THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 13, 2020

Via email: norman.sabourin@cjc-ccm.ca

Norman Sabourin
Executive Director and Senior General Counsel
Canadian Judicial Council
Ottawa, ON K1A 0W8

Dear Mr. Sabourin:

Re: Ethical Principles for Judges

The Canadian Bar Association thanks the Hon. Chief Justice Popescul and the Hon. Chief Justice Smith, co-Chairs of the Canadian Judicial Council's Judicial Independence Committee, for the opportunity to comment on the draft revised *Ethical Principles for Judges* (EPJ).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. Our comments were prepared by the CBA's Judicial Issues Committee and Ethics and Professional Responsibility Committee (the CBA Committees).

In Part I, we make comments and recommendations on the seven areas identified in our April 11, 2019 letter on the CJC's January 2019 Background Paper.

In Part II, we make comments and recommendations on the EPJ text on matters of substance, language and style.

Part I

Harmonization of English and French Language Versions: Aspirational or Directive

The Introduction to the EPJ states: *"It is not intended to be a code of conduct that sets out minimum standards of behaviour."*

The CBA Committees reaffirm that the EPJ should be a code of conduct with clear, consistent and directive language to give meaningful guidance to judges and enhance public understanding and confidence in judicial ethics.

In this regard, we refer you to our April 2019 letter, as well as the December 20, 2019 from the Canadian Association for Legal Ethics. (See attached)

Social Media

The CBA Committees are pleased the EPJ offers guidance to judges on the use of social media and includes a statement that judges should develop and maintain some proficiency with technology relevant to their duties.

Self-represented Litigants

The EPJ provides helpful guidance to judges on dealing with self-represented litigants.

The CBA Committees recommend the EPJ adopt or refer to the CJC *Statement of Principles on Self-represented Litigants and Accused Persons* as endorsed by the Supreme Court of Canada in *Pintea* v. *Johns*, 2017 SCC 23.

Case Management, Settlement Conferences and Judicial Mediation

Section 5.A.10 of the EPJ addresses the role of judges in settlement conferences and judicial mediation.

The CBA Committees reaffirm that, in general, judges involved in settlement conferences and judicial mediation should not preside over any trial of the issues, except as agreed to by the parties.

We recommend including this restriction in Section 5.A.10.

Public Engagement

Section 5.B.11 of the EPJ states judges should use even greater caution in considering whether to become officers, directors or board members of civic, religious or charitable organizations.

The CBA Committees reaffirm that this kind of community involvement carries a significant risk of perceived conflict and should be engaged in by judges only with the approval of their Chief Justice.

Professional Development

The CBA Committees are pleased the EPJ states that a judge's responsibility to continuing professional development includes education on social context issues affecting the adjudicative process.

Post Judicial Careers

Section 5.E.2 of the EPJ states former judges should not appear as counsel before a court or in administrative or dispute resolution proceedings in Canada, subject to exceptions where a judge has left the judiciary after a very short time.

The CBA Committees believe further exceptions may exist where it would not be inappropriate for former judges to appear as counsel before a court or in administrative or dispute resolution proceedings in Canada. Law Societies in each jurisdiction are well situated to develop rules applicable to former judges returning to the practice of law, including appearing as counsel before a court or in administrative or dispute resolution proceedings in Canada.

The CBA Committees recommend that Section 5.E.2 clearly acknowledge the prospect of further exceptions to the prohibition against former judges appearing as counsel before a court or in administrative or dispute resolution proceedings in Canada. The EPJ in this vein should acknowledge the role of Law Societies in developing rules applicable to former judges returning to the practice of law.

Part II

Purpose

The CBA Committees recommend removing phrases such as *"highest ethical aspirations"* and *"exemplary behavior which all judges strive to maintain"*.

Many principles in the EPJ reflect fundamental legal requirements for judicial conduct and should not be mistaken for aspirations or exemplary behaviour beyond the norm.

1.A.5

The CBA Committees recommend clarifying what *"improperly"* invoking judicial independence means.

