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### (Re) Constructing Judicial Ethics in Canada

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# (Re)Constructing Judicial Ethics in Canada

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# **(Re) Constructing Judicial Ethics in Canada**

Richard F. Devlin\*

## **I. INTRODUCTION**

Any discussion of judicial ethics and accountability—whether it is at the state, national, or international level—inevitably requires engagement with two key ideals: impartiality and independence. Ideals are important because they can provide a trajectory for human action. But ideals can also be a problem because their generality and abstraction can cause one to prevaricate—or even pontificate—when it comes to the immediate and the pragmatic. Indeed, there are times when ideals such as impartiality and independence can become false gods insofar as they promise salvation but ultimately, deliver little. Consequently, when one is asked to consider concrete questions of judicial ethics and accountability, such as those identified by the coordinators of this Symposium,<sup>1</sup> too great a focus on a philosophical inquiry into the essence of impartiality and independence may not take one very far. Rather, as I have argued elsewhere, a more productive (if iconoclastic) approach to answering such questions may be to seek to assist judges to minimize their own partiality.<sup>2</sup>

This short Article approaches the foregoing questions with a discussion of the state and status of judicial ethics in Canada. While popular mythology tends to portray Canadians as relatively laid-back, pragmatic people, this essay contends that Canadians have, in actuality, made some quiet and careful progress on the subject of judicial ethics and accountability that can provide valuable insight for further improvement in those areas. Moreover, this Article suggests that the methodology underlying Canada's progress does, in fact, embrace the pragmatic task of minimizing partiality in as much as it aspires to achieve maximum impartiality. To support these claims, this Article will proceed in four stages. First, it will lay a foundation for the rest of the discussion by explaining

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1. The coordinators of this Symposium asked presenters to consider several unsettled issues, such as: "What does it mean for a judge to be ethical? How should judges overcome implicit or explicit bias? Does appointment to the bench mean leaving personal, professional, moral or political identity behind? Why did Justice Sotomayor's comments about her own identity and experience attract such attention and controversy? Can judicial ethics be taught?" University of the Pacific, McGeorge School of Law, Capital Center for Public Law & Policy Symposium, Judicial Ethics and Accountability: At Home and Abroad (Apr. 9-10, 2010).

2. Richard F. Devlin, *Judging and Diversity: Justice or Just Us?*, 20 *PROVINCIAL JUDGES J.* 4, 20-21 (1996) (Can.). For a cognate argument that justice can best be pursued via the minimization of injustice see AMARTYA SEW, *THE IDEA OF JUSTICE* (2009).

how the very idea of judicial ethics as an object of analysis and contestation is of relatively recent vintage in Canada. Second, it will identify several institutional initiatives that have enhanced the profile of judicial ethics in Canada. Third, it will suggest ways in which the judicial ethics project in Canada (but also perhaps in the United States) can be re-imagined, expanded, and even reconstructed by paying greater attention to the concept of an ethical identity. Fourth and finally, this Article will conclude by linking some more general observations back to the questions posed by the Symposium coordinators.

## II. LAYING THE FOUNDATION

Unlike in the United States, where there is a well-developed regime for—and discourse on—judicial ethics, in Canada, there is a relative dearth of analysis.<sup>3</sup> Historically—and perhaps ironically in light of our patronage-tainted appointments processes<sup>4</sup>—the topic of judicial ethics rarely surfaced. Judges, as paragons of independence and impartiality, were assumed to be ethical by definition. Indeed, it was not until 1980 that the Canadian Judicial Council<sup>5</sup> first “sponsored” the publication of two books relating to judicial conduct. The first book, *A Book for Judges*,<sup>6</sup> is written by a former Chief Justice of British Columbia, John O. Wilson, who rather quaintly characterized his book as “friendly advice from experienced judges to brother judges.”<sup>7</sup> The second book, written by a former Chief Justice of Canada Gérard Fauteaux, is a French counterpart to the first entitled, *Le Livre du magistrat*.<sup>8</sup> Just over a decade later, in 1991, the Canadian Judicial Council also endorsed publication of a third book, called *Commentaries on Judicial Conduct*.<sup>9</sup>

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3. See MARTIN FRIEDLAND, *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA* (Canadian Judicial Council 1995); Philip Bryden, *Legal Principles Governing the Disqualification of Judges*, 82 THE CAN. BAR REV. 3, 556 (2003); Georgina R. Jackson, *The Mystery of Judicial Ethics: Deciphering the “Code”*, 68 SASKATCHEWAN L. REV. 1 (2005); John J. (Jack) Walsh, *Cross-Examination by the Prosecutor: Stopping Transgressions; It is also a Trial Judge’s Responsibility*, 11 CANADIAN CRIM. LAW REV. 301 (2007).

