Justice(s) Out of Office: Principles for Former Judges

***Mark Mancini**[*] **and Geoffrey Sigalet**[**]*

In the wake of the SNC-Lavalin scandal, a debate has broken out about how to regulate the professional legal conduct of Canadian judges once they retire from office. The entanglement of four former Supreme Court of Canada justices in the violation of the Conflict of Interest Act *and the attempted circumvention of prosecutorial independence by Justin Trudeau's Prime Minister's Office has led some to argue in favour of a complete prohibition on all professional legal activities by former judges. Others have defended the lack of such restrictions, citing the contribution former judges make to the public interest by practicing law. In this article the authors argue that these arguments have so far failed to address how the deeper principles of Canadian constitutionalism relate to the question of allowing former judges to practice law. They think the fundamental principles engaged by this question are democracy and the rule of law. They argue that together these principles require that former judges be prohibited from practicing in matters of constitutional and administrative law, but allowed to work in all other areas of law not directly implicating decisions they made on the bench. The authors' policy recommendations are for the provincial and territorial law societies to enact prohibitions on former judges practicing constitutional and administrative law, and for the law societies to establish broad exemptions for former judges to practice other types of law in cases not directly related to cases they adjudicated on the bench.*

* National Director, Runnymede Society.

** Postdoctoral Fellow, Research Group for Constitutional Studies, McGill University.

Thanks to Gerard Kennedy, Ian Brodie, and the two anonymous reviewers for helpful comments. We are also grateful to Grégoire Webber, Dwight Newman, Brian Bird, Asher Honickman, Michael Da Silva, Michael McConnell, and Jacob Levy for scholarly conversations and encouragement. We would also like to thank the editors at the *Queen's Law Journal* for their hard work and help. We can be reached at mark.p.mancini@gmail.com and geoffrey.sigalet@mail.mcgill.ca.

Introduction
I. Seeing the Forest for the Trees
II. Principles for Post-Judicial Office
A. Democracy and the Separation of Powers
(i) Basic Principles
(ii) Application
B. The Rule of Law and Judicial Independence
(i) Basic Principles
(ii) Application
III. Policy Recommendations
A. Policy Distinctions
(i) Legal Practice and Advice
(ii) Prohibiting Constitutional and Administrative Law
B. Recommendations
(i) Models in Canada
(ii) Constitutional/Administrative Law: Punitive Model
(iii) Other Areas of Law: Partial Restrictions
Conclusion
Appendix

"[J]udges are, or ought to be, of a *reserved* and retired character, and wholly unconnected with the political world".[1]
Edmund Burke

Introduction

Constitutional and political debates about judicial retirement typically focus on questions of whether judges should be limited to specific terms or ages in office, or granted life tenure.[2] However, an interesting and distinct question arises within each of these models of judicial tenure: how should the professional activities of judges be regulated once they retire from office?

While this question is relevant to jurisdictions featuring different models of judicial tenure, in Canada it has recently become a more pressing constitutional and political issue. The question of regulating the activities of former judges is the subject of debate in the Canadian legal community in the wake of a constitutional scandal involving not only the Prime Minister and the Attorney General, but also four former Supreme Court of Canada justices. In August

1. Edmund Burke, *On Presenting to the House of Commons: A Plan for the Better Security of the Independence of Parliament, and the Economical Reformation of the Civil and Other Establishments* (London, UK: J Dodsley, 1780) at 83.

2. See e.g. Brian Opeskin, "Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Terms Limit for Judges" (2015) 35:4 Oxford J Leg Stud 627.

2019, the Canadian Conflict of Interest and Ethics Commissioner, Mario Dion, released a report finding that Prime Minister Justin Trudeau violated section 9 of the *Conflict of Interest Act* by inappropriately seeking to influence his Minister of Justice and the Attorney General, Jody Wilson-Raybould, to use her role as Attorney General to overrule a decision of the Director of Public Prosecutions.[3] The Ethics Commissioner found that the Prime Minister inappropriately pressured the Attorney General to overturn the decision of the Director of Public Prosecutions, who decided not to offer SNC-Lavalin a remediation agreement that would have deferred or suspended prosecution for criminal charges.[4] This is because section 9 of the *Conflict of Interest Act* prohibits public officials from using their offices to "improperly further another person's private interests".[5] The Ethics Commissioner found that part of the Prime Minister's Office's (PMO) improper influence involved asking the Minster of Justice/Attorney General to "re-examine" her views by seeking the legal advice of "someone like" former Chief Justice Beverley McLachlin of the Supreme Court of Canada.[6] Unbeknownst to Wilson-Raybould, SNC-Lavalin's legal counsel and a senior advisor at the PMO had already reached out to McLachlin CJ about advising the Attorney General concerning her role in the matter and mediating the prospective deferred prosecution agreement.[7] Former Supreme Court of Canada justice Frank Iacobucci J provided a legal opinion advocating the "legitimacy" of the Attorney General's "intervention in criminal matters seized by the Prosecution Service" and as co-counsel for SNC-Lavalin, solicited a legal opinion from former Supreme Court of Canada justice John Major J.[8] He also reached out to McLachlin CJ.[9] Once Wilson-Raybould quit Cabinet, she secured the counsel of former Supreme Court of Canada justice Thomas Cromwell J on how her obligations of cabinet confidentiality related to her subsequent testimony about the PMO's attempts to improperly influence her.[10]

While the judges mentioned above have not acted unlawfully, the SNC-Lavalin scandal raises important questions about the constitutional convention protecting prosecutorial independence from the Attorney General's intervention in prosecutions on behalf of partisan interests. But it has also

3. See Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, by Mario Dion (Ottawa: OCEIC, August 2019) [OCIEC].

4. See *ibid* at 1–2.

5. RSC 2006, c 9, s 2, s 9.

6. OCIEC, *supra* note 3 at para 201.

7. See *ibid* at para 273.

8. *Ibid* at paras 165, 167.

9. See *ibid* at para 193.

10. See The Canadian Press, "Jody Wilson-Raybould Resigns from Cabinet", *MacLean's* (12 February 2019), online: <www.macleans.ca/news/canada/jody-wilson-raybould-resigns-from-cabinet>.

raised the question of whether the role of the former Supreme Court of Canada justices in the scandal was improper, and this in turn has sparked a wider debate about how we should regulate the post-retirement professional activities of Canadian judges. This debate can roughly be divided between those who think former Canadian judges, including Supreme Court of Canada justices, should be limited from practicing law as legal professionals, and those who defend their ability to practice law after leaving judicial office. No one questions the ability of former judges to give speeches and write articles, but they do question the ability of judges to litigate cases and get paid for their legal advice once they are out of office.

In this article, we address the fundamental legal values governing this debate. We will first outline the broad lines of the debate concerning former judges. In our view, the debate about former judges has so far lacked adequate engagement with the relevant basic principles of Canadian constitutionalism, and as such has failed to see the forest for the trees. The existing scholarly literature on regulating former judges has helpfully addressed how this issue relates to judicial impartiality and independence, but more is needed to elucidate how these values relate to basic principles of Canadian constitutionalism. Similarly, past scandals involving former judges failed to show how this issue is related to democratic concerns, at least not as clearly as the SNC-Lavalin affair.

We then outline the two constitutional principles we think are essential to understanding the question of whether to regulate the lives of former judges. These are the principles of (a) democracy and (b) the rule of law. Finally, we draw on these two principles to argue for provincial policies restricting former judges from practicing law in matters of constitutional and administrative law, but only partially restricting former judges from practicing in all other areas of law. We also outline how these policies could be enacted. We argue that former judges could be prohibited from practicing constitutional and administrative law by regulatory bans created and enforced by the provincial law societies. We also make the case for partially restricting former judges from practicing in other areas of law, subject to exemptions that will be applied by the provincial law societies.

I. Seeing the Forest for the Trees

A silver lining to the SNC-Lavalin scandal is that it has already helpfully generated some debate about the professional status of former judges, but in our view the debate has so far failed to adequately track the important principles at stake in this issue. Some legal scholars and practitioners have argued against allowing former judges to practice any law at all, while others have objected to such a full ban.[11] The debate has implicitly touched on principles such

11. See Cristin Schmitz, "SCC Alumni's Role in Legal Controversies Sparks New Debate

as democracy and the rule of law, but has so far failed to address how these principles are relevant. The debate sparked by the SNC-Lavalin scandal is not entirely novel, as the question of how to regulate retired judges has been evaluated by scholars of legal ethics and even raised by previous scandals. But the scholarship has largely omitted the democratic and rule of law implications of restrictions on retired judges practicing law, and previous scandals failed to show these implications as clearly as SNC-Lavalin. Our goal is to fill this gap in the literature by focusing first on the principles of democracy and the rule of law, and then using those principles to provide policy prescriptions on this issue.

Starting with the most recent debate created by the SNC-Lavalin scandal, those who now favour a full ban have typically cited the institutional danger of former judges using their prestige on the bench to create the impression of less than partial courts. For example, Professor Amy Salyzyn has argued that allowing former Supreme Court of Canada justices to practice law, even outside of litigation, harms "public confidence in the administration of justice".[12] She thinks that the threat of this harm justifies amending the provincial and territorial codes of conduct to prohibit *any* judge returning to practice from communicating with any Canadian court or tribunal. She also thinks that Supreme Court of Canada justices should be specifically prohibited from practicing law outside of litigation (e.g., signing pleadings). This view helpfully touches on a concern for the principle of the impartiality of judges, but it fails to explicitly explain how this principle relates to cases of former judges practicing law. Would plaintiffs think differently about the partiality problem facing a Supreme Court of Canada justice in a private law case rather than a constitutional law case? What distinguishes a plaintiff's perception of partiality from a similar perception he might get from facing, say, a famous litigator who is well known to win cases before the relevant court? We agree with Professor Salyzyn's concerns, but, with respect, think the answers to these questions need to further explore the principles at stake.

