

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

MODEL CODE OF PROFESSIONAL CONDUCT

CONSULTATION REPORT

JANUARY 31, 2017

INTRODUCTION

1. The Model Code of Professional Conduct (the “Model Code”) was developed by the Federation of Law Societies of Canada (the “Federation”) to synchronize as much as possible the ethical and professional conduct standards for the legal profession across Canada. First adopted by the Council of the Federation in 2009, the Model Code has now been adopted in 13 of the 14 provincial and territorial law societies.
2. The Federation established the Standing Committee on the Model Code of Professional Conduct (the “Standing Committee”) to review the Model Code on an ongoing basis to ensure that it is both responsive to and reflective of current legal practice and ethics. The Standing Committee is mandated by the Federation to monitor changes in the law of professional responsibility and legal ethics, to receive and consider feedback from law societies and other interested parties regarding the rules of professional conduct, and to make recommendations for amendments to the Model Code.
3. In accordance with its mandate, the Standing Committee engages in an extensive process of review, analysis and deliberation before recommending amendments to the Model Code. Consultation with the law societies and other interested stakeholders is an essential component of this process.

REQUEST FOR FEEDBACK

4. The Standing Committee seeks the feedback of Canadian law societies, representatives of the judiciary, the Canadian Bar Association, the federal Department of Justice, the Public Prosecution Service of Canada, individuals actively engaged in legal ethics issues, and interested members of the public on draft amendments to the Model Code.
5. The proposed amendments in this Consultation Report address issues related to technological competence, the return to the practice of law by former judges, and an amendment to the rule on encouraging respect for the administration of justice. Feedback on any or all of the proposed amendments is welcomed.
6. The Standing Committee will carefully consider the substantive feedback it receives, making further changes to the proposed draft amendments as appropriate. The deadline for providing feedback on the proposed amendments is **May 30, 2017**. Please send your feedback to consultations@flsc.ca.
7. The final amendments will be presented to the Council of the Federation for approval in December 2017 and then submitted to the law societies for adoption and implementation.



I. TECHNOLOGICAL COMPETENCE

8. The Standing Committee is proposing the addition of paragraph 5A to the commentary to rule 3.1-2 to provide guidance on technological competence. The draft amendments are shown in Appendix “A” to this consultation report.

Background

9. The Standing Committee conducted an environmental scan which demonstrated that technological competence is an important issue for legal regulators and lawyers. Current legal practice is very integrated with technology. Lawyers need to understand the tools they use and intend to use to practice law. It is imperative that they also understand the legal and ethical implications of those technological tools, including issues related to privacy and security. Due diligence is required in reviewing agreements with technological service providers, and in assessing any risks associated with the use of particular technology. Members of the legal profession must also inform their clients of any risks associated with the use of technology in the lawyer-client relationship. Issues associated with the proliferation of technology are not currently specifically addressed in the Model Code.

Proposed Amendments

10. The Standing Committee recognizes that lawyer competence is addressed by law societies in many different ways. However, the Standing Committee considers a lawyer’s understanding and maintenance of technological competence to be an ethical issue of significant importance that should be specifically referenced in the Model Code.

11. Proposed additional commentary to the general competence rules counsels members of the legal profession on the need for technological competence appropriate for their own practice area and circumstances. It also stresses the need for counsel to appreciate the benefits and risks associated with the technology, particularly in light of the duty to protect confidential information.

II. FORMER JUDGES RETURNING TO PRACTICE

12. The Standing Committee is also proposing amendments to the Model Code rules concerning the return to legal practice by former judges. The draft amendments include changes to rule 5.6-1 (Encouraging Respect for the Administration of Justice), a new rule 5.6-4

(Recruitment of Judges), and a complete revision of section 7.7 of the Model Code (concerning the return to practice of former judges). The draft amendments and new rules are shown in Appendix “A” to this consultation report.

Background

13. In recent years concerns about judges retiring and returning to practice have been raised in a variety of quarters, including the legal ethics academy and the courts. Concerns about the ethical rules governing the conduct of judges returning to legal practice were first raised in a 2011 letter from a group of ethics professors to the then president of the Federation (see Appendix “B”). The matter was referred to the Standing Committee and in late 2015, after concerns about post-judicial conduct were raised with the Federation by Associate Chief Justice Frank Marrocco of the Ontario Superior Court of Justice, the Standing Committee embarked upon a review of the relevant rules in the Model Code. In response to the Associate Chief Justice’s concerns, the Law Society of Upper Canada recently amended its rules concerning return to practice and is actively considering additional amendments.