4. See Luis Millan, *Allegations Send Judicial Shockwaves Throughout Quebec*, LAWYERS WEEKLY, Apr. 23, 2010, at 1; Jacob Ziegel, *Federal Judicial Appointments: Nothing has Changed*, LAWYERS WEEKLY, Nov. 20, 2009.

5. The Canadian Judicial Council (C.J.C.) was established in 1971 and is comprised of thirty-nine, federally-appointed chief justices, associate chief justices, and some senior judges from provincial and federal superior courts, see CANADIAN JUDICIAL COUNCIL, *Mandate and Powers* (July 21, 2010), [http://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_mandate\\_en.asp](http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mandate_en.asp) (on file with the *McGeorge Law Review*); see generally FRIEDLAND, *supra* note 3, at 87-88 (giving a more thorough analysis of the reason for establishing the C.J.C.); Patrick Healy, *The Unique Jurisdiction of the Canadian Judicial Council*, 13 CANADIAN CRIM. LAW REV. 103 (2009) (providing an interesting discussion of the complaints procedure). Its mandate is to “promote efficiency and uniformity, and to improve the quality of judicial service. . . .” Judges Act of 1971, R.S.C., c. J-1, § 60(1) (1985) (Can.). It also has disciplinary authority to enforce that mandate. See *id.* § 63.

6. J.O. WILSON, *A BOOK FOR JUDGES* (1980).

7. *Id.* at xiii.

8. GERALD FAUTEAUX, *LE LIVRE DU MAGISTRAT* (1980).

9. Jackson, *supra* note 3, at 4.

More significantly, however, it is important to point out that in 2010, there still is no Code of Conduct for Canadian judges. Rather, what Canadian judges have is an elegant fifty-two page booklet, first published in 1998, again by the Canadian Judicial Council, entitled *Ethical Principles for Judges*.<sup>10</sup> Importantly, in its second paragraph, this booklet acknowledges that:

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.<sup>11</sup>

Canadian judges generally advance four arguments in opposition to an enforceable code of conduct: (1) it is unnecessary; (2) it poses a threat to judicial impartiality and independence; (3) it misconceives the essential nature of ethics which should be viewed as aspirations, not prescriptions; and (4) it cannot purport to be comprehensive.<sup>12</sup> Supporters of an enforceable code, however, rely

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10. CANADIAN JUDICIAL COUNCIL, ETHICAL PRINCIPLES FOR JUDGES (Canadian Judicial Council 1998) [hereinafter ETHICAL PRINCIPLES]. These principles were drafted for federally appointed judges. *Id.* at 3; see also Jackson, *supra* note 3, at 3 n.7 (“The Canadian Association of Provincial Court Judges has recommended the *Ethical Principles* to its members.”). Apart from British Columbia and Quebec, provincial court judges do not have a governing document. PROVINCIAL COURT OF BRITISH COLUMBIA, CODE OF JUDICIAL ETHICS (rev. 1994); Courts of Justice Act, R.S.Q., c. T-16, § 261 (2004) (Can).

11. ETHICAL PRINCIPLES, *supra* note 10, at 3. Justice Georgina R. Jackson delicately recounts the background of the *Ethical Principles* as follows:

Coincidentally, in 1991, a Committee of the Canadian Bar Association asked the Hon. Bertha Wilson, a former judge of the Supreme Court of Canada, to chair a committee to study gender discrimination in the legal profession. Bertha Wilson and her committee produced a major report entitled *Touchstones for Change: Equality, Diversity and Accountability*. The Wilson Report was critical of the judges’ records regarding matters of equality, and not only recommended the adoption of a code of conduct but linked it to discipline. As one might well imagine, much discussion ensued as a result of the Wilson Report, culminating in the December 1993 resolution of the Independence Committee of the Canadian Superior Court Judges Association to develop ethical guidelines.

In 1994, the Canadian Judicial Council passed a resolution establishing a Working Committee, and charged the Committee with the responsibility of preparing ethical guidelines. Around the same time, the Judicial Council hired Martin Friedland, a well-known legal scholar, to study this issue among others. In 1995, Dr. Friedland recommended that a code of ethics be developed, but that it should not “be so directly linked to the discipline process.”

After four years of consultations, the Working Committee released the *Ethical Principles*. Jackson, *supra* note 3, at 4-5 (footnotes omitted); see also Cristin Schmitz, *Judges, CBA Lock Horns Over Code of Conduct*, LAWYERS WEEKLY, July 24, 1998, at 1.

