Judicial Confidentiality in Canada

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Judges often have access to information that is outside the public record, such as the deliberations of their colleagues and excluded evidence. Despite this, Canadian judges have no express obligation under current ethics frameworks, including the Canadian Judicial Council's Ethical Principles for Judges *and provincial codes of judicial conduct, to keep such information confidential or to avoid using it outside their judicial capacity. This gap means that it is possible for judges and former judges to take advantage of such information in ways that may undermine public confidence in the judiciary and the integrity of judicial deliberations.*

Surveying existing Canadian judicial ethics frameworks, the doctrine of deliberative secrecy, and the ethics frameworks of other jurisdictions including the UK and the USA, the authors argue that Canadian judicial ethics frameworks are inconsistent with international norms that recognize a duty of judicial confidentiality. The authors argue that imposing this duty would bring greater consistency to the legal profession by mirroring other duties of confidentiality and would safeguard public confidence in reasons for decisions and the intellectual freedom of judges' deliberative processes. The authors recommend that Ethical Principles for Judges *should be revised and that the Canadian* Judges Act *should be amended to create a duty of judicial confidentiality that can be enforced against current and former judges using more flexible sanctions than currently exist.*

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Introduction

A concern about whether judges will maintain the confidentiality of certain information arises in several situations. A judge might reveal information about his or her own deliberative process or about the deliberative process of another judge. A judge might reveal private information about a dispute that was acquired by virtue of the judge's position. Similar situations involving former rather than current judges raise similar concerns.

For example, an appellate judge might choose to discuss, in a speech or publication, a split decision in which he or she was involved. The judge might reveal how close he or she was to reaching the opposite decision. The judge might explain what elements of the case were most important to him or her in deciding as he or she did. The judge might reveal which member of the panel was least sure of the outcome, initially favouring one outcome but ultimately changing his or her mind and reaching a different outcome. The judge might explain how some members of the panel argued with one of the judges to persuade him or her to reach a particular outcome. A judge might reveal that the collective deliberations were heated or tense or collegial or disinterested.

As another example, a former judge might be retained by lawyers to preside over an internal preparatory run-through of an important motion or appeal, playing the role of an actual judge. The lawyers might ask the former judge

to come at the submissions as he or she might expect a specific current judge would do, based on their previous interactions together on the same court. Afterwards the lawyers might tell the former judge the specific judge or judges assigned to the motion or appeal and ask for advice about framing the submissions accordingly for best effect. The former judge is being paid by the lawyers asking these questions.

Different examples flow from the fact that a judge can become aware of evidence in a proceeding that does not form part of the public record. For example, evidence may be provided to a judge for a determination of its admissibility, relevance or protection by privilege. If the judge excludes the evidence, it does not form part of the record but the judge remains aware of it. Concern could then arise if the judge subsequently disclosed or made use of information contained in that evidence.

At present, Canadian judges do not owe an explicit duty of confidentiality with respect to private information acquired in their judicial capacity. Focusing on federally appointed judges, this article advocates that an obligation of judicial confidentiality should be included in Canada's judicial ethics framework. It evaluates Canada's existing framework with respect to confidentiality and engages in a comparative law analysis using other Western democracies and the United Nations. It concludes with a specific proposal for creating and enforcing the obligation in Canada.

I. The Current Situation in Canada

A. Ethical Principles for Judges

The conduct of federally appointed judges is regulated by the Canadian Judicial Council (CJC). The CJC was created in 1971 under the federal *Judges Act* in order to "promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts".[1] In 1998 the CJC published *Ethical Principles for Judges* to establish guidelines for the conduct of federally appointed judges.[2] *Ethical Principles* is based on previous publications about

1. RSC 1985, c J-1, ss 59(1), 60(1).

2. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) [*Ethical Principles*].

judicial ethics and input from academic and international sources,[3] and describes itself as "by far the most comprehensive treatment of the subject to date in Canada".[4]

Ethical Principles is an advisory document rather than a binding code of conduct. Its principles "shall not be used as a code or a list of prohibited behaviours" and "do not set out standards defining judicial misconduct".[5] Nevertheless, the guidelines in *Ethical Principles* can form a basis for investigations and inquiries into judicial conduct under the *Judges Act*.[6] If a judge violates an ethical principle, the CJC may initiate an inquiry or investigation. In a 2008 inquiry decision, the CJC stated in its majority reasons that:

> [T]he fact that challenged conduct is inconsistent with or in breach of the *Ethical Principles* constitutes a weighty factor in determining whether a judge has met the objective standard of impartiality and integrity required of a judge and in determining whether the challenged conduct meets the objective standard for removal from the Bench.[7]

In this article, reference is made to a judicial obligation or duty of confidentiality. But it is understood that duty or obligation is, of course, only as binding as the rest of *Ethical Principles*. Whether judges should be subject to a truly binding code of conduct is a broader issue beyond the scope of this article.

Ethical Principles sets out five broad principles that are designed 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".[8] The principles are judicial independence, judicial integrity, diligence, equality and impartiality. Of these, only three have any potential to cover the disclosure of confidential information. The first is the principle of judicial independence, which provides that judges should "uphold and exemplify judicial independence in both its individual and institutional aspects".[9] The second principle is integrity, which provides that judges "should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons".[10] Third, the principle of impartiality states

3. See e.g. *ibid* at 4–5.
4. *Ibid* at 4.
5. *Ibid* at 3.
6. See Lorne Sossin & Meredith Bacal, "Judicial Ethics in a Digital Age" (2013) 46:3 UBC L Rev 629 at 632. See also *Judges Act*, *supra* note 1, s 63(1)–(2).
7. Canadian Judicial Council, *Majority Reasons of the Canadian Judicial Council in the Matter of an Inquiry into the Conduct of The Honourable P Theodore Matlow* (Ottawa: Canadian Judicial Council, 2008) at para 99 [*Matlow Inquiry*].
8. *Supra* note 2 at 3.
9. *Ibid* at 7.
10. *Ibid* at 13.