In this regard, Sections 1.A.5 and 1.D.4 could be consolidated or, alternatively, Section 1.A.5 could use wording similar to the current EPJ:

> *While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, judges should be staunch defenders of their own independence.*

1.D.4

The CBA Committees recommend replacing *"do not always constitute threats to judicial independence"* with *"do not necessarily constitute threats to judicial independence"*.

2.B.1

The CBA Committees recommend replacing *"circumstances of a dispute"* with *"circumstances of a matter or dispute"*.

Judges may receive confidential information through an *ex parte*, without notice process (for example pre-charge judicial authorizations, warrants or orders) which is more accurately described as a *"matter"* than a *"dispute"*.

2.B.2

The CBA Committees recommend replacing *"Judges should be discreet when discussing their work, particularly in contexts in which what they say may be inadvertently overheard by third parties"* with *"Judges should be discreet when discussing or performing their work, particularly in contexts in which what they say or do may be observed by third parties"*.

Not only what judges say could be observed, but also what judges do when performing their work (for example using a portable work device or reviewing material in a hotel, plane or other public setting). Judges must be discrete and safeguard confidential information in all circumstances.

The word *"inadvertently"* should be removed because third parties may deliberately observe what judges say or do notwithstanding inadvertence on the part of the judge.

2.C.4

The CBA Committees recommend replacing "*inappropriate remarks"* with "*unnecessary comments".*

The recommended language makes it clear that judges are not restricted from making comments about a person's conduct or motives if necessary, to properly adjudicate the matter or dispute.

2.C.6

The CBA Committees recommend replacing *"where the judge becomes aware of"* with *"where the judge has clear and reliable evidence of"*.

The recommended language is from the current EPJ and makes it clear that judges will take action only where appropriate and not based on conjecture, rumour or hearsay.

The recommended language is also more consistent with Section 2.F.1 which suggests that *"a strong likelihood of unethical conduct"* is required before a judge responds to the impugned conduct of another judge.

2.F.1

The CBA Committees recommend inserting *"the"* before *"administration of justice".*

3.C.3

The CBA Committees recommend inserting *"factors such as"* after *"in particular"* to emphasize that the categories are not foreclosed.

4.A.1

The CBA Committees recommend replacing "*the equal worth and dignity of all persons is protected"* with *"the equal worth and dignity of all persons are protected"*.

5.A.4

The CBA Committees recommend replacing *"are free of"* with *"are free of or from".*

5.A.5

The CBA Committees recommend replacing *"reasonable perception of bias"* with *"reasonable apprehension of bias"* which is consistent with established law.

The CBA Subcommittee further recommends that similar language be used consistently throughout the EPJ where applicable.

5.B.18

The CBA Committees recommend clarifying the phrase *"judges should avoid acquiring or receiving out-of-court information related to the parties or witnesses in cases before them, or information about the issues to be adjudicated."*

This phrase appears overly broad and could be interpreted to include judges accessing the news or researching case law outside of court.

5.C.3

The CBA Committees recommend replacing *"or the judge having expressed views evidencing bias"* with *"or the judge having expressed views giving rise to a reasonable apprehension of bias"*.

5.C.7

The CBA Committees recommend replacing *"(ii) Judges who practised law in government service or legal aid should not sit on cases commenced in the particular local office in which the judge practised prior to the judge's appointment."* with *"(ii) Judges who practised law in government service or legal*

aid should not sit on any case in which the judge was directly involved as either counsel of record or in any other capacity that could give rise to a reasonable apprehension of bias."

Due to the nature of government service and legal aid work, a large portion of a court's docket (for example criminal files) could come from one local office. Impeding a judge from sitting on these cases would be unmanageable, particularly in smaller communities. It may also discourage the appointment of judges who practiced law in government service or legal aid to the communities of which they are most knowledgeable.

The CBA Committees recommend replacing *"for a least as long as"* with *"for at least as long as*".

English and French Equivalency

On the issue of harmonizing the English and French language versions generally, the CBA Committees recommend a careful line by line comparison of the English and French versions to ensure they are equivalent.