12. See e.g., Jackson, *supra* note 3, at 16-18. Justice Jackson, for example, argues:

First and foremost, it is not necessary to interpret the *Ethical Principles* as creating standards of conduct. The *Ethical Principles* booklet is written for an independent judiciary. Canadian judges have earned their status first through rigorous training, and then by the respect and approval of their peers prior to appointment. A disciplinary code may be more important in a judicial system where judges are elected or enjoy less status than Canadian judges, but it is not needed for a judiciary that is free from political and financial pressures.

on one simple question to convey their response: without articulated and enforceable standards, how can the judiciary effectively self-regulate when judges are accused of misconduct?<sup>13</sup>

In 2008, the Canadian Judicial Council directly confronted this debate while considering proper disciplinary action to be taken against Justice Matlow.<sup>14</sup> In this case, the Toronto Transit Commission (T.T.C.) lodged a complaint against Justice Matlow for his vocal leadership of a community group opposed to one of T.T.C.'s development projects.<sup>15</sup> An Inquiry Committee was then appointed to conduct an investigation.<sup>16</sup> This investigation determined that Justice Matlow had: (1) organized and led a neighbourhood group opposed to the T.T.C. development; (2) contacted municipal and provincial politicians, including the Attorney General; (3) approached newspaper columnists urging them to write articles opposing the T.T.C. project; (4) used "intemperate language" in his communications with the media; (5) deployed his title "Justice" in connection with the activities; and (6) sat on a judicial panel in a case that resulted in the granting of an injunction against the T.T.C. dealing with another development project.<sup>17</sup> After concluding that Justice Matlow's behaviour was "manifestly and totally contrary to the impartiality, integrity and independence of the judiciary," the five-person inquiry panel unanimously found that Justice Matlow had

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Second, it is commonly believed that the test for sanctionable conduct is now established at a level that maximizes the exercise of impartial judicial thought. If the *Ethical Principles* are interpreted as creating a standard of conduct for disciplinary purposes, the ambit of what is considered sanctionable conduct may be broadened. This may result in an increase in complaints. As Professor Morissette indicates, "a series of complaints is likely to affect the judge where he or she is most vulnerable, namely in the ability to make impartial decisions with the appropriate degree of detachment on questions of general interest that are both very difficult and controversial."

Third, one can, in my opinion, accomplish more with ethical principles than with a code of prohibited behaviours. Ethical principles are, by their nature, more stringent than any standard of conduct can ever be. They represent the ceiling to which judges strive. . . . Ethical principles leave more to the individual good conscience of the judge than a code that can lead simply to legalistic ritual.

Fourth, any attempt to use the *Ethical Principles* as a standard of behaviour for discipline overlooks the fact that the booklet omits matters that we take for granted as sanctionable conduct and addresses matters which could be considered innocuous. For example, there is no mention of gifts, but there is extensive treatment of the circumstances in which a judge can give a letter of reference.

*Id.* (footnotes omitted)

13. See, e.g., Adam M. Dodek, *Help Wanted: A Judicial Code of Conduct*, LAW TIMES, Feb. 25, 2008, at 6.

14. CANADIAN JUDICIAL COUNCIL, REPORT OF THE INQUIRY COMMITTEE CONCERNING THE HON. P. THEODORE MATLOW (2008), available at [http://www.cjc-ccm.gc.ca/cmslib/general/CJC\\_20080528.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/CJC_20080528.pdf) [hereinafter REPORT OF THE INQUIRY COMMITTEE].

15. *Id.* ¶ 8.

16. *Id.* ¶ 9.

17. *Id.* ¶ 205.

engaged in judicial misconduct.<sup>18</sup> Thus, the panel recommended his removal from the bench.<sup>19</sup>

When it came to the final decision of the full C.J.C., a seventeen-to-four majority agreed that Justice Matlow's conduct was inappropriate, unacceptable, and qualified as judicial misconduct.<sup>20</sup> However, they also recognized that judges, as citizens, are still entitled to exercise their rights of expression, association, and protest.<sup>21</sup> Central to Justice Matlow's defence, and the ultimate reasons of the majority of the C.J.C., was the claim that the *Ethical Principles* are "not written as a proscriptive conduct code and it is not possible to apply them as such."<sup>22</sup> In lieu of removing Mr. Justice Matlow from office, the majority imposed three penalties: (1) compulsory participation in a judicial ethics seminar; (2) letters of apology to several parties; and (3) a requirement to obtain approval from a committee of judges prior to any future participation in public debate.<sup>23</sup>

The minority, in a stinging dissent, found that the Inquiry Panel was right to recommend removal from office because Justice Matlow's conduct "would severely undermine public confidence in the administration of justice."<sup>24</sup> The minority's view seems to be in-line with those individuals who are in favor of establishing a code of judicial conduct. Those in favor often argue that the C.J.C. has not gone far enough in fulfilling its regulatory obligations.<sup>25</sup> While judicial independence is a public good, so too are accountability and transparency,<sup>26</sup> and those who support the implementation of a code of judicial conduct maintain that an enforceable code of conduct would enable the C.J.C. to not only talk-the-talk, but also to walk-the-walk.

