Action-Learning Program on Judicial Transparency and Accountability in LCR

"How can greater judicial integrity be achieved?"

Lorne Sossin

Faculty of Law, University of Toronto

I. The Conceptual Framework of Judicial Integrity

All across the globe governments and courts at the national, regional, continental and transnational level have searched for effective tools to protect and advance judicial independence. At the same time, judicial conduct needs to be regulated to ensure judges do not abuse their professional competencies or the rule of law.

On the Northern American continent, the United States was among the first countries in the world to realize the need for drafting a code of ethics for judges. In the 1920s, a judge served as the national commissioner of baseball for a salary seven times the size of his judicial remuneration. In response to concerns over the ethical obligations of judges, the American Bar Association appointed a commission on judicial ethics tasked to develop a code of judicial conduct. The "Canons of Judicial Ethics" approved in 1924 were applicable country-wide.[1]

The fundamental principle of judicial ethics – namely judicial independence, was mentioned in Article 10 of the Universal Declaration of Human Rights (1948), which stated the following:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The same principle has been further elaborated in Article 14 of the International Covenant on Civil and Political Rights that was adopted in 1966, in the following wording:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The same principle, as well as other important standards that should guide judicial conduct were later considerably expanded in the United Nations Basic Principles on the Independence of the Judiciary, adopted by the United Nations Congress in 1985, which stated:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

1 In 1972, the ABA replaced the Canons with a mandatory and more streamlined Model Code of Judicial Conduct, which underwent major amendment in 1990, followed by subsequent changes. The Code includes provisions requesting judges to avoid impropriety and the appearance of impropriety in all of the judge's activities, and that judges should carry out their extra-judicial activities as to minimize the risk of conflict with judicial obligations.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

The Bangalore Principles of Judicial Conduct, adopted by the General Assembly of the UN Human Rights Commission in May 2003, establish guidelines for ethical judicial conduct in the form of six values:

- independence,
- impartiality,
- integrity,
- propriety,
- equality,
- competence and
- diligence.

Various regions around the world have further refined these principles with their own legal traditions and histories in mind. At the regional European level, there are a number of major instruments pertaining to judicial ethics. They are the "Judges' Charter in Europe" adopted on March 20, 1993 in Wiesbaden (Germany) by the European Association of Judges, which is a regional group of the International Association of Judges, which provides,

The Judge is only accountable to the law. He pays no heed to political parties or pressure groups. He performs his professional duties free from outside influence and without undue delay (Article 2), and that "Not only must the Judge be impartial, he must be seen by all to be impartial."

The Recommendation on the Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers of the Council of Europe in 1994, and the European Charter on the Statute for Judges adopted by the Council of Europe in Strasbourg in 1998 expand the principle of independence and responsibility of judges and contain provisions about the preconditions for ensuring judicial independence by ensuring proper methods of selecting and recruiting judges, ensuring proper working conditions, and safeguarding judicial independence by a judicial association or administration body.

In Western European countries, judicial ethics norms are embedded both in actual Codes of Judicial Ethics like the one that exists in Italy since 1994, as well as in various types of documents, that deal with certain aspects of judicial ethics, such as the "Equal Treatment Bench Book" published by the England's Judicial Studies Board and the Dutch 2004 "Judicial Impartiality Guidelines."

Judicial ethics has also featured prominently in the reform efforts in Central and Eastern Europe

Latin America

Recently, the interest in judicial ethics has also been increased in Latin America. On regional level, the Statute of Iberoamerican Judges adopted in 2001, for example, contains a separate chapter on judicial ethics. South American countries such as Mexico, Costa Rica, Guatemala, Panama, Chile, Venezuela, and Peru have also adopted judicial ethics codes at national level.

Asia and the Pacific region

In the Asia and Pacific region, the "Beijing Principles of the Independence of the Judiciary," signed by or on behalf of thirty-two Chief Justices of the Asia and Pacific region in 1995, including from China, Australia, India, Japan, Indonesia, South Korea, Malaysia, New Zealand, Pakistan, the Philippines, Fiji, Hong Kong, Singapore, and Thailand spell out the requirements to the judiciary when examining and deciding cases.