Conclusion

The CBA Committees recognize the importance of the EPJ in reinforcing and reflecting the independence, integrity, diligence, equality and impartiality of the judiciary.

We acknowledge the great time and effort the CJC has invested to modernize the EPJ and thank you again for the opportunity to comment on these significant changes.

Yours sincerely,

(original letter signed by Julie Terrien for John D. Stefaniuk and Craig M. Yamashiro)

John D. Stefaniuk
Chair, Judicial Issues Committee

Craig M. Yamashiro
Chair, Ethics and Professional Responsibility Committee

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 11, 2019

Via email: norman.sabourin@cjc-ccm.ca

Norman Sabourin
Executive Director and Senior General Counsel
Canadian Judicial Council
Ottawa, ON K1A 0W8

Dear Mr. Sabourin:

Re: Ethical Principles for Judges

The Canadian Bar Association Judicial Issues Committee (CBA Committee) thanks the Hon. Martel Popescul and the Hon. Deborah Smith, co-chairs of the Canadian Judicial Council's Judicial Independence Committee, for the invitation to comment on proposed changes to the Canadian Judicial Council's *Ethical Principles for Judges* (EPJ).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Committee addresses policy issues relating to judicial appointments, compensation, discipline and independence. On the issue of post-judicial practice of law, the CBA Committee's comments were developed in consultation with the CBA Ethics and Professional Responsibility Committee, whose mandate includes fostering ethical and professional conduct and standards in the legal profession.

The CJC's January 2019 Background Paper to guide stakeholder feedback on the current approach comments on distinctions between the English and French versions of the EPJ and introduces six themes for consideration: social media; self-represented litigants; case management, settlement conference, and judicial mediation; public engagement; professional development; and post-retirement. The CBA Committee comments on each topic in turn.

Harmonization of English and French Language Versions: Aspirational or Directive

The Background Paper states that the language in the English version is aspirational, while the French version is more directive. The Background Paper notes that the CJC will revise the two versions to "provide further clarity on the generally aspirational nature of ethical guidance for judges." We understand that the CJC plans to revise the French version to be less directive and more aspirational.

The EPJ states:

> The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct. (p. 3)

The CBA Committee believes that modern guidance on judicial ethics requires more than aspirational guidelines.

One argument advanced in support of aspirational guidelines is that they inspire individuals to a higher standard of behaviour by articulating general principles and underlying goals, while a code of conduct creates a minimum standard to which individuals will be held accountable through rules.[1] In other words, a code of conduct sets an ethical ceiling, while aspirational guidelines set a floor. A code of ethics with specific rules of conduct, it is argued, precludes moral development.[2]

The CBA Committee would take a different view of the purpose of codes of conduct and their intended effects. We agree with then Professor Alice Woolley that, for lawyers, a code of conduct ought to give meaningful guidance on the things lawyers are actually required to do, by articulating specific and general duties.[3] Codes of conduct should provide guidance on important issues of practice, avoid moral ambiguity and, perhaps most importantly, articulate for the benefit of the broader public interest the standards by which the profession holds itself to account.

The CBA Committee believes the same holds true for the judiciary. The CBA's 1993 report, *Touchstones for Change: Equality, Diversity and Accountability*, identified the need for mechanisms addressing judicial conduct to maintain public confidence in the justice system.[4] CBA policy supports a model Code of Conduct for the judiciary developed by the Canadian Judicial Council and its provincial and territorial counterparts and which articulates clear and specific guidance. At minimum, the CBA Committee encourages the CJC to consider more consistent and directive language for the EPJ, to be both meaningful for judicial practice and an aid to public understanding of the standards by which the judiciary holds itself to account.

Social Media

The CBA Committee believes that the extent to which courts engage with social media should be left to court administration. However, the CBA Committee recommends that the CJC offer guidance on the use of social media by individual judges.

