



CCCT CCTJ

CANADIAN CENTRE FOR COURT TECHNOLOGY
CENTRE CANADIEN DE TECHNOLOGIE JUDICIAIRE

THE USE OF SOCIAL MEDIA BY CANADIAN JUDICIAL OFFICERS

A Discussion Paper of the Canadian Centre for Court
Technology

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INTRODUCTION

In October, 2011, the Canadian Centre for Court Technology (CCCT-CCTJ) established an IntellAction Working Group (IWG) on Social Media and the Courts to:

- assess and determine the needs of courts and develop best practices; and
- consider best practices amongst the judiciary in their use of social media.

As a first initiative, the IWG developed National Guidelines on the Use of Electronic Devices in Courts. The CCCT-CCTJ Board of Directors approved the National Guidelines on December 17, 2012 and the Guidelines are available on the CCCT-CCTJ web site under the publications section.¹

As a next phase of work, the Working Group turned its attention to the use of social media by “judicial officers,” defined as judges and tribunal members. Its mandate is to explore the implications (including legal, social and technological) of the use of social media by judicial officers. The IWG was directed to produce a discussion paper to

- identify the nature and extent of current use of social media by judicial officers in Canada;
- identify the extent of current use of social media by judicial officers in other jurisdictions;
- identify the extent to which best practices (such as guidelines, rules and advisory opinions) as to the use of social media by judicial officers in Canada and elsewhere have been developed; and
- make recommendations as to the use of social media by judicial officers in Canada.

The focus is on the use of social media by individual judicial officers and not by courts or tribunals themselves. Some courts already use social media to distribute information on their processes, judges and rulings. As well, the discussion paper deals with the use of social media after appointment – not the so-called “digital baggage” accumulated prior to appointment.

For purposes of this discussion paper, social media is defined as “a class of web sites deriving their primary value from the social interactions taking place on the site.”

¹ Canadian Centre for Court Technology, Guidelines & Studies, online : http://wiki.modern-courts.ca/images/9/96/Use_of_Electronic_Communication_Devices_in_Court_Proceedings.pdf.

The members of the Working Group were: Julian Appel (Manager, Operations and Security, Court Services, Ontario Ministry of Attorney General), Stephen Bindman (Special Advisor on Wrongful Convictions, Department of Justice Canada), Santina Di Pasquale (administrative judge, Commission des lésions professionnelles, Quebec), Professor Adam Dodek (University of Ottawa, Faculty of Law), Justice Fran Kiteley (Ontario Superior Court of Justice and Co-Chair of the Board of Directors of the CCCT), Olivier Jaar (former Project Manager, CCCT), Bruce Laregina (law student, Osgoode Hall Law School), Associate Chief Justice John Rooke (Court of Queen's Bench, Alberta), Diana Lowe, QC (Executive Counsel to ACJ Rooke and Deputy Executive Director, Court of Queen's Bench, Alberta), Professor Lisa Taylor (Faculty of Journalism, Ryerson University), Bill Trudell (Chair, Canadian Council of Criminal Defence Lawyers), Cheryl Vickers (Chair, Property Assessment Appeal Board and Surface Rights Board; former Acting Chair, Civil Resolution Tribunal, British Columbia), Justice Bonnie Wein (Ontario Superior Court of Justice), Vince Westwick (Counsel, Ottawa Police Service), Honorable Ray Wyant (former Chief Judge, Provincial Court of Manitoba).

Each member of the Working Group made important contributions to this discussion paper, with particular thanks to Stephen Bindman, Adam Dodek, Olivier Jaar, Diana Lowe and Bruce Laregina.