Africa

In Africa, judicial ethics standards are embodies in the African "Charter on Human and People's Rights" adopted in 1986, the 2003 Principles and Guidelines on "the Right to a Fair Trial and Legal Assistance in Africa," and the 2003 "Commonwealth Principles on the Accountability of, and the Relationship between, the Three Branches of Government."

Canada

Judicial ethics has been a particular interest in Canada. The *Ethical Principles* booklet was published in 1998 by the Canadian Judicial Council to "provide ethical guidance for federally appointed judges." The *Ethical Principles* booklet set out the main principles and provide commentary and examples intended to sustain what is already an ethical judiciary. The principles are:

(i) judicial independence,
(ii) impartiality
(iii) integrity,
(iv) diligence, and
(v) equality.

1. What is integrity?

Integrity may be given a variety of meanings, and its scope may be influenced by culture and history, among other factors. At a minimum, in a judicial context, integrity includes

- honesty,
- fairness, and
- trust.

Integrity may also be defined by what it is not. Where a person in a position of power acts for his or her own self-interest, or for ulterior or improper

purposes, it is widely understood that such a person lacks integrity.

2. Principles of judicial accountability.

The judicial branch of government must be accountable for the the effectiveness of the judicial process and the expenditure of public funds.

Principles of judicial accountability include:

a. Judges should provide reasons for their decisions;
b. Judicial decisions should be rendered in a timely fashion;
c. Judges must act – and be seen to act – in a fair and reasonable manner;
d. Courts budgets and expenditures should be transparent

Judges must be accountable to the public and the public interest.

3. Principles of judicial independence.

While judicial accountability is important, it should not be understood as permitting government or any external individual, group or organization from influencing the decision-making of judges.

Richard Goldstone, formerly of South Africa's Constitutional Court has observed,

> The cardinal importance of judicial independence as a necessary prerequisite for the operation of the rule of law is not in issue. The problem that calls to be addressed is the content of judicial independence. It is here that there is controversy in many jurisdictions, both in the older and the more recently established democracies.
>
> It usually came as a surprise to many students of Apartheid South Africa that the boast of the government that there was an independent judiciary was justified. Of course, it was all white and all male – and was appointed by the executive. Nonetheless, there was no interference from the other two branches. They could afford to have an independent judiciary for two principle reasons. The first was that without a written constitution parliament was supreme and the courts had no power of judicial review. Parliament could literally undo on Tuesday what the judges ordered on Monday. Secondly, the overwhelming majority of the judges enthusiastically supported Apartheid and did not need, and would have been intolerant of, any government interference. It followed, also, that the government could afford to appoint to the bench a few liberal, anti-Apartheid lawyers, like myself.

Judicial independence requires objective guarantees to protect the fairness of the judicial process for parties before the Court. Those guarantees, however, cannot alone produce a judiciary that is truly independent. Ultimately, independence is a state of mind more than it is a set of structures, mechanisms or processes.

Canada's *Ethical Principles* states that "[a]n independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects."[2]

While it would be impossible to provide an exhaustive list of the factors that constitute judicial independence in various jurisdictions, the most important features of judicial independence include:

a. Judges must be free from political direction or interference from the Government over judicial decision-making;
b. The conditions of office (security of tenure, financial remuneration) are set and determined objectively rather than at the discretion of the Government; and
c. Judicial discipline and supervision of judicial conduct is carried out by the judiciary.

4. Principles of judicial impartiality

Principles of independence are closely related to judicial inpartiality. Judicial impartiality includes not only a protection against actual bias, but also the appearance of bias.