The Canadian Centre for Court Technology's May 2015 discussion paper, *The Use of Social Media by Canadian Judicial Officers*,[5] gives empirical insight and proposed guidance on this issue. The National Center for State Courts Center for Judicial Ethics has also gathered and analyzed advisory opinions and discipline decisions on social media and judicial ethics.[6] These are rich resources for understanding the range of ethical issues which judges confront when engaging with social media.

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1 M.A. Wilkinson, Crista Walker & Peter Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill LJ. 645 at 651 online.

2 *Note* 1, at 653.

3 Alice Woolley, "What Should a Code of Conduct Do (Or Not Do)?" *Slaw* (25 February 2016), online.

4 CBA, Touchstones for Change: Equality, Diversity and Accountability (1993), online.

5 "The Use of Social Media by Canadian Judicial Officers" (May 2015).

6 See, e.g.: Social Media and Judicial Ethics Update February 2019, online.

The CBA Committee recommends that the EPJ clarify the duty of individual judges on use of social media in personal and professional contexts. The CBA Committee agrees with then Dean Lorne Sossin that judges must understand that their social media activity "will be measured against the standard of public confidence in the justice system."[7] We support the recommendation in the CCCT discussion paper that judicial institutions develop complementary education programs and ensure that human and technological resources are in place to support judges in understanding the implications and accountabilities arising from their use of social media.

Self-Represented Litigants

The CBA Committee appreciates that this issue challenges our entire legal system, not only the judiciary. The CBA has generally approached this issue as one of access to justice and is one of many justice organizations to make tools available to the public to assist with defining legal problems, identifying resources and, if needed, guidance on self-representation.[8]

We are advised that National Judicial Institute resources give detailed guidance for judges on a range of issues related to appearances by self-represented litigants. Guidance in the EPJ on the boundaries between assisting and advocating for a self-represented litigant should be helpful for judges and assist the public in understanding the challenges.

Case Management, Settlement Conferences and Judicial Mediation

In general, judges involved in settlement conferences and mediation should not preside over any trial of the issues. In some jurisdictions, parties may agree to a judicial dispute resolution that permits judges involved in pre-trial settlement to make final orders.

Public Engagement

The EPJ identifies several limitations related to public engagement by judges. Judges should not:

- be involved with an organization if there is a prospect that it will be involved in litigation before the judge or will regularly be engaged in proceedings in any court
- solicit funds or membership
- provide investment advice.

There is significant risk of perceived conflict when judges participate in the activities of, or sit on the boards of, civic and charitable organizations. The CBA Committee believes they should do so only with the approval of their Chief Justice.

Professional Development

The CBA Committee believes that judges have a duty to engage in continuing education, particularly about the social context in which judicial decision-making takes place.

This duty is recognized in EPJ Rule 4 (Diligence), Commentary 5 and the CJC's *Judicial Education Guidelines for Canadian Superior Courts*.[9]

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7 Lorne Sossin & Meredith Bacal, "Judicial Ethics in a Digital Age" (2013) 46.3 UBC L Rev 629-664, online.

8 See, e.g. Legal Health Checks, online.

9 *Judicial Education Guidelines for Canadian Superior Courts*, (2008 as am. 2009) online.

Post-Retirement

The CBA Committee encourages the inclusion of post-retirement issues in a revised EPJ.

An important issue is the return to practice of former judges. Generally, this is a matter for law societies, and is, by all accounts, under discussion by the Federation of Law Societies of Canada and its member law societies across Canada. In a 2016 submission to the Federation of Law Societies, the CBA Ethics Committee suggested that the principal issue is not whether former judges should be allowed to return to practice, but rather what aspects of post-judicial practice should be regulated and how.[10]

The CBA Committee believes some aspects of legal practice should be permitted by former judges, as they would be beneficial to the public. The most contentious issue is appearances in the court of a former judge. The primary concern, from our perspective, is the perception of bias favouring the former judge. The concern extends beyond individual cases to public perception of the integrity of the legal system.

We encourage the CJC to consider whether a post-judicial code of conduct, separate from the EPJ, might be a better mechanism for managing the expectations and accountabilities of former judges, whether they return to the practice of law or not.