A. SURVEY ON THE NATURE AND EXTENT OF CURRENT USE OF SOCIAL MEDIA BY CANADIAN JUDICIAL OFFICERS

A 2010 survey by the New Media Committee of the Conference of Court Public Information Officers in the United States found the following about the use of social media:²

- About 40 per cent of responding state court judges reported they are on social media profile sites, the majority of these on Facebook. This is almost identical to the percentage of the adult U.S. population using these sites.
- Judges who are appointed and do not stand for re-election were much less likely to be on social media profile sites. About 9 per cent from non-elected jurisdictions reported they were on these sites.
- Nearly half of judges (47.8 per cent) disagreed or strongly disagreed with the statement —“judges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.”
- Judges appear to be more comfortable with using these sites in their personal lives, with 34.3 per cent disagreeing or strongly disagreeing with the statement —“judges can use social media profile sites, such as Facebook, in their personal lives without compromising professional conduct codes of ethics.”

To provide Canadian background for this study, the Working Group conducted a survey to understand the present level of social media usage amongst Canadian judicial officers. The survey consisted of a series of basic questions, followed by an opportunity to answer a series of more detailed queries ([PDF copy of the original online form](#)).

Various groups were approached to respond to the questionnaire:

- | | |
|---|----------------------------|
| • Provincial Tribunal Members | • Masters |
| • Federal Tribunal Members | • Prothonotaries |
| • Justices of the Peace | • Superior Court Justices |
| • Provincial / Territorial Court Judges | • Court of Appeal Justices |

² <http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf>.

The judicial officers were not sent the survey directly; Rather it was sent to the following organizations which were asked to distribute it to its members or authorized the Working Group to distribute it:

- Canadian Judicial Council
- Canadian Council of Chief Judges
- Council of Canadian Administrative Tribunals
- British Columbia Council of Administrative Tribunals
- Presidents / Chairs of various administrative tribunals

Email invitations were sent out in two waves: one in early November 2013, and a second in the middle of December 2013. The survey was an online Google form and available in both English and French. Some judicial officers invited to participate were not able to access the survey when using government computers because of incompatible Internet Explorer versions or restrictive security filters on their office's network.

Originally, a total of 704 responses were received (489 English, 215 French), but some had to be eliminated from the database,³ leaving a sample of 678 participants (474 English, 204 French) which was analyzed. The Working Group thanks all those who responded to the survey.

Table 1 shows the distribution of the responses by jurisdiction and by level of courts.

Table 1

	AB	BC	MB	NB	NFL	NS	ON	PEI	QC	SK	NWT	NU	YK	Fed	TOTAL
Provincial Tribunal Member		50			1		3		137						191
Federal Tribunal Member									14						14
Justice of the Peace							71		4						75
Provincial / Territorial Court Judge	57	6	9		2	2	63	1	24	9					173
Superior Court Justice	19	29	1	1	5	11	58	1	21	18	3	2		11	180
Court of Appeal Justice	1	5	2	1	1	4	3	4	2	4					27
Master	3	4					7								14
Prothonotary		1				1								2	4
TOTAL	80	95	12	2	9	18	205	6	202	31	3	2	0	13	678

³ 13 were not judicial officers, 12 had key information not provided (role, jurisdiction, etc.), and 1 where the form was filled out twice by the same person.

Limitations of the Findings

Although a range of judicial officers responded to the survey, from all but one jurisdiction (there were no responses from the Yukon), the findings from the survey cannot be generalized to all judicial officers in Canada. (Only surveys that include a sufficient number of the general population to produce statistically reliable and valid results can be generalized. These must either take the form of a census, including everyone in a particular population, or have a random sample that can reasonably be assumed to have included a representative portion of all population groups. In practice this is very difficult to achieve.)

The following limitations on the reported survey data should be kept in mind:

- The organizations listed above were asked to send out the surveys to their members, but only a minority completed the survey;
- We can make no claim to statistical significance;
- Judicial officers were sent the survey based on their role within the system, and completed the survey voluntarily. Both researcher and self-selection bias are therefore present; and
- This is the first known survey of Canadian judicial officers on social media issues, and more research is needed.

The findings reported describe only the group which participated in the survey. Findings should be regarded as indicators of trends, and factors that are present for at least some of the participants. Despite the above limitations, the survey responses provide some insight into social media issues among judicial officers, and will provide a valuable starting point for the conversations, policies and research that should follow.

