problematic on their own.[54] However, the manner in which he carried out these activities was inappropriate. The majority of the CJC concluded as follows:

> In summary, while judges who have personal interests, such as home ownership, that can be affected by government action have the right, in their private capacity, to contest, as do other Canadians, decisions that affect those interests as do other Canadians, there are limits as to what a judge might do. A judge is not entitled to use the prestige of judicial office to advance his or her private interests. Nor should a judge use intemperate language where others would likely know, or could be expected to know, that he or she was a judge. And under no circumstances is a judge entitled to act as a legal advisor for individuals opposing government action.[55]

The majority of the CJC found that some of Justice Matlow's actions constituted judicial misconduct and placed him in a position incompatible with the due execution of his office. However, it found that removal was not warranted given his expressions of regret, his 27-year career on the bench without other incidents, and the fact that the misconduct did not occur during the performance of his judicial duties.[56] The majority did, however, strongly disapprove of his actions and directed him to apologize to specified individuals, attend a judicial ethics seminar, and obtain prior approval should he wish to participate in a public debate in future.[57]

A minority of the CJC found that the conduct was sufficiently serious to undermine public confidence and, accordingly, would have recommended Justice Matlow's removal.[58]

Justice Matlow's situation is interesting in that he was advocating for his property rights. His involvement in a community organization was not *per se* to contribute to the community but rather to advocate for his interests and those of his neighbours. The majority of the CJC concluded that judges should be able to advocate for their own interests as private citizens—but they must truly do so as *private citizens*, without identifying themselves as judges or providing any kind of legal advice. Moreover, as was stated explicitly, a judge should act in line with the dignity of his or her office, avoiding intemperate language.

A recent case before the Ontario Judicial Council (OJC) illustrates the difficult distinction between community involvement that is educational and that which is advocacy. Justice Donald McLeod is a judge of the Ontario Court of Justice. As a Black judge who grew up in subsidized housing and with limited resources, he sought to assist others in overcoming similar barriers; he wished to be a leader for

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[54] *Ibid* at paras 107–14, majority reasons.

[55] *Ibid* at para 123, majority reasons.

[56] *Ibid* at paras 176, 179–84, majority reasons.

[57] *Ibid* at para 186, majority reasons.

[58] *Ibid* at para 9, minority reasons.

Black youth. Before his appointment, he was involved in community initiatives relating to education and mentorship of Black youth.[59] One can readily conclude that this commendable commitment was a factor favouring his appointment. After his appointment, he sought to create a national organization called the Federation of Black Canadians (FBC) with a mandate to advance the social, economic, political, and cultural interests of Black Canadians. He became the Chair of the FBC's Interim Steering Committee.[60] Was this compatible with his new role as a judge?

The Associate Chief Justice of the Ontario Court of Justice expressed concerns. She and Justice McLeod agreed to consult the court's Judicial Ethics Committee. The Committee approved his involvement with limitations: notably, he was not to be involved in fundraising or lobbying. However, after a time, the FBC began to engage in activities in which members, including Justice McLeod, would meet with politicians and government officials. Critiques started to emerge in the media about his participation, and a complaint was made to the OJC. Justice McLeod ultimately stepped down from his position at the FBC.[61]

The OJC found that his conduct had been incompatible with judicial office but did not amount to judicial misconduct.[62] It recognized that the FBC's goals and Justice McLeod's motivations were laudable:

> Justice McLeod is rightly seen as a leader in his community. As a racialized judge, he has a moral obligation as a leader and role model in the Black community. As he noted in his response to the complaint, his community involvement was an important factor when he was appointed. There is no reason why it should have entirely ended when he assumed judicial office. He is to be commended for leaving his court room and judicial chambers from time to time in order to present to the public a positive and inspiring vision of what young Black Canadians can aspire to.[63]

However, his activities had crossed the line into advocacy on public policy. In his meeting with government officials and politicians, he "not only provided information but also advocated specific policy changes and the allocation of government resources to achieve those policy changes."[64] He was also publicly identified as a judge. These activities were not, the OJC found, "merely educative or intended to inform politicians

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[59] *In the Matter of a complaint respecting The Honourable Justice Donald McLeod* (20 December 2018) at paras 4–6, online: Ontario Judicial Council <www.ontariocourts.ca/ocj/ojc/public-hearings-decisions/#Justice_Donald_McLeod>.