14. In conducting its review the Standing Committee considered the relevant rules in the Model Code, the corresponding rules in the provincial and territorial rules of professional conduct, academic literature, and international approaches to the regulation of post-judicial conduct.

15. Recognizing that the return of judges to legal practice after leaving the bench has implications not only for the regulators of the legal profession, but also for sitting members of the judiciary, their representative organizations, and the Canadian Judicial Council (the body responsible for setting standards for judicial conduct) in May 2016, the Standing Committee shared a discussion paper exploring the issue (available [here](#)). The discussion paper included an in-depth discussion of the policy questions arising from the return to practice of former judges. Feedback on those questions was sought from law societies, the Canadian Judicial Council, the Canadian Superior Court Judges Association, the Canadian Association of Provincial Court Judges, the Canadian Bar Association, and a number of legal ethics academics. The Standing Committee received feedback on this early discussion paper from the law societies, the Canadian Superior Court Judges Association, the Canadian Bar Association’s Ethics Committee, Professors Stephen Pitel, Adam Dodek, Alice Woolley, Richard Devlin, Amy Salyzyn, Gabrielle Appleby, and Alysia Blackham, and a former President of the Federation as an individual.

16. The Standing Committee considered the responses to the questions posed in the discussion paper and determined that changes to the Model Code are required.

Proposed Amendments

17. Although the Standing Committee recognizes that as lawyers, former judges should be able to return to their profession after leaving the bench, the committee is persuaded that the administration of justice is negatively affected by the appearance of a former judge as counsel in a Canadian court. The proposed amendments would thus permit a return to practice, but would prohibit all former judges from appearing before or communicating with any court, subject to the right to apply to the regulator based on exceptional circumstances. The Standing Committee saw no ethical purpose in a temporal prohibition on returning to practice.

18. The Standing Committee was persuaded by submissions that it is artificial to distinguish between types of judges. The Standing Committee noted that today judges interact with each other at all levels. For example, judges from across the country at all levels of court meet through several judicial education organizations, chiefs of courts collaborate from time to time, and the judiciary sometimes works together across all of its different constituent parts.

19. The Standing Committee did not define the term “judge” in the proposed draft rules and amendments beyond specifying that the proposed rule applies to former judges who were “provincially, territorially, or federally appointed to a court in Canada.” The Standing Committee otherwise chose to leave the term “judge” to be defined by the legislation governing judges applicable to each court in Canada. This approach is intended to exclude a range of other senior judicial administrative positions and part-time judges across Canada, as well as international judges. The Standing Committee is seeking feedback on whether this is the correct approach – should the term “judge” be defined in the Code? If yes, what definition of the term would work for the entire Model Code and for all provincial, territorial, hybrid and federal courts in Canada?

20. The Standing Committee was persuaded by arguments put forward by Professor Stephen Pitel that a duty of judicial confidentiality should be imposed on former judges returning to practice. The new rules propose barring former judges from breaching the confidentiality of the judicial process. As an officer of the court, a former judge should not bring the administration of justice into disrepute by disclosing the confidential debates and discussions between judges. In the absence of an obligation of judicial confidentiality, former judges who have returned to practice should be prohibited from disclosing anything that gives the appearance of relying on confidential information or judicial confidences. The Standing Committee concluded that former judges who have returned to practice must be otherwise free, like any other lawyer governed by relevant ethical constraints in the Model Code, to comment on decisions, to advise their clients and to make public statements.

21. It is the view of the Standing Committee that former judges should also be free to provide behind the scenes help such as providing advice to and mentoring other lawyers and practitioners. The Standing Committee did not agree with the suggestion that a former judge



should be prohibited from “ghost writing” submissions etc., concluding that the proposed limits on court appearance would be sufficient to address concerns about the impact on the administration of justice.

22. The proposed amendments include commentary identifying factors law societies will consider in determining whether exceptional circumstances justify permitting a former judge to appear in court. In the view of the Standing Committee, the “exceptional circumstances” requirement sets a very high standard, consistent with how this term is used elsewhere in the Model Code.

23. After reviewing the marketing rules the Standing Committee concluded that they address sufficiently the concerns raised around retired judges returning to practice. Commentary 4 to rule 7.7-1 does however reference the marketing rules and cautions a former judge from suggesting qualitative superiority over other lawyers or law firms.

24. The Standing Committee agreed with concerns that the administration of justice could be put into disrepute if lawyers and law firms are engaging in employment discussions with sitting judges. To address this concern amendments are proposed that would bar lawyers and law firms from soliciting sitting judges or from entering into discussions with a sitting judge about post judicial employment.