Definitions

At the beginning of the survey, definitions were provided to participants to ensure a better understanding of the terminology used in the questionnaire. Those definitions are also relevant to correctly interpret the results presented in this report.

Terminology	Definition
To visit	<i>Visiting, viewing or reading on the web.</i>
To contribute	<i>Adding content (such as pictures, documents, posts, links or comments) to a site.</i>
Personal capacity	<i>Visiting or contributing material unrelated to the law or to your judicial role.</i>
Professional capacity	<i>Visiting or contributing material related to the law or your judicial role more generally.</i>
Social media	<i>A class of web sites deriving their primary value from the social interactions taking place on the site.</i>
Blog	<i>Website which presents posts, with or without comments, in reverse chronological order (more recent posts appear first). Such posts can be from one author or several. For example, slaw.ca is a legal community blog and falls in the category of "blogs".</i>

Given that the response rate varied greatly between jurisdictions, and that some groups of judicial officers have responded much more actively than others, the following data will always represent Canadian judicial officers as a whole, unless specified otherwise, because the distribution of the responses might not always be representative of a certain level of court or jurisdiction.

General Use of Social Media

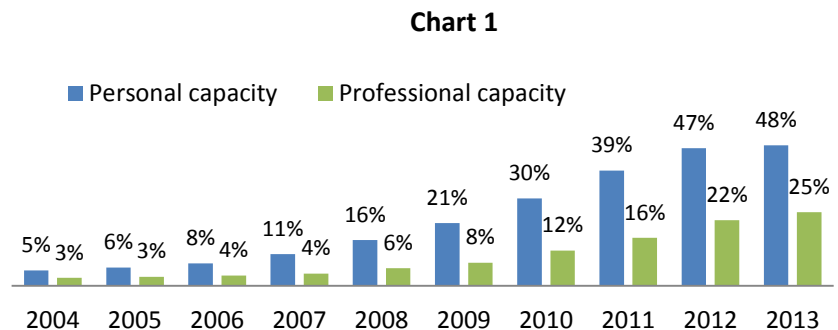
According to our sample, 48 per cent of Canadian judicial officers visit or contribute to social media sites (such as Facebook, LinkedIn, Twitter, YouTube and blogs) in a personal or professional capacity, to some small extent. This compares, depending on the criteria used in other studies, to 67 per cent of the general Canadian population “*who used the Internet visited social networking sites such as Facebook or Twitter in 2012*”⁴ and approximately 59 per cent of Canadians aged 12 and above who “*visit two or more different social media websites within a given month.*”⁵ While respondents in our survey were not asked to give their age, it is

⁴ Individual Internet use and e-commerce, Statistics Canada, 2012, online: <http://www.statcan.gc.ca/daily-quotidien/131028/dq131028a-eng.htm>.

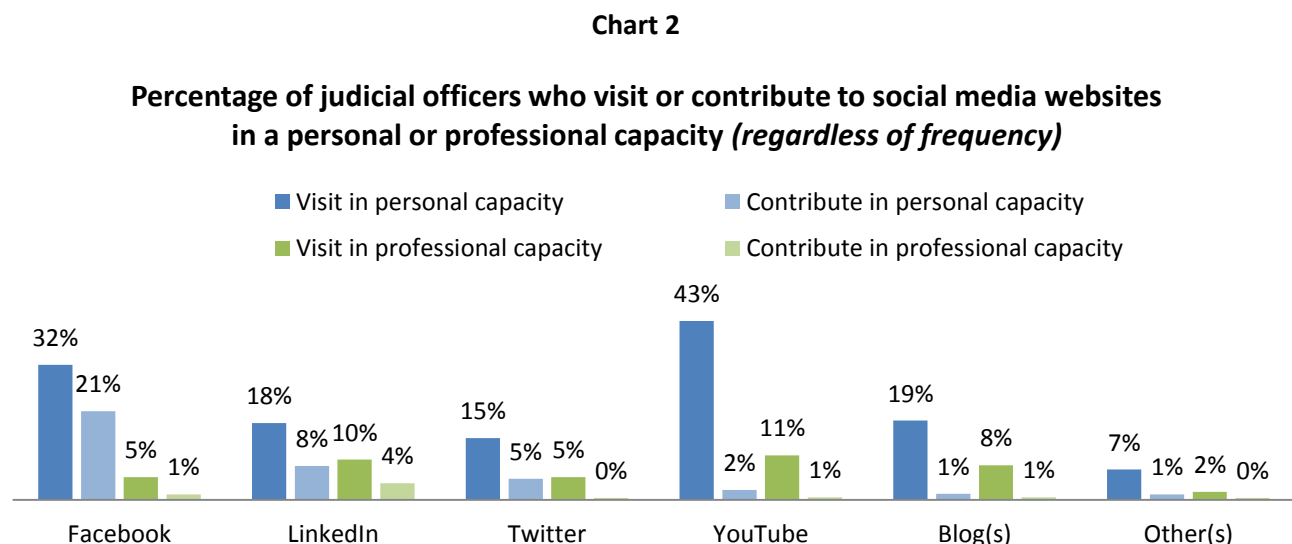
⁵ RTS Survey - Social Media, Print Measurement Bureau, 2012.