[60] *Ibid* at para 11.

[61] *Ibid* at paras 16–21, 21–32, 38–39, 45.

[62] *Ibid* at paras 92, 94.

[63] *Ibid* at para 73.

[64] *Ibid* at para 75.

of the difficulties facing Black Canadians."[65] The OJC emphasized that "[i]t is incompatible with the separation of powers for a judge to enter the fray and ask political actors for policy changes and the allocation of resources, however worthwhile the judge's motivating cause."[66] His actions were therefore incompatible with judicial office. The OJC did note, however, that Justice McLeod likely would not have crossed the line "had he restricted his efforts to educating members of the public about these issues."[67]

The OJC held that Justice McLeod's actions were incompatible with judicial office; however, they did not amount to misconduct.[68] It noted that there was no evidence that Justice McLeod had been involved in partisan political activity or fundraising. He had also contacted his court's Ethics Committee and spoken with his Associate Chief Justice.[69] Overall, he had been motivated to promote public confidence in the judicial system, which was "relevant precisely because the aim of judicial misconduct proceedings is to maintain public confidence in judicial institutions."[70]

Justice McLeod's situation illustrates that judges inevitably sacrifice certain aspects of full citizenship. However, the OJC made clear that a judge need not be a recluse. Rather, judges can contribute to their communities in many ways, including education as to policy issues. The OJC's decision is notable in that it explicitly evaluated Justice McLeod's conduct in light of the racial dynamics in Ontario.[71] It noted that many Black people mistrust the criminal justice system, that they are overrepresented in that system, and that they are disproportionately arrested and searched by police. Justice McLeod's life experiences, the OJC held, made him uniquely aware of these issues, and his presence on the bench promotes the public's confidence in the administration of justice.[72] This explicit acknowledgment by the OJC of the context of the complaint recognizes the legitimate and important role that judges can play in addressing inequities.

Since the drafting of this paper, a further complaint has been made against Justice McLeod relating to the evidence he gave at the first hearing.[73] As this matter is still before the OJC, we make no further comment on it.

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[65] *Ibid* at para 76.

[66] *Ibid* at para 84.

[67] *Ibid* at para 88.

[68] *Ibid* at para 94.

[69] *Ibid* at paras 95–100.

[70] *Ibid* at para 103.

[71] *Ibid* at para 102.

[72] *Ibid* at paras 102–103.

[73] "Notice of Hearing into a Complaint about the Conduct of the Honourable Justice McLeod", online: *Ontario Judicial Council* <www.ontariocourts.ca/ocj/ojc/public-hearings/mcleod2020/>.

C. *Fundraising*

The *Principles* are clear that fundraising should be avoided by judges. They prohibit judges from soliciting funds "except from judicial colleagues or for appropriate judicial purposes."[74] Further, judges must not lend the prestige of their office to such solicitations.[75]

Fundraising is different from other forms of community involvement: "It moves beyond one's own individual support to the active seeking out of expressions of support from others. It encompasses an advocacy function, championing the cause and seeking to rally others to it."[76] Fundraising also raises a real risk that the public will consider a judge to be affected by contributions made in response to their solicitation.[77] The perceived effects on the impartiality and independence of the judge require a complete ban.

D. *Involvement in boards, universities, and other institutions*

Judges are prohibited from serving on the boards of commercial enterprises.[78] They are also discouraged from membership on boards of universities, dioceses, schools, hospitals, charitable foundations, and the like.[79] While such positions may seem harmless, it is not uncommon for such bodies to be involved in litigation, as well as in matters of public controversy. Being on such a board could disqualify a judge from sitting; in addition, it could raise concerns about impartiality.