III. RELATED AMENDMENT TO THE RULE ON ENCOURAGING RESPECT FOR THE ADMINISTRATION OF JUSTICE

25. In reviewing rule 5.6-1 (Encouraging Respect for the Administration of Justice) and commentary the Standing Committee identified a need to clarify commentary to state that making irresponsible allegations is only one example of how a lawyer could weaken or destroy public confidence in legal institutions or authorities.



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Model Code of Professional Conduct

As amended March 10, 2016, **Draft 2017 Consultation proposed changes in red font**

[...]

Competence

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer's general experience;
- (c) the lawyer's training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[5A] To maintain the required level of competence, a lawyer should develop and maintain a facility with technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] A lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1A.

[7B] In providing short-term summary legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

[9] A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such

that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[13] The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[...]

5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities, **for example through** irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

[3] Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal

institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

5.6-2 A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

[1] If possible, the lawyer should suggest solutions to the anticipated problem such as:

- (a) further security, or
- (b) reserving judgment.

[2] If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of section 3.3 (Confidentiality).

Recruitment of Judges

5.6-4 A lawyer or law firm shall not solicit, recruit or engage in discussions with a judge concerning a potential business or employment relationship.

Commentary

[1] Lawyers and law firms could negatively impact the administration of justice if they are permitted to discuss post-judicial employment or business prospects with a judge. The independence and integrity of the justice system must be protected by lawyers and law firms at all times. Even the suggestion of lawyers or law firms being able to discuss post-judicial business affairs with a judge puts the appearance of judicial independence into question and could create judicial conflicts of interest detrimental to the expeditious administration of justice if these discussions turn sour.

[2] A lawyer or law firm may discuss employment and business relationships with a former judge subject to the provisions on conflicts of interest and other principles in this Code of Conduct.

[...]

7.7 — RETIRED JUDGES RETURNING TO PRACTICE

~~7.7-1—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 the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.~~

7.7 FORMER JUDGES RETURNING TO PRACTICE

Judge Returning to Practice

7.7-1 A judge who returns to practice after retiring, resigning or being removed from office must not communicate with or appear as a lawyer before any Canadian court or tribunal.

Commentary

[1] The administration of justice in Canada may be negatively impacted by a former judge appearing in court after they have left the bench. Former judges who return to practice should avoid any perception that they are advocating or appearing before a court or tribunal. A former judge should not be seen to be actively involved on behalf of a client in a matter before a court or tribunal, for example by sitting at counsel table or signing materials submitted to the court or tribunal.

[2] A former judge is encouraged to provide mentoring, support, coaching and limited scope legal services to teach others how to better advocate before or correspond with a court.

[3] This rule is not meant to interfere with the lawyer-client relationship but a former judge must be wary if the public may perceive them to be advocating before a court or tribunal. A former judge acting as counsel cannot control what their client may do with legal services or opinions provided to their client. No ethical concerns arise if a former judge's legal services are incidentally exposed to a court, for example where the former judge's lawyer's bill is assessed by a court.

[4] A judge who returns to practice may market professional services subject to Rule 4.2-1. Any marketing should avoid suggestions of qualitative superiority over other lawyers or law firms or that suggests any special influence over, or a favoured relationship with the court.

[5] A former judge granted permission under Rule 7.7-3 cannot use a judicial title or honorific or suggest they have special influence beyond that of other lawyers when communicating with or appearing before a court or tribunal.

[6] This rule applies to any former judge who was once provincially, territorially or federally appointed to a court in Canada.

Protecting the confidentiality of the judicial process

7.7-2 A former judge who returns to practice must respect the confidentiality of the judicial process and must not disclose judicial confidences or any information that gives the appearance of relying on confidential judicial information, discussions or deliberations.

Commentary

[1] Lawyers are obliged to encourage respect for the administration of justice and to strengthen public confidence in legal institutions. A former judge who discloses judicial confidences undermines public confidence in the judicial process and in the finality of judicial decisions.

Exceptional Circumstances

7.7-3 A former judge who returns to practice may apply to the Law Society for permission to communicate with or appear as a lawyer before any Canadian court or tribunal and will be granted such permission only in exceptional circumstances.

Commentary

[1] Factors to be considered in assessing whether exceptional circumstances exist include:

- (a) the length of the former judge's tenure on the bench;
- (b) the length of the former judge's retirement; and
- (c) the range or jurisdiction of the former judge's judicial activity.

[...]

Mr. Ronald J. MacDonald, Q.C.
President
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

March 21, 2011

Dear Mr. MacDonald:

We are law professors committed to the teaching of professionalism and the ethics of the legal profession, including judicial ethics. Attached to this letter you will find a letter to Chief Justice McLachlin as Chair of the Canadian Judicial Council encouraging the Council to develop guidelines to assist judges in issues that arise as they exit judicial office. We believe that such guidelines are necessary to ensure public confidence in the independence of the judiciary and the impartiality of adjudication which are cornerstones of the rule of law in Canada.