important to keep in mind that, when compared to the general population, judicial officers tend to represent an older group of individuals; for example, the mean age for federally-appointed judges is 62 years old.⁶

Chart 1 shows the progressive adoption by some judicial officers of social media over the course of the last decade. Respondents were invited to *estimate* the year in which they started using social media in a personal or professional capacity.



Judicial officers who do visit social media websites do so using the following devices: a desktop computer (51 per cent), a laptop (65 per cent) or a netbook (3 per cent), a tablet (60 per cent), a smartphone (53 per cent) or other devices (4 per cent). The graph below outlines the frequency with which judicial officers reported visiting or contributing to major social media websites:



Frequency

Judicial officers do not visit social media websites as much as the general population. For example, while 54 per cent of Canadians “log onto Facebook at least once every month,”⁷ only

⁶ Office of the Commissioner for Federal Judicial Affairs Canada, 2014.

⁷ Maclean's, 2013.

23 per cent of all judicial officers reported doing so. Graphs in Appendix 1 break down the frequencies at which judicial officers reported visiting and contributing to such sites, in both personal and professional capacity.

Purposes of Social Media Used by Judicial Officers

The following sections present percentages of Canadian judicial officers who reported using social media (n = 325). Only those who do were invited to provide answers to the following questions:

Table 2

Why do judicial officers visit social media?	Personal	Professional
Follow your contacts	61%	21%
Follow the news	56%	40%
Find online content (<i>e.g. articles, reports</i>)	46%	34%
Follow events	41%	26%
Find online multimedia content (<i>e.g. photos, videos</i>)	41%	15%
Access online collaborative work (<i>e.g. agendas, documents</i>)	14%	12%
Other	6%	3%
Why do judicial officers contribute to social media?	Personal	Professional
Send private messages to contacts	47%	11%
Comment on contact's activity or online articles	26%	5%
Maintain your online profile page	23%	8%
Share online content (<i>e.g. articles, reports</i>)	20%	9%
Share online multimedia content (<i>e.g. photos, videos</i>)	18%	5%
Organize events	11%	4%
Publish original multimedia content (<i>e.g. photos, videos</i>)	8%	3%
Publish original content (<i>e.g. articles, reports</i>)	3%	1%
Manage online collaborative work (<i>e.g. agendas, documents</i>)	0%	0%
Other	2%	2%

Social Media Policies

Chief judges/justices or tribunal presidents/chairs do not tend to be advised about their judicial officers' online networking habits. In fact, only 19 per cent of judicial officers who do visit social media websites report that their superiors are aware of their social media usage, whether personal, professional or both (8 per cent personal, 6 per cent professional and 5 per cent both).

Organizational policies on reporting social media use are not common. Only 7 per cent of judicial officers who reported using social media are obligated to inform their superior when used in a professional capacity, and 2 per cent need to divulge both personal and professional habits. Comparatively, when asked *"Should you be obligated to inform your president/chair or chief judge/justice about your social media usage?"* 22 per cent of judicial officers who reported using social media answered "Yes" for professional usage only, and 14 per cent for both personal and professional. Surprisingly, 1 per cent of respondents indicated that there should be a disclosure obligation solely for personal use of social media.