that judges "must be and should appear to be impartial with respect to their decisions and decision making" and that their conduct in and out of court should maintain and enhance public confidence in the impartiality of the judiciary.[11]

While elements of these principles are not unrelated to maintaining confidentiality, the relationship is, at best, indirect. The principle of judicial independence is primarily concerned with the exercise of judicial functions "free of extraneous influence".[12] This is unlikely to be interpreted as restraining the conduct of judges who voluntarily divulge information acquired by virtue of their office. Similarly, the principle of impartiality would not necessarily be violated by a judge who reveals information about the deliberative process. It is possible that the disclosure could actually enhance the sense of impartiality, depending on what was disclosed. Finally, the principle of integrity is primarily aimed at protecting the public's confidence in the judiciary. While noting that "integrity" is difficult to define with precision, the commentary states that the "key issue about a judge's conduct must be how it '. . . reflects upon the central components of the judge's ability to do the job'"[13] and that "the ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office".[14] It is unclear to what extent judicial disclosure of information threatens public confidence in the judiciary or would reflect negatively on a judge's ability or fitness for judicial office. It is at least conceivable that disclosure of certain information could do none of those things—for instance, if a judge described the private, enlightening and fair deliberations of an appellate panel that led to a particular decision—yet still be undesirable.

While the focus of this article is on federally appointed judges, it can be briefly noted that each province and territory has the power to create standards of conduct to regulate the judges it appoints. Most have created judicial councils but only Ontario, Québec, British Columbia and Newfoundland and Labrador have established either a code or principles of judicial conduct.[15] None of these impose any duty of judicial confidentiality.

11. *Ibid* at 27 (specifically, "Impartiality", statement and principle 1).

12. See *ibid* at 7 (specifically, "Judicial Independence", principle 1).

13. *Ibid* at 14, citing Jeffrey M Shaman, Steven Lubet & James J Alfini, *Judicial Conduct and Ethics*, 2nd ed (Charlottesville, VA: Michie, 1995) at 335.

14. *Ibid* at 14–15, quoting Shaman, Lubet & Alfini, *supra* note 13 at 312.

15. See e.g. Ontario Judicial Council, "Principles of Judicial Office for Judges" by Judicial Conduct Subcommittee of the Chief Judge's Executive Committee (Toronto: Ontario Judicial Council, 2013), online: <www.ontariocourts.ca/ocj/ojc/principles-of-judicial-office>; Provincial Judges Association of British Columbia, *Code of Judicial Ethics*, revised 1994, online: <www.provincialcourt.bc.ca/downloads/pdf/codeofjudicialethics.pdf>.

B. Deliberative Secrecy

The principle of deliberative secrecy can protect some confidential information about the deliberative process of judges. As noted by the Nova Scotia Court of Appeal in *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*:

> The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them.[16]

However, the scope of deliberative secrecy is narrow. It operates as an evidentiary rule that prevents disclosure of evidence concerning the deliberative process of judges and tribunal members. As noted by McLachlin J in *MacKeigan v Hickman*, it is grounded in the constitutional principle of judicial independence:

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence . . . As stated by Dickson C.J. in *Beauregard v. Canada*, the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment.[17]

Deliberative secrecy is prima facie mandatory and cannot be waived by judges to voluntarily explain their deliberative reasoning when convenient,[18] though it can be lifted by the court to admit deliberative evidence in some situations.[19]

Deliberative secrecy is an ineffective and inappropriate mechanism to respond to the ethical concerns surrounding judicial confidentiality. First, deliberative secrecy only applies in the context of legal proceedings. It is an evidentiary doctrine that concerns the admissibility of evidence rather than

16. 2007 NSCA 37 at para 14, 253 NSR (2d) 144.

17. [1989] 2 SCR 796 at 830–31, 76 DLR (4th) 688.

18. See *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 64, [2016] 1 SCR 29.

19. See e.g. *ibid* at para 58, citing *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952, 90 DLR (4th) 609 ("when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice" at 966).

an ethical doctrine concerning the appropriate behaviour of judges. Deliberative secrecy does not provide a remedy or sanction in situations in which a judge voluntarily reveals information about the deliberative process in a particular case. Second, deliberative secrecy primarily exists to protect judges and judicial independence rather than to protect ethical standards of conduct for the judiciary. Addressing deliberative secrecy in *MacKeigan v Hickman*, McLachlin J described the "judge's right to refuse to answer to the executive or legislative branches of government . . . as to how and why the judge arrived at a particular decision".[20] In contrast, the underlying rationale for an obligation of confidentiality goes well beyond the need to protect judges from state coercion.

II. Judicial Confidentiality in Other Jurisdictions

A. The United States of America

(i) Codes of Judicial Conduct

The conduct of federal judges in the United States is subject to the *Code of Conduct for United States Judges*,[21] which was adopted by the Judicial Conference of the United States in 1973. The *Code of Conduct* applies to all federal judges other than the justices of the United States Supreme Court.[22] At the state level, the American Bar Association's *Model Code of Judicial Conduct*[23] has been adopted either in whole or in part by most American states.[24]

The *Code of Conduct* and ABA *Model Code* both contain similar provisions concerning judicial disclosure or use of confidential information. Canon 4 of the federal *Code of Conduct* concerns extrajudicial activities and canon 4D(5) states that: "A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties."[25] In the commentary for canon 4D(5), the *Code of Conduct* states that

20. *Supra* note 17 at 830.

21. US, "Code of Conduct for United States Judges", *Guide to Judiciary Policy*, vol 2A ch 2 (Washington: Administrative Office of the United States Courts, 2014) [*Code of Conduct*].

22. *Ibid.*

23. The American Bar Association, *Model Code of Judicial Conduct*, 2011 ed (Chicago: American Bar Association, 2010) [ABA *Model Code*].

24. For a summary of states adopting the ABA *Model Code*, see Charles Gardner Geyh et al, *Judicial Conduct and Ethics*, 5th ed (New Providence, NJ: Matthew Bender & Company, 2013) ("every state . . . now has a code based on the three ABA models" at 1–7).