Additional Issues

Several commentators have encouraged the CJC to consider elaborating on a duty of confidentiality for judges.[11] The CBA Committee supports including in the EPJ (and a post-judicial code of conduct) guidance demarcating a judicial duty of confidentiality, particularly for matters that are not part of the public record.

The CBA Committee thanks the CJC for the opportunity to comment on these important issues. We would welcome further discussion as the consultation progresses.

Sincerely,

(original letter signed by Tina Head for John D. Stefaniuk)

John D. Stefaniuk
Chair, CBA Judicial Issues Committee

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10 CBA Ethics Committee, Submission to the Federation of Law Societies (2016).

11 Stephn Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (Fall 2011) 34:2 Dalhousie LJ 483-527, online. Adam Dodek, "Judicial Confidentiality" *Slaw* (13 June 2016), online.

December 20, 2019

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The Honourable Chief Justice Popescul
The Honourable Chief Justice Smith
c/o Norman Sabourin
Canadian Judicial Council
Via email: norman.sabourin@cjc-ccm.ca

Dear Chief Justice Popescul and Chief Justice Smith:

On behalf of the Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ), I write in response to Mr. Sabourin's letter of November 22, 2019 inviting CALE/ACEJ to provide comments on the Canadian Judicial Council's (CJC) draft revised *Ethical Principles for Judges* (*EPJs*).

Our Board of Directors has now reviewed the draft *EPJs.* It was clear to us that the CJC's Judicial Independence Committee has put great thought and effort into preparing revised ethics guidance that takes account of contemporary realities and addresses gaps in the current *EPJs.* The draft *EPJs* are impressive. We commend the Committee for its hard and fruitful work.

CALE/ACEJ was particularly pleased to see several of the issues raised in our previous correspondence of March 14, 2019 and June 4, 2019 addressed in the draft *EPJs.* The draft *EPJs* include discussions of obligations in relation to judicial confidentiality, access to justice, technology and post-judicial careers. These are important issues to address in ethics guidance for judges.

We were disappointed to see that two issues raised in our previous correspondence were not addressed, namely our submissions that the *EPJs* should (1) be constituted as a binding Code and (2) explicitly reference reconciliation and the judiciary's role in establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples in Canada. We address each issue below.

At the end of this letter is a detailed Appendix which contains suggested in-text edits to the draft *EPJs*. These address a wide range of issues, some quite substantive and others more matters of form or style.

Additional submissions on why the *EPJs* should be constituted as a binding Code

In our two previous submissions we advanced several arguments as to why the *EPJs* should be constituted as a binding code of conduct. A similar position was adopted by the Canadian Bar Association in its submission dated April 11, 2019. As a consequence, we were disappointed with paragraph 3 of the current draft. While there are some subtle differences in the wording of this paragraph from paragraph 2 (on page 3) of the original *EPJs*, the premise remains the same – the *EPJs* are advisory only and are not intended to be binding.

We will not reiterate the five arguments we made in our submission of June 4, 2019. There is, however, one additional point. As *Roncarelli v. Duplessis* made clear, all holders of public power must be subject to the principles of the rule of law. This applies to members of the judiciary as much as it applies to others who exercise public power. If the *EPJs* do not establish the standards by which judges can be assessed in their exercise of public power, then what are the standards, and where can they be found? How can the public have confidence in the judiciary if there are no clearly articulated and enforceable standards by which to assess judicial behaviour? In a mature democracy in the twenty-first century, a binding code of conduct is a vital mechanism that provides public accountability and enhances the legitimacy of the judiciary as an independent and self-regulating institution. Moreover, judges themselves also need clearly articulated standards which can guide their behaviour and on which they can rely to avoid allegations of misconduct, as demonstrated by the case of Justice Patrick Smith. Thus, our first submission on this point is that paragraph 3 should be redrafted to indicate that the *EPJs* do constitute a binding Code of conduct. This does not mean that it cannot also fulfill the other three functions identified in the paragraph. A single document can fulfill multiple functions that are complementary rather than contradictory.