Out of the 85 per cent of judicial officers who visit social media sites and preside in a court or tribunal that does not have a policy on personal use – whether official or unofficial – 42 per cent believe that it would be useful for their organization to develop such a policy (34 per cent disagree, 24 per cent are unsure). As for the 79 per cent presiding where there is no policy on professional use of social media, a stronger 73 per cent believe a policy would be useful (13 per cent disagree, 14 per cent are unsure).

Security and Privacy

Participants were questioned on both the actual and perceived security risks while using social media. Where precautions can be taken to ensure security of social media accounts, it seems the majority of judicial officers do not expose themselves to risk in the workplace. Only 1 per cent of judicial officers have provided someone else with permission to make changes to any of their social media accounts - in which cases it's always an assistant. However, 12 per cent of social media-using judicial officers reported individuals who have regular access to their computer – generally department IT staff or assistants, and in rare occurrences, a colleague or a superior.

In regards to perceived risks where limited precautions can be taken by the user of social media, the survey results appear to reflect an elevated concern about security and privacy amongst judicial officers. When asked about major social media websites like Facebook and

LinkedIn, 36 per cent of judicial officers who use social media felt that their computer and the electronic documents it contains are secure while using such sites (32 per cent disagree, 31 per cent are unsure). As for the online account itself, including its content, only 24 per cent of the respondents who use social media feel that they are secure (45 per cent disagree, 31 per cent are unsure).

Ethics and Social Media

Networking Interactions

Judicial officers responding to the survey tend to believe that using social media websites in a personal capacity is more acceptable than engaging in similar activities from a professional standpoint. Having a personal profile page (e.g. Facebook) is acceptable to 41 per cent of them (36 per cent disagree, 24 per cent are unsure), while having a professional profile page (e.g. LinkedIn) is only acceptable to 21 per cent of those same respondents (56 per cent disagree, 23 per cent are unsure). To a lesser degree, that same tendency can be observed for contributing to social media (e.g. writing blog posts or articles); 37 per cent find it acceptable in a personal capacity (39 per cent disagree, 23 per cent are unsure) as opposed to only 23 per cent for doing so in a professional capacity (50 per cent disagree, 26 per cent are unsure).

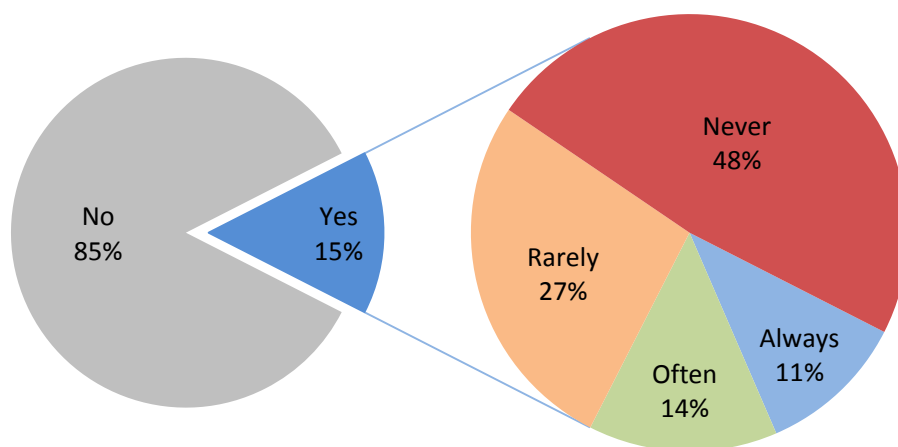
In regards to professional interactions with a lawyer who is a social networking contact, 33 per cent of judicial officers who reported social media use believe that it would be acceptable for a “LinkedIn contact” to appear before him/her (37 per cent disagree, 31 per cent are unsure). However, a small, yet clear, distinction is made if the lawyer is a “Facebook friend,” in which case only 23 per cent of judicial officers find it acceptable for the lawyer to appear before him/her (53 per cent disagree, 25 per cent are unsure).