No one may be the judge in his or her own cause. This ancient rule is one of the fundamental rules of natural justice.[3] Instances in modern times of judges rendering judgments based on direct self-interest are hopefully rare. Judges may, however, be subject to forms of indirect self-interest that are referred to generally as "bias". Bias may be relational or attitudinal. Its characteristic manifestation is a closed mind: "[bias] represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction."1 A biased judge will be disqualified from hearing and deciding the matter to which the bias relates.

The result of bias is therefore partiality, and a biased judge will contravene the litigant's right to an impartial tribunal under the *Charter*.1 Furthermore, a public perception of widespread bias in the judiciary would threaten the rule of law itself:2

> In a democracy, the enforcement of judicial decrees and orders ultimately depends upon the public co-operation. The level of co-operation, in turn depends upon a widely held perception that judges decide cases impartially... Should

2 See http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf.*Ethical Principles*, p.5.

3 *Nemo debet esse judex in propria sua causa*, which was considered an established rule of law by Coke in the *Earl of Derby's Case*, 12 Co. Rep. 114, in about 1610.

the citizenry conclude, even erroneously, that cases were decided on the basis of favouritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgments.

Madame Justice L'Heureux-Dubé, in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919 (S.C.C.), stated that "the concept of impartiality should be seen as a dichotomy involving two states: that of bias and that of impartiality. The only choice in such a dichotomy is between bias and impartiality, meaning that there is no intermediate obligation and thus no continuum". As a result, the obligation to be impartial is not something that is subject to flexibility or compromise, although there is flexibility with respect to what perceptions of bias will be treated as reasonable in different settings.

The test developed by the Supreme Court of Canada in cases of judicial impartiality is one of the "reasonable apprehension of bias." The test has been described in the following terms:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person viewing the matter realistically and practically — and having thought the matter through — conclude".

5. The Role of Government.

Government has an important role to play in any scheme to ensure judicial integrity, independence and impartiality, which includes:

a. Respecting the autonomy of judges in their decision-making;
b. Providing a sustainable budgetary environment for the administration of justice;
c. Ensuring the highest merit-based standards in judicial appointment; and
d. Establishing a fair and objective process, where necessary, for judicial removal.

To the extent possible, the relationship between the Government and the judiciary should be "depoliticized."

6. The Role of the Legislature

The Legislature provides an important source of legitimacy – and oversight - for the judiciary. Special legislative committees with responsibility for the justice sector may play a key role in supervising court administration and providing a buffer against governmental intervention in the judicial process.

7. The Role of the Chief Justice & the Judiciary.

While objective structures and the political branches of Government can create the necessary autonomy for the judiciary to be accountable for the advancement of judicial integrity, this goal can only be achieved where the judiciary itself is committed and has the capacity to undertake these activities.

The Chief Justice of a court stands in a unique position, both of leadership as the "first among equals" or "primer inter paries" of the Court and as a bridge between the Court and Government or other external parties.

8. The evaluation of integrity.

Integrity is difficult to measure. There are assessments, however, which may be a proxy for measuring integrity. These include:

- The number of complaints against judges
- Surveying public trust and confidence in the judiciary
- Surveying judicial activities and practices

Evaluating integrity should be done in a transparent fashion – for example, through the body which conducts the investigations into complaints against judges issuing an annual report which is made available to the public.

II. Judicial Appointments

1. The appointment process.

One of the most important aspects of judicial integrity is the appointment process by which judges are selected.

In Canada, the informal federal judicial selection process, which involved private recommendations to the office of the Minister of Justice and consultation with regional Ministers, was replaced by a system of direct application by the prospective judge to the Office of the Commissioner for Judicial Affairs. Certain standard information is supplied by the applicant, and the Commissioner's Office administers the list, at one step removed from the political atmosphere of the Minister's office. Letters of recommendation are still written, but they no longer initiate the process.

The federal judicial appointments process underwent significant reform in the 1980s and 1990s. The judicial appointments advisory committee. The committee generally has the same composition in each province (Ontario and Quebec have regional committees rather than a single provincial committee). The committees consist of eight members

appointed by the federal Minister of Justice. Three of the seven members were non-lawyers who serve as representatives of the community at large. Four members served by invitation from the provincial or territorial Chief Justice, the Attorney General, Law Society and CBA Branch, respectively. One member is drawn from the law enforcement community. Committee members served on a *pro-bono* basis for three-year terms.