### III. FRAMING IT UP

Despite the obvious reluctance to implement a comprehensive code of judicial ethics, there has been some significant progress in Canada. This progress has manifested itself in two ways. First, in 1998, Canadian judges created a ten-

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18. *Id.* ¶ 207.

19. *Id.* ¶ 208.

20. CANADIAN JUDICIAL COUNCIL, REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE, MAJORITY REASONS OF THE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HON. P. THEODORE MATLOW ¶ 185 (2008).

21. *See id.* ("There are limits to what a judge can do in pursuit of his or her personal or private interests. . . .").

22. REPORT OF THE INQUIRY COMMITTEE, *supra* note 14, at ¶ 103.

23. CANADIAN JUDICIAL COUNCIL, REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE, MAJORITY REASONS OF THE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HON. P. THEODORE MATLOW ¶ 9 (2008).

24. *Id.* ¶ 186.

25. Dodek, *supra* note 13.

26. *See generally* FRIEDLAND, *supra* note 3. *See also* T. DAVID MARSHALL, JUDICIAL CONDUCT AND ACCOUNTABILITY (Carswell 1995); Beverley McLachlin, *Courts and Judges in the Framework of Accountability*, 1 J. PARLIAMENTARY & POL. L. 293 (2008).

person Judicial Ethics Advisory Committee that represents Canada's various regions.<sup>27</sup> Second, the C.J.C. authorized its educational branch, the National Judicial Institute (N.J.I.),<sup>28</sup> to design, develop, and deliver programmes on judicial ethics education.<sup>29</sup>

#### A. *The Judicial Ethics Advisory Committee*

The Judicial Ethics Advisory Committee is appointed by a nomination committee jointly composed of representatives from the C.J.C. and the Canadian Superior Court Judges Association.<sup>30</sup> Its function is to provide confidential and prompt advice to judges who encounter an ethical dilemma.<sup>31</sup> On average it gives about ten advisory opinions per year.<sup>32</sup> Justice Jackson, the chairperson, reports that "[t]he Committee rarely tells a judge that he or she must or must not undertake the proposed activity. The Committee uses language that speaks to the wisdom of the judge's proposed participation in the activity, and leaves the ultimate decision to the judge."<sup>33</sup> The advisory opinions are crafted anonymously and, unless the inquiring judge requests otherwise, are accessible to all federally appointed judges on JudgeNet.<sup>34</sup> Significantly, however, they are not available to the general public or researchers.

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27. Jackson, *supra* note 3, at 7; Cristin Schmitz, *Judges Can Turn to New Ethics Committee*, LAWYERS WEEKLY, Dec. 11, 1998. The Committee recently expanded to twelve people in 2010.

28. The National Justice Institute, About the NJI, <http://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm> (last visited July 7, 2010) (on file with the *McGeorge Law Review*). The NJI website states the:

National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.

Since its inception in 1988, the NJI has continued to develop and deliver stimulating programs and a variety of electronic resources that foster judicial excellence. Alone or in partnership with courts and other organizations, the NJI is involved in the delivery of the majority of education taken by judges in Canada.

*Id.*

29. Ottawa Charities, National Judicial Institute, <http://www.ottawacharities.com/nji.php> (last visited July 7, 2010) (on file with the *McGeorge Law Review*). The NJI's mandate is:

- To foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth;
- To engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary;
- Thereby improving the administration of justice.

*Id.*

30. Jackson, *supra* note 3, at 7.

31. *Id.* at 8. It serves a similar function to the U.S. Judicial Conference's Committee on Codes of Conduct, which "provides ethics advice and training that includes issuance of more than 100 advisory opinions annually and response to nearly 1,000 informal requests for ethics advice." David Ingram, *Congress Set to Take Aim at Judicial Recusals*, NAT'L L. J., Nov. 2, 2009 (on file with the *McGeorge Law Review*).

32. Jackson, *supra* note 3, at 7.

33. *Id.*

34. "The Judicial Communications Network (JUDICOM) is a communications system developed by the Office of the Commissioner for Federal Judicial Affairs Canada for the Canadian federal judicial community. It is designed to facilitate and enhance communication, collaboration and knowledge sharing by connecting all



*B. The N.J.I.'s Judicial Ethics Education Programmes*

*1. Judicial Ethics Modules*

The N.J.I.'s programmes on judicial ethics are implemented in two ways. The first way is through freestanding "judicial ethics modules" that range in length from half-day to multi-day programmes.<sup>35</sup> These modules emphasize "ethical issues in the courtroom, judicial conduct outside the courtroom and judgment writing"<sup>36</sup> and proceed according to a "Framework for Ethical Analysis" whereby judges are introduced to a schema of reasoning and given an opportunity to deploy it through a series of learning moments built around core principles of adult education.<sup>37</sup>

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members within a trusted online environment." See Office of the Commissioner for Federal Judicial Affairs Canada, JUDICOM Portal, <http://www.judicom.ca/home-eng.html> (last visited July 31, 2010) (on file with the *McGeorge Law Review*). JudgeNet is the internal communication network that is available to judges over JUDICOM.