Some lawyers who favour allowing former judges to practice law, or at least to do so under specific conditions, have emphasized the public interest in having former judges practice law. They have also noted the ethically fuzzy line between cases involving clear conflicts of interest, and cases where this is not a concern. For example, Gavin MacKenzie has argued against banning former judges from practicing law because this can "prevent members of the public and practising lawyers from benefiting from the valuable experience and judgment

over Ex-Judges' Return to Practice", *The Lawyer's Daily* (5 September 2019), online: <www.thelawyersdaily.ca/articles/14985/scc-alumni-s-role-in-legal-controversies-sparks-new-debate-over-ex-judges-return-to-practice> [Schmitz, "New Debate"].

12. Amy Salyzyn, "Against Supreme Lawyering", *Slaw* (29 March 2019), online: <www.slaw.ca/2019/03/29/against-supreme-lawyering>.

of former judges".[13] He also argues that the potential conflicts of interest entangling former judges who practice law are minimal, and that concerns about the perceived unfairness of former judges participating in litigation are overblown. MacKenzie is therefore "less troubled" than other lawyers by the role of the former judges in the SNC-Lavalin affair.[14] In our view, this argument fails to properly engage with the fundamental principles we think govern this issue. Are there not democratic problems with elected politicians publicly courting the legal advice of former judges to signal the constitutional legitimacy of their actions outside of the courts, especially Supreme Court of Canada justices? Does the need for the experience and judgment of former judges, which MacKenzie takes to justify allowing former judges to practice law, *outweigh* concerns about democracy and impartiality?

Some of the past scholarship in legal ethics has addressed the principles at stake in this debate.[15] For instance, in an important article on the legal ethics of regulating retired judges, Professor Stephen Pitel and Will Bortolin have argued for expanding the provincial law societies' existing rules concerning retired judges. Existing rules are relatively weak, as many of the provincial law society codes and rules restrict retired judges in the context of appearing before courts in litigation, but not in serving as counsel or in other aspects of legal practice.[16] Professor Pitel and Bortolin argue for strengthening such restrictions by removing the timed expiration of prohibitions on judges either appearing before courts they previously served on, or courts subject to the appellate jurisdiction of their previous court.[17] They justify this recommendation with reference to the value of preventing former judges from having "special influence" in their former courts, but also with the aim of precluding the "appearance of impropriety" that can threaten public confidence in the justice system.[18] They further argue that if these restrictions serve these purposes, it makes little sense for them to expire, as they do in certain provincial codes of legal ethics for lawyers.[19]

Other scholarship by Professor Pitel and Liam Ledgerwood argues that both current and former judges should have an explicit duty to remain confidential about private information acquired in their official adjudicative capacity.[20] The

13. Schmitz, "New Debate", *supra* note 11.

14. *Ibid*.

15. See e.g. Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483 at 487.

16. See *ibid* at 499.

17. See *ibid* at 514.

18. *Ibid* at 513.

19. See *ibid*.

20. See Stephen GA Pitel & Liam Ledgerwood, "Judicial Confidentiality in Canada" (2017) 43:1 Queen's LJ 123.

instrument for enforcing this duty against federal justices, and the focus of their article, is the Canadian Judicial Council's (CJC) *Ethical Principles for Judges*.[21] The CJC is the body for regulating federally appointed justices created by the 1971 *Judges Act*.[22] Although the *Ethical Principles for Judges* are not binding on federal justices as a code of conduct, their guidelines can constitute the basis for CJC inquiries into judicial conduct (but not the conduct of former justices) under the *Judges Act*.[23] This argument for a judicial duty of confidentiality is grounded in concerns over how judges who reveal confidential information could undermine public confidence in the impartiality of justice,[24] and the ability of sitting judges to engage in "candid and rigorous" deliberations without fear of public scrutiny or accountability.[25] This recommendation appears to have been followed in a new draft of the *Ethical Principles for Judges* that extends the duty of confidentiality and discretion past the retirement of a judge, even though the CJC has no jurisdiction to enforce this duty against former judges.[26]

Although this scholarship has helpfully addressed concerns about judicial impartiality, independence, and confidentiality, it has not sufficiently discussed how these principles relate to more fundamental principles of the Canadian Constitution. For example, while these arguments address the need for public confidence in the justice system as part of the justification for maintaining an impartial and independent judiciary,[27] they do not explain how the duties of former judges to preserve judicial impartiality and independence relates to democracy or the rule of law. To an extent, this scholarship has related the problem of regulating former judges to sub-principles of the rule of law such as judicial independence, but it has not adequately discussed how such regulation relates to other aspects of the rule of law such as access to justice. Nor has it connected these sub-principles to more fundamental Canadian constitutional principles such as democracy and the rule of law.

Perhaps the closest scholarship on regulating retired judges has come to discussing the principle of democracy is Adam Dodek's work on political uses of judicial independence in Canada.[28] Dodek shows how retired judges have

21. See *ibid* at 125–27, citing Canadian Judicial Council, *Ethical Principles for Judges*, Catalogue No JU11-4/2004E-PDF (Ottawa: Canadian Judicial Council, 1998).

22. See *ibid* at 125, citing *Judges Act*, RSC 1985, c-1, ss 59(1), 60(1).

23. See *ibid* at 126, citing 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 22, ss 63(1)–(2).

24. See Pitel & Ledgerwood, *supra* note 20 at 137.

25. *Ibid* at 138.

26. See Canada, Judicial Independence Committee, *Ethical Principles for Judges: Draft* (Ottawa: Canadian Judicial Council, 2019), at 2.B.3 [JIC, *Draft Principles*].

27. See e.g. Pitel & Ledgerwood, *supra* note 20 at 137.

28. See Adam Dodek, "Judicial Independence as a Public Policy Instrument" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 295 at 319–23.

increasingly been used for administrative functions such as parliamentary ethics or integrity officers, child advocates, and human rights tribunal adjudicators, because these roles involve "quasi-judicial powers".[29] His analysis is focused on the extra-adjudicative uses of sitting judges, and he is more concerned with the impact of the extra-adjudicative activities of judges in democratic politics. We think the big picture requires thinking through how former judges practicing law could negatively impact democratic principles and the rule of law.

Besides the scholarly literature, the SNC-Lavalin affair is not the first scandal to raise the question of how to regulate former judges in Canada. Past scandals include former Supreme Court of Canada justice Michel Bastarache J acting as paid counsel in 2018 on submissions to the Supreme Court of Canada's *Canada (Minister of Citizenship and Immigration) v Vavilov* (*Vavilov*)[30] decision that created a new standard of review analysis, changing the scheme from his co-authored opinion in the *Dunsmuir v New Brunswick* (*Dunsmuir*)[31] decision; Bastarache J's authoring of a 2011 legal opinion for the Canadian Bar Association on how conflicts of interest rules for lawyers related to cases he helped to decide; and former Supreme Court of Canada justice Robert Locke J's 1972 appearance as lead counsel in (successful) oral arguments before a Supreme Court of Canada consisting of three of his former colleagues on the bench.[32] Justice Bastarache's 2011 opinion certainly raised eyebrows and probably helped spur legal ethics scholarship focusing on judicial impartiality and confidentiality, but none of these scandals embroiled former Supreme Court of Canada justices so clearly in conflicts implicating the democratic accountability of political actors. In our view, the debate spurred by the SNC-Lavalin scandal requires us to look at the basic principles implicated in the regulation of former judges, from the Supreme Court of Canada and down, in a way that the existing literature has not yet accomplished. Past scholarship and past scandals have helped us to navigate many of the trees, and even glimpse the woods, but they have so far failed to offer the more comprehensive vision of the forest.

29. *Ibid* at 320–21.

30. 2019 SCC 65 [*Vavilov*].

31. 2008 SCC 9.

32. See Schmitz, "New Debate" *supra* note 11; Cristin Schmitz, "Ex-SCC Judge Who Co-Wrote Dunsmuir Weighs in as Counsel as Top Court Revisits Dunsmuir's Standard of Review", *The Lawyer's Daily* (5 December 2018), online: <www.thelawyersdaily.ca/articles/8945/ex-scc-judge-who-co-wrote-dunsmuir-weighs-in-as-counsel-as-top-court-revisits-dunsmuir-s-standard-of-review>.

II. Principles for Post-Judicial Office

We think that the question of former judges practicing law touches on at least[33] two principles of Canadian constitutionalism: democracy and the rule of law.

A. Democracy and the Separation of Powers

The first principle that should inform policy and legal ethics concerning judicial retirement is democracy. In this section, we will first outline the principle of democracy as it relates to the separation of powers in Canadian constitutional law. Then we discuss its implications for former judges.

(i) Basic Principles

Democracy is a core principle animating the structure and substantive rights guaranteed by the Canadian Constitution.[34] As a basic principle of Canadian constitutionalism, democracy implicates structural aspects of the Canadian Constitution such as the federal division of powers and the separation of the Crown's powers at both the federal and provincial levels of government.[35] It also obviously underpins the substantive purposes of constitutional rights such as the *Canadian Charter of Rights and Freedoms* (the *Charter*)'s section 3 protections for the right to vote and to run for office in federal and provincial elections.[36] But the principle of democracy does not simply empower courts to invalidate whatever legislation they take to threaten this principle,[37] nor does it allow legislatures to run roughshod over constitutional rights and provisions. Instead, the principle requires that Canadian institutions remain accountable to the citizens they serve.[38]

---

33. This is not to say that these are the only two principles at play. There could be others.

34. See *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 61, 161 DLR (4th) 385 [*Secession Reference*].

35. See *ibid* at para 65–69.

36. S 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

37. See *Toronto (City) v Ontario (AG)*, 2019 ONCA 732, Miller JA (explaining why the "unwritten principles" of democracy and the rule of law are insufficient grounds to strike down laws that are not inconsistent with constitutional rights or provisions at paras 81–89).

