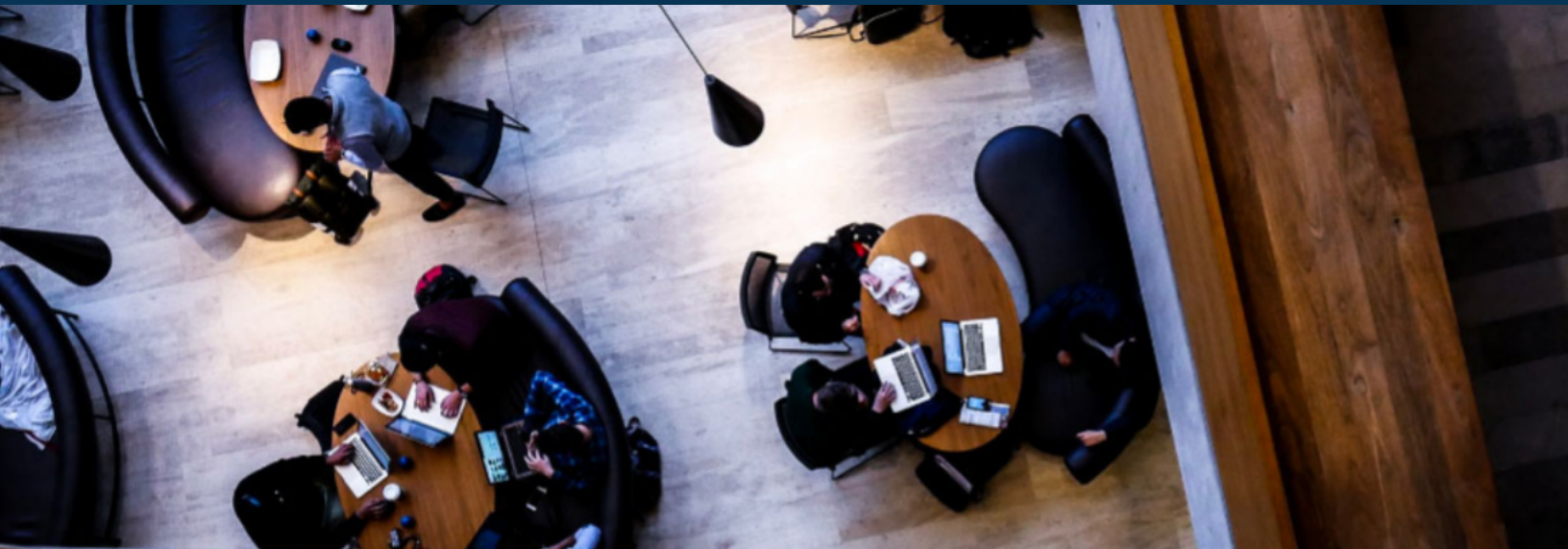


CONSULTATION ON ETHICAL PRINCIPLES FOR JUDGES

Public Consultation from the Canadian Judicial Council



In Spring 2019, the Canadian Judicial Council (CJC) released a background paper to introduce the project to modernize the Ethical Principles for Judges. The paper presented six new and emerging themes on which Council sought the public's views. The CJC hired Abacus Data to conduct a public web-based consultation. A press release invited the public to fill out the survey on our website. The survey was live from March 7th to April 12th, 2019.

Through the survey, the public was given the opportunity to provide feedback on proposed principles and allowed the CJC to gauge the public support for the principles as well as the public's opinion. Key stakeholders were also invited to make submissions.

The consultation received 941 complete responses and submissions from multiple partners. This report highlights the results.

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KEY FINDINGS

1 Overall

Almost all participants agree with the principles outlined in the present document. For many, upholding these principles is a way of protecting the foundations of Canada's judicial system.

2 Professional Development

Most respondents that understanding the evolving social context and any legal changes over time is important for judges and the judicial system as a whole. Though social context should not be a deciding factor for a ruling, it should at the very least be understood.

3 Post-Retirement Return to Practice

Participants are of the view that returning to legal practice could foster perceptions of bias or partiality or inappropriate use of past office. It was recommended that judges not discuss future opportunities, and refrain from actively highlighting their former position when job-searching and be limited in appearing before court after retirement.