The appointment process in several jurisdictions involves legislative review. This form of review has significant implications for judicial independence. In 1939, the great jurist Felix Frankfurter appeared as a prospective Supreme Court Justice before the United States Senate Committee. He made it clear in a brief opening statement that he perceived a conflict between testifying on his own behalf and his judicial independence:

> …I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee no less than a member of the Court to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations. That is all I have to say.[4]

In Canada, the *Judges Act* which governs the appointment process does not contain any standards or requirements for appointment beyond professional standing and a minimum period of legal experience (10 years).

In the 2004 Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness's hearings regarding changes to the Supreme Court judicial appointment process, the Hon. Irwin Cotler, Minister of Justice, outlined the criteria that he used in selecting the best candidates. His predominant consideration was merit, divided into three main categories: professional capacity, personal characteristics, and diversity.1 In the same hearings, former Supreme Court Justice Madam L'Heureux-Dubé emphasized the importance of courage in a judge. She stated, "To me, being courageous is the best quality of a judge, to do the job whether you're popular or not".

The judicial selection process in Canada remains one controlled by the executive branch. While a Parliamentary committee has heard testimony from an Attorney General about the appointment process, and while one nominated Supreme Court Judge did appear before such a committee prior to his appointment to answer questions (in 2006), there remains no formal role for the legislative branch in the judicial appointment process in Canada.

2. Merit and the criteria for judicial selection

As Judith Resnick has observed, there is no self-evident process for judicial selection in a democracy, but there are principles which tie judicial selection clearly to the idea of merit:

> Democracy tells one a good deal about rights to justice, equality before and in the law, and constraints on the power of the state, its courts included. But absent a claim that all government officials in a democracy must be elected, it is difficult to derive from democracy any particular process for picking judges. In contrast, democratic principles do rule out a few procedures for judicial selection – such as by inheritance or through techniques that systematically exclude persons by race, sex, ethnicity, and class.[5]

Few would disagree with the idea that judicial appointments should be merit-based. But not everyone would agree on what merit means. For example, in the context of the "merit principle" in civil service appointments, the Federal Public Service Commission has traditionally defined merit in terms of three related values: fairness, equity and transparency.[6] While fairness relates to objectivity and transparency relates to results that are "clear and explainable", equity is said to include reasonable access to competitive opportunities for appointment and representativeness. Representativeness as a goal is described simply as "reflective of the Canadian society in all its diversity."[7]

Some aspects of identity go to important judicial skills. For example, access to justice in a legal system committed to two official languages requires

4 U.S. Congress, Senate Committee on the Judiciary, Frankfurter Statement, "Hearings on the Nomination of Felix Frankfurter", 76th Congress, 1st Sess., January 12, 1939 (Wash. D.C.; Government Printing Office).

5 J. Resnick, "Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure" (2005) 26 Cardozo L. Rev. 579 at 579.

6 See PSAC Working Group on Merit, "Merit in the Public Service" (Ottawa, 2001) at <http://pscac-cccfp.gc.ca/publications/rpt_merit/index_e.php>.

7 *Ibid.* at 5. For further discussion on the issue of a representative public service, see L. Sossin, "Discretion and the Culture of Justice" (2006) Singapore Journal of Legal Studies 356-384. For a discussion of a representative judiciary, see K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary (2000) 38 Alta. L. Rev. 708.

sufficient bilingual judges.8 The complexity and importance of aboriginal law in Canada's legal system suggests the need for more judges familiar with aboriginal justice concepts and systems.