In the alternative, given the reality that the *EPJs* have been used in discipline proceedings involving judges (such as those involving Justices Theodore Matlow and Patrick Smith) and the perception by many judges that *de facto* the *EPJs* are being deployed as a binding Code, we propose that the *EPJs* explicitly acknowledge this. In this regard, our alternative submission is that the *EPJs* include wording modelled on the recently revised (March 2019) *Guide to Judicial Conduct* for England and Wales. This states, at page 5, under the heading "Discipline":

> "While the JCIO in handling complaints, and the Lord Chancellor and Lord Chief Justice in exercising their disciplinary powers, may choose to have regard to this Guide, they are not obliged to follow it."

The adoption of such an acknowledgment reinforces our contention that an articulated set of ethical principles can serve a variety of functions: aspirational, hortatory and, when appropriate, regulatory.

Reconciliation

While the draft *EPJs* refer to Indigenous peoples, they do not refer to the important contextual issue of reconciliation and the judiciary's role in establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples in Canada. For example, there is no mention of the importance for judges to be mindful of the recommendations of the Truth and Reconciliation Commission, which is regrettable. The Appendix below suggests some language to fill this gap. CALE/ACEJ also continues to urge the CJC to carefully consider any submissions received from the Indigenous Bar Association.

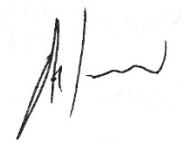
Next Steps

We would be pleased to answer any questions or provide any clarification regarding the feedback contained in this letter and the Appendix.

We have limited our comments to the English draft. If we have any additional comments on the French draft, we will provide them to you in a separate letter by your deadline of February 14, 2020.

Thank you again for the opportunities that you have provided CALE/ACEJ to share both written and in-person feedback in relation to the proposed revision of the *EPJs*. We look forward to further collaboration.

Yours sincerely,



Amy Salyzyn
President, Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ)

Appendix A:
In-Text Feedback on Ethical Principles

1

Replace "At the same time, all members" with "All members".

Reasons:

1. The transition language seems to suggest some level of tension or incompatibility between the idea in the previous sentence and this sentence. But there is no tension or incompatibility.

4

Replace, in the footnote, "At the time, *Ethical Principles for Judges* built upon" with "That version built upon".

Reasons:

1. The proposed language is clearer and simpler.

7

Replace "the experience of Canada's Indigenous communities" with "the experience of Indigenous peoples, including with Canada's laws and legal institutions,".

Reason:

1. "Canada's Indigenous communities" may be perceived as having a possessive connotation, thereby generating concerns about ongoing implicit colonization.

2. The reference to "experiences" is too generic. The additional language is more specific about what are particularly important concerns.

10

Replace "after judges retire." with "after judges leave office."
Replace "A retired judge" with "A former judge".

Reasons:

1. Use broader language than just retirement, since a judge could also resign or be removed from office.

2.B.3

Replace "past the retirement of a judge." with "beyond a judge's term of office."

Reasons:

1. Use broader language than just retirement, since a judge could also resign or be removed from office.

2.A.4

Remove this entire section.

Reasons:

1. The references to "basic standards" and "precepts" of the community in which the judge serves are vague and are susceptible to problematic application. It could be argued that the "basic standards" and "precepts" of a particular community might be "flouted" or "offended" by private behaviour which is completely legal and consistent with all other content in the draft *EPJs*. For example, a judge's religion or sexuality might offend standards of a community where (s)he presides. We are also concerned that including this wording may encourage what would otherwise be viewed as inappropriate investigations and intrusions into a judge's private life.

2.C.6

In the fourth sentence, replace "duty of" with "duties, including" and delete "the lawyer's duty of".

Remove the words "serious" and "seriously" from the fifth sentence.

Reasons:

1. The amended language in the fourth sentence is intended to recognize that lawyers owe duties in addition to the two that are specified, while recognizing that those two are likely to be most applicable in the context of court appearances.