4 Self-Represented Litigants

Respondents believe self-represented litigants should be provided with adequate information on rules and regulations to a fair hearing, but not be provided information in a way that could indicate bias. Participants agree this should be the case no matter if the individual was self-represented or not.

5 Case Management

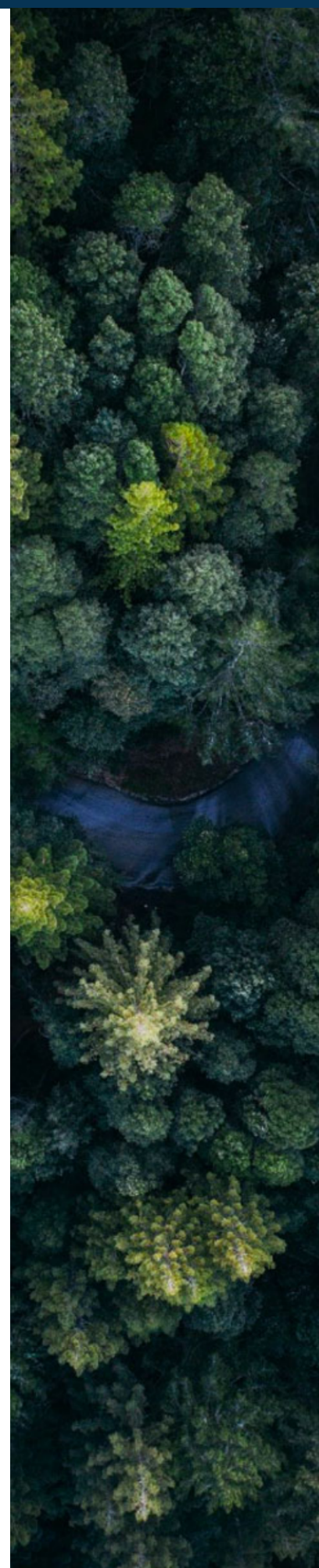
Respondents agree that conduct within the courtroom should remain mindful of possible perceptions of bias and ensure a fair trial for all. This includes balancing efficiency and access to fair trials, respecting those in the court by fulfilling their role of maintaining control of the courtroom, and withholding views, through the legal process, that could be perceived as introducing bias.

6 Social Media

As with conduct in any public space, respondents agree judges should exercise caution on social media. Above all else judges should use common sense in their interactions to avoid perceptions of bias, unprofessionalism and conflict of interest on current and future cases that appear before them.

7 Public Engagement

While increasing public knowledge about the legal system is important for most, there is some disagreement on the extent to which this is the responsibility of judges. Judges can engage in activities like any other citizen (including educating others about their profession, and volunteering) but should not do anything that could jeopardize the appearance of impartiality.



OVERVALL PRINCIPLES

Principle 1: Judges must uphold and promote the independence, integrity and impartiality of the judiciary.

Respondents suggested that this principle is the foundation of Canada's strong judicial system. Many expect the judicial system to carry out its role in a manner that upholds the independence, integrity and impartiality expected of the system.

Additionally, many Canadians depend on the decisions made by judges and these decisions bear heavy consequences for society; as such, these decisions should not be taken lightly.



Principle 2: Judges must conduct themselves in public and private life, in a way that fosters public confidence in the judiciary.



Being seen as trustworthy to the public bears significant weight on the appearance of judges in their professional life. We recognize that personal life and public life are not the same; however, at the very least a judge should hold themselves to the same standards they set for the public. In holding themselves accountable in their public life they are able to legitimately hold citizens accountable for their actions as well.

Trust in judges is seen as a key pillar to public trust in the judiciary itself.

PROFESSIONAL DEVELOPMENT

Principle 3: Judges have a personal obligation to pursue ongoing professional development.

For many Canadians, the evolution of the law is an important field to stay-up to date. Not only is there opportunity for laws to change over time, but the context in which laws are applied also evolves. To Canadians, there is an understanding that judges will educate themselves on changes that have an impact on society and the judiciary that could also have implications for their work.



There was also some discussion as to whether this education should be mandatory or voluntary. There was some consensus that judges should stay up to date on judicial and societal changes, in some capacity.