The Federal Government in Canada has established Advisory Committees to determine whether those who apply to become judges are "qualified." The Advisory Committees are responsible for assessing the qualifications for appointment of the lawyers who apply. There is at least one committee in each province and territory; because of their larger population, Ontario has three regionally based committees and Quebec has two. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner. Each committee consists of eight members representing the bench, the bar, the law enforcement community and the general public.

The criteria for federal, judicial selection are provided to the Judicial Advisory Committees in the following terms:

Professional Competence and Experience

- proficiency in the law	- organizational skills incl. people
- well rounded legal experience	and time management
- advocacy experience	- collegiality
- commitment to the law	- scholarly ability
- ability to exercise role conferred	- achievements & contributions incl.
By Charter	Books and articles
- standards / reputation	- areas of specialization
- mature & objective judgement	- non-mainstream legal experience
- work habits	- bilingualism
- writing & communication skills	

Personal Characteristics

- ethical standards	- common sense	- courtesy
- honesty	- ability to listen	- tact
- integrity	- ability to make	- humility
- fairness	Decisions	- reliability
- tolerance	- consideration for	- punctuality
- patience	Others	

Social Awareness

- sensitivity to gender and racial	- public and community service
Equality	- receptivity to ideas
- appreciation of social issues	
Arising in litigation	

3. Conflicts of interest and judicial appointments.

In Canada, Judges are drawn from the legal profession and, inevitably, have pre-existing relationships with members of the Bar who may appear before them. The Bars of most provinces have developed a "rule of thumb" to eliminate the most obvious situations.

Where a member of a law firm is elevated to the Bench, no other member of the firm may appear before that judge for a specified period of two to five years after the elevation. This is a rule of professional conduct applicable to lawyers and not judges, although in practice judges may feel bound to disqualify themselves, even if a former colleague before them wishes to proceed.

4. The evaluation of appointments process.

There are limited options by which the judicial appointment process may be evaluated. Rather than a process by which the Government or some other body reviews the quality of appointments, a more appropriate model of evaluation would rely on transparency in the appointments process.

Where an appointment advisory committee is present, that committee may publish reports on its activities and effectiveness.

The U.K. Judicial Appointments Commission, for example, publishes in its Annual Report statistics on the number and type of applicants and the number and type of appointments.[9]

III. Tools of Judicial Discipline

1. Statutory context of discipline and judicial misconduct.

A key tool of discipline and investigating misconduct is statutory authority. In Canada, the *Judges Act* provides a framework to govern the process by which the Canadian Judicial Council (comprised of the Chief Justices of Canada's 10

8 See Third Report of the Standing Senate Committee on Official Languages on *Environmental Scan: Access To Justice In Both Official Languages.*

9 See http://www.judicialappointments.gov.uk/static/documents/JAC_AR09_web.pdf.

provinces, 3 territories and the Federal Court and Supreme Court) may hold an inquiry into judicial conduct. The *Judges Act* also addresses the powers of the Council. The relevant provisions are set out below:

> **63.** (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).
> Investigations
> (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.
> Inquiry Committee
> (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.
> Powers of Council or Inquiry Committee
> (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
> (a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
> (b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.
> Prohibition of information relating to inquiry, etc.
> (5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.
> Inquiries may be public or private
> (6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.
> R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27; 2002, c. 8, s. 106.
> Notice of hearing
> **64.** A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.
> R.S., 1985, c. J-1, s. 64; 2002, c. 8, s. 111(E).
> Report and Recommendations
> Report of Council
> **65.** (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.
> Recommendation to Minister
> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
> (a) age or infirmity,
> (b) having been guilty of misconduct,
> (c) having failed in the due execution of that office, or
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.
> R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5; 2002, c. 8, s. 111(E).

2. Ethical Codes & Guidelines.

Statutory legitimacy is valuable in setting out the process by which judicial misconduct can be addressed. With respect to the standards by which judicial conduct should be assessed, a code of conduct or non-legislated guideline may be preferable.