38. See *Secession Reference*, *supra* note 34 at para 65.

Concerns about judges and democracy traditionally focus on the democratic legitimacy of unelected courts using their power to enforce the rule of law by thwarting the valid enactments of majoritarian governments.[39] The problem of the democratic legitimacy of adjudication is tied to the separation of the legislative and adjudicative powers. The purpose of adjudicating public law is to apply and interpret fundamental laws enacted by constitutional negotiations or statutes enacted by legislatures.[40] The purpose of legislating is to change the meaning of the law to meet the shifting normative and empirical circumstances faced by a political community.[41] The Canadian Constitution is democratic because it leaves the changing of most legal rules up to elected legislatures and amendment procedures requiring negotiations between the governments responsible to such legislatures.[42] When judges try to enact their own preferred meaning of the law, as opposed to interpreting and applying the meaning set down democratically by constitutional negotiations or enacted by elected legislatures, they undemocratically abuse the separation of the judicial and legislative powers of the Crown by unequally changing the meaning of law for their fellow citizens.[43]

This "counter-majoritarian difficulty" famously involves the act of striking down duly-enacted legislation because it violates the constitution.[44] Although there is obviously some grey area where adjudication concerns the law governing interactions between private parties, democratic concerns are somewhat mitigated by the expectation that these are long-standing areas of judicial decision-making, and additionally by the ability of constitutional and statutory law to displace whatever policies are set by courts.[45] One can agree with Professor Ernest Weinrib about the conceptual autonomy of private law[46] or

39. See e.g. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill Company, 1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).

40. See HLA Hart, *The Concept of Law*, 2nd ed (New York: Oxford University Press, 1994) at 96–99.

41. See *ibid* at 95–96. See also Richard Ekins, *The Nature of Legislative Intent* (Oxford, UK: Oxford University Press, 2012).

42. See *Mikisew Cree v Canada*, 2018 SCC 40 at para 118, Brown J.

43. See *Hillier v Canada (AG)*, 2019 FCA 44 at para 33.

44. See Bickel, *supra* note 39 at 16–18.

45. See Henry M Hart Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY: The Foundation Press Inc, 1994) at 4 (defining the principle of institutional settlement). Hart and Sacks ask: "When is a question one of law for the court and when one of policy for the legislature?" See *ibid* at cxxxviii. See also Harlan F Stone, "The Common Law in the United States" (1936) 50:1 Harv L Rev4 at 13.

46. See Ernest Weinrib, *The Idea of Private Law* (Oxford, UK: Oxford University Press, 1993).

with instrumentalist theorists who regard the common law of contracts, torts, and property as another extension of the "regulatory enterprise of the state",[47] and in either case still think that the democratic legitimacy of judicial decision-making deserves stricter scrutiny in areas of law directly regulating the power of state institutions.

Because the counter-majoritarian difficulty concerns sitting judges, the principle of democracy may appear to be irrelevant to our expectations about the behavior of judges when they are out of office. But the actions of former judges contribute to the difficulty of unelected officials unaccountably changing the meaning of the law outside the scope of their authority, and for that reason, they violate the principle of democracy. There are two general ways former judges can contribute to this difficulty: first, they can indirectly exacerbate the problem of sitting judges and other officials unequally controlling changes to the law; second, despite being out of office, they might directly interfere with the democratic accountability and separation of the Crown's powers.

(ii) Application

Some of the behaviour of former judges raising democratic difficulties will concern activities that indirectly exacerbate the problem of unelected officials unaccountably controlling changes to the law. There is a wide array of ways that former judges can contribute to this problem, but it will in many cases be counter-productive and disproportionately invasive to use formal laws or ethical codes to police them. For example, former judges might engage in legal scholarship that openly advocates for judges to enact changes to constitutional law based on their raw policy preferences. It is possible for such scholarship to unduly influence sitting judges. This should certainly be discouraged by the legal profession, the academy, and the public sphere, but it would endanger the democratic free exchange of ideas and the importance of judicial independence for the rule of law to restrict this type of expression.

The more directly former judges participate in official processes in ways that that interfere with the accountability of the state to citizens, the easier it becomes to justify formal restrictions on their participation in such processes. In our view, this standard is the key to understanding how the principle of democracy informs the restrictions that should be placed on former judges, and why restrictions on former judges practicing constitutional and administrative law are more justifiable than prohibiting them from practicing in other areas of law. Of course, whether former judges will enjoy unaccountable control over

47. Benjamin C Zipursky, "Philosophy of Private Law" in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2002) 623 at 625.

the meaning of the law is dependent on the nature of their role and area of law in question. For example, while it may not always be prudent, it would be democratically unproblematic for a former judge to run for legislative office, precisely because they would be subject to free and fair contests for the equal votes of their fellow citizens. They would be granted a measure of control over changes to the law in a way that constitutes rather than counters the citizenry's ability to equally control deliberate changes to law. This is why there was no reasonable democratic objection to Carol Baird Ellen CJ running for a seat in the House of Commons as a federal New Democratic Party nominee in 2015 after retiring as Chief Judge of the Provincial Court of British Columbia.[48] Her former position in the judiciary granted her no unfair advantage in the contest (in any case, she lost). For this same reason, we think it is democratically illegitimate for former judges to practice law in constitutional or administrative cases, even in an advisory role, because the cloak of their former office threatens to grant them unequal power in areas of law that directly constrain and govern majoritarian processes. In our policy recommendations below, we elaborate on how both democracy and the rule of law suggest the need to prohibit judges from practicing constitutional or administrative law. We reserve discussion of the more practical reasons for limiting the prohibition to constitutional and administrative law there. For now, we will focus on the basic reasons why democracy grounds this prohibition.

Having former judges litigating constitutional or administrative law cases encourages the connection between judicial office and groups seeking to use the courts to change the law to realize factional interests. This is part of a more general democratic problem concerning the relationship between political factions and an independent judiciary. As James Madison noted in *The Federalist 10*, the "causes" of factional interest groups cannot be wholly eliminated because factions are endemic to constitutions fostering democratic liberty.[49] But the "effects" of factions can be exacerbated or ameliorated by constitutional arrangements, and the Canadian Constitution's allocation of the judicial power to invalidate laws for violating structural or substantive rights provisions can incentivize factions to litigate cases to achieve policy goals they cannot achieve by democratic means.[50]

The judicial review of administrative actions presents another counter-majoritarian danger for courts. Factions can unequally achieve changes to the law

48. See Mychaylo Prystupa, "NDP Chooses Ex-Judge for Tight Federal Race in Burnaby", *Canada's National Observer* (25 February 2015), online: <www.nationalobserver.com/2015/02/25/news/ndp-chooses-ex-judge-tight-federal-race-burnaby>.

49. See James Madison, "No. 10" in George W Carey & James McClellan, eds, *The Federalist: The Gideon Edition* (Indianapolis: Liberty Fund, 2001) 42 at 43.

50. See e.g. FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 162.

by either having courts approve of administrative actions that favour their interests but exceed statutory authorization, or else striking down the proper exercise of delegated authority that threatens their interests.[51] Whatever side one may take in debates about the need for judicial deference to administrative decision-making,[52] or the need for aggressive administrative judicial review,[53] these views are partly justified as a means of protecting a democratically vulnerable pressure point.

The judicial power to interpret statutes features a much weaker variation of the problems with constitutional law and administrative law, which is why many of the most ardent and influential critics of constitutional judicial review do not argue against statutory bills of rights.[54] Although factions can use courts to resolve questions of statutory interpretation to their political advantage, the changeable nature of statutory law means that whatever changes factions may achieve through the interpretation of statutes can be undone by the victories of rival lobbying in the legislature. As such, the resources of special interests and political factions may be better spent influencing the legislative drafting of the statutes in the first place. This is why political scientists have argued that the ability of legislatures to constrain judicial decision-making about statutory interpretation incentivizes the judiciary to be "the most strategic in its own actions" in the context of statutory interpretation.[55] Constitutional changes to fundamental law achieved through courts are much harder to democratically reverse than changes brought through statutory interpretation or the development of common law doctrines.

In comparison to judicial review of executive or administrative action, the democratic risks are much less critical when a court simply interprets a statute. This is because of the typical principal-agent problem arising in administrative law and judicial review.[56] When a court faces a statutory interpretation

51. See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, UK: Cambridge University Press, 2007) at 244–49.

52. See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012); Cass R Sunstein, "*Chevron* as Law" (2019) 107:6 Geo LJ 1613.

53. See generally Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

54. See Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, Mass: Harvard University Press, 2016) at 199–202.

55. Keith E Whittington, "Legislative Sanctions and the Strategic Environment of Judicial Review" (2003) 1:3 Intl J Constitutional L 446 at 447.

56. See e.g. Mathew D McCubbins, Roger G Noll & Barry R Weingast, "Administrative Procedures as Instruments of Political Control" (1987) 3:2 JL Econ & Org 243; Mathew D McCubbins, Roger G Noll & Barry R Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies" (1989) 75:2 Va L Rev 431 at 433.

problem, the court takes an independent view of the statute, but also enforces Parliament's will directly. There is a risk that courts will get this wrong, leading to an error cost. But this risk is doubled when we observe a more complicated principal-agent relationship with the introduction of another layer of government exercising delegated power. This extra layer of government multiplies risks to the democratic control of Parliament as a principal that delegates powers to agencies under judicial supervision: the delegate might have her own preferences, leading to a problem of "bureaucratic drift".[57] As such, the democratic risks in judicial review outweigh the typical risks in statutory interpretation.