25. *Supra* note 21 at 16.

the restriction on using non-public information does not apply in situations where the judge uses the information to "protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code".[26] Non-public information is not defined in the *Code of Conduct*.

Similarly, rule 3.5 of the ABA *Model Code* states that: "A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties."[27] It defines "nonpublic information" as information unavailable to the public, including (but not limited to) information under seal, information offered in grand jury cases, presentencing reports, dependency cases or psychiatric reports.[28] The comment on rule 3.5 explains that a judge must not reveal or use non-public information of "commercial or other value" acquired in the course of performing judicial activities for personal gain or any purpose unrelated to his or her judicial duties.[29]

(ii) Ethics Advisory Opinions

Most states have created ethics advisory committees empowered to issue advisory opinions to state judges concerning ethical issues. Several advisory committee opinions have discussed the scope of state provisions identical to or based on rule 3.5 of the ABA *Model Code*.

In one case, a New York judge asked the New York Courts Advisory Committee on Judicial Ethics whether the judge could participate in an anonymous interview with a graduate student related to the graduate student's dissertation research. Most notably, the student sought to ask the judge "how do courts decide . . . cases" of a particular type and "[w]hat questions or concerns weigh on the minds of judges when they decide these cases."[30] The advisory committee allowed the interview "provided the judge does not . . . disclose non-public information acquired in a judicial capacity for purposes unrelated to official judicial duties" as required by the applicable provision in the New York judicial code of ethics.[31] In another New York case, the issue was whether a judge

26. *Ibid*.

27. *Supra* note 23, r 3.5.

28. See *ibid*, "Terminology", para 19.

29. See *ibid*, r 3.5, comment 1.

30. US, *Opinion 11-138* (New York: New York Courts Advisory Committee on Judicial Ethics, 2011), online: <www.nycourts.gov/ip/judicialethics/opinions/11-138.htm>.

31. *Ibid*. See also US, *Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts*, NYCRR tit 22 Part 100, §100.3(B)(11).

could respond to a survey from a state agency concerning a controversial law.[32] The judge expressed concern that responding to the survey might violate ethical rules, including the principle regarding the use of non-public information acquired in a judicial capacity.[33] The advisory committee simply stated that if the judge concluded that answering the questions would violate the applicable provision then the judge should not respond to those questions.[34]

In Massachusetts, a judge asked the state's Committee on Judicial Ethics whether it would be appropriate to grant a journalist an interview that included questions about the judge's "impressions", "extra concerns", approach, and personal views about what "stood out" during a high-profile criminal trial conducted by the judge.[35] The advisory committee referred to what was then the Massachusetts equivalent of rule 3.5, section 3(B)(11) of the *Massachusetts Code of Judicial Conduct*,[36] and stated that it is based on the fundamental value that "we should strive to have judges resolve issues based

32. See US, *Opinion 99-44*, (New York: New York Courts Advisory Committee on Judicial Ethics, 1999), online: <www.nycourts.gov/ip/judicialethics/opinions/99-44_.htm> [*Opinion 99-44*]. For confirmation of this opinion, see New York, *Opinion 10-131* (New York: New York Courts Advisory Committee on Judicial Ethics, 2010), online: <www.nycourts.gov/ip/ judicialethics/opinions/10-131.htm>.

33. See *Opinion 99-44*, *supra* note 32.

34. See *ibid.*

35. US, *Trial Judge Being Interviewed by Author for Book about Criminal Case* (Massachusetts: Massachusetts Committee on Judicial Ethics, 2008), CJE Opinion No 2008-1, online: <www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-opin-2008-1.html> [*Massachusetts Committee on Judicial Ethics*].

36. *Ibid.* At that time the relevant provision, quoted in the advisory opinion, stated:

> A judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the public. When a judge, in a judicial capacity, acquires information, including material contained in the public record that is not yet generally known, the judge must not use the information in financial dealings for private gain. Notwithstanding the provisions of Section 3 B (9), a judge shall not disclose or use, for any purpose unrelated to judicial duties, information that, although part of the public record, is not yet generally known, if such information would be expected unnecessarily to embarrass or otherwise harm any person participating or mentioned in court proceedings.

Ibid. This provision was worded somewhat differently from the ABA *Model Code*'s rule 3.5. The current provision is closer to that rule. See US, Massachusetts Supreme Judicial Court, *Massachusetts Rules and Orders of the Supreme Judicial Court* (Massachusetts: Massachusetts Trial Court Law Libraries, 2016), s 3.09, online: <www.mass.gov/courts/docs/lawlib/docs/sjc-rules.pdf>. Section 3.09 of the *Massachusetts Rules and Orders of the Supreme Judicial Court* enacts the state's *Code of Judicial Conduct*, rule 3.5 of which addresses the use of "non-public information".

on the public record and not a 'real story' hidden from public view".[37] The committee noted that public comments from judges regarding the adjudicative process in cases over which they presided are especially of concern in criminal cases, when such comments run the risk of "instigating or prejudicing" a subsequent proceeding based on judicial prejudice or impropriety.[38] The committee concluded that the applicable provision "prohibits . . . discussion of the adjudicative process on matters not contained in the public record", though the judge would be free to discuss administrative matters unrelated to the substantive adjudicative process, general legal principles, court procedures or information contained in the public record.[39]

Some advisory decisions have also considered contemporary concerns about judicial confidentiality and the rise of social media. An Arizona Judicial Ethics Advisory Committee opinion in 2014 stressed that judges should consider Arizona's equivalent of rule 3.5 when engaging in social networking and participating in social media.[40]

(iii) Disclosure of the Private Papers of United States Supreme Court Justices

The increasingly common practice of retired United States Supreme Court judges or their heirs disclosing or releasing the judge's private papers engages several issues relating to judicial confidentiality. These private papers typically include "draft opinions, exchanges of memos among the Justices approving of or requesting changes in opinions, memos from law clerks, handwritten notes, and notes taken of the discussions at the Court's closed door conferences where cases are discussed and decided".[41] Until recently, the internal deliberations and private papers of United States Supreme Court judges were considered strictly confidential: it was thought that "the caliber of deliberations, and ultimately of decision-making, would be diminished" without strong protection of the internal deliberative process of the Court.[42]

37. *Massachusetts Committee on Judicial Ethics*, *supra* note 35.