In Canada, the Canadian Judicial Council issues a non-binding "Ethical Principles for Judges."[10] The document is divided into the following categories: Judicial Independence, Integrity, Diligence, Equality and Impartiality. Each topic is addressed by a statement, a principle and commentary. For example, for the topic of integrity, the statement is:

> Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

The two principles following this statement on integrity states:

10 See http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf.

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

Finally, one of the commentaries observes,

A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.

3. A complaints process about judges.

Judicial accountability must include a mechanism by which those concerned by judicial conduct may have their concerns investigated.

The complaints process may initiate an investigation into judicial conduct, but it is important to emphasize that the investigation itself is conducted by judicial peers, and not through the private prosecution of the complainant. In other words, once the complaint is made in the Canadian system, it is pursued by the Council in the public interest, and not by the complainant as private litigation. That said, complainants are entitled to know the information gathered in the investigation and to reasons for the decision or recommendation at the conclusion of the investigation.

4. Dispute resolution and judicial discipline

Judges who are part of a disciplinary investigation are in a particularly vulnerable position. It is vital that the investigative and decision-making process in areas of discipline is fair and objective.

Judges subject to an investigation are entitled to natural justice, including the chance to know the case against them, and to respond to those issues through an opportunity to be heard.

As in other settings of professional regulation, it should be open to judges to settle or deal informally with a dispute, with the consent of the complainant or affected parties.

5. Sanctions for judges.

Judges who are found to have acted unethically or improperly usually will be subject to removal. Short of removal, the range of remedies and sanctions may be limited.

In order to ensure judicial independence, it may not be proper to suspend a judge for a period of time or to limit the activities of judges. A formal reprimand may be another option short of removal, but may also have the effect of eroding public confidence in the judge in question.

IV. Corruption & Improper Influence

1. Causes and consequences of judicial corruption.

Judicial corruption has a variety of causes. These include:

a. A culture of bribery
b. A lack of oversight;
c. Low judicial salaries
d. Ineffective law enforcement

Judicial corruption strikes at the very heart of the rule of law. Once the Bar and the public lost confidence in the independence and impartiality of the judiciary, it may prove difficult to restore. Further, it is even more difficult to attract jurists of integrity to pursue judicial careers.

2. Legal tools to address improper influence.

A vital legal tool to address improper influence is a robust scheme of disclosure and recusal. Upon becoming judges, individuals may be required to disclose business and economic interests, and interests of relevant family members. This reporting/disclosure requirement may be an annual feature of judicial accountability.

The legal tools available to address improper influence also include the discipline and misconduct process discussed above. Those tools may also include the criminal justice system and prosecution for crimes of corruption.

Other regulatory and oversight bodies may also play a role in monitoring improper influence, including an auditor general, ombudsman

3. Capture of justice system by economic elites.

Corruption may both be caused by and may contribute to the capture of the justice system by economic elites. This corruption may also compromise the independence of the Bar and other key aspects of the justice system. Capture may be explicit (e.g. bribery) or implicit (e.g. judges connected to economic elites through shared experience and perspectives).

4. Recusals and conflicts of interest.

There has been some debate concerning the appropriate procedure to be followed when

disqualification of one member of a multi-member panel of judges is sought,[11] but it is generally conceded that the proper approach is for that party to make a motion that will be decided by the judge whose disqualification is being sought.This can cause some difficulty if the judge rejects the application to disqualify himself or herself and the other members of the panel believe that this decision is incorrect.[12]

Judges swear an oath upon taking office that they will discharge their duties in an impartial manner.[13] There is as well a professional or ethical duty to decide all matters impartially. A judge may therefore disqualify himself or herself on his or her own motion in any case in which an issue of bias (or apprehension of bias) might arise. This self-disqualification is known as recusal.

A judge may recuse himself or herself despite the express wishes of all parties that the judge continues. From the judge's point of view, the consent of the parties is not determinative, although consent will count against an appellant if bias is raised on appeal. The Quebec *Code of Civil Procedure* contains a scheme of *recusation* rules that specify in some detail the circumstances in which a judge should not hear a case.[14]

The Canadian Judicial Council has set out a non-binding statement of principles with respect to recusal:

1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially;
2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty; and
3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or (b) no other tribunal can be constituted to deal with the case, or because of urgent circumstances, failure to act could lead to a miscarriage or justice.