This risk to democracy was arguably present when Bastarache J signed his name to written submissions in the *Vavilov* case that determined the fate of the standard of review created by his own co-authored decision as a sitting member of the Supreme Court of Canada in *Dunsmuir*.[58] We need not impugn the good intentions of Bastarache J or his client to see the democratic vulnerability in this state of affairs. If groups with an interest in more or less deference by courts to administrative actors can purchase arguments supporting their interest from the very retired justices who authored the existing standard, then former judges could be complicit in allowing such groups to undermine Parliament's control over agencies with delegated powers. This illustrates how allowing former judges to practice administrative law could disrupt democratic control over the administrative state.

Because the counter-majoritarian difficulty is particularly acute in cases of constitutional and administrative law, the democratic problem of former judges practicing law will grant the most significantly unequal decision-making power to former judges practicing these kinds of law. Of course, the arguments of former judges will not formally count as adding to precedent.[59] But allowing former judges to represent the interest groups they may have favoured in their past judicial decisions will grant the groups they represent an unequal advantage because the arguments of ex-judges may have the false tint of judicial precedent.

There is also the danger that allowing former judges to litigate constitutional and administrative law may further incentivize sitting judges to change the law to realize the interests of factions who may offer them future employment as litigators. If former judges serve as counsel on both sides of a constitutional or administrative law case, their intervention may unequally privilege the judge whose voting record better aligns with the current courts, and interest groups who manage to gain former judicial counsel could have an unfair advantage in gaining leave to appeal cases.

---

57. Jacob E Gersen, "Designing Agencies" (2011) John M Olin Program in Law & Economics Working Paper No 543, online: <chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1167&context=law_and_econ>.

58. See Schmitz, "New Debate", *supra* note 11.

59. Many thanks to Gerard Kennedy for ensuring that we clarify this point.

In cases where former judges serve as advisory legal counsel to democratic actors about constitutional or administrative legal matters, such as legislators or government ministers, the factional danger is that the legal blessing of ex-judges can be used by political actors to shirk democratic accountability and constitutional responsibility. While the judges entangled in the SNC-Lavalin affair did not formally act improperly, Prime Minister Trudeau's use of Iacobucci J, and attempted use of McLachlin CJ, in the SNC-Lavalin scandal to violate the *Conflict of Interest Act* and override a constitutional convention demonstrates how politicians may seek the approval of eminent former judges for the policy positions they adopt. In the case of SNC-Lavalin, the opinion of Iacobucci J and the prospect of adding the voices of other former members of the Court was used to support the legality of "partisan political interests" being used to pressure the Attorney General "on at least four separate occasions".[60] While the scandal involved government officials and their subordinates acting in (or on behalf of) their executive capacity as members of cabinet, the Prime Minister and Attorney General are elected Members of the House of Commons, and elections are one of the most important means by which they are held democratically accountable for their use of executive (and legislative) power. The former justices' role in the scandal served as convenient legal cover to convince the Canadian public and their representatives of the good-faith legitimacy of the PMO's conduct.

This kind of strategic delegation to former members of the judiciary is contrary to the principle of democracy. When people vote, they vote for certain elected representatives to make decisions for them. When politicians deflect that responsibility by seeking the advice of former judges, the public will tend to also put their stock in those judges' opinions—to say nothing of the incentives in place for former judges qua lawyers to aim to please their clients. This creates a democratic problem, owing to the separation of powers; the judiciary is not the law-making branch of the state, and as such they cannot participate in the legislative process.[61] Legislators already run the risk of undemocratically shifting their responsibility for changing the law in many policy areas over to sitting judges. Involving ex-judges at the pre-enactment stage only promises to further interfere with the accountability of legislators to citizens. As Professor Rosalind Dixon has noted in her process theory of *Charter* dialogue, governments that are largely in control of legislative agendas are tempted to "pass the buck" for certain policy decisions outside of the legislature in order to more effectively achieve higher priority policy goals, avoid fracturing party

60. OCIEC, *supra* note 3 at para 329.

61. See Keith E Whittington, "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court" (2005) 99:4 American Political Science Rev 583.

coalitions, etc.[62] The legal counsel of former judges, especially former Supreme Court of Canada justices, can be used to internally pass the buck on decisions that unconstitutionally change or execute the law, should such decisions become subject to scrutiny by the opposition and media. The strategic delegation of advisory authority to judges is different in kind from other types of advisory opinions that parties may receive, including from internal government lawyers or from prominent legal counsel. While parties may aid their arguments by receiving advisory opinions from other lawyers, it is a different proposition to suggest that judges—former adjudicators of disputes engaging fundamental law—can or should be relied upon by parties in strengthening their arguments. Judges hold a unique position in the legal order that is very different from the position held by lawyers. For that reason, judges have special guarantees of institutional and individual independence. Those guarantees, so the argument goes, do not speak simply to the status of the judge while she is a judge, but to the institutional independence of the judiciary as a whole. This puts judges—even former judges—in a different category than a prominent lawyer. This leads us to questions concerning how former judges relate to the rule of law.

B. The Rule of Law and Judicial Independence

The rule of law is the second fundamental principle that bears on the question of former judges re-entering legal practice. In this section we first outline the principle of the rule of law and the relevant parts of that principle: access to justice and judicial independence and impartiality. Then we apply these parts of the principle to the context of former judges.

(i) Basic Principles

The rule of law is a central organizing principle of Canada's constitutional arrangements,[63] though its definition is "essentially contested".[64] Nonetheless, the rule of law as understood in Canada contains within it the important principles of judicial independence and impartiality,[65] and equal access to the

62. See Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue, and Deference" (2009) 47:2 Osgoode Hall LJ 235 (discussing "coalition-driven [legislative] inertia" at 259).

63. See *British Columbia v Imperial Tobacco*, 2005 SCC 49 at para 57; *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689.

64. Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2013) 39 at 40.

65. See generally *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward*

courts.[66] Those principles weigh against permitting former judges to be advocates before courts, particularly where concerns about judicial independence and impartiality are heightened in the areas of constitutional and administrative law.

The starting point for this analysis is the Supreme Court of Canada's definition of the rule of law:

i. The law is supreme over officials of the government as well as private individuals, and thereby precludes arbitrary power.[67]

ii. The creation and maintenance of an actual order of positive laws which preserves the more general principle of normative order.[68]

iii. The relationship between the state and individual must be regulated by law.[69]

This third requirement is relevant for our purposes. Under Canada's constitutional arrangements, it is the role of the courts and the task of judicial review that are "intimately connected with the preservation of the rule of law".[70] The Court has held that "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself".[71] To that end, sections 96, 99, and 100 of the *Constitution Act, 1867* protect the role of the courts in enforcing the rule of law by ensuring that judges have administrative independence, financial security, and security of tenure.[72]

There are two important aspects of the rule of law relating this theme to courts. First is the idea of *equal access to courts by all Canadians*. In the *Trial Lawyers Association of British Columbia v British Columbia (AG)* case,[73] the Court held that "access to justice is fundamental to the rule of law, and

---

Island; *Reference Re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 10 WWR 417 [*PEI Judges Reference* cited to SCR].

66. See *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at para 32 [*Trial Lawyers*].

67. See *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 748, 19 DLR (4th) 1.

68. See *ibid* at 749.

69. See *Secession Reference*, *supra* note 35 at para 71.

70. *Dunsmuir v New Brunswick*, *supra* note 31 at para 27.

71. *MacMillan Bloedel v Simpson*, [1995] 4 SCR 725 at para 37, 130 DLR (4th) 385.

72. See *Toronto Corporation v York Corporation*, [1938] 1 DLR 593 at 594, [1938] 1 WWR 452.

73. We recognize that *Trial Lawyers* contained within it a vigorous dissent by Rothstein J. However, the fact that equal access to the courts is a part of the rule of law is traceable back to

the rule of law is fostered by the continued existence of the s.96 courts".[74] Access to justice is central to the functional role of the courts in advancing the rule of law. It naturally follows from this that there must be equal access to the courts for all of those with cognizable legal claims. This is because the rule of law assumes a system of courts that can always review the substance of state action, no matter whether that state action affects someone who is poor or rich. Unlike the principle of democracy, the need for equal access to justice would seem to be as equally salient in the areas of constitutional and administrative law as it is in the common law of torts, contracts, property, and in many other areas of law.

Additionally, the principles of judicial independence and impartiality are connected to, but distinct from, the idea of access to justice. In the Canadian legal context, judicial independence is an "unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts".[75] Under the Supreme Court of Canada's precedents, a "social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule".[76] To the Court, judicial independence is intimately connected to the rule of law, because of the role courts have in enforcing the law and the distinct counter-majoritarian challenges that attend that role, as noted in the previous section. This is why Professor Peter Russell has referred to the separation of powers as the "kissing cousin" of judicial independence.[77]

This is a position advanced by scholars in addition to the Supreme Court of Canada. AV Dicey, in his *Introduction to the Study of the Law of the Constitution*, argues that there should be an "equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts".[78] He contrasts this system of the ordinary courts with the special administrative courts associated with the *droit administratif* of France.[79] The takeaway of this comparison for our purposes is the idea that the ordinary courts were separated from the administration, unlike administrative actors.[80] For Dicey, the British rule of law "excludes the idea of any exemption of

AV Dicey. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: MacMillan, 1915) at 198 [Dicey, *Law of the Constitution*].

74. *Trial Lawyers*, *supra* note 66 at para 39.

75. *PEI Judges Reference*, *supra* note 65 at para 83.

76. *Ibid* at para 10.