2. The terms words "serious" and "seriously" are redundant given that "misconduct by a lawyer" or "incompetence that compromises client interests" already captures behaviour that should be taken seriously. By adding the qualifiers "serious" and "seriously", a judge may be overly reluctant to report lawyer behaviour that should be brought to the attention of law societies. Any concerns about judicial overreach are captured by the language "appropriate action." A judge can vary the tone or content of his or her reporting to the relevant law society depending on the severity of the conduct.

3.C.4

Either (i) delete "some" or (ii) replace "some" with "adequate" or "sufficient".

Reasons:

1. The word "some" unduly qualifies and weakens the requirement to develop and maintain proficiency with technology. A standard of competence should not, as a rule, require qualification. If any qualification is thought necessary, "adequate" or "sufficient" convey the standard better than merely "some".

3.C.3

At the end of the sentence "It also includes education on social context issues affect the adjudicative process" add "and relevant skills-based anti-oppression education."

Add the following sentence at the end of this provision: "Judges should develop an understanding of Canada's history, especially as it pertains to Indigenous-Crown relations, and that of the evolving domestic and international law on rights of Indigenous peoples."

Reasons:

1. This additional language is consistent with the TRC Report.

3.D.1

Remove this provision.

Reasons:

This is an unusual provision. It does not appear in other legal codes of professional conduct. It has the potential to appear somewhat self-serving. It is also unclear what analytical work this provision would perform. It should not be something that

could be raised as an explanation for a failure to meet any of the other provisions. It also raises concerns, if retained, that it is too narrow in that it omits other equally important relationships beyond family.

4.A.1

Delete the final sentence.

Reasons:

This sentence is phrased awkwardly and adds little, if anything, to the preceding language.

4.C.1

Delete "grossly".

Reasons:

1. The concern should be for any level of inadequacy in stereotyping, not just a very high level. The concern about stereotypes is warranted because they are often inadequate.

4.C.3

After the first sentence of this provision, add "This is particularly significant in light of Canada's commitment to pursue reconciliation with Indigenous peoples".

Begin the next sentence with "Judges" instead of "They".

Reasons:

1. This additional language is consistent with the TRC Report.

4.D.1

Delete the final sentence.

Reasons:

This sentence is repetitive. This point has been made in the preceding language.

5.A.7

Remove "or vexatious".

Reasons:

It is sufficient to say "challenging" since that term is broad enough to cover a vexatious litigant. Specifically referring to a vexatious litigant could be read as editorializing and having prejudged the issues being raised.

5.A.10

Either (i) delete "hard and fast" or (ii) replace "hard and fast" with "bright-line".

Reasons:

1. This is an overly colloquial and unnecessary modifier.

5.B.3

Replace "and/or" with "or".

Reasons:

1. This is the only instance of the inelegant "and/or" which can be replaced by the conjunctive "or".

5.B.7

Replace "are occasionally" with "might be".

Reasons:

Some judges are never considered for promotion, such as those who do not apply. So the implication that all judges are considered for promotion, if only occasionally, is not accurate.

5.B.14

Replace "from judicial colleagues" with "from judicial colleagues or family members".

Add, at the end, the following:

However, judges may: (i) assist in fundraising planning for a civic, charitable or religious organization or an organization concerned with the law, the legal system or the administration of justice, and (ii) appear or speak at or receive an award or other recognition at a fundraising event for an organization concerned with the law, the legal system or the administration of justice, and in connection with that event be featured in its promotion.

Reasons:

1. This additional language is supported by the analysis in Stephen G.A. Pitel & Michal Malecki, "Judicial Fundraising in Canada" (2015) 52 Alta. L. Rev. 519. It is unclear whether that analysis has been considered as part of these revisions.

5.B.16

Remove "and perhaps more importantly,".

Reasons:

The claim that this additional aspect is more important than the prior aspects is not supported and not self-evident. This claim is not necessary.

5.B.18

Replace "In addition, in" with "In".