35. For example, a program in September 2008 outlined the following "Learning Objectives":

- To identify real and emerging ethical issues for judges
- To provide a framework for judges to work through these issues
- To address the ethical problems of judges in the mediation and case management setting
- To familiarize judges with the *Ethical Principles for Judges* and Advisory Committee opinions and consider their relevance today
- To consider the judge's own religious and moral convictions and the impact they have on the decision-making process.

See generally Georgina R. Jackson & C. Adèle Kent, "Teaching" Judicial Ethics: The Canadian Methodology (Nov. 2, 2004) (unpublished manuscript) (on file with the *McGeorge Law Review*).

36. *Id.* at 5.

37. *Id.* at 5-6.

The N.J.I.'s framework<sup>38</sup> is constructed upon the following questions:

1. What is the ethical dilemma?
2. Are there specific legal rules or established principles of ethical conduct (established by statute, codes of conduct, court decisions) that are relevant to the identified dilemma?
3. If relevant, what is (was) the preferred course of conduct for counsel or litigant?
4. What steps would you take prior to identifying your options?
5. a) In light of the events as they occurred in this fact situation, what are the permissible options/choices available to the judge?  
b) Where appropriate, what are the pros and cons of each of the available options?
6. If possible, identify your preferred choice or the option that, in your opinion, most closely accords with the rules or principles identified in #2 above.

## 2. Social Context Education

The second way the N.J.I.'s judicial ethics programmes are implemented is through "social context education" (SCE) initiatives.<sup>39</sup> In response to widespread

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38. This framework will be revisited *infra* Part V.

39. Donna Hackett & Richard F. Devlin, *Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges*, 4 J. OF L. & EQUALITY 157 (2005):

In a multicultural society, diversity can mean that people with different customs and cultures may not be fully understood or believed because of their differences. So also, without knowing about experiences of disadvantage, it is difficult to anticipate or know how a particular application of the law may affect some individuals differently in some unforeseen or unintended manner, or bar their access to justice. Therefore, in order to deliver equality, judges should know about all forms of inequality, discrimination and the experience of disadvantage; recognize these issues and provide access to justice in their courtrooms and decisions. However, a judge's own life experiences may not include various forms of disadvantage and discrimination. A judge's ability to assess credibility, reliability and the weight to be applied to evidence, interpret and apply laws in circumstances of difference and disadvantage may be limited by what they do not know or have not experienced. Thus, social context education for judges entails the pursuit of at least four broad goals: increasing judges' understanding of equality principles, facilitating enhanced recognition by the judiciary of the pervasiveness of disadvantage and inequality in modern society; challenging judge's assumptions and the impact of such assumptions on judicial decision making; and demonstrating the relevance of the experience of diversity, (in)equality and (dis)advantage to the judicial function.

concerns about the Canadian judiciary's capacity to respond to equality claims, the C.J.C. authorized the N.J.I. to develop "comprehensive, in-depth, credible education programs on social context issues which include gender and race (aboriginal peoples, blacks and other visible minorities)."<sup>40</sup> As Rosemary Cairns Way points out, the core objectives of these social context programmes are:

(1) to assist judges to gain better understandings of the communities that they serve, the impacts of disadvantage and the particular social, cultural and linguistic issues that shape the persons who appear before them; (2) to assist judges to examine their own assumptions, perspectives and views of the world; and (3) to explore the impact of contextual inquiry on issues related to the judicial role, judicial process and the process of judgment [sic]<sup>41</sup>

SCE relates to judicial ethics education by expressly engaging with the first principle of judicial ethics—impartiality.<sup>42</sup> Traditionally, impartiality has been equated with sameness of treatment. This correlation of impartiality with sameness is premised upon a formal conception of equality. Unlike in the United States, where liberty is the ethical lodestar, Canada's *Ethical Principles for Judges* explicitly incorporates an equality principle.<sup>43</sup> More significant still is that this equality principle, according to the C.J.C.'s commentary, embraces a substantive, rather than formal, conception of equality:

1. The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination. *This is not a commitment to identical treatment but rather "... to the equal worth and human dignity of all persons" and "... a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.*" Moreover, Canadian law recognizes that discrimination is concerned not only with intent, but with effects. Quite apart from explicit constitutional and statutory guarantees, fair and equal treatment has long been regarded as an essential attribute of justice. While its demands in particular situations are sometimes far from self evident, the law's strong

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*Id.*; see also Lynn Smith, *Judicial Education on Context*, 38 U.B.C. L. Rev. 569 (2005).