Justice Georgina Jackson of the Court of Appeal for Saskatchewan has provided a helpful set of questions that judges can ask themselves when considering whether to be a member of a board:

1) Would association with this board reflect adversely on the judge's impartiality?
2) Would this activity interfere with the performance of his or her judicial duties?

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[74] CJC, *Principles*, *supra* note 17 at 28, principle C.1(b); CJC, *Draft Revised Principles*, *supra* note 19 at 38, commentary 5.B.14.

[75] CJC, *Principles*, *supra* note 17 at 28, principle C.1(b); CJC, *Draft Revised Principles*, *supra* note 19 at 38, commentary 5.B.14.

[76] Stephen GA Pitel & Michael Malecki, "Judicial Fundraising in Canada" (2015) 52:3 Alta L Rev 519 at 530.

[77] *Ibid* at 531.

[78] CJC, *Principles*, *supra* note 17 at 36, commentary C.7.

[79] CJC, *Principles*, *supra* note 17 at 37, commentary C.9; CJC, *Draft Revised Principles*, *supra* note 19 at 37–38, commentaries 5.B.11–12; Wilson, *supra* note 26 at 8.

3) Is the judge being asked to join this board to lend the prestige of the judicial office to fund-raising?
4) Is this board likely to be involved in litigation?
5) Is the judge being asked to play a role in the expectation that he or she will give legal or investment advice?[80]

These questions provide a useful framework. However, as we will see, this too is an area where judges can find themselves uncertain as to what is appropriate.

In the *Yukon Francophone School Board* case referred to above, the Supreme Court of Canada addressed a bias claim against a judge. The judge had heard a case in which the school board was suing the territorial government for deficiencies in the provision of minority language education. The judge ruled in the board's favour on most issues. The Court of Appeal found a reasonable apprehension of bias based on incidents at trial and the judge's involvement as governor of a philanthropic Francophone community organization.[81]

The Supreme Court upheld the bias findings based on the incidents at trial, but it set aside the findings relating to the judge's position in the philanthropic organization.[82] The Court explained:

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.[83]

As this case did not arise in the context of a complaint to the CJC, it is unclear what the CJC's views on the judge's involvement in the organization would be. However, the *Principles* suggest that the main considerations would be whether the organization was likely to be involved in litigation or in matters of public controversy, both of which arose here. The case presents an interesting perspective on the interaction of the *Principles* with the law of reasonable apprehension of bias.

This kind of participation is at the heart of a case that was recently before the courts. Justice Patrick Smith of the Ontario Superior Court of Justice was asked to be the interim dean of Bora Laskin Faculty of Law at Lakehead University, following the unexpected resignation of its dean.[84] That faculty has, as an important part of its

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[80] The Honourable Georgina R Jackson, "The Mystery of Judicial Ethics: Deciphering the 'Code'" (2005) 68:1 Sask L Rev 1 at 9.

[81] *Yukon Francophone School Board*, *supra* note 29 at paras 3, 5.

[82] *Ibid* at paras 55–56.

[83] *Ibid* at para 33.

[84] *Report of the Review Panel Constituted by the Canadian Judicial Council Regarding the Honourable Patrick Smith* (Ottawa: CJC, 5 November 2018) (RS Veale, Chairperson) at para 1, online (pdf): *Canadian*

mandate, the study of Aboriginal and Indigenous law.[85] The law school cited Justice Smith's experience with Indigenous communities and publications on Aboriginal law as its reasons for asking him to accept the position.[86]

Justice Smith spoke to his Chief Justice about the invitation to serve as interim dean. They sought approval from the federal Minister of Justice for a six-month leave of absence, noting that Justice Smith's responsibilities would be confined to academic leadership, that he would delegate administrative responsibilities to other personnel, and that he would not be remunerated (beyond his judge's salary). The Minister granted the leave of absence, noting that she had "no concerns."[87]