In the case of Justice Ted Matlow, a judge sat on a case involving a challenge to the City of Toronto's development of a neighbourhood, when that same judge had publicly criticized the City's development of his own neighbourhood. The lawyer for the City of Toronto complained to the CJC that Justice Matlow should have recused himself and violated his ethical duties in his public criticism of the City.

The Canadian Judicial Council found that Judges are not prohibited at all times from speaking out about a controversial matter. The question is one of context. Some of Justice Matlow's conduct and speech in this case did fall within the permissible range of activities for any citizen, including a judge, and do not constitute misconduct. However, there are limits to a judge's ability to publicly comment on a contentious issue. A judge's freedom of expression is subject to scrutiny by judicial councils.

Judges have the right, in their private capacity, to contest, as do other Canadians, decisions that affect their interests. However, there are limits to what a judge can 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 is a judge. And judges are not entitled to act as legal advisors for individuals opposing government action.

A judge's decision to recuse or not from a given case includes a subjective element. With regard to the challenge to the City of Toronto's development which came before Justice Matlow, his failure to recuse himself may demonstrate seriously flawed judgement. However, it was a discretionary judicial decision.

It was not inappropriate for Justice Matlow to express his concern as a resident of his neighbourhood. However, it was inappropriate for him to continue pursuing the issue by emailing and delivering documents relating to that issue to a national newspaper when he knewhe would be adjudicating the challenge to the City of Toronto.

The Canadian Judicial Council concluded that while this is not a case that warrants removal, Justice Matlow must accept responsibility for his improper conduct and, therefore, he is directed (1) to make written apologies to those who were affected by his conduct; (2) to attend a seminar on judicial ethics; and (3) to seek advice before participating in any public debate in future.

11 See P. Bryden, "Legal Principles Governing the Disqualification of Judges" (2003), 82 Can. Bar. Rev. 555 at pp. 594-596; Sir Anthony Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998), 1 Constitutional Law and Policy Review 21.

12 See *SOS-Save Our St. Clair Inc. v. Toronto (City)*, [2005] O.J. No. 4729, 18 C.P.C. (6th) 286, 38 Admin. L.R. (4th) 117 at 1 and 21 (Div. Ct.) (per Greer and E. Macdonald, JJ.) and 115-116 (per Matlow, J.). In *SOS-Save Our St. Clair Inc. v. Toronto (City)*, the majority of a panel of the Ontario Division Court concluded that the appropriate course of conduct was for them to recuse themselves so the matter could be heard by a panel that would be, in their view, properly constituted.

13 The Ontario Oath makes explicit reference to impartiality: "I solemnly swear that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of [judge]".

14 Articles 234 and 235 of the Quebec *Code*.

5. Teaching Judicial Ethics

While supervision over judicial conduct such as recusal in conflicts of interest is one tool for addressing unethical behaviour, teaching judicial ethics so unethical behaviour is prevented in the first place is an even more important tool.

In Canada, the National Judicial Institute (NJI), a federally funded body with a statutory mandate to provide tranining and education to federally appointed judges has a mandate over teaching judicial ethics. In Canada, the first national conference was developed in 2003 under the guidance of Mr. Justice Michel Proulx of the Quebec Court of Appeal.[15]

The NJI approached the kinds of ethical issues that judges confront into three broad areas:

- ethical issues in the courtroom,
- judicial conduct outside the courtroom and
- judgment writing.