Principle 4: Judges should make themselves aware of social context and diversity of human experience in Canada. This includes an understanding of issues related to gender, race, ethnicity, religion, culture, sexual orientation, differing mental or physical abilities, age, socio-economic background, children and family violence.



Similar to the previous principles, understanding the context in which the law is applied is very important for the effective application of the law. Judges should also have an understanding of socio-economic and demographic factors to better understand the many people who make up society.

Social context factors are not meant to make up a large part of the judicial ruling and influence decision. Rather, in understanding perspectives and situations of others, judges will be able to recognize and counteract their own underlying bias. Having a greater understanding of situations, decreases the chances that bias will influence a decision.



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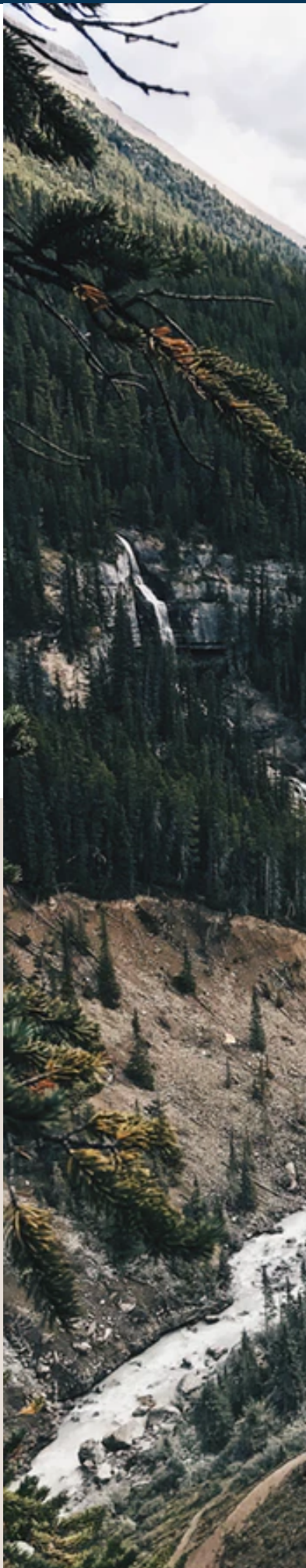
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Principle 5: Judges have an obligation to be aware of, and sensitive to, the diversity of cultures and communities, including those of Canada's indigenous communities.

Understanding the diversity of cultures is necessary to fairly apply the law. Canadian society is a combination of many cultures; having knowledge of various communities and cultures is important to ensure fairness in rulings.

Understanding the culture of an individual can help a judge be aware of the circumstances under which the behaviour was committed. There was concern that this could cause bias, however, most felt this would ensure that the whole picture was being taken into consideration and allowing judges to apply the law fairly.





POST-RETIREMENT RETURN TO PRACTICE

Principle 6: Judges should not discuss future job opportunities while serving on the bench.

Individuals agreed that judges pursuing future opportunities while on the bench can be perceived as problematic. It may also be perceived as a conflict of interest, which would impede on the judges' ability to remain impartial.

Those who disagreed did not view judges pursuing a career while on bench as an indication of bias, nor should they be prevented from opportunities after serving.



Principle 7: Upon retirement, judges should not use the prestige of their former position to gain any business advantage.

Most respondents agreed that judges should not actively highlight their role as a judge when seeking post-retirement opportunities.

Those who disagreed felt it was dependent on context and the nature of the job opportunity. Some felt, the title "former judge" carried no prestige and that judges should not be prevented from having a career after serving.



Principle 8: In general, former judges should not argue a case or appear in court.

For many, this was necessary to avoid any appearance of a prior relationship between the former judge and the court.

Those who disagreed believed a "cooling-off" period could allow former judges to provide valuable insights from their past experiences.



SELF-REPRESENTED LITIGANTS

Principle 9: Judges have an obligation to inform self-represented litigants while ensuring they do not advantage or disadvantage any parties in doing so.

For most respondents, this principle was common sense. An understanding of the rules and regulations of the law among all parties is essential for a sound trial. Self-represented litigants would not have the same access to this information as lawyers, so having this information provided by judges appeared to be a fair gesture. However, this advice needs to be impartial.