Although the above comparisons suggest a tendency for judicial officers to discriminate between personal and professional social media interactions, data distribution suggests an underlying phenomenon. Both the absence of a well-defined majority on one side or the other and the relatively high levels of uncertainty at every question, might reflect a lack of understanding or knowledge of the social media concepts at play, the risks or the ethical issues they may or may not raise in a professional context. This hypothesis is supported by the very fact that the vast majority of individuals surveyed here almost never use social media in a professional capacity (Appendix 1).

Non-Legal Research through Social Media

This section examines the use of social media by judicial officers to research background information, other than legal issues, for a particular case they are hearing - i.e. factual information found through social media. When asked if they do such research, the majority of judicial officers answered “No” (pie chart below). Those who answered “Yes” were asked in a subsequent question the frequency with which they disclose this fact to the parties (pie chart on the right).

Chart 3



As shown in green, orange and red, a fair portion of the respondent judicial officers who sometimes use social media for non-legal research do not systematically disclose this information to the parties. When asked whether doing such factual research while judgment has been reserved raises ethical or legal concerns, 79 per cent of reported users believe that it does (9 per cent disagree, 12 per cent are unsure). Furthermore, 89 per cent consider that doing so without disclosing it to the parties raises ethical or legal concerns (10 per cent disagree, 12 per cent are unsure).

While those numbers may look surprising at first, comments received from participants mitigate these results to a certain extent. Appendix 2 provides examples of responses to the question: “Do you think using social media to research background information (other than legal issues) without disclosing this research to the parties raises ethical or legal concerns?” We report “typical responses” as those which were similar in content and reflect the majority of responses, and “unique responses” as outliers, but perhaps of interest to readers of this report.

Summary of Survey Findings

Overall, the survey findings were informative. It found that judicial officers responding to the survey use social media at a significantly lower rate than the general population. Those judicial officers who do use social media are relative newcomers, having started only in the past several years. By far, most use of social media by judicial officers is in a personal capacity. Judicial officers visit social media most often to follow contacts, follow the news, find online contacts, follow events and find online multi-media content such as photos and videos. A negligible minority of judicial officers contribute to social media sites in a professional capacity while a small minority contribute to social media sites such as Facebook in a personal capacity.

The survey results indicate a high level of concern about security and privacy amongst judicial officers. In terms of ethics, judicial officers believe that using social media in a personal capacity is more acceptable than engaging in the same activities from a professional standpoint. Judicial officers are unsure about many of the ethical implications of social media use, such as the propriety of professional interactions with social media contacts. In terms of conducting non-legal research through social media, a strong majority of respondents do not do so. Amongst the minority that do, almost half never disclose this information to the parties, a quarter rarely do so and another quarter always or often disclose.

The survey found a general lack of social media policies for judicial officers in Canadian courts and tribunals and a lack of awareness by chief judges/justices of use of social media by members of their courts/tribunals. We venture to suggest that the concerns and lack of clear understanding about ethical implications noted above, all point to the need for social media policies and education for judicial officers.

B. CURRENT GUIDANCE FOR JUDICIAL OFFICERS IN CANADA

There are currently few specific rules or guidelines in Canada dealing with the use of social media by judicial officers, although 7 per cent of judicial officers in our survey who reported using social media said they were obligated to inform their superiors. However, some guidance about conduct in the realm of social media may be available through more general ethics codes for judges and tribunal members and members of the Bar. Specifically, as social media tools are increasingly becoming the predominant mode of electronic communication by the public, lawyers and judges need to consider rules relating to *ex parte* communications.