77. Peter H Russell, "A General Theory of Judicial Independence Revisited" in Dodek & Sossin, *supra* note 28, 599 at 605.

78. *Supra* note 73 at 120.

79. See *ibid.*

80. See AV Dicey, *Law and Public Opinion in England,* 2nd ed (London, UK: MacMillan & Co, 1962) at xiv.

officials or others from the duty of obedience to the law . . . or from the jurisdiction of the ordinary courts".[81] In the ordinary courts, law was to be administered equally to all citizens, without exemption, separated from the travails of politics.

Joseph Raz has more directly associated judicial independence with the rule of law. He argues that "rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law".[82] In this way, courts cannot be dedicated enforcers of the rule of law if there is a chance that they can be compelled by authority other than the law. Indeed, this was Dicey's basic point. This is why independence is central to the rule of law—it vouchsafes to all that their claims will be heard in a fair and impartial manner.

When we speak of independence here, we are speaking of the way the court operates in relation to the parties: the idea of impartiality. Impartiality is a "state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case".[83] It is connected to the "traditional concern for the 'absence of bias, actual or perceived'".[84] Independence is notionally distinct from impartiality,[85] but independence is a means to the end of impartiality.[86]

A large part of impartiality is perception. Indeed, the Supreme Court of Canada has held that public confidence in the judiciary depends on "reasonable perception".[87] We must be reasonably concerned with protecting the perception of the judiciary as an impartial institution that fairly applies the law. The need for the perception and reality of impartial and independent judges is distinct from the need for equal access to justice in that it takes on a special significance in the context of constitutional and administrative law. As mentioned above, the very idea of judicial independence is connected with the principle of democracy because it is the impartial exercise of judicial reasoning drawing on "the knowledge of the laws" that justifies institutionally separating courts from majoritarian elections, and thereby risking arbitrary changes to democratically negotiated law.[88]

---

81. Dicey, *Law of the Constitution*, *supra* note 73 at 198.

82. Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford, UK: Oxford University Press, 1979) 210 at 217.

83. *Valente v The Queen*, [1985] 2 SCR 673 at 685, 24 DLR (4th) 161.

84. *PEI Judges Reference*, *supra* note 65 at para 111.

85. See *ibid.*

86. See *R v Lippé*, [1991] 2 SCR 114 at 139, 64 CCC (3d) 513.

87. *Canada (AG) v Federation of Law Societies*, 2015 SCC 7 at para 97.

88. Alexander Hamilton, "No. 81" in Carey & McClellan, *supra* note 49, 417 at 419.

We need not follow Professor Richard Bellamy in fully identifying the democratic control of citizens over the state with the constitutional rule of law to agree that judicial independence is particularly vulnerable to counter-majoritarian abuses in the areas of constitutional and administrative law.[89] Judicial independence helps justify the role of impartial courts in resolving politically charged questions of constitutional and administrative law according to legal reasoning, but it also endangers democracy and the rule of law by making it difficult for democratically elected institutions to contest and correct political changes to the law dressed up as judicial decisions about its positive meaning. This entanglement of judicial independence and impartiality with democracy means that the impartiality of independent courts has a special rule of law significance in the contexts of constitutional and administrative law. The difficulty of democratically reversing judicial decisions about constitutional law means that the impartiality of courts, and thereby the rule of law, will suffer from undemocratic abuses of judicial power. The reliance of legislators on the judicial enforcement of statutory decisions about the execution of policies, and on judicial deference to delegated decision-making, means that legally unjustified judicial policy-making will undermine democracy and the rule of law in the same stroke.

(ii) Application

The foregoing analysis outlines two important parts of the rule of law that are central to the issue of regulating former judges. Let us first consider equal access to the courts. As noted above, permitting well-resourced or connected litigants to weaponize former judges of high stature to advance their cases risks giving parties with these resources or connections an arbitrary leg up against other litigants. While there are already existing financial reasons why some parties may be better suited than others to advance their cause in the courtrooms, existing disadvantages should not be exacerbated by permitting former judges to litigate. To do so tips the scales in favour of certain litigants, limiting the chances of less well-resourced parties to have a fair hearing in the ordinary courts. As noted in the previous section, the submissions of former judges risk taking on the false tint of judicial precedent, due to their privileged position.

The impartiality problem is even thornier. Recall that the Supreme Court of Canada has said that impartiality refers to two basic concepts: the state of mind of the tribunal and the reasonable perception of the public. Part of the state of mind consideration is the relationship between the courts and the parties.[90] If there is a risk that courts could be swayed by the advocacy of a former colleague based

89. See Bellamy, *supra* note 51 at 194–208.

90. See *Valente v The Queen*, *supra* note 83 at 685.

solely on the stature of that colleague, there is a clear worry that the state of mind of the court will be compromised. While Canadian judges are among the best in the world, and we would expect them to live up to that standard, judges are only human, and there is a risk that the stature of their former colleagues could imperil the state of mind of the court. Involving former judges in litigation implicates an attribute that is shared exclusively by sitting and former judges: prestige. Though one must always assume that judges will not violate their oath to decide cases on the basis of anything other than the relevant facts and law, introducing prestige as a variable in deciding cases creates the reasonable chance of undermining this presumption. Of course, such prestige might not have the same unfortunate relevance in all cases.

The idea of prestige is necessarily tied up with perceptions of status, which leads to another facet of impartiality. Specifically, impartiality is concerned with the question of perception. The perception is of the reasonably informed person, viewing the matter seriously.[91] There is a distinct risk that the general public, most of whom are denied access to former Supreme Court of Canada justices as counsel, would view these justices advocating for their opponent's cause as violating impartiality, thereby risking the independence of the judiciary as a whole. This is because there is at least a reasonable apprehension that judges may be swayed by the stature of former judges, or come to view the former judges' advocacy of what the law is as having undue weight. In such circumstances, there is a threat to the public's confidence in the independence of the judiciary at an institutional level.

The situation becomes even more serious when the access to justice and impartiality problems are brewed together. When government actors or well-resourced private parties can weaponize former judges in the courtroom, there is a double-bias at risk: a bias in favour of the well-resourced party, and a bias in favour of the well-resourced party because of the stature of the advocate. Taken together, the equal and fair access to independent courts that is fundamental to the rule of law is put at risk. This risk is arguably particularly heightened when it intersects with the principle of democracy in areas of law where adjudication is the most vulnerable to enacting counter-majoritarian changes to the law that are difficult to democratically correct.

At least part of this concern was evident in the SNC-Lavalin case. In that case, a number of former Supreme Court of Canada justices were used by the parties to the affair to bolster their position. Most notably, the PMO sought out McLachlin CJ as an extra-judicial advisor, though she declined to act. But there was no rule compelling her to decline. This raises the prospect that some former judges could take up a future executive's offer to assist their arguments on the merits. This creates a distinct rule of law problem. From an equal access

91. See *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716, de Grandpre J, dissenting.

perspective, it clearly permits well-situated political actors to use former judges in a way that would be realistically impossible for the average Canadian. If the executive branch is in a privileged position to use former judges to advance their position, or give them political cover, the impartiality of the judiciary as a whole might be threatened.

The rule of law is partially premised on the ideas that all should have equal access to the ordinary courts, and that those courts should exercise their functions without fear or favour. When former judges—particularly former Supreme Court of Canada justices—enter the arena as advocates, there is a risk that one party could weaponize those judges to its benefit. The reality is that ordinary Canadians do not have access to Supreme Court of Canada justices as lawyers. And to the extent this is true, it presents a problem for the rule of law in Canada.

III. Policy Recommendations

When considered together alongside practical policy considerations, the principles of democracy and the rule of law require that former judges should be prevented from practicing in any cases related to constitutional and administrative law, but do not demand extending this blanket ban to other areas of law. Instead of simply banning former judges from practicing in any area of law, we argue that democracy and the rule of law suggest that they should only be prevented from practicing in constitutional or administrative cases, or cases in other areas of law directly related to cases they adjudicated during their judicial tenure. In this section we first outline relevant questions concerning the key distinctions at work in our policy recommendations: namely, what constitutes "practice" for the purposes of any proposed rules, and whether and how the proposed rules should extend to different areas of law. In the second part of this section, we outline our proposed policy prescriptions, elaborating on the rationale for the blanket ban on former judges practicing law in constitutional and administrative cases, as well as the distinctions between punitive and exception-based models for regulating the practice of all other areas of law.

A. Policy Distinctions

(i) Legal Practice and Advice

One of the thorniest issues involved in crafting rules concerning the professional conduct of former judges is the distinction between practice and advisory work. That is, whatever system of rules is adopted, should that system govern just the direct court appearances of ex-judges, or *any* legal work they

may undertake after leaving office? Asking this question fairly raises concerns about the extent to which one can classify ex ante the types of professional activities a judge will undertake in retirement.

Currently, there are rules governing the court appearances of former judges. But what constitutes a "court appearance"? As Professor Salyzyn notes, former judges may sign pleadings, yet not appear in court—but this would seem to raise the same problems that appearing in court would.[92] In response to this concern, the Federation of Law Societies, for example, has proposed changing the Model Code to deal with this problem by preventing court appearances and any communication with a court by former judges.[93] There is a legitimate question, then, about the scope of activities that should fall under any proposed rule restricting the professional conduct of former judges.