Principle 10: Judges should not have any close relationships with a lawyer when the other party is self-represented.



For most, eliminating bias from close relationships in the courtroom was essential for an impartial justice system. Any close relationships were considered a conflict of interest and could cloud and decisions made. They believe close relationships could be indicative of bias and could affect the perception of a fair trial.

There was some confusion on what constitutes a close relationship and there was consensus that this definition should be more clearly defined.

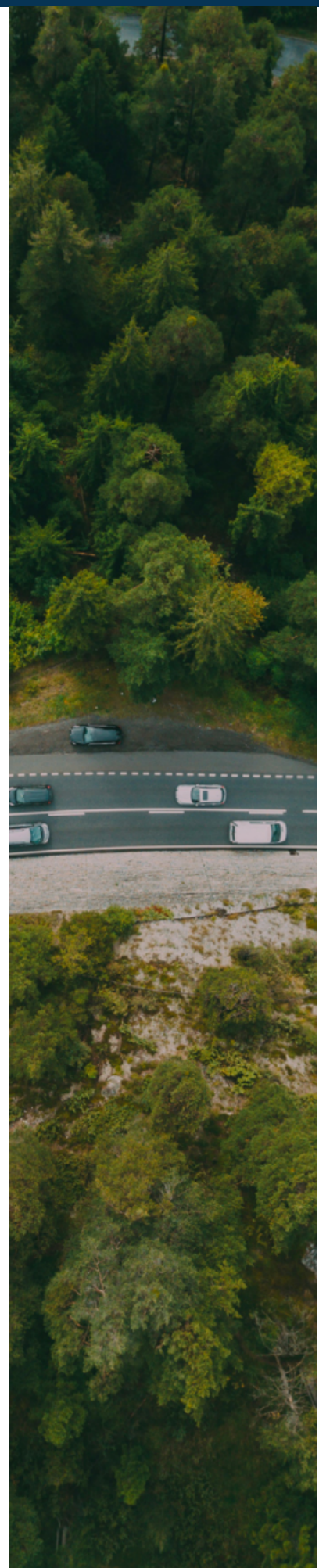
CASE MANAGEMENT

Principle 11: Judges have an obligation to make efficient use of court resources, in keeping with the principles of proportionality.

Most respondents agreed that judges should not be wasting resources as it is in the public's interest to be efficient.

It was especially important that Judges should do what they can to use what they have in an efficient manner, both from a resource perspective and in the interest of the people the court is serving.

While most agreed that it is in the public's interest to be efficient, there was some concern that efficiency may overpower fairness. So while efficiency is important, it is also important that individuals have the right to a fair trial.



Principle 12: Judges must strike a balance between maintaining a firm control of proceedings and being respectful to all those who appear in court.



Reasons for agreeing with this principle are connected to the fundamental role of judges in the court: maintaining respect and order in the court room. This includes respecting the proceedings of the court and also the individuals participating in the proceedings.

Judges also have a duty to maintain a sense of order within the courtroom, establish their authority and work to hold all of those involved accountable. This should all be done while being aware of the power they possess and exercising it within a respectable means.



To Canadians, judges have a duty to maintain a sense of order within the courtroom, establish their authority and work to hold all of those involved accountable.



Principle 13: Judges may express their views on possible outcomes of a matter during a case management conference.

There was slightly less agreement on this principle, compared to the other two principles on case management. For those that agreed with this principle, it made sense to include information that would help with proceedings, but not to provide information that may introduce or share bias. A judge sharing their views to encourage resolution was seen as entirely within reason during a case conference.

For others, sharing information before the case is presented in court introduced concerns of potential bias, or "pre-judging".



SOCIAL MEDIA

Principle 14: Judges should not identify themselves as judges on social media.

Many respondents agreed on this principle because it related to maintaining professionalism. Other reasons included misinterpretation of information, safety concerns and personal opinions clouding perceptions of a judge's ruling in court.



Among those who agreed with this principle, the concluded that judges should not be on social media at all.