Reasons:

There is no need for this transitional language when the obligations being described in this comment are not very closely and directly linked to the ones in the prior comment. Otherwise such language could precede many of the comments.

5.B.22

Replace "Judges may attend social or public events in their communities" with "Judges may attend conferences and social or public events".

Reasons:

1. While 5.B.21 deals with speaking at conferences, there are ethical issues involved simply in attending conferences. So the language here needs to address attending conferences.

2. The modifier "in their communities" is unnecessary and unduly narrows the scope of the provision. If the event is a conference or public event in a foreign country, it is arguably not in the judge's community but the provision should still apply.

5.B.24

Replace "Judges' attendance at social events" with "Judges' attendance at conferences and social events".

Reasons:

1. The concerns raised in this provision should apply with equal force to attending a conference sponsored by businesses or for-profit organizations.

5.C.3

Replace "may arise from:" with "may arise from, among other circumstances,". Delete "(e.g. one's personal physician)".

Reasons:

1. It should be clear that this is not a closed list of circumstances that may give rise to a conflict of interest.

2. The specific example is, in the context of the overall provision, too detailed. In addition, it would appear equally problematic to have one's personal physician appear as a witness rather than only as a party.

5.C.5

Delete the first sentence and replace "Nevertheless, judges" with "Judges".

Reasons:

1. The first sentence replicates 3.A.5 and seems an oddly specific point to make in two distinct places.

5.C.8

Replace ", spouse, son, daughter or other" with "or" in the first sentence.

Reasons:

These examples are redundant as caught by "member of the judge's immediate family". They are not used throughout the remainder of the comment.

5.E.1

Replace "retirement or resignation." with "leaving judicial office."
Replace "pre-retirement planning for one's" with "a judge's planning for his or her".
Replace "Pre-retirement discussions" with "Discussions".

Reasons:

1. Use broader language than just retirement or resignation, since a judge could also be removed from office.

2. Use broader language than pre-retirement, since a judge could resign or be removed from office.

5.E.2

Replace "after retirement or resignation" with "upon leaving judicial office".
Replace "after their retirement or resignation from the bench" with "after leaving judicial office".
Replace the final sentence with "This constraint may be subject to exceptions, such as in cases in which a judge has left the judiciary after a very short time."

Reasons:

1. Use broader language than just retirement or resignation, since a judge could also be removed from office.

2. A judge leaving office after a very short time should be the main, but not the only, possible exception to the preclusion on appearances. Another example would involve considering the access to justice needs of a small and remote community.

5.E.3

Replace "in high profile or politically contentious matters" with "in high profile, politically contentious, or any other matters".
Replace "the judge's former status" with "the former judge's status".

Reasons:

1. The appropriate caution should not be limited only to high profile and politically contentious matters. Any matter in which the client may be expected to make use of the former judge's status to advance his or her interests warrants caution.

2. At this point, the individual is a former judge rather than a judge and so should be described as such.

5.E.5

This provision should be reworded as follows:
In Canada, the title "The Honourable" is an honorific given to a judge upon appointment. Upon leaving judicial office, in most circumstances, the former judge is granted the right to retain the title. When granted, care should be exercised in the use made of that honorific. In general terms, referring to a former judge as "The Honourable" is recognized as acceptable. Should the former judge return to private practice, restraint should be exercised so as to not give the appearance, by attaching the honorific to the former judge's name or otherwise, that the former judge is touting or using the prestige of the former judicial office to attract business, gain advantage, suggest qualitative superiority over other lawyers, or suggest any kind of influence or favoured relationship with the judiciary.

Reasons:

1. Remove the initial word "Finally". While this happens to be the last comment, it seems odd to label it as such.

2. Use the language of a former judge rather than a retired judge. A judge who resigns has not retired.

3. Make it clear that the obligation not to give the appearances that are described in the final sentence extends more generally, beyond solely in terms of using the honorific.

4. Remove the reference to "good taste" due to both its vagueness and potential social and cultural biases.

Miscellaneous

Use a consistent spelling for “behaviour”.