While reasonable people could disagree on how to draw the line between activities, democracy and the rule of law suggest that the entire spectrum of activities—from advising, to signing off pleadings, to appearing in court—should fall under the scope of any prohibitions on former judges returning to practice. This is because in all these classes of activity, there is a risk that an unjustified form of deference might accord to a particular argument simply because a sitting judge knows that a former judge has (a) advised on the argument, (b) officially endorsed the argument, or (c) appeared in court to make the argument. This unjustified form of deference is problematic from a rule of law perspective because it threatens the perception of impartiality. If judicial involvement in a case is going to create the perception that sitting judges were partial to the arguments of a firm employing a former judge, then it does not matter if that perception is created by the direct litigation of the former judge, their signed pleadings, or their advisory counsel. It is also problematic from a democratic perspective, because if executive actors are able to purchase the council of former judges, they can use this setup to shirk democratic responsibility for difficult constitutional decisions.

This was evident in the SNC-Lavalin scandal, as the PMO used the counsel of two former Supreme Court of Canada justices to try to convince an extra-judicial actor, the Attorney General, to break a constitutional convention. The fact that the opinions of the two Supreme Court of Canada justices were not legal arguments submitted to a sitting judge did not change the way they were used to shield the PMO from democratic accountability for flouting the rule of law. The rules concerning professional conduct should not distinguish between legal advice and practice, but should instead focus on how the principles of democracy and the rule of law relate differently to constitutional and administrative law.

92. See Salyzyn, *supra* note 12.

93. See "Federation News: Consultations Begin on Model Code Amendments" (2 February 2017), online: *Federation of Law Societies of Canada* <flsc.ca/consultations-begin-on-model-code-amendments>.

(ii) Prohibiting Constitutional and Administrative Law

A different question is whether there should be a distinction in the way the rules governing the work of former judges apply to matters of constitutional and administrative versus other areas of law.

We favour a minimalist interpretation of the prohibited activities as a way of balancing the various interests at issue. Namely, we identify prohibited cases as only those that raise a constitutional issue or deal with the reasonableness or correctness of an administrative or executive decision. This classification has several benefits. For one, it is a clear rule that eliminates much debate over the scope of what constitutes prohibited or permitted activity without engaging in messy theoretical debates about the definition of public versus private law. This has the benefit of, ex ante, lowering the cost of obtaining legal advice for those subject to the law, as it is clear from the outset whether certain activities fall within the scope of constitutional and administrative law.[94] As noted below, the target prohibition flows directly from an analysis of the principles of democracy and the rule of law. And it respects the right of judges to work, subject to certain restrictions, in other areas of law.

Some might argue that a clear rule of this sort leaves out certain hard cases.[95] That is, they might argue that there could be some constitutional and administrative law matters embedded in putatively acceptable private law matters or issues of statutory interpretation that the rule would not capture. Of course, the line between different areas of law will not always be clear or hard-and-fast. Indeed, there are even some private law cases that could end up raising constitutional issues. An example is a warrant applied for under the *Income Tax Act*.[96] While the *Income Tax Act* does not facially deal with public law matters as we define them, one might make the argument that an application for a warrant deals with the public interest more broadly, and one may go further by claiming that once someone raises a constitutional challenge (say under section 8 of the *Charter*) to an *Income Tax Act* warrant, a putative private law case turns into a constitutional one. We think our rule characterizes this example as a case of constitutional law once it features a constitutional challenge. Our rule can deal with such hard cases.

94. See Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557 at 564.

95. See Isaac Ehrlich & Richard A Posner, "An Economic Analysis of Legal Rulemaking" (1974) 3:1 J Leg Stud 257 at 268–70.

96. RSC 1985, c 1 (5th Supp), s 231.1(3).

B. Recommendations

With these preliminary concerns about the scope of our preferred rules aside, we can now turn to our recommendations. In our view, there are two distinct models for regulating the practice of former judges in Canada. The first, a punitive model, would ban retired judges from practicing law, subject to penalties. The second, an exception-based model, would permit judges to practice with permission of the relevant provincial law society. We prefer a punitive model for constitutional and administrative law issues and the exception-based model for issues relating to all other areas of law. In this section, we first outline these models and then deal with their applicability in different areas of law.

(i) Models in Canada

There are at least two ways of restricting the legal practice of former judges: what we call the "punitive model" would ban former judges from practicing law, subject to penalties; another option we call the "exception-based model" would ban former judges from practicing but implement procedures allowing them to receive permission from the law society to work on specific cases.[97]

In Canada, there are currently examples of both the punitive and the exception-based models. While the issue of former judges returning to practice is ultimately a provincial issue involving particular law society rules, a good place to start is the CJC's *Ethical Principles for Judges*, noted above. The draft ethical principles indicate that the CJC is considering a largely punitive model for judges returning to practice, albeit one where actual punishment exceeds CJC jurisdiction. The new draft of the *Ethical Principles for Judges* says that "former judges should not appear as counsel before a court or in administrative or dispute resolutions in Canada".[98] It allows for "former judges to review or draft legal arguments and pleadings, to provide advice to counsel and parties" but specifically instructs against former judges standing, speaking, appearing as counsel, or signing documents in any court or tribunal.[99]

Because the CJC lacks jurisdiction over former judges, those flouting its prohibition will not be punished in any CJC disciplinary proceeding. But the prospective ethical principles provide prohibitions that might be cited in disciplinary proceedings against former judges conducted by provincial or territorial law societies. While the prospective new ethical principles

97. This is not to say that these models are perfect Platonic forms. Some jurisdictions, such as British Columbia, mix punitive and exception-based models, as we note below.

98. JIC, *Draft Principles*, *supra* note 26 at 5.E.2, 5.E.3.

99. *Ibid* at 5.E.2.

contemplate exceptions for particular classes of lawyers, they are largely operating on a punitive model that bans judges from practicing law in general, with limited exceptions. They fail to distinguish between the significance of judges practicing different areas of law, although, perhaps partly in response to the SNC-Lavalin scandal, they do provide the general warning that "judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary".[100] These draft updates are meant to guide former judges, but they also create the prospect of discipline for wayward behavior by other entities with jurisdiction over former judges. As noted in Section II above, although the *Ethical Principles for Judges* is not binding, its guidelines can serve as a basis for CJC investigations into the conduct of sitting judges and potential disciplinary measures. Presumably, any jurisdiction adopting the *Ethical Principles for Judges* or similar measures will require ex post penalties for those breaking any of the rules associated with appearances in the punitive model.

Many provinces have time-limited or situation-specific rules based on a punitive model. In British Columbia, for example, a former judge of a provincial or territorial court in Canada must not appear as counsel in the Provincial Court of British Columbia for three years after ceasing to be a judge.[101] In Quebec, a former judge must not plead before the tribunal or adjudicative body of which she was a member "if the situation is likely to bring the administration of justice into disrepute".[102]

On the other hand, the exception-based model is largely an ex ante permission based system. This system is prevalent throughout Canada. None of the provincial law society rules prevent a judge from returning to practice writ large.[103] The different provincial and territorial rules are summarized in the following chart:

100. *Ibid*.

101. See The Law Society of British Columbia, *Law Society Rules*, Vancouver: Law Society of British Columbia, 2015, r 2-87(1)(b) [BC *Rules*].

102. Law Society of Quebec, *Code of Professional Conduct of Lawyers*, Montreal: Law Society of Quebec, 2015, s 142.

103. See Pitel & Bortolin, *supra* note 15 at 486.

Table 1

Jurisdiction	Rule
British Columbia	A former judge of a federally-appointed court must not appear as counsel in any court in British Columbia without first obtaining the approval of the Credentials Committee.[104]
Alberta	Former judges who are reinstated to active status in the Law Society cannot appear in chambers or in any court in Alberta without first obtaining the approval of the Benchers, with or without conditions.[105] There is a three-year cool off period until judges may be approved by a committee for reinstatement.[106]
Saskatchewan	A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before a court of equal or inferior jurisdiction.[107]
Manitoba	Same as Saskatchewan.[108]
Ontario	1) Former justices of the Supreme Court of Canada, the Court of Appeal for Ontario, the Federal Court of Appeal, and the Superior Court of Justice may not appear as counsel or advocate in any court or tribunal without the express approval of a panel of the Hearing Division of the Law Society Tribunal.[109] 2) Former justices of the Federal Court, Tax Court, Supreme Court of Canada, Trial Division, County or District Courts, or the Ontario Court of Justice may not appear before the court on which she served as a justice or before any lower court, and may not appear before any administrative board or tribunal over which the court of which the justice was a member exercised an appellate or judicial review jurisdiction, for a period of three years after leaving office, without the express approval of a panel of the Hearing Division of the Law Society Tribunal.[110]

104. See BC *Rules*, *supra* note 101, r 2-87(1)(a).

105. See Law Society of Alberta, *The Rules of the Law Society of Alberta*, Calgary: Law Society of Alberta, 2020, s 117(b) [Alberta *Rules*].

106. See *ibid*, s 117(a).

107. See Law Society of Saskatchewan, *Code of Professional Conduct*, Regina: Law Society of Saskatchewan, 2012, ch 7.7(1). These rules, and the other rules in the provinces that follow Saskatchewan, are based on the Model Canadian Bar Association Code. See Pitel & Bortolin, *supra* note 15 at 485–86.

108. See The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2007, ch 7.7.

109. See Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2000, ch 7.7-1.1, 7.7-1.2.

110. See *ibid*, ch 7.7-1.3, 7.7-1.4.

Jurisdiction	Rule
Nova Scotia	Same as Saskatchewan.[111]
New Brunswick	Same as Saskatchewan.[112]
Prince Edward Island	Same as Saskatchewan.[113]
Newfoundland and Labrador	Same as Saskatchewan.[114]
Yukon	Same as Saskatchewan.[115]
Northwest Territories	Same as Saskatchewan.[116]
Nunavut	As a condition of reinstatement after leaving office, a former judge shall not appear in a court in Nunavut without first obtaining the approval of the Executive.[117]

While all of these rules differ in some respects, including the extent to which they are time-limited or situation-specific,[118] they all share a basic model: they require former judges to obtain permission for appearances of various types before different categories of courts.