38. *Ibid.*

39. *Ibid.*

40. US, *Use of Social and Electronic Media by Judges and Judicial Employees* (Arizona: Arizona Supreme Court Judicial Ethics Advisory Committee, 2015), Advisory Opinion 14-01, online: <www.azcourts.gov/LinkClick.aspx?fileticket=zNRP1_l8sck%3D&portalid=137>.

41. Stephen Wermiel, "Using the Papers of U.S. Supreme Court Justices: A Reflection" (2012) 57:3 NYL Sch L Rev 499 at 500, n 1.

42. *Ibid* at 500.

However, the disclosure or release of these private papers has become common in the past fifty years. In several cases, former justices have voluntarily released their private papers to the public or have given journalists or biographical authors access to them.[43] Because United States Supreme Court justices are not bound by the *Code of Conduct* or the ABA *Model Code*, the confidentiality provisions do not apply.

In one striking case, Brennan J voluntarily provided access to his private files from the Warren Court era to an author, Bernard Schwartz.[44] Schwartz used these files in his publication *Super Chief*, which aimed to provide detailed accounts of major cases from the Warren Court era. The book described the conversations of judges during private judicial conferences and the drafting processes of the justices based on the notes and papers that Schwartz accessed.

In another case, Powell J granted his biographer, John Jeffries, access to his private files and working papers one year after he retired from the bench.[45] The biography revealed previously confidential information pertaining to several high-profile cases. For instance, it revealed that Powell J was the swing vote in several decisions, including the United States Supreme Court's decision to engage in an expedited review of President Nixon's Oval Office tapes.[46]

The voluntary disclosure of private papers by former United States Supreme Court judges has been subjected to criticism from a judicial ethics standpoint. It has been suggested that the private papers are unreliable as evidence due to a lack of appropriate context,[47] that their release may tarnish the judiciary's reputation,[48] and that the deliberative process should remain confidential.[49] However, the private papers tend to be treated as the private property of the judges.[50] Whether or not the former justices would be in violation of an ethical principle of confidentiality, were they subject to one, by disclosing their private papers does not appear to be the subject of substantial discussion.

43. *Ibid* at 501.

44. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court: A Judicial Biography* (New York: New York University Press, 1983).

45. See Timothy S Huebner, Book Review of *Justice Lewis F. Powell, Jr.* by John C Jeffries (1995) 39:3 Am J Leg Hist 391.

46. John C Jeffries, Jr, *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994) ("[a]s so often happened, his was the crucial vote" at 374).

47. See Wermiel, *supra* note 41 at 513.

48. See Kathryn A Watts, "Judges and Their Papers" (2013) 88:5 NYUL Rev 1665 at 1706.

49. See *ibid.*

50. See *ibid* at 1675.

B. The United Nations and the Bangalore Principles

In 2000 the United Nations Judicial Group on Strengthening Judicial Integrity (Judicial Integrity Group) was created. It was committed to "[e]nsuring the integrity of the global judiciary" through the creation of an international model code of judicial conduct.[51] It was composed of chief justices and judges from around the world. In 2002 the Judicial Integrity Group adopted the *Bangalore Principles of Judicial Conduct* as a model code of judicial ethics.[52] These principles are intended in part to "establish standards for ethical conduct of judges . . . to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct".[53] Several nations have adopted the *Bangalore Principles* in their entirety and others have used the *Bangalore Principles* as a model for their own codes of judicial conduct.[54]

Value 4 of the *Bangalore Principles* is judicial propriety. It states that: "Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge."[55] Value 4.10 establishes a discrete principle of judicial confidentiality as a subprinciple of propriety, providing that: "Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties."[56]

An earlier draft of value 4.10 was framed as a provision primarily precluding judges from financially profiting from confidential information. It stated that confidential information acquired by a judge in his or her judicial capacity shall not be used or disclosed by the judge "in financial dealings or for any other purpose not related to the judge's judicial duties".[57] The change arguably had little substantive effect on the meaning of the provision, since the early draft precluded

51. Judicial Group on Strengthening Judicial Integrity, *Commentary on the Bangalore Principles of Judicial Conduct*, UNODC (The Hague: United Nations Office on Drugs and Crime, 2007) at 5, online: <www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf> [*Bangalore Commentary*].

52. Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct*, ECOSOC, UN Doc E/CN.4/2003/65 (2002) [*Bangalore Principles*].

53. *Ibid*, Preamble.

54. *Bangalore Commentary*, *supra* note 51 at 5.

55. *Bangalore Principles*, *supra* note 52, Value 4.

56. *Ibid*, Value 4.10.

57. Judicial Group on Strengthening Judicial Integrity, *The Summary Record of the Round-Table Meeting of Chief Justices to Review the Bangalore Draft Code of Judicial Conduct* (The Hague: United Nations Office on Drugs and Crime, 2002) at 9, n 27, online: <www.unodc.org/pdf/corruption/hague_meeting_02.pdf>.

the use or disclosure of confidential information for any other purpose in addition to financial dealings. The primary effect of the change was contextual; by removing the reference to financial dealings, the final provision stresses its breadth and more general application.

That breadth is made clear in the official *Commentary* to the *Bangalore Principles*.[58] It explains that judges may, in the course of performing judicial duties, acquire information of commercial or other value that is unavailable to the public. The *Commentary* states that the judge "must not reveal or use such information for personal gain or for any purpose unrelated to judicial duties".[59] It is also noted that value 4.10 is "principally concerned with the improper use of undisclosed evidence such as, for example, evidence subject to a confidentiality order in a large-scale commercial litigation".[60]

C. The United Kingdom

All full-time and part-time judges in the United Kingdom are subject to the *Guide to Judicial Conduct*.[61] The *Guide to Judicial Conduct* is intended "to offer assistance to judges on issues rather than to prescribe a detailed code and to set up principles from which judges can make their own decisions and so maintain their judicial independence".[62] It is heavily influenced by the *Bangalore Principles*.[63] Chapter 5 of the UK's *Guide to Judicial Conduct* adopts the *Bangalore Principles*' provision on judicial propriety: "As a general statement of the conduct to be expected of a judge, the section (Section 4) of the Bangalore principles under this heading is admirable and appropriate to be adopted as guidance It is set out in full and without comment."[64] As a result, principle 5.1(10) of the *Guide to Judicial Conduct* is an exact mirror of the *Bangalore Principles*' value 4.10 and states that: "Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties."[65]

58. *Supra* note 51.