Scenarios which give rise to ethical issues were written in each of those areas. Most judges will have an intuitive response almost immediately when an ethical problem is presented to them. Often that response is the correct one, but other times it is not. The

framework forces the judges to work through the problem in the context of the Ethical Principles before arriving at the most appropriate response. The steps of the framework are:

(i) Define the ethical dilemma

(ii) Identify any specific rules, codes, guidelines that are relevant

(iii) Preferred course of conduct for counsel (this is for in-court issues)

(iv) Step for judge to take prior to identifying options

(v) Identify permissible options, outlining strengths and weaknesses of each

(vi) Identify preferred option

This framework was used by the NJI to facilitate the analysis of various scenarios. Here are some examples of questions that deal with out-of-court conduct.

(a) A judge wants to run in a marathon to raise money to combat cancer. The ethical dilemma is whether this activity involves the solicitation of funds or lending the prestige of the judicial office to such activity. The section of the *Ethical Principles* which is engaged is the principle of impartiality. Applying the framework, the NJI found that the preferred option is to participate so long as the judge puts up his or her own money or money from close family members, but if the judge solicits money from others, the judge may appear to be beholden to that person and may not appear to be impartial if that person, or organization, were to be a lawyer or a potential litigant. Thus there is no issue with respect to running in the marathon, but a judge would not be advised to seek pledges.

(b) A judge is asked to attend a dinner where the Prime Minister of Canada and

other politicians will be speaking. The ethical dilemma is whether this activity constitutes participation in political activity. The *Ethical Principles* state "all partisan political activity must cease upon appointment." Attendance at political gatherings might reasonably give rise to a perception of ongoing political involvement or reasonably put in question the judge's impartiality.

(c) A judge who is an amateur artist wishes to sell his or her artwork and donate

the money to charity. The concerns with respect to this fact pattern relate to diligence and impartiality. There are two ethical dilemmas. The first is whether the judge's artistic work is detracting from his work as a judge. The *Ethical Principles* states that a judge will not engage in commercial activities and will devote himself or herself to judicial

duties including work associated with the administration of justice. That is the first

concern. The second dilemma has two aspects. First, is the judge taking advantage of his judicial office. For a judge to engage in such an activity runs the risk that he or she

will be seen to be seeking to promote the sale of the work by its association with the

office of the judge. Second, the offering of such work for sale could be interpreted by

prospective customers and others as affording a way to curry favour with the judge

for the purposes of potential litigation.

In this context, the NJI found that the preferred option depends upon a number of factors. The number of paintings, the nature of the charity, who the buyers might be, where this comes in a career of a judge---all these factors and others may play a role. The occasional sale on a private basis by the judge of his or her artistic work to friends and acquaintances either individually or in a venue such as a small charity auction, particularly one that is associated with the administration of justice, might well not run those risks. In such a case, the reasonable understanding might well be that the transaction is merely a personal one to which the judge's holding of judicial office is entirely irrelevant.

(d) A judge is asked to serve on the board of a local charity. This is the most commonly asked question. The ethical dilemma it raises depends upon the nature of the board and the board's expectations of the judge. In considering whether a judge should accept to be a board member of a particular

15 See A. Kent, "Teaching Judicial Ethics: The Canadian Methodology" (2004)

organization, these are the questions which must be considered:

(i) would association with this board reflect adversely on the judge's

impartiality?

(ii) would this activity interfere with the performance of his or her judicial

duties?

(iii) is the judge being asked to join this board to lend the prestige of the judicial

office to fund raising?

(iv) is this a board that is likely to be engaged in litigation?

(v) is the judge asked in the expectation that he or she will give legal or

investment advice?

(vi) is there something about this board or organization which does not respect

the principle of equality?

(e) A judge is asked to write a letter urging a member of parliament to pursue, or

not to pursue, a particular course of action. The ethical dilemma is whether the judge is attempting to influence a political decision. The Ethical Principles say that a judge should refrain from "…signing petitions to influence a political decision." 15 Although this is not a petition, it is a similar document. The preferred option, in the NJI's view, is not to write the letter.

As these examples show, teaching judicial ethics should involve judges working through problems rather than learning abstract principles. Rather than learning a set of rules, this educational opportunity allows judges to learn how best to analyze ethical situations. ■