The *Ethical Principles for Judges* and the law societies' rules represent two different visions of controlling judicial activity post-retirement. In our view, each model has its merits in relation to the different types of law one could practice post-resignation.

111. See Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2011, ch 7.7.

112. See Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton: Law Society of New Brunswick, 2020, ch 7.7.

113. See The Law Society of Prince Edward Island, *Code of Professional Conduct*, Charlottetown: Law Society of Prince Edward Island, 2014, ch 7.7.

114. See Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, St. John's: Law Society of Newfoundland and Labrador, 2014, ch 7.7.

115. See Law Society of Yukon, *Code of Conduct*, Whitehorse: Law Society of Yukon, 2015, ch 7.7-1.

116. See Law Society of the Northwest Territories, *Code of Professional Conduct*, Yellowknife: Law Society of the Northwest Territories, 2015, s 30.

117. See Law Society of Nunavut, *Rules of the Law Society of Nunavut*, 2020, s 75(2).

118. See Pitel & Bortolin, *supra* note 15 (describing the rules in Canada as either "situation-specific" or "court-specific" at 487). While this is one axis on which to describe the rules, the axis we choose is either an ex post punitive model or an ex ante exception-based model.

(ii) Constitutional and Administrative Law: Punitive Model

The principles of democracy and the rule of law weigh in favour of a complete ban (punitive model) when it comes to former judges litigating cases involving constitutional and administrative law. Our criteria for distinguishing prohibited cases allow us to specify the two main areas to which this ban should extend: (1) cases raising a constitutional question; and (2) cases involving the judicial review of executive or administrative action. In this section we expand on how our arguments for this prohibition relate to the punitive model for enforcing it.

The in-principle objection to former judges litigating constitutional and administrative law cases raises two preliminary questions. First, is a legislative ban in the mould of a punitive model the ideal way to defend the principles of democracy and the rule of law? And second, how should the ban apply to courts? Should it be limited to appellate courts, or should it also apply to trial courts?

In our view, the best way to deal with the first problem is a full-out legislative[119] or regulatory ban on the practice of constitutional and administrative law by former judges. This is merited by the sort of problems raised by former judges litigating constitutional and administrative law cases. These problems engage the core tenets of the legal system: democracy and the rule of law. There should and could be no permissive regulatory system that allows for former judges to practice in *some* constitutional or administrative law cases, because in every constitutional or administrative law case where former judges practice, these principles are at heightened risk. Even if there are some constitutional and administrative law cases where these principles are not at risk (which we doubt), a complete ban prevents arguments over which cases fall into a standard that inevitably cannot be completely clear.

On the merits, the principles of democracy and the rule of law militate against permitting former judges to professionally litigate or advise clients on matters of constitutional and administrative law. As argued above, under the principle of democracy, judicial review on constitutional grounds presents important challenges because of the risk of judges acting according to raw policy preferences. The problem in this case is the introduction of extraneous influences on the task of constitutional interpretation, outside of legitimate factors such as text, purpose, or precedent. Permitting former judges to practice law in this area risks introducing these extraneous considerations. Prestige is the most relevant, and it is possible that the prestige of former judges could attract a legally unjustified form of deference. This presents rule of law problems. The heightened importance of the independence of the judiciary (and its perception)

119. It is possible that such a ban could be instituted by a provincial statute amending the relevant provincial Law Society's home statute. However, it is much more likely to be enacted via by-law by the societies themselves.

in constitutional law cases is threatened when a former judge, carrying her prestige, appears before a current judge.

The second class of cases we are concerned about involve the judicial review of administrative or executive action. As noted above, administrative law cases implicate the supervisory role of the courts to enforce duly-enacted statutory boundaries against the delegated decision-makers.[120] There is a risk that the entire project of judicial review could be made partial towards certain parties that have the money or political capital to hire former judges. It implicates the fair and neutral enforcement of statutory boundaries against administrative decision-makers. There is a risk, again, that these decision-makers (or the government that oversees them) could use former judges to somehow receive an unjustified form of deference in judicial review proceedings. There is also a risk, as explained above, that former judges could win favour for their arguments to nullify administrative decisions, leading to errors that undermine the democratic character of the administrative state.

There remains the secondary question: which officials of which courts should be covered by the ban? In our view, the ban must go "all the way up" to include cases involving administrative agencies, provincial courts, superior courts, provincial appellate courts, the federal court system, and the Supreme Court of Canada. In other words, former adjudicators in these bodies should not be permitted to litigate constitutional and administrative law issues because of the institutional features of the bodies of which they are a part.

Recall that the test for whether an issue is a prohibited case is whether it (a) raises a constitutional question or (b) involves an issue of judicial review of administrative action. Each of the bodies listed above have the potential to deal with these issues. Constitutional and administrative law cases raised in these fora present heightened risks to democracy and the rule of law.

First consider administrative agencies and provincial courts. In their own way, each institution engages issues of constitutional law. Administrative agencies that have power to decide questions of law can entertain constitutional questions on the facts of particular cases,[121] and can also issue constitutional remedies in certain cases.[122] Provincial courts are the same—they can entertain constitutional questions raised in the context of, say, a criminal proceeding.[123] In each context, former judges of these courts and bodies have played a role in elucidating Canadian public law, if only in specific cases, and there is a risk that judges may unduly defer to these actors because of the role they played.

120. See *Vavilov*, *supra* note 30 at paras 108–10. For a different take on what the rule of law could mean in the administrative state, see Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford, UK: Oxford University Press, 2004).

121. See *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 3.

122. See *R v Conway*, 2010 SCC 22 at para 81.

123. See *R v Comeau*, 2016 NBPC 3 at para 193.

The other courts mentioned above clearly fall within the scope of the punitive model banning the practice of constitutional and administrative law (as we define it). This is because they all have the power to declare laws unconstitutional, or otherwise have jurisdiction to engage in the judicial review of administrative actions and regulations.

Of course, these principles may have more resonance in the context of appellate courts and the Supreme Court of Canada. This is because appellate courts and the Supreme Court of Canada have the potential to set the law on particular issues. An appellate court, for example, may hold a statute unconstitutional (in contrast to a provincial court), and that conclusion may not be appealed to the Supreme Court of Canada, or leave may be denied. In that case, the legal conclusion drawn by the appellate court remains on the books. The Supreme Court of Canada, by its very design as an apex institution, is accustomed to drawing legal conclusions for the whole Canadian justice system—even if it shares co-ordinate constitutional authority with the federal and provincial legislatures.[124] Given the importance of these courts in setting law for entire jurisdictions or the entire country as the case may have it, the force of the constitutional and administrative law ban will be stronger in these contexts.

One might advance the criticism that our preferred mandatory ban on constitutional and administrative activities is too drastic. One response to this is to point out the generous pensions that *some* former judges—particularly Supreme Court of Canada justices—receive upon retirement. This pension is likely designed to recognize that the working life of the former judge is nearing its completion. Moreover, the generosity of pensions contributes to the proportionality of prohibiting harms to the rule of law by restricting former judges' freedom to work and any societal benefits derived from such work.[125] Additionally, the ban should not cover other activities that do not engage the core tenets of democracy and the rule of law to the same extent. For example, we should note that the prohibition in no way prevents former judges from being appointed to non-partisan commissions or practicing international law on behalf of Canada. Serving on the kinds of commissions and inquiries that investigate government impropriety does not require former judges to unfairly draw on their professional experience anymore than appointing former astronauts. In some cases, judges may be appointed to commissions or inquiries in ways that threaten the principles of democracy and the rule of law, but that will be a matter of variables other than their former adjudicative role (e.g., their personal or familial relationship with the subjects of an inquiry). Similarly, because the principles of democracy and the rule of law centrally

124. See Dennis René Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010).

125. See Salyzyn, *supra* note 12.

concern the domestic relationships between state institutions and citizens, there is no reason that former judges cannot practice international law for the Crown (e.g., arbitrating the dispute over the US-Canada maritime boundaries in the Beaufort Sea).[126]

(iii) Other Areas of Law: Partial Restrictions

In our view the principles of democracy and the rule of law do not demand extending the punitive blanket ban on former judges practicing law to cases about matters outside of constitutional and administrative law. This is because former judges practicing in other areas law generally poses less of a risk to democracy, and a lesser degree of risk to the rule of law. There are also distinct reasons to favour former judges practicing law, subject to controls by the relevant law societies.

The principle of democracy is less endangered by former judges practicing other types of law, particularly private law, and to some degree this also diminishes rule of law concerns. Following the criteria we developed above, other areas of law include cases involving torts, contracts, wills and estates, and certain conflicts of law. Other types of law can of course involve the public interest, but generally concern the principles of democracy and the rule of law to a lesser degree than constitutional and administrative law. When former judges practice law in cases not directly related to cases they decided as judges, their prior appointment presents less significant rule of law concerns, at least of the type related to the connection between judicial independence and democracy. Their prestige as a litigator may be no more, and likely less, important to the fair administration of justice than the prestige of top litigators in the field.