59. *Ibid* at 104.

60. *Ibid.*

61. UK, Courts and Tribunals Judiciary, *Guide to Judicial Conduct*, revised 2016, by Judges' Council (London: Judges' Council, 2016) at 10, online: <www.judiciary.gov.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf>.

62. *Ibid* at 3.

63. See e.g. *ibid* at 15.

64. *Ibid.*

65. *Ibid* at 16.

III. Analysis

A. Reasons for a Duty of Judicial Confidentiality

(i) The Duty Parallels Similar Obligations on Others in the Legal System

Other professionals in the legal system are already under a duty to maintain confidences. It is well established that a lawyer "at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship".[66] Similarly, a lawyer "must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client".[67] The prohibition on disclosure overlaps with the provision above, while the prohibition on use is consistent with the fiduciary nature of the relationship.[68] These obligations are not temporally limited—they bind the lawyer indefinitely.[69]

While perhaps a smaller analogy, it is also worth noting that the judicial clerks employed by judges for assistance in researching and preparing memoranda of law are, under their contract of employment, subject to express obligations of confidentiality.[70] Adam Dodek has pointed out the inconsistency of having the law clerks so bound but not the judges they serve.[71]

It would be consistent with these obligations on other legal professionals for judges to also owe a duty of confidentiality. Moreover, the underlying reasons that other legal professionals owe such a duty apply equally to judges. For example, the central reason for the lawyer's obligation is that unreserved

66. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 2016, r 3.3-1 [FLSC *Model Code*]. See generally Adam M Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014) (on the importance of confidentiality).

67. FLSC *Model Code*, *supra* note 66, r 3.3-2.

68. For an important recent analysis of lawyers as fiduciaries, see Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:4 UTLJ 285.

69. See FLSC *Model Code*, *supra* note 66 ("[t]he duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client", r 3.3-1, commentary).

70. The Supreme Court of Canada, for example, states that its law clerks must sign and abide by a confidentiality declaration. See Supreme Court of Canada, "Law Clerk Program" (11 October 2017), online: <www.scc-csc.ca/empl/lc-aj-eng.aspx>. See also Kirk Makin, "Top court orders clerks to keep quiet", *The Globe and Mail* (18 June 2009), online: <www.theglobeandmail.com/news/national/top-court-orders-clerks-to-keep-quiet/article1188221/>.

71. Adam Dodek, "Judicial Confidentiality" (13 June 2016), *Slaw* (blog), online <www.slaw.ca/2016/06/13/judicial-confidentiality/>.

communication between the lawyer and the client is essential. Without the expectation of confidentiality, clients will withhold information. This has parallels to judicial deliberations, as is discussed below. And while judges are not anyone's fiduciaries, it would not be consistent with reasonable expectations in Canada for judges to be allowed to make use of information, obtained solely through holding judicial office, outside the scope of that office.

It should be noted that a duty of judicial confidentiality differs in some key ways from the confidentiality obligations of lawyers and law clerks. Those latter obligations are, for the most part, owed to specific people: lawyers to their clients; law clerks to their employers. The duty is mirrored by a right, held by the client or the employer, to the confidentiality. In contrast, the obligation on judges is not generally mirrored by a right held by a specific person. Instead it is based on a systemic interest in preserving the confidentiality. One consequence of this is that unlike a lawyer or law clerk's confidentiality obligations, which can be waived by a client or employer, no specific person can waive the duty of judicial confidentiality.

(ii) The Duty Promotes Public Confidence in Decisions

A central function of the Canadian judicial ethics framework is to promote public confidence in the judiciary. *Ethical Principles* states that:

> The rule of law and the independence of the judiciary depend primarily upon public confidence . . .. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.[72]

Similarly, the primary purpose of the principle of judicial integrity is to "sustain and enhance public confidence in the judiciary".[73] *Ethical Principles* states that "public confidence in . . . the judiciary [is] essential to an effective judicial system and, ultimately, to democracy founded on the rule of law".[74] Public confidence in judicial decisions is dependent in part on a belief that the official record and written judgment of a case is a complete explanation of the decision. If judges divulge private information about the deliberative process, this could harm the public's confidence in the official judgment.

72. *Supra* note 2 at 10.
73. *Ibid* at 13.
74. *Ibid* at 14.

(iii) The Duty Protects the Deliberative Process

A duty of judicial confidentiality promotes candid and rigorous judicial deliberations by protecting the deliberative process from public scrutiny. Allowing judges to reveal information pertaining to deliberations may lead to a "chilling effect" whereby judges focus on public opinion or external pressures to conform to popular norms.[75] On this point, Powell J, a former justice of the United States Supreme Court, stated that:

> The integrity of judicial decision making would be impaired seriously if we had to reach our judgments in the atmosphere of an ongoing town meeting. There must be candid discussion, a willingness to consider arguments advanced by other Justices, and a continuing examination and re-examination of one's own views. The confidentiality of this process assures that we will review carefully the soundness of our judgments. It also improves the quality of our written opinions.[76]

Similarly, Oakes J of the Second Circuit argued that: "Public access to judicial materials would serve, on an appellate level, to inhibit free discussion among the participating judges, chill exploration of unconventional or uncharted areas of law, and generally delay the operations of a system already strained by a number of extraneous factors."[77]

There are several reasons why a chilling effect could result from widespread public access to information concerning judicial deliberations. Most importantly, judges might be concerned that their early draft judgments, correspondence or conversations might someday become the subject of public analysis and media attention. This may have the effect of stifling deliberations that a judge perceives to be unpopular or politically incorrect, though legally or logically sound. Recognizing a duty of judicial confidentiality would guard against such a chilling effect, thereby protecting the integrity of the deliberative process of judges.