40. Rosemary Cairns Way, *Contradictory or Complementary? Reconciling Judicial Independence with Social Context Education*, in *THE FUTURE OF JUDICIAL INDEPENDENCE* (Lorne Sossin & Adam Dodek, eds., University of Toronto Press, forthcoming 2011) (manuscript at 14, on file with the *McGeorge Law Review*).

41. *Id.* at 27. The first two phases of the Social Context Education Project were offered between 1998 and 2003. After that it was hoped that SCE would become pervasive in all NJI programs through the deployment of an integration protocol. Doubts have been expressed about the success of the pervasive method. Meanwhile, integration of Phase III continues. *Integration Protocol for Social Context*, NATIONAL JUDICIAL INSTITUTE SOCIAL CONTEXT EDUCATION, Oct. 2009, at 17 (on file with the *McGeorge Law Review*).

42. Smith, *supra* note 39, at 570.

43. See *ETHICAL PRINCIPLES*, *supra* note 10, at 23 ("Judges should conduct themselves and proceedings before them so as to assure equality according to law.").

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societal commitment places concern for equality at the core of justice according to law.

2. *Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality.* A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.

3. Judges should not be influenced by attitudes based on stereotype, myth, or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to, and correct such attitudes.

4. . . . Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial, or other traditions or failing to realize that certain conduct is hurtful to others. *Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial.*<sup>44</sup>

Nevertheless, the commentary to the equality principle also adds the following caveat:

In doing this, however, it is also necessary to take care that these efforts enhance and do not detract from judges' perceived impartiality. All forms or vehicles of education are not necessarily appropriate for judges given the demands of independence and impartiality. Care must be taken that exaggerated or unfounded concern in this regard does not undermine efforts to enhance good judging.<sup>45</sup>

Throughout the 1990s and early 2000s, approximately one-thousand of Canada's approximately two-thousand judges<sup>46</sup> participated in social context education programmes designed by the N.J.I. The topics of these programmes covered a vast domain of procedural law, as well as public and private substantive law, and in doing so, addressed multiple forms of inequality, including violence and abuse

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44. *Id.* at 24-25 (emphasis added) (footnotes omitted).

45. *Id.* at 25 (emphasis added) (footnotes omitted).

46. There are approximately 1,100 federally appointed judges. Office of the Commissioner for Federal Judicial Affairs Canada, *Number of Federal Judges on the Bench as of September 1, 2010*, <http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.html> (last visited Sept. 12, 2010) (on file with the *McGeorge Law Review*). There are more than 1,000 provincial and territorial judges in Canada. E-mail from Alan T. Tufts, Judge, Canadian Association of Provincial Court Judges, to David Michels, Librarian, Dalhousie University (March 1, 2010, 9:50 ADT) (on file with the *McGeorge Law Review*).

in intimate relationships, self-represented litigants, sexual assault, and many others.<sup>47</sup>

Despite the significant amount of judicial involvement, social context education programmes were not without critics.<sup>48</sup> In fact, some critics even viewed these programmes as a threat to judicial independence and impartiality.<sup>49</sup> This Article, however, takes the position that social context education cannot be legitimately criticized as a threat to either judicial independence or judicial impartiality. On the contrary, social context education enhances the independence, impartiality, and ethical identity of our judges by helping judges to both minimize their partiality and maximize their capabilities to think through and deploy Canada's deeper constitutional values, as discussed in Part IV below.

#### IV. THE VALUE OF "UNWRITTEN CONSTITUTIONAL VALUES"

In a series of Canadian cases, the Supreme Court of Canada has stated that beyond the express provisions of our Constitution there are also a number of "unwritten constitutional values."<sup>50</sup> These values include, but are not limited to: federalism; democracy; constitutionalism and the rule of law; respect for minorities; respect for the inherent dignity of the human person; commitment to social justice and equality; accommodation of a wide variety of beliefs; respect for cultural and group identity; and faith in social and political institutions which enhance the participation of individuals and groups in society.<sup>51</sup>

My point in highlighting these "unwritten constitutional values" is that they can serve as a sort of ethical grundnorm for Canadian judges.<sup>52</sup> There is always a danger that some judges will abuse the principles of judicial independence to justify a vast range of subjective preferences. What Canada's unwritten constitutional values do is provide a foundation and orientation for the pursuit of judicial impartiality. In the American context, Brad Wendel argues that "fidelity to law" helps to define the role of morality for American lawyers.<sup>53</sup> Analogously, I want to suggest that constitutional values—both written and unwritten—help define the role morality of Canadian judges. As judges struggle with the dilemmas of judgment, they must go beyond subjective preferences and they must seek guidance from these deep-seated constitutional values.

