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MODERNIZING *ETHICAL PRINCIPLES FOR JUDGES*

Background Paper January 2019

I. OVERVIEW

Canadians expect their judges to uphold the highest ethical standards in both their personal and professional lives. Having a clear set of guiding principles helps judges and the public understand and appreciate principles that have been recognized as essential in the judicial context: Integrity, Independence, Equality, Diligence and Impartiality. These principles are a foundational feature of our constitutional and legal framework on which the rule of law is dependent. The role of the judiciary, and judges individually, in reinforcing these principles by serving ethically, is a fundamental aspect of the faith and trust placed in the judiciary.

Council's *Ethical Principles for Judges* has remained relatively unchanged since 1998. However, the work of judges has changed. Society has evolved. New and emerging ethical questions are before us. Reflecting this changing environment, Council is reviewing the current *Ethical Principles* to ensure they continue to provide guidance for judges in a manner that reflects evolving public expectations.

II. ETHICAL PRINCIPLES

The five principles of Integrity, Independence, Equality, Diligence and Impartiality are discussed in individual chapters of the existing *Ethical Principles*. Each chapter contains a Statement, followed by one or more Principles and a series of Commentaries that provide additional guidance.

Most of the language in the English version of *Ethical Principles for Judges* is written in aspirational terms, setting out a number of ideals or goals. The French *Principes de déontologie judiciaire* is written in somewhat more directive language. It is intended that both versions be harmonized to provide further clarity on the generally aspirational nature of ethical guidance for judges.

Ethical Principles remains as relevant today as when it was adopted in 1998 after broad consultation. Of all Council publications, it is the one most requested by the public and judges. The publication has inspired the adoption of similar sets of principles in other jurisdictions, both in Canada and abroad.

Having stood the test of time, the Judicial Independence and Appointment Process Committee of the Canadian Judicial Council proposes that the general format and structure of the *Ethical Principles* remain, with the five principles noted above, that the language be modernized and harmonized and that the commentaries be streamlined to include more recent illustrations of ethical challenges. In addition, some of the principles and commentaries will be re-organized to make the document internally and logically consistent.

III. THEMES TO CONSIDER

Substantively, six major themes have been identified as issues to be included on expanded upon in the updated *Ethical Principles*. Some of these are new; all themes would be incorporated in the current chapters.

Social Media

Given the pervasiveness of social media in digital age, this theme considers ethical guidance for judges regarding the use of social media within the courts and the risks and pitfalls to judges who use social media or are recipients of social media communications in their personal lives.

Self-Represented Litigants

This theme considers guidance to judges in managing the challenges presented as they increasingly encounter self-represented litigants in court proceedings.

Case Management, Settlement Conferences and Judicial Mediation

This theme gives consideration to the ethical issues presented to judges as courts are increasingly involved in case management and in settlement conferencing or mediation during which judges assist in the resolution of disputes through non-adjudicative means.

Public Engagement

To an increasing degree, judges engage with the wider community to inform and educate the public about the role of the judiciary in maintaining the rule of law, and to participate in opportunities that allow them to become better informed about the communities they serve. This theme considers the ethical challenges that this engagement presents.

Professional Development

This theme would provide further guidance to judges about professional development, as part of their general ethical obligation of diligence.

Post-Retirement

As more judges remain in good health and maintain an interest in returning to law practice following retirement from the bench, ethical questions arise regarding certain boundaries of pre-retirement engagement and challenges that may present, for instance, for judges when former colleagues are engaged on matters that come before them. This issue considers ethical issues regarding pre-retirement discussions and limits on post-retirement professional activities.

IV OBJECTIVES OF THE CONSULTATION

Judges, members of the legal profession and academics have all expressed interest in being consulted about the review of *Ethical Principles*. Council welcomes their active participation.

We will also seek input from members of the public who are interested in ethical issues and of course members of the judiciary generally.

A website will be unveiled in February, where a series of questions will seek general views about the themes currently explored.

Participants will have an opportunity to provide their views on any issue that has not yet been identified but which may merit consideration by Council.

After the consultation exercise is completed, Council will summarize and consider the results.