B. Reasons Against a Duty of Judicial Confidentiality

One potential argument against a duty of judicial confidentiality is that it might negatively impact public transparency and judicial accountability. Preclu-

75. See e.g. Watts, *supra* note 48 at 1706.

76. Lewis F Powell Jr, "What Really Goes On at the Supreme Court" in Mark W Cannon and David M O'Brien, eds, *Views From the Bench: The Judiciary and Constitutional Politics* (Chatham, NJ: Chatham House, 1985) 71 at 72.

77. "Testimony Received in Public Hearings" in Anna Kasten Nelson, ed, *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials* (New York: Garland, 1978) at 266 (statement of Oakes J, United States Court of Appeals for the Second Circuit).

ding judges from divulging private information, such as information concerning the deliberative process in a particular case, may result in a less transparent and accountable legal system by insulating potentially flawed or inappropriate deliberative methods from external review.

This argument has been primarily raised by commentators in the United States to rationalize the practice, discussed above, of former United States Supreme Court justices making their private papers available to the public or journalists.[78] Kathryn Watts has suggested that "the public's interest in governmental transparency, accountability, and disclosure . . . supports public access to federal judges' [private] papers"[79] and that "the fact that judges are relatively unaccountable while in office might suggest that it is even more imperative that judges be made accountable to history, at least eventually. Without an opportunity for public scrutiny, the fear is that 'anonymous hands may become irresponsible hands.'"[80]

This argument turns the concern about a potential chilling effect on the deliberative candour of judges on its head. It postulates that without judicial confidentiality, judges might be particularly careful to ensure that their deliberative process accords with the expected standards of judicial conduct:

> [I]f judges know that their records will be subject to eventual public scrutiny, they might well be even more careful to avoid making improper comments, such as discriminatory statements . . . They also would likely be even more mindful to adhere carefully to the rule of law when deciding cases since their actions would ultimately be judged by history, and they might take greater care to communicate with their colleagues with civility if they knew that others outside the Court ultimately would be able to read the communications.[81]

For these reasons, several American commentators have suggested that the release of the private papers of United States Supreme Court justices has been a "success story—for researchers, for students of the Court, and for the credibility of the Justices".[82]

There is some force in this position, but it is insufficient to carry the argument. Accountability and transparency are crucial aspects of a liberal democratic legal system, but our mechanism for ensuring accountability and transparency is not, and cannot be, the unpredictable and *ad hoc* divulgations of judges and former judges to the public or journalists. The lack of a duty of ju-

78. See Part II. A (iii), *above*, for more information on this subject.

79. *Supra* note 48 at 1703.

80. *Ibid* at 1703–04, citing Edmond Cahn, "Eavesdropping on Justice", *The Nation* 184:1 (5 January 1957) 14 at 15.

81. *Ibid* at 1705.

82. See e.g. Wermiel, *supra* note 41 at 515.

dicial confidentiality governing United States Supreme Court justices has produced a market for sensationalistic judicial biographies and stylized retellings of former cases based on potentially unreliable or incomplete private papers. The phenomenon of "accountability by bestseller" is not the appropriate mechanism for ensuring or safeguarding the integrity of the deliberative process of judges in Canada.

In addition, this argument against a duty of judicial confidentiality only addresses the issue of disclosing information about deliberations. It does not address concerns about judges making some use, without any disclosure, of private information obtained while holding judicial office and it does not address judges disclosing private information in situations in which the disclosure does not foster greater transparency about deliberations.

IV. Remedial Challenges

A. Available Sanctions

A possible challenge to the explicit recognition of a duty of judicial confidentiality is rooted in the issue of enforceability. The *Judges Act* provides for only one sanction against a judge found to have committed misconduct: a CJC recommendation to the Minister of Justice that the judge be removed from office.[83]

While there might be some extreme instances where removal from office is an appropriate sanction for a breach of judicial confidentiality,[84] it is much more likely that removal from office would be an inappropriately excessive response. So even on the understanding that the provisions of *Ethical Principles* can serve as the basis for investigations and inquiries conducted under the *Judges Act*, there is no meaningful or appropriate sanction for a violation of this proposed duty in most cases.

One response to this challenge is simply to sidestep it. The duties contained in *Ethical Principles* are not primarily based on an effective enforcement mechanism. They are normative and aspirational. The expectation is that most judges will strive to comply with them regardless of questions about possible sanctions. To take one example, one specific obligation in *Ethical Principles* is

83. *Supra* note 1, ss 63(1), 65(2).

84. An example of such a situation might be one in which a judge makes investment decisions based on private information and thereby makes a significant profit.

that: "Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations."[85] It is highly unlikely that a violation of this obligation would warrant dismissal from office, but that is in itself not a sufficient reason either to delete the obligation from *Ethical Principles* or to have not included it in the first place.[86] The same can be said of a duty of judicial confidentiality.

There is another response, which is to amend the *Judges Act* to provide for the possibility of intermediate sanctions for judges who commit misconduct. This is not a speculative suggestion. In June 2016 the Department of Justice issued a discussion paper seeking input on the process by which judges are disciplined.[87] One of the specific questions asked in the paper is whether the range of sanctions for misconduct should be expanded and, if so, what the sanctions should be (such as a formal expression of concern, required courses of continuing education or counselling, or suspension without pay) and whether the range of sanctions should be set out in the *Judges Act* or specified more informally by the CJC.[88] In response the CJC published a policy paper calling for the *Judges Act* to be amended to expand the range of remedial options available.[89] It recommended that the *Judges Act* should allow the creation of review panels or judicial discipline committees that are empowered to impose sanctions or remedial measures, including the authority to express concern to the judge about his or her conduct, issue a private or public reprimand, give a warning (including a warning about the consequences of any future misconduct), order the judge to apologize to the complainant or to any other person, and order that the judge take specified measures, including counselling, coaching, treatment or training.[90] The CJC further recommended that "a Judicial Discipline Committee have the further authority to suspend a judge – without pay but with benefits – for a period of up to 30 days".[91]

85. *Supra* note 2 at 28 (specifically, "Impartiality", principle C1(b)).