The Executive Director of the CJC wrote to Justice Smith expressing concerns about the appointment and informing him that the situation may warrant consideration by the CJC. The matter was ultimately referred to a review panel.[88]

The review panel concluded that s 55 of the *Judges Act* "requires judge to devote themselves exclusively to their judicial duties and to abstain from businesses and occupations falling outside the judicial sphere." (As noted, s 55 states that "[n]o judge shall…engage in any *occupation or business* other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties" [emphasis added].) The meaning of "occupation," the panel held, was to be "broadly interpreted to capture all non-judicial activities, whether paid or unpaid, that interfere with the judicial role." Moreover, the leave-of-absence mechanism in s 54[89] did not permit a judge to take on a business or occupation outside the judicial sphere, with limited exceptions. Justice Smith had also violated his ethical obligation "to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office," and his appointment had raised concerns that the prestige of his office was being misused. The review panel concluded

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Judicial Council <cjc-ccm.ca/sites/default/files/documents/2019/Report%20of%20Review%20Panel.pdf> [CJC, *Smith Report*].

[85] "Bora Laskin Faculty of Law" (2019), online: *Lakehead University* <lakeheadu.ca/academics/departments/law>.

[86] CJC, *Smith Report*, *supra* note 84 at para 7.

[87] *Ibid* at paras 8–15.

[88] *Ibid* at paras 17–19, 28.

[89] Section 54(1) states the following:

> 54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period (a) of six months or less, except with the approval of the chief justice of the superior court; or (b) of more than six months, except with the approval of the Governor in Council.

that Justice Smith had violated s 55.[90] However, it held that the conduct was not serious enough to warrant removal.[91]

In a recent judicial review, the Federal Court held that the review panel's interpretation of s 55 was unreasonable. The court held that, properly interpreted, s 55 prohibits engaging in any *occupation or business* other than judicial duties—not *any* extra-judicial activities.[92] It further concluded that the panel's interpretation of s 54 was unreasonable: the provision did *not* prevent a judge from taking up extra-judicial activities that are not inconsistent with his or her judicial duties while on leave.[93] In the result, Justice Smith had not violated s 55.[94]

The court further held that Justice Smith had not violated his ethical obligations. The panel's references to potential litigation involving the law school were "entirely speculative and unworthy of…consideration," and in any case, Justice Smith could simply recuse himself if any such case arose. Moreover, the panel had exaggerated the media coverage generated by Justice Smith's appointment, and its concerns about improper use of his judicial reputation were not supported by the *Principles*.[95]

Finally, the court held that the proceedings were procedurally unfair, amounting to an abuse of process.[96] There had been insufficient grounds to refer the matter to the review panel, materials had not been disclosed to Justice Smith, and the procedures were pursued, at least in part, for an improper purpose.[97] The court declared that Justice Smith had not contravened s 55, quashed the decision, and ordered that its judgment be posted on the CJC's website and referenced in every mention to Justice Smith's case.[98] Following the decision, the CJC has decided that it is not in the public interest to appeal the decision and has stated that "[a]ll aspects of the order will be complied with promptly."[99]

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[90] *Ibid* at para 76.

[91] *Ibid* at paras 77–78.

[92] *Smith v Canada (AG)*, 2020 FC 629 at paras 75–76.

[93] *Ibid* at paras 104, 110–12.

[94] *Ibid* at para 114.

[95] *Ibid* at paras 124–31.

[96] *Ibid* at para 136.

[97] *Ibid* at paras 145–46, 155–57, 160–63, 167–69.

[98] *Ibid* at para 176, Order.

[99] "Canadian Judicial Council responds to the Federal Court decision regarding Justice Patrick Smith" (25 May 2020), online: *Canadian Judicial Council* <cjc-ccm.ca/en/news/canadian-judicial-council-responds-federal-court-decision-regarding-justice-patrick-smith>.