The reason for this is partly a matter of how democracy and the rule of law relate to other areas of law. For example, judicial decisions about private law rarely threaten to override the democratic enactments of legislatures, and they are in most cases subordinate to statutory and constitutional codification. There is generally less of a "counter-majoritarian" difficulty over the ability of judges to change the common law rules governing cases of private law because holdings in private law decisions are subject to democratic legislative and constitutional changes and displacement. Individual plaintiffs and defendants in private law cases may be socially unequal in terms of the resources they can muster to their case, but they will share a reasonable measure of democratic equality insofar as they have equal political rights in the legislative and constitutional procedures for changing the law. In addition, former judges gain their prestige in public law cases from the political charge that is intrinsic to the task of adjudicating constitutional and administrative law. While we readily admit that rule of law

126. Many thanks to Ian Brodie for suggesting that we consider this possibility.

concerns apply outside of constitutional and administrative cases, and that the boundary between different areas of law can appear murky in certain contexts, the more democratically neutral valence of cases outside of constitutional and administrative law diminishes the political prestige former judges can expect to gain from their time on the bench. Sitting judges will be less likely to be perceived as favouring the arguments of their former colleagues as a means of reinforcing their own authority in the face of political challenges from other institutions. This makes former judges practicing non-constitutional or administrative areas of law less of a threat to democracy, and having a clear prohibitory rule along these lines could help mitigate perceived rule of law difficulties of unequal access to justice and judicial partiality. Have clear rules for allowing former judges to practice in a narrower range of cases in other areas of law could also assuage such concerns.

Importantly, there are good reasons to favour former judges practicing law outside of constitutional and administrative cases. This is because, with less countervailing democratic or rule of law concerns, former judges who are still able to work should have the freedom to do so. It would take, in our view, a compelling case to override this freedom to work—a case built on fundamental legal principles, like democracy of the rule of law. And, in fact, former judges may bring their specialized expertise in service of clients who need their help.

The exception to the general benefits that might accrue from the legal practice of former judges is in cases where former judges have decided cases directly relevant to the case on which they are acting. In such cases the general rule of law problem of the court's past authority is more acute, because the former judge's arguments as a lawyer will be more liable to be mistaken as an elaboration on their past precedent. There is still unlikely to be a democratic issue with a former judge practicing law in a tort or contract case directly related to precedent they decided, but the rule of law problems of perceived partiality and unequal access to justice are exacerbated in such cases. How could the former judges' arguments about references to their own adjudicative record not appear to receive some partial deference given that they decided directly relevant precedent? Even if a former judge dissented on precedent directly related to a case they are currently litigating, their contemporaneous arguments are still likely to be held with higher prestige insofar as they could have decided the case. How could access to the legal services of former judges in case they decided on the bench not contribute to unequal access to justice, when no litigator can offer this advantage based on their legal talent alone? Former judges arguing cases directly related to their own precedent is thus an exceptional problem that any policy allowing former judges to practice law must design rules to mitigate.

One way of minimizing the risk is to simply ban former judges from all types of professional legal practice. We admit that might be one reasonable way of dealing with this issue. It is true that a blanket ban on former judges practicing any type of law could resolve the rule of law concerns raised by former judges

litigating and advising about cases related to their past adjudication. But it seems disproportionate to us in light of the less heightened threat former judges practicing law poses to the principles of democracy and the rule of law outside of constitutional and administrative matters. In addition, a blanket ban would disincentivize quality candidates, and perhaps even diverse candidates, from applying for appointment to judicial office. As Kyla Lee has astutely noted, making an appointment to the bench "the final resting point for an otherwise exceptional career" is not going to make the pool of diverse candidates any wider.[127] The alternative is to implement policies that allow former judges to engage in the practice of law outside of constitutional and administrative matters while mitigating the risks this poses to the rule of law. This requires policies ensuring that former judges do not litigate or serve as counsel in cases directly related to decisions they adjudicated while in office.

Given that a full ban is overkill, what institutional mechanism would work? The exception-based models that characterize many of the provincial and territorial law society rules provide a good starting point. In our view, an exception-based rule can balance protecting democracy and the rule of law, while also encouraging the proper practice of law by former judges in certain cases.[128] As such, a good starting point might be the Alberta rule. Recall that in Alberta, Law Society rules require that former judges cannot appear in chambers or in any court in Alberta without first obtaining the approval of the Benchers, with or without conditions.[129] We favour a modified variation of the Alberta rule because it generally respects the freedom and autonomy of former judges to practice, with less restrictive conditions than other jurisdictions' rules.

The Alberta rule, unlike the Ontario rule for example, does not claim that exceptions will only be granted in "exceptional" cases. As argued above, there is significantly less reason to fear former judges returning to practice non-constitutional or administrative law. For that reason, there is no need for the law societies to jealously guard the granting of exceptions in this range of cases. The Alberta rule is also probably much easier to administer than some of the other exception-based rules (particularly Ontario). It asks the Benchers of the Law Society to approve applications for judicial appearances upon receiving them. We recommend making this process even less restrictive and easier to administer by making staff of the law society responsible for

127. Kyla Lee, "Retirement from the SCC Should Not Be a Life Sentence", Opinion, *The Lawyer's Daily* (20 August 2019), online: <www.thelawyersdaily.ca/articles/14618/retirement-from-scc-should-not-be-a-life-sentence-kyla-lee?category=opinion>.

128. One could also envision, in place of an exception-based model, a sort of "complaints-based" model that is dependent on members of the public bringing complaints to the attention of the law society, rather than the former judges themselves seeking exceptions. Ultimately, this is a question that will be left up to provincial law societies.

129. See Alberta *Rules*, *supra* note 105, s.117(b).

approving applications for appearances and allowing a statutory appeal to the Benchers if a negative decision is reached. This would have the effect of (1) easing the pure discretion that exists in the Law Society (e.g., preventing a former judge whose decisions were viewed unfavourably by the benchers from being persecuted), and (2) ensuring a check on the staff of the Law Society. Either way, this solution might be clearer and easier to administer than the possible alternatives. It may even be advisable to remove the requirement that former judges obtain permission to appear before courts, and instead to set up a tribunal for disciplining former judges found to have practiced law in cases directly relevant to cases they adjudicated in the past. This latter option could streamline the law societies' way of prohibiting former judges from practicing constitutional and administrative law by making the same tribunal responsible for complaints about former judges practicing in prohibited categories of cases.

We also approve of how the Alberta rule does not include court-specific restrictions. In our view, as noted above, the democratic and rule of law concerns go "all the way up" to the Supreme Court of Canada and "all the way down" to provincial courts and administrative decision-makers, to the extent they deal with potential questions of constitutional law. We suggest following Alberta's example by requiring these former decision-makers in the provincial courts and administrative agencies to receive the permission of the law society before returning to practice.

One way our proposed rules would be more restrictive than the Alberta model is that we would prohibit judges from practicing law in cases directly relevant to cases they adjudicate. This restriction could be implemented along with the constitutional and administrative law ban by requiring the Executive Director or cognate officer of the law society to administer former judges swearing an oath not to practice law in constitutional or administrative law cases, nor on any matter of law settled by their court(s) during their time in office. To the extent that concerns linger about judges practicing outside of constitutional and administrative law, these clear restrictions should go some way to reassuring the public that former judges are not allowed to practice law in ways that are inconsistent with the rule of law.

Finally, Alberta's model is more restrictive than we would like in that it does contain time-restrictions, with former judges not subject to approval for reinstatement until three years have elapsed. We would remove this time-based restriction on the reinstatement of former judges to practice outside of the constitutional and administrative law. In this view, we follow Professor Pitel and Bortolin, who question the justification of rules allowing judges to practice law after a relatively short period of time by asking: "What changes after two or three years?"[130] If there are principled objections to judges practicing law in a certain context, it is hard to see how those objections dissipate with time given

130. Pitel & Bortolin, *supra* note 15 at 513.

that democracy and the rule of law ground concerns about public perceptions regarding how former judges relate to the judiciary writ large, not just the relationships between a judge and her former colleagues.[131]

For these reasons, a less restrictive variation of the Alberta rule provides a good starting point for provincial law societies who seek to adopt a simple exception-based system with few restrictions (our proposed rules are outlined in the Appendix). Because the principles of democracy and the rule of law suggest lower risks to former judges practicing law outside of constitutional and administrative matters, this practice should be encouraged with Alberta style rules that free ex-judges to keep contributing to the profession and Canadian society until they are ready for other pastures.

Conclusion

The SNC-Lavalin scandal revealed a blind spot in Canada's constitutional order: former justices of the Supreme Court of Canada were caught up in political ambitions that violated the *Conflict of Interest Act* and sought to undermine constitutional conventions. Our constitutional order lacked rules for preventing this undemocratic abuse of judicial independence. Now that political ambitions have abused the status accorded to former judges based on their independence in office, we need rules to protect former judges from such abuses in order to buttress the important role courts play in preserving Canadian democracy and the rule of law. We therefore recommend that the provincial law societies enact rules prohibiting former judges from practicing constitutional and administrative law and allowing exemptions for them to practice all other legal cases not directly related to cases adjudicated by their court during their time in office. We do not make these recommendations to disrespect judicial virtue, but to preserve it.

131. See *ibid.*

Appendix

The proposed rule is formatted to fit into the Alberta Law Society's Rules, but it could be applied in any other Canadian jurisdiction.

Special Provisions for former Judges and Masters in Chambers:

> 117 Where an application is made by a former judge referred to in Rule 116(2), or by a former master in chambers under Rule 115 or 116(4)(b), the following provisions apply:
>
> (a) the Executive Director shall not refer the application to the Credentials and Education Committee pursuant to Rule 118(1)(a) unless the applicant swears the following oath in writing:
>
> That I will continue to be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not advise, sign pleadings, nor appear in court on any matter of constitutional or administrative law. I will not advise, sign pleadings, nor appear in court on any matter of law settled by the judgement of a court during my appointment to its office. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta.
>
> (b) if the applicant is reinstated as a member, it is a condition of the reinstatement that the member must not appear in chambers or in any court in Alberta as a barrister and solicitor without first obtaining the approval of the Benchers, which may be given with or without conditions, or an administrator tasked with confirming that such an appearing will not violate the former judges' oath outlined in 117(a). Should an administrator decline to approve the reinstated applicant's submission, an appeal made be made to the Benchers.