86. For a detailed analysis of this obligation, see Stephen GA Pitel & Michal Malecki, "Judicial Fundraising in Canada'' (2015) 52:3 Alta L Rev 519.

87. Department of Justice Canada, *Possibilities for Further Reform of the Federal Judicial Discipline Process* (Ottawa: Department of Justice, 2016), online: <www.justice.gc.ca/eng/cons/fjdp-pdmf/fjdp-pdmf.pdf>.

88. *Ibid* at 35–36.

89. Canadian Judicial Council, *Proposals for Reform to the Judicial Discipline Process for Federally-appointed Judges* (Ottawa: Canadian Judicial Council, 2016), online: <www.cjc-ccm.gc.ca/cmslib/general/CJC%20Position%20Paper%20on%20Discipline%20Process%202016-10.pdf>.

90. *Ibid* at paras 3.8–3.8.5.

91. *Ibid* at para 3.9.

It is beyond the scope of this article to engage fully with the debate as to whether intermediate sanctions should be available for judicial misconduct. Two points can be briefly made. First, intermediate sanctions, if available, would refute the above concern based on removal from office being the only sanction. Second, judicial confidentiality, like the restriction on fundraising, and like many other aspects of *Ethical Principles*, each point out the limitations of the current approach to discipline. To the extent that there is a misalignment between the obligations and the possible sanctions, the response should not be to draw back from the commitment to well-established obligations but rather to bring the possible sanctions into better alignment.

B. Former Judges

An additional remedial challenge to the recognition of a duty of judicial confidentiality is the lack of a framework for regulating the conduct of former judges. The existing judicial ethics regime applies only to current judges. There is no provision in the *Judges Act* allowing for sanctions of any kind against former judges, and there is no suggestion in *Ethical Principles* that former judges remain subject to any of its guidelines. The CJC has no authority over former judges.[92]

This poses a practical challenge for two reasons. First, the revelation of confidential information acquired in a judicial capacity by former judges engages the same concerns as the equivalent conduct by a current judge. As with lawyers, the reasons requiring confidentiality in the first place of necessity mean that the duty must survive the holding of the office.[93] While a judge's personal integrity, diligence or impartiality might become irrelevant in retirement, his or her commitment to refrain from using or revealing confidential information acquired in his or her judicial capacity remains as relevant as ever. Second, as suggested by the American experience, it is former

92. See e.g. Canadian Judicial Council, *Report of the Inquiry Committee to the Canadian Judicial Council Concerning the Hon FJC Newbould* (Ottawa: Canadian Judicial Council, 2017) at paras 6–9, online: <www.cjc-ccm.gc.ca/ cmslib/ general/ Newbould_Docs/ 2017-06-01%20Newbould% 20Inquiry%20Concludes%20in%20light%20of%20Judge%E2%80%99s%20Retirement.pdf>.

93. As noted earlier, a lawyer's obligation of confidentiality is ongoing. See FLSC *Model Code*, *supra* note 66 ("[t]he duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client", r 3.3-1, commentary 3). It is fair to point out that former lawyers are no longer subject to sanction by their professional regulatory bodies. However, a lawyer's obligation of confidentiality is owed to a particular person and this relationship means that other mechanisms including the law of contract, tort and fiduciary duty can operate to at least partially sanction breaches of the obligation by a former lawyer. It is beyond the scope of this article to consider whether former lawyers should in some respects remain subject to the regulation of law societies.

judges who may be more likely to reveal the kind of information the duty protects.

One response to this challenge is to formulate the duty as applying to both current and former judges and then accept the lack of authority over the latter as a relatively minor limitation on the effectiveness of the duty. The aspiration would be that former judges would choose to comply with the duty even after their term of office.

A second response is suggested by the increasing frequency with which former judges are resuming the private practice of law.[94] The conduct of these former judges could be regulated not by the CJC but rather by the relevant law society of which he or she becomes a member. Recently the Federation of Law Societies of Canada (FLSC) circulated for comment a discussion paper about specific issues raised by the return of former judges to practice.[95] The central focus of possible regulation relates to the propriety of appearances in courts or tribunals, especially those in which the former judge presided or over which he or she exercised appellate control. But if law societies are prepared to regulate former judges in respect of these issues, it is not a large step from there to reinforcing a duty of judicial confidentiality by imposing restrictions about disclosure or use of private information on former judges. One of the questions that the discussion paper asked related to "the propriety of a former judge providing legal advice about a case in which he or she participated".[96] This question is at minimum a starting point for broader considerations about confidentiality, because it focuses at least in part on the former judge's use of information obtained in the course of judicial office. Even more recently, the FLSC released a consultation report seeking feedback on proposed changes to the FLSC's *Model Code of Professional Conduct*.[97] One of the changes is a new provision stating: "A former judge who returns to practice must respect the confidentiality of the judicial process and must not disclose judicial confidences or any information that gives the appearance of relying on confidential judicial information, discussions or deliberations."[98] This is an important development and would be a welcome

94. See Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483.

95. Federation of Law Societies of Canada, *Post-Judicial Return to Practice* (Ottawa: Federation of Law Societies of Canada, 2016), online: <flsc.ca/wp-content/uploads/2014/10/Discussion-Paper-Post-judicial-Return-to-Practice.pdf>.

96. *Ibid* at 12, Appendix A (a letter from several law professors to the FLSC (21 March 2011)).

97. Federation of Law Societies of Canada, *Model Code of Professional Conduct Consultation Report* (Ottawa: Federation of Law Societies, 2017), online: <flsc.ca/ wp-content/ uploads/ 2014/ 10/Consultation-Report-Draft-Model-Code-Amendments-for-web-Jan2017-FINAL.pdf>.

98. *Ibid*, Appendix A, r 7.7-2.

step forward, but it must be acknowledged that this particular response—law society regulation—is limited, because it would only catch those former judges who do return to the practice of law. Others would be beyond the reach of law societies.