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47. CANADIAN JUDICIAL COUNCIL EDUCATION COMMITTEE, SOCIAL CONTEXT EDUCATION PROJECT, NATIONAL JUDICIAL INSTITUTE: PHASE II AND BEYOND, May 16, 2005, presentation (on file with the *McGeorge Law Review*).

48. Smith, *supra* note 39, at 572.

49. *Id.*

50. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 239-40 (Can.); see also R. v. Oakes, [1986] 1 S.C.R. 103, 136 (Can.).

51. Reference re Secession of Quebec, 2 S.C.R. at 240.

52. The term "grundnorm" was developed by the legal philosopher Hans Kelsen, to mean the basic norm or order underlying a legal system, see HANS KELSEN, PURE THEORY OF LAW (2002) (1960).

53. W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247, 264-65 (2008).

## V. RECONSTRUCTING THE ETHICS EDIFICE

### A. A Suggested Framework

It should be clear by this point that over the last two decades, judicial ethics have taken on greater prominence in the Canadian judicial imaginary. Undoubtedly, this is a good thing, but there is much more to be done. Only a very small number of Canada's approximately two-thousand judges<sup>54</sup> have chosen to enroll in the voluntary judicial ethics programmes. While most, but not all, Canadian judges participated in some aspect of the first two phases of social context education,<sup>55</sup> many of them did so more than a decade ago. Moreover, a recent surge in retirements by baby-boomer judges has resulted in a significant amount of turnover in the judiciary. Consequently, many junior judges with little or no exposure to social context education are taking their place on the bench. In accordance with all of these recent changes, it is imperative for Canada to make an enhanced commitment to, and investment in, both judicial ethics and social context education programmes. This Article suggests, however, that the Canadian judiciary, and perhaps even the American judiciary, should go even one step further than that—they should construct a more robust ethical edifice.

The N.J.I.'s Framework for Ethical Analysis was introduced in Part III of this Article. While this framework is an extremely helpful analytical tool, it is not quite enough to engage judges in the process of ethical reasoning. In my experience of working with judges for more than twenty years, most judges tend to respond to ethical challenges with a legalistic (perhaps even formalistic) mindset.<sup>56</sup> This is completely understandable—it is how judges have been educated—and there is very little in the literature (were they to read it) or in the material presented at conferences (were they to attend them) that would push them beyond a conventional professional comfort zone. The only problem with such a mindset is that it does not adequately engage with the demands of ethical judgment, which are quite distinct from the modes of conventional legal reasoning. As such, I recommend the following "Framework of Ethical Analysis for Judges"<sup>57</sup> that adopts, but significantly supplements, the N.J.I.'s Framework:

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54. See *supra* note 46.

55. Despite the recommendations from the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, social context education was never mandatory for Canadian judges. See CANADIAN BAR ASSOCIATION TASK FORCE ON GENDER EQUALITY IN THE LEGAL PROFESSION, TOUCHSTONES FOR CHANGE: EQUALITY, DIVERSITY AND ACCOUNTABILITY 192 (1993).

56. The author of this Article bases this statement on his personal experience of working with judges for more than twenty years.

57. This is a modified version of a *Framework of Ethical Analysis* developed by Jocelyn Downie and Richard Devlin for the education of law students and lawyers.

FRAMEWORK OF ETHICAL ANALYSIS FOR JUDGES

1. What is the ethical dilemma?
2. Are there specific legal rules or established principles of ethical conduct (established by statute, codes of conduct, court decisions) that are relevant to the identified dilemma?
3. *Identify the underlying philosophy/spirit of the rules or principles.*
4. If relevant, what is (was) the preferred course of conduct for counsel or litigant?
5. *Ascertain the interests, wishes, and rights of all potentially affected parties.*
6. What steps would you take prior to identifying your options?
7. *Consider the larger constitutional values, both written and unwritten.*
8. *Identify your own personal values.*
9. a) In light of the events as they occurred in this fact situation, what are the permissible options/choices available to the judge?  
b) Where appropriate, what are the pros and cons of each of the available options?
10. *Calculate the consequences of each option short/long term; benefits/harms; means/ends.*
11. *Discuss with others (if appropriate or possible).*
12. *Identify the scope of your discretion.*
13. If possible, identify your preferred choice or the option that, in your opinion, most closely accords with the rules or principles identified in #2 above.
14. *Engage in situated self reflection.*
15. *Identify priorities.*
16. *Make your choice.*
17. *Review—result and processes.*
18. Develop institutional mechanisms for future situations.

