



## **Former Judges Returning to Practice**

The Canadian Judicial Council's position on former judges returning to practice was formulated in response to the Federation of Law Societies of Canada who consulted with a number of judicial organizations on this matter as part of a review of its *Model Code of Professional Conduct*.

The Council's position was developed subsequent to its own consultation process with Chief Justices, puisne judges and retired judges.

### **Issue 1: General policy question: Should Council develop related ethical principles?**

Yes, Council should develop ethical principles in relation to former judges returning to practice.

Council has an interest in the integrity of the institution of the judiciary, and having ethical principles regarding post-retirement conduct would promote this objective. It would benefit: (1) sitting judges before whom a retired judge might seek to appear; (2) judges contemplating retirement; and (3) retired judges, on how former judges should conduct themselves after retirement. Canadian Judges enjoy the privilege of serving, and one's image as a judge extends beyond retirement. So it is important that principles be developed.

### **Issue 2: Based on the above, what should be the scope and the content of the applicable ethical principles?**

The focus is on appearance in court and other forums for resolution of disputes. The following categories will be addressed:

- Appearing in court
- Participating in tribunals or quasi-judicial proceedings
- Participating as commissioner in public inquiries and the like
- Participating in arbitration/mediation
- Acting as counsel practicing law in a law firm.

### **Issue 3: Should a former judge be eligible to return to practice?**

Yes, a former judge should be able to return to practice; however, subject to restrictions against appearing in court or as counsel in other forums. These restrictions will be formulated in consultation with an expert advisor. Some precision on the word "practice" is required.

**Issue 4: Should a former judge ever appear in Court, and if so, under what conditions?**

No, a former judge should not appear in court, unless there are exceptional circumstances that do not affect the reputation of the judiciary and the courts. A former judge should stay out of the role of advocate. A former judge could act as an arbitrator, mediator or commissioner, but should not appear as counsel in court or in any quasi-judicial or dispute resolution proceedings. Exceptions may occur when the person ceased to be a judge shortly after appointment due to special circumstances which resulted in withdrawal from the bench.

This restriction addresses the primary concerns of impartiality and the appearance of impartiality: (1) litigants and members of the public may reasonably perceive that appointment as a judge is viewed by a person as a career move toward a lucrative post-judge career; and (2) the client who is being represented in court by a retired judge will be perceived as having an unfair advantage. Both considerations impact negatively on the fundamental necessity of public confidence in judicial impartiality.

**Issue 5: If a former judge should be permitted to appear in court after a time limit, what is the appropriate length of the time limit?**

Not applicable, due to prohibition against appearing as an advocate in a court or tribunal.

A former judge should not appear in court at all, or before a quasi-judicial tribunal or other dispute resolution forum in a representative capacity. Any appearance should be only in accordance with the Provincial Law Society Rules. Therefore, no time limit need be stated. The FLS standing committee “*saw no ethical purpose in a temporal prohibition on returning to practice.*” We agree.

**Issue 6: What are the parameters of an “appearance” in court?**

Appearance in court is broader than physical appearance. A former judge should not stand, speak or appear in court as advocate, counsel or at all. A former judge may act as a mediator, arbitrator, commissioner, conflicts of interest commissioner and the like. Further, a former judge may review, draft arguments, pleadings and provide advice to members of a legal firm on strategy and the like. The former judge should not sign court documents or legal opinions that are, or may be, the subject of court proceedings. Legal documents upon which the former judge has input are the final responsibility of the directing legal counsel.

**Issue 7: Should there be exceptional circumstances?**

Exception may be made if a judge has left the judiciary after a very short time for personal reasons (illness, family constraints, personal difficulties in carrying his or her judicial obligations); and in any event in accordance with Law Society rules and approval.

**Issue 8: Should a law firm and the judge be permitted to discuss post-judicial employment? When?**

No. Talking about the prospect of a post-judicial employment opportunity is not acceptable until after a judge has officially resigned or retired. Any such interaction diminishes public confidence that judges and courts are impartial.

**Issue 9: Should a former judge be permitted to comment on case law from the judge's former court?**

The duty of judicial confidentiality borne by sitting judges should continue for former judges who have returned to practice. A former judge should not disclose the confidential debates and discussions between judges, or disclose anything that gives the appearance of relying on confidential information or judicial confidences. Former judges should be otherwise free to comment on decisions, to advise their clients and to make public statements, like any other lawyer governed by the relevant Law Society ethical constraints and rules.

**Issue 10: Should there be a special rule for retired judges working pro bono?**

No. Working pro bono does not make any difference. A conflict or perceived conflict doesn't disappear just because a former judge works for free.

**Issue 11: Marketing (additional Council issue)**

Like any other lawyer, a former judge must comply with Law Society rules. A former judge should also be cautious to avoid participating in any marketing that suggests that by virtue of having been a judge he or she or their law firm thereby has qualitative superiority over other lawyers or law firms.

We suggest the following language would be appropriate:

- In Canada, the title "*Honourable*" is an honorific given to a judge upon appointment and which is retained throughout the judge's lifetime. Care should be exercised, however, in the use made of that honorific. In general terms, referring to a retired judge as "*The Honourable \_\_\_\_\_*" is recognized as being perfectly acceptable. Should the retired judge return to private practice, restraint and good taste should be exercised so that attaching the honorific to the retired judge's name does not give the appearance that the judge is touting or using the prestige of the judge's former office to attract business, gain advantage, suggest qualitative superiority over other judges or law firms, or as having any kind of influence or favoured relationship with the judiciary.
- The designation Queen's Counsel is an honorific bestowed on a lawyer by the Government and/or governing Law Society. It is the custom that the title "Q.C." is relinquished by the lawyer upon appointment to the Bench. If a retired judge, who had earned the Q.C. designation, were to return to private practice, any decision as to whether the retired judge would be entitled to resume using the "Q.C." designation is a matter to be decided by the particular Government/Law Society with jurisdiction to permit and regulate the return to practice.