Those who disagreed felt that transparency was important. Their argument was that determining the identity of the judge would not be difficult; therefore hiding it would be moot. Those who disagreed also believed that identifying as a judge would depend on the context, platform, relevance of the position and any risks associated with identifying oneself.



Principle 15: Judges should not use social media to “like”, “friend” or “share” about matters that could come before the courts, generate negative debate (political or otherwise) or be the subject of controversy.

This principle garnered the highest level of support among principles on social media conduct of judges. As with other principles with a high level of support, this centered on the two main themes: fairness and professionalism. Of course, this would be within reason. Judges should use caution about which issues they comment on, and which to reserve their opinions continue to be perceived as impartial in their professional life.

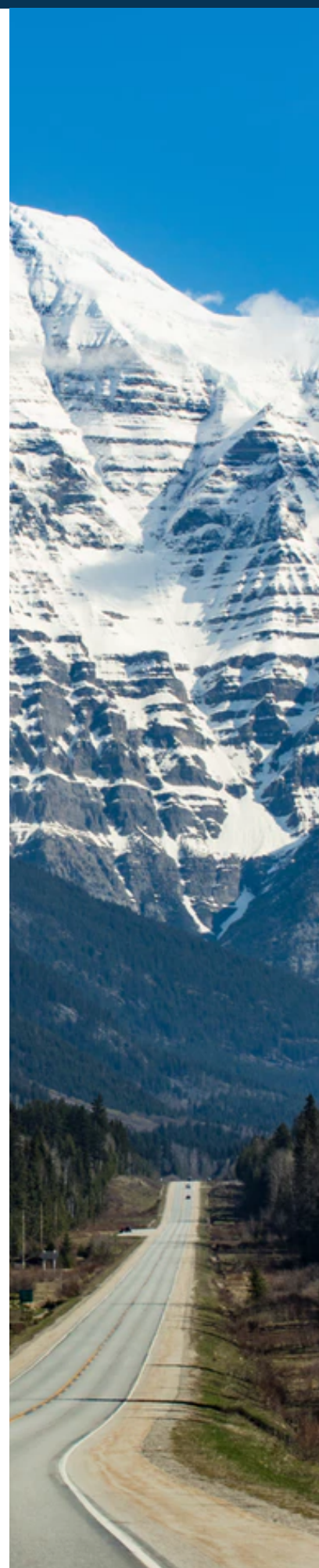


Principle 16: Judges should not “friend” any lawyer who could appear before their court.

Reasons for agreeing with this principle included perceived bias, unprofessionalism and conflict of interest. There were also concerns regarding judges using social media in general. Some thought that relationships through social media were much less personal than those in person.

Of those who disagreed, they felt this statement was very ignorant as it is expected that friendships would exist among individuals working in the same field. However, there should be expectations that judges act professionally and place personal amity aside.





Principle 17: Judges should take reasonable steps to avoid accessing online information about a matter that is before them.

Among those who agreed, avoiding online or external information on a case was important to remain impartial and alleviate another potential source of bias.

On the other hand, those who disagreed were of the view that judges should educate themselves on public affairs, and that prohibition is naive and judges should instead focus on preventing bias rather than preventing the influx of information.



Principle 18: Judges should avoid making known personal interests which may give a perception of partiality in the eyes of some litigants.



If personal opinions have already been made known, judges should disclose them before the proceedings. Some respondents who agreed believed that if judges felt strongly regarding a certain issue, they should place aside their personal interest or ask to remove themselves from the case so that matters remain impartial.

Those who disagreed felt that judges should be able to place aside their personal interests when conducting matters, or otherwise disclose their personal interests prior to the proceeding in the case that there is a conflict of interest.

PUBLIC ENGAGEMENT

Principle 19: Judges should seek out opportunities to publicly explain their work.

Over a third of respondents were in favour of increasing the public's understanding of the legal system. Some felt that a greater understanding would lead to an increased trust in the judiciary. Most were comfortable and encouraged a discussion of general information but were careful to note that there should be no discussion of specific cases, especially those currently before the courts.



Principle 20: Judges should proactively exchange with the general public on questions relating to the justice system and the work of judges in general.