We are writing to you as President of the Federation of Law Societies of Canada to encourage the Federation to consider adopting rules to govern the conduct of former judges who return to the practice of law as part of the Federation's Model Code of Conduct.

At present, very few Law Societies have rules that specifically address the situation of retired judges returning to practice. At one point, the Law Society of British Columbia had a rule that provided for a "cooling off period" of several years during which a retired judge could not appear as counsel before the court in which the judge used to be a member, or any court below. This is but one example of the sorts of rules that Law Societies should consider.

We believe that demographic and cultural changes in the judiciary over the past decade necessitate the consideration of such rules. It used to be that when judges retired at 75 or before, they enjoyed a well-deserved quiet retirement at the end of a productive legal career. However, as Canadians are living longer and enjoying more active and productive working lives, for many the judicial career has become the second career (the practice of law being the first) and many embark on a productive third career in law, public policy or business after leaving the bench. Codes of Conduct do not address this new reality.

In October 2010, members of the Canadian Association of Legal Ethics (CALE) joined with the National Judicial Institute to bring together over 100 federally-appointed judges, law professors and members of the bar to discuss selected judicial ethics issues. One of the sessions was entitled "Judicial Independence and Judicial Ethics: Ethical Issues over the Career Cycle of the Judge" and a panel discussion was specifically devoted to issues that arise when a judge retires from the bench.

In this session and over the course of the last few years, numerous issues have arisen regarding judges' actions when exiting the job and after retiring from the bench. Such issues include the propriety of a former judge providing legal advice about a case in which he or she participated, judges stepping down to run for political office, commenting on the work of the court on which the judge formerly sat, and a judge appearing as counsel before former colleagues. These are difficult and controversial issues that are in need of serious consideration.

Many of us have worked collaboratively with the Federation in the past and we stand ready to continue to do so on this issue.

Sincerely yours,

Richard F. Devlin
Professor, Schulich School of Law
University Research Professor, Dalhousie University

Adam M. Dodek
Associate Professor
Faculty of Law (Common Law Section)
University of Ottawa

Alice Woolley
Associate Professor
Faculty of Law
University of Calgary

Annalise Acorn
Lawlor Professor of Law and Ethics
Faculty of Law
University of Alberta

David Asper
Assistant Professor
Faculty of Law
University of Manitoba

Janine Benedet
Associate Professor
Faculty of Law
University of British Columbia

David Blaikie
Assistant Professor
Schulich School of Law
Dalhousie University

Jocelyn Downie
Professor, Schulich School of Law
Canada Research Chair
Dalhousie University

Trevor C. W. Farrow
Associate Professor
Director, Clinical Legal Education
Osgoode Hall Law School

Aline Grenon
Professor
Faculty of Law (Common Law Section)
University of Ottawa

Allan C. Hutchinson
Distinguished Research Professor
Osgoode Hall Law School
York University

Jasminka Kaladjic
Assistant Professor
Faculty of Law
University of Windsor

William C.V. Johnson
Adjunct Professor of Law
Faculty of Law (Common Law Section)
University of Ottawa

Lorraine Lafferty
Assistant Professor
Schulich School of Law
Dalhousie University

John M. Law
Professor
Faculty of Law
University of Alberta

Anne McGillivray
Professor
Faculty of Law
University of Manitoba

Tammy Moore
Faculty of Law
University of New Brunswick

Chantal Morton
Adjunct Professor, 2010-11
Ethical Lawyering in a Global Community
Osgoode Hall Law School
York University

Marina Pavlovic
Assistant Professor
Faculty of Law (Common Law Section)
University of Ottawa

Stephen G.A. Pitel
Associate Professor and Goodmans LLP Faculty Fellow in Legal Ethics
Faculty of Law
University of Western Ontario

Annie Rochette
Professeure agrégée, Département des sciences juridiques
Université du Québec à Montréal

Chris Sprysak
Associate Professor of Law
Faculty of Law
University of Alberta

David Tanovich
Professor
Faculty of Law
University of Windsor

David Wiseman
Assistant Professor
Faculty of Law (Common Law Section)
University of Ottawa

Ellen Zweibel
Full Professor
Faculty of Law (Common Law Section)
University of Ottawa

- c. The Rt. Hon. Beverley McLachlin, Chief Justice of Canada and Chair, Canadian
Judicial Council
Mr. Rod Snow, President, Canadian Bar Association
Mr. Jonathan Herman, CEO, Federation of Law Societies of Canada