This decision provides a useful analysis of the meaning of ss 54 and 55 of the *Judges Act*. It confirms that judges can hold other positions while on a leave of absence, as long as they are not incompatible with the judicial role. Notably, while the interpretation of these sections arose in a judicial review, the court held that this was one of the rare situations in which there is only one reasonable interpretation of the provisions.[100] The decision also suggests that the mere possibility that a university or other institution may become involved in litigation is insufficient to render a judge's involvement incompatible with the judicial role.

E. *Matters of public controversy*

The *Principles* and *Draft Revised Principles* advise judges to be cautious as to their involvement in certain groups and organizations. In particular, "consideration should always be given to the possibility or likelihood that the group or organization could become involved in public controversy or litigation."[101] The *Draft Revised Principles* further counsel that "[t]he more likely the organization is to be embroiled in controversy or litigation, the more cautious the judge should be."[102] The oft-cited case of Justice Thomas Berger provides a prime example of what can happen when a judge does become involved in such matters.

Justice Berger was a judge of the Supreme Court of British Columbia. Before his appointment, he was a leading lawyer in Aboriginal law and had represented Indigenous people in landmark cases. In 1981, he made a speech and wrote an article in a newspaper criticizing proposed constitutional changes for their failure to protect Aboriginal and treaty rights. He also criticized the absence of a veto by the province of Québec on future constitutional changes, a matter of intense controversy.[103]

Prime Minister Pierre Elliott Trudeau stated that it was improper for a sitting judge to make such comments. A judge of the Federal Court made a complaint to the CJC, and an inquiry panel was formed.[104] The panel discussed the independence of the judiciary in detail, noting the following:

> The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judge must be free from political interference, but that politicians must be free from

[100] *Ibid* at para 181.

[101] CJC, *Draft Revised Principles*, *supra* note 19 at 38, commentary 5.B.13. See also CJC, *Principles*, *supra* note 17 at 36–37, commentary C.8.

[102] CJC, *Draft Revised Principles*, *supra* note 19 at 38, commentary 5.B.13.

[103] Kent Roach, "Judges and Free Speech in Canada" in HP Lee, ed, *Judiciaries in Comparative Perspective* (New York: Cambridge University Press, 2011) 175 at 178.

[104] *Ibid*.

> judicial intermeddling in political activities. This carries with it the important and necessary concomitant result—public confidence in the impartiality of judges—both in fact and appearance.[105]

The inquiry panel held that Justice Berger had "intervened in a matter of serious political concern and division when that division or controversy was at its height."[106] It rejected Justice Berger's argument that his remarks related to matters of conscience rather than politics. The panel suggested that he should resign as a judge if he wanted to comment on such matters.[107] It concluded: "Judges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem."[108] However, the inquiry panel refrained from recommending that Justice Berger be removed, as this was the first situation of this kind to come before the CJC.[109]

A subsequent resolution of the full CJC was less critical than the inquiry panel. It concluded that Justice Berger's actions were "indiscreet" but did not warrant removal. The CJC did, however, state that judges should not take part in controversial political discussions, except as they relate to the operation of the courts.[110]

The Chief Justice of Canada at the time, Bora Laskin, made the following comments about Justice Berger in a speech: "[U]nbelievably, some members of the press and some in public office in this country, seem to think that freedom of speech for the judges gave them the full scope of participation and comment on current political controversies, on current social and political issues. Was there ever such ignorance of history or principle?"[111] Chief Justice Laskin further stated that any judge wanting to comment on political issues should resign from the bench.[112] Both Chief Justice Laskin's comments and the views expressed by the CJC have been commented on unfavourably by academics.[113]

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[105] John J Robinette, "Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Judicial Council" (1983) 28:2 McGill LJ 378 at 389.

[106] *Ibid* at 389.

[107] *Ibid* at 390–92.

[108] *Ibid* at 391.

[109] *Ibid* at 392.