While I take the position in this Article that the foregoing framework can provide a useful template for facilitating a process of enhanced ethical reasoning by judges, I also fear that judges will view it as too procedural, too instrumentalist, and too mechanical in both its structure and its tone. It may not give judges a sufficient opportunity to reflect upon the very idea of a judicial role morality, or the challenges of constructing an ethical identity. Consequently, to supplement this Framework, I have developed another strategy in the next part of this Article that may help Canadian judges to contemplate their own ethical identity.

*B. From Judicial Archetypes to Judicial Architects*

In 2008, the N.J.I. asked me to participate in the creation of a new programme, “The Art and Craft of Judging”, which later became known as the “Sophomore Programme.” As far as I know, there is no judicial education project like this anywhere else in the world. The project is an intensive four-and-a-half day retreat for judges who have been sitting for approximately five years, and it is designed to: (1) enable them to reflect upon their challenges, stresses and successes to date, and then; (2) assist them to develop capabilities to move forward for the next decade or more. In discussing these twin objectives with the N.J.I., I suggested that judges might be able to benefit from a more extensive exposure to, and engagement with, the concepts of “role morality” and “ethical identity.” This suggestion was well received by the judges on the organizing committee.

It was my belief that judges might be able to learn a great deal about themselves by looking to the challenges and opportunities experienced by another class of professionals: architects.<sup>58</sup> My rationale for such a belief was that by reflecting upon the unfamiliar, judges might enhance their sense of the familiar,<sup>59</sup> thereby, once again, creating an opportunity for them to minimize their own partiality. In the Canadian version of the project, “From Judicial Archetypes to Judicial Architects,” I dovetailed extensive details on the ethical challenges of architects with real cases facing judges in a variety of areas, including contracts, criminal, family, evidence, and constitutional law. By doing so, I identified five potential parallel challenges, and I characterized them as: (1) The Integration of Function, Structure and Beauty; (2) The Balancing of the Technical and Practical with the Conceptual and the Visionary; (3) The Calibration of Continuity and Change to provide Cohesion between the Past, Present and Future; (4)

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58. For three helpful texts in this regard see ALBERTO PÉREZ GÓMEZ ET AL., *TOWARDS AN ETHICAL ARCHITECTURE: ISSUES WITHIN THE WORK OF GREGORY HENRIQUEZ* (David Weir ed., 2006); BAUMANLYONS *ARCHITECTS, HOW TO BE A HAPPY ARCHITECT* (2008); PAUL GOLDBERGER, *WHY ARCHITECTURE MATTERS* (2009).

59. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 1 (2000).



Responsiveness to both the Individual and the Community; and (5) The Quest for the Infinite within the Finite.<sup>60</sup>

The first cohort of fifty judges was exposed to this programme in the summer of 2009, and the evaluations were very positive. As a result, the N.J.I. is now developing a redux version for the summer of 2010. In this version, two judges will co-present with me, and each of them will illustrate the relevance of the five themes by exploring some of their own ethical dilemmas both in and out of court. This panel presentation will also be supplemented with a workshop in which the judicial participants will work through a number of scenarios designed to foster discussion of the challenges and opportunities of developing an ethical identity. At the end of the panel presentation and workshop discussions, it is our hope that we will have helped the participants to bridge the gap between the theory and practice of ethical reasoning. Only time will tell if this programme will in fact achieve the desired result.

## VI. CONCLUDING THOUGHTS

To come full circle, having reviewed the past, present, and possible future of judicial ethics in Canada, I believe this Article has indirectly (and perhaps iconoclastically) answered the five questions posed at the outset by the organizers of the Symposium. Now let me be more explicit:

What does it mean for a judge to be ethical?

*It means to have a considered and well developed ethical identity, to be a "judicial architect."*

How should judges overcome implicit (or explicit) bias?

*If a judge embraces a sophisticated Framework of Ethical Analysis, she will focus less on the false god of impartiality and instead be able to more readily identify and minimize—though not necessarily overcome—potential biases.*

Does appointment to the bench mean leaving personal, professional, moral, or political identity behind?

*Absolutely not; rather, it means integrating them into a larger vision of one's role morality as a judge.*

Why did Justice Sotomayor's comments about her own identity and experience attract such attention and controversy?

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60. Richard Devlin, *From Judicial Archetypes to Judicial Architects*, 43 UBC L. REV. 2 (forthcoming 2010).

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*Because many commentators have a mythological and reified understanding of judicial ethics that denies the reality and vitality of identity and experience.*

Can judicial ethics be taught?

*I hope so; if not, I have wasted a large part of the last twenty years of my life!*