76% of respondents say they agree

Respondents who agreed with this principle felt the public has the right to know about the role of judges within the judicial system. Some agreed that educating the public would help ensure that everyone has access to information about the legal system, and that judges would be a good source of such information.

Those who disagreed felt it was not their role, nor an obligation for judges to share this information with the general public. While educating the public is important, some felt that judges should not be the ones to do it and that they may mistakenly share information that could affect their impartiality in court.



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Better public information may lead to the development of trust in the system.

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Principle 21: Judges must not take part in debates or activities that are the subject of public controversy.

Those who agreed felt that upholding this principle would help remove possible bias, perceived or otherwise, on matters before the courts.

Like earlier principles, those who disagreed felt that judges should be able to engage in discussion and participate in the community like any other citizen but should not let it get in the way of their work and professionalism.



76% of respondents say they agree

Principle 22: Judges should not express views about social or political issues, except where the operations of the courts, the administration of justice and the independence of the judiciary are concerned.

Many agreed on this principle because it related to maintaining professionalism. Other reasons included misinterpretation of information, safety concerns and personal opinions clouding perceptions of a judge's ruling in court.



78% of respondents say they agree

Principle 23: Judges can consider their involvement in civic or charitable activities and on boards, except if that involvement compromises their impartiality or interferes in their abilities to meet their judicial functions.

84% of respondents agreed with this principle. For these respondents, a career as a judge should not impede on an individual's participation in their community. If questions of impartiality arise, judges are at liberty to recuse themselves.

Those who disagreed felt this was a situation that could introduce a conflict of interest, and should be avoided altogether. Such organization could become political, or controversial, now or in the future, and should generally be avoided.



SUMMARY OF THE CONSULTATION SESSIONS ON ETHICAL PRINCIPLES FOR JUDGES

Below are some key takeaways from stakeholders

Canadian Association for Legal Ethics

The CALE underscored the need to include specific terminology and explicit references to the recommendations in the Truth and Reconciliation Commission Report as a sign that the judiciary is committed to concrete action. The CALE also endorsed the Indigenous Bar Association's submission and urged Council to accept their suggestions – specifically the duty to learn Indigenous history. The CALE emphasized that Indigenous issues cannot be lumped in with multicultural needs, and require their own specific reference.

Criminal Lawyers' Association

The CLA undertook a study on the retention of women in criminal law which surfaced some key concerns regarding equality in the court room. They suggested that equality within the existing list of principles be strengthened to urge judges to question any inherent bias they may have.

Additionally the CLA recommended that more examples be added to the section on equality, stating that judges must avoid bias is not sufficient enough. The Criminal Lawyers' Association also cautioned against over emphasizing the rights of self-represented litigants to prevent perception of bias or unfairness.

Canadian Bar Association

The Canadian Bar Association discussed self-represented litigants and the repercussions of over-representation. The CBA underscored the importance of pursuing professional development, particularly in terms of social context. In the new principles, The CBA expects much to be written in the area of social media and the post-judicial return to practice. Additionally, the The CBA discussed the idea of a separate post-judicial code of conduct, also stating that aspirational goals should apply equally to all judges – sitting and former.

The Advocates' Society

The Advocates' Society discussed judges concerns with what they permitted to do and the risks of perceived bias associated in attending certain events. In addition to that, the Advocates' Society was eager to see principles regarding social media as a judge and post-judicial return to practice.

Ontario Superior Court Judges Association

The Ontario Superior Court Judges Association raised the question of judges participating on boards of directors and whether there is value in seeking the views of the Ethics Advisory Board. Ultimately, the OSCJA is interested in guidance and the clarification of boundaries in which judges must hold themselves to. The OSCJA acknowledges that with the changing times, what may have been acceptable previously may no longer be. As such judges must continually reassess the impacts of their affiliations in this context and the OSCJA believes the new principles will help with these concerns.

Vincent Denault - Université de Montréal

Professor Denault acknowledged the importance that court judges require the skills and knowledge sufficient to understanding scientific evidence to effectively qualify who is an expert. Professor Denault was most concerned about how judges with little scientific expertise are capable of evaluating and measuring scientific evidence. Professor Denault considers that judges have an ethical duty to stay informed of the law to ensure they have the required knowledge in addressing science-based cases.