[110] *Ibid* at 379.

[111] As cited in Roach, *supra* note 103 at 179.

[112] *Ibid*.

[113] *Ibid* at 179–80.

F. *Social media*

The *Draft Revised Principles* include guidance on social media usage by judges. Most lawyers have an online presence before appointment to the bench. After appointment, is an online presence comparable to involvement in a community group or organization?

As Sossin and Bacal explain, different considerations may apply when considering a judge's physical and digital involvement in a given activity:

> Unlike social clubs or civic groups that one must join and maintain membership in, being part of a social-media network does not imply any particular commonality or shared values. For example, if a judge joins a civil-liberties association, that may be taken to imply sympathy with the association's goals and activities. If a judge instead follows that organization on Twitter, or receives a feed from its Facebook page, however, it is unclear whether and in what circumstances this might be taken to imply support or "membership".[114]

Drawing from Justice Matlow's situation, they suggest that "it is clear that judges who use social media to express their engagement in the community and to further their involvement in community affairs are not in violation of any ethical guideline per se"; rather than the medium, the focus will be on the context in which a judge discusses an issue, that is, as a private citizen or as a judicial officer.[115]

The *Draft Revised Principles* have provided further guidance. They state that social media activities "are subject to the overarching principles that guide judicial behaviour"; judges must consider how their activities may "reflect on themselves and upon the judiciary and should be attentive to the potential implications for their ability to perform their judicial role."[116] They should also be alert to how social media usage by family members may reflect adversely on them.[117] Moreover, judges should be mindful of certain social media realities, including the ease and speed with which communications by social media can be transmitted and the potential for inappropriate communications directed to judges.[118] There is also the reality that "[j]udges' communications and associations with others are a common basis upon which claims of lack of impartiality are based"; as a result, "[j]udges should be vigilant in minimizing reasonable apprehension of bias arising from these communications and

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[114] Lorne Sossin & Meredith Bacal, "Judicial Ethics in a Digital Age" (2013) 46:3 UBC L Rev 629 at 634.

[115] *Ibid* at 640.

[116] CJC, *Draft Revised Principles*, *supra* note 19, 5.B.15.

[117] *Ibid*.

[118] *Ibid*, 5.B.16.

associations," which is "all the more important, and difficult, in the age of social media."[119]

As social media use increases, this will undoubtedly be an area in which judges and judicial councils will face new and difficult issues on the limits of judges' involvement.

VI. Conclusion

In summary, in Canada the key ethical considerations for judges regarding involvement in the community are the following:

- Judges must weigh the benefits of community involvement against the potential risks to impartiality and independence;
- Judges must not engage in political activity of any kind;
- Judges may engage in civic and charitable activities, provided they do not reflect adversely on their impartiality or interfere with the performance of their judicial duties;
- Judges should be wary of involvement in organizations or causes that are likely to be engaged in litigation or matters of public controversy;
- Judges may advocate for their own private interests, provided they do not use the prestige of their office inappropriately;
- Judges must not engage in fundraising;
- Judges should be cautious when becoming involved with boards of schools, charitable foundations, and the like, as they are increasingly involved in litigation and matters of controversy; and
- Judges should refrain from commenting on matters of public controversy.

Judges occupy a unique role in society. As a leading Canadian jurist puts it, "[t]o sit in judgment on one's fellow citizens is a weighty responsibility. To carry it out, the judge must be worthy of public respect and confidence and be trusted by the bar."[120] We expect our judges to act with integrity, impartiality, and independence so as to ensure the fair resolution of disputes. Judges are called upon to show a restraint and propriety beyond that which is expected of their fellow citizens. Determining the appropriate limits of their personal conduct is not an exact science. Fortunately, much guidance exists from judicial councils, courts, and commentary. Ultimately, the genius of the law is experience. As is life, the law is ever changing.

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[119] *Ibid*, 5.B.17.

[120] Sharpe, *supra* note 7 at 249.