A third response would be to amend the *Judges Act* to grant the CJC authority over former judges in limited circumstances. While broad and general remedial powers over former judges are unnecessary and undesirable, a provision targeted specifically at certain post-judicial conduct may be an idea whose time has come. It might be perceived as the only means to properly implement and enforce a duty of judicial confidentiality. The exercise of this authority would be a restriction on post-judicial conduct to which judges would agree by virtue of accepting the initial appointment. Of course, this response depends on the *Judges Act* being amended, as discussed above, to allow for intermediate sanctions. Granting the CJC authority to regulate former judges would be futile if the only sanction available was removal from judicial office. Former judges who violate the ongoing duty of confidentiality could be made subject to an expression of concern or a reprimand or perhaps even some suspension of post-judicial benefits.

V. Recommendations

There are different ways in which a duty of judicial confidentiality could be implemented. One is simply to accept, as a matter of interpretation, that it is a part of the existing broader principle of integrity. But it would be preferable to make the duty explicit. One of the primary purposes of *Ethical Principles* is to "assist judges with the difficult ethical and professional issues which confront them".[99] Broadly constructed principles of integrity are not sufficient to assist a judge in making an ethical decision concerning potential disclosure of private information. An explicit obligation of confidentiality promotes clarity.

A similar concern arises with respect to the handling of any complaint about disclosure by a judge. While *Ethical Principles* is not a binding code of conduct giving rise to penalties for misconduct, it can form the basis for an investigation or inquiry under the *Judges Act* by the CJC.[100] If a judge were to reveal or use private information acquired in the judge's official capacity, it would be better to decide the outcomes of judicial inquiries or investigations

99. *Supra* note 2 at 3.

100. See Sossin & Bacal, *supra* note 6 at 631–32; *Matlow Inquiry*, *supra* note 7 at paras 99–100.

using a clear statement about confidentiality rather than relying on interpretations of the broad principle of integrity.

In the judicial ethics regimes of the United States and the United Kingdom, and under the *Bangalore Principles*, confidentiality is not a stand-alone principle of judicial ethics. In the American *Code of Conduct* and ABA *Model Code*, judicial confidentiality is a subprinciple within the category of extrajudicial activities. In the *Bangalore Principles* and the UK's *Guide to Judicial Conduct*, judicial confidentiality is a subprinciple of judicial propriety. There is no duty of judicial propriety in *Ethical Principles*, nor is there a section devoted to extrajudicial activities. Accordingly, a practical implementation question is where the duty of judicial confidentiality should be housed in the *Ethical Principles* framework.

Confidentiality likely does not warrant its own chapter in *Ethical Principles*. While judicial confidentiality is important, it is a specific principle relating to a narrow range of conduct. The five principles currently outlined in *Ethical Principles* set out the foundational values of judicial ethics in Canada. A duty of confidentiality is not rooted in a new foundational value. Its purpose is to promote the foundational values of judicial ethics already recognized in *Ethical Principles* by identifying conduct that might threaten them.

Accordingly, confidentiality most appropriately fits into the *Ethical Principles* framework as a subprinciple of the principle of judicial integrity. The principle of integrity is framed very broadly in *Ethical Principles*, and deliberately so: "While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific. There can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place and time."[101] The flexibility of the integrity principle is likely why a separate principle of judicial propriety, as contained in the *Bangalore Principles*, is unnecessary. Judicial conduct which might engage the principle of judicial propriety under the *Bangalore Principles* or UK's *Guide to Judicial Conduct* would engage the principle of integrity under *Ethical Principles*.

The principle of integrity should be revised to read as follows, with proposed revisions in italics:

Statement: Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

Principles:

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

101. *Supra* note 2 at 14 (specifically, "Integrity", commentary 2).

2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.
3. *Information that is not public and that is acquired by a judge in his or her judicial capacity or office shall be confidential and shall not be used or disclosed by the judge, during or subsequent to his or her term of judicial office, for any purpose that is not related to the performance of his or her judicial duties.*

As explained above, this change would implement a duty of judicial confidentiality that applies to current and former judges. Without more, it would be unenforceable with respect to former judges and would not be enforced with respect to current judges unless the judge's misconduct justified removal from office. This means that the impact of this change would primarily be declaratory. It would recognize the importance of judicial confidentiality and would provide guidance for the conduct of current and former judges.

Beyond the language proposed, the challenges in formulating precise definitions for terms such as confidential or nonpublic information outweigh the benefits of additional specificity. Similarly, there could be ambiguity as to what constitutes the performance of a judge's judicial duties. For example, this very likely includes current judges providing training or education to new judges, but this might be less clear for a former judge. While this article advocates that a specific duty of judicial confidentiality is of more assistance than leaving the issue to general concepts such as integrity, *Ethical Principles* is not a taxation statute and should not be drafted as such. For additional guidance, analysis could be added to the commentary, in particular addressing some of the hypothetical situations raised at the beginning of this article. Judges are also able to contact the CJC, in advance of a proposed course of conduct, for guidance and recommendations about complying with *Ethical Principles*.

In order to make the proposed change to *Ethical Principles* enforceable, an amendment to the *Judges Act* is required. That amendment should both provide for intermediate sanctions for judicial misconduct and should extend the CJC's disciplinary jurisdiction to include, in limited circumstances, former judges. The latter step, while controversial, is vital if a duty of judicial confidentiality is to have its intended effect.

While the focus of this article has been on federally appointed judges, the analysis applies with equal force to provincially appointed judges. Language identical or similar to that proposed above could be added to current or future provincial or territorial statements of judicial ethics. Indeed, one of the ancillary issues for the CJC, namely intermediate sanctions, does not arise in the provincial or territorial context since such sanctions are, in general, already available there.

In summary, a duty of judicial confidentiality should be added to *Ethical Principles* in order to protect and promote public confidence in the judiciary, safeguard deliberative integrity and candor, and bring Canada's judicial ethics

framework in line with judicial codes from other similar jurisdictions. The duty should apply to both current and former judges. To ensure that the duty is enforceable, the *Judges Act* could be amended accordingly.