Judges

Codes of Civil Procedure, for example, may provide rules on how parties and their lawyers should regulate their communication with each other, as well as possible reasons to seek the recusal of a judge for inappropriate use of social media or conflicts arising therefrom. For example, in the soon to be former Quebec *Code of Civil Procedure*, s. 234⁸ lists the possible reasons for a judge to be recused from a case, namely if the judge:

⁸CQLR, c C-25. It should be pointed that sections 202 and 203 of the new *Code of Civil Procedure*, CQLR c C-25.01 (which sections were not yet in force at the time of this paper) have somewhat updated the list of causes for recusal. Section 202 now lists the following are, among others, such causes:

- (1) the judge being the spouse of one of the parties or of the lawyer of one of the parties, or the judge or the judge's spouse being related by blood or connected by marriage or civil union to one of the parties or to the lawyer of one of the parties, up to the fourth degree inclusively;
- (2) the judge being a party to a proceeding pertaining to an issue similar to the one before the judge for determination;
- (3) the judge having given advice or an opinion on the dispute or having previously dealt with the dispute as arbitrator or mediator;
- (4) the judge having represented one of the parties;
- (5) the judge being a shareholder or an officer of a legal person or a member of a partnership or an association or another group not endowed with juridical personality that is a party to the proceeding;
- (6) a serious conflict existing between the judge and one of the parties or the lawyer of one of the parties, or threats or insults having been uttered between them during the proceeding or in the year preceding the application for recusal.

Section 203 adds that "A judge who has an interest or whose spouse has an interest in a case is disqualified and cannot hear the case."

1. is the spouse or related or allied ... to one of the parties;
2. is himself or herself party to an action involving a question similar to the one in dispute;
3. has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator, if the judge has acted as attorney for any parties, or if the judge has made known his or her opinion extra-judicially;
4. is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

[...]

7. is a member of an association partnership or legal person, or is manager or patron of some order or community which is a party to the suit;
8. has any interest in favouring any of the parties
9. is the spouse of or is related or allied to the attorney or counsel or to the partner of any of them, either in the direct line or in the collateral line in the second degree; or
10. if there is reasonable cause to fear that the judge will not be impartial.

Provisions such as s.234 provide guidance on when a judge should legally recuse him/herself from a case due to the way in which they might be connected to the parties or the litigation, or how they might have otherwise demonstrated a risk to impartiality through extrajudicial comments on the matter. The Quebec *Civil Code of Procedure* seems to provide the most comprehensive list of such situations. Ontario's *Rules of Civil Procedure*, in contrast, do not provide any guidance on when a judge should recuse from a case.

Another source of advice are Judicial Codes of Ethics, which provide guidance to judges on how they should conduct themselves generally. At the national level, there is the Canadian Judicial Council's *Ethical Principles for Judges*.

Canadian Judicial Council: Ethical Principles for Judges

The Canadian Judicial Council (CJC) has provided very limited guidance on social media use. On the CJC's website, there are papers on Skype,⁹ Facebook and Social Networking Security¹⁰ and

⁹ Canadian Judicial Council, "Is Skype Safe for Judges?", online: <https://www.cjc-ccm.gc.ca/cmslib/general/Is%20Skype%20Safe%20for%20Judges%202014-01-17%20E%20v2.pdf>.

¹⁰ Canadian Judicial Council, "Facebook and Social Networking Security", online: <https://www.cjc-ccm.gc.ca/cmslib/general/Facebook%20security%202014-01-17%20E%20v1.pdf>.

other “technology issues,” but the website provides little or no guidance as to what the Council considers to be acceptable use.¹¹

The Council’s *Ethical Principles for Judges*¹² offers a number of provisions that can provide guidance to how judges might limit their engagement with social media. Although the guidelines are advisory in nature and not binding per se, they have nonetheless formed the basis of investigations and inquiries under the *Judges Act* which can result in the CJC recommending the removal of a judge.¹³

Some of the relevant ethical principles are:

1. Purpose: The purpose of this document is to provide ethical guidance for federally appointed judges.
2. Judicial Independence: An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.
3. Integrity: Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.
4. Diligence: Judges should be diligent in the performance of their judicial duties.
5. Equality: Judges should conduct themselves and proceedings before them so as to assure equality according to law.
6. Impartiality: Judges must be and should appear to be impartial with respect to their decisions and decision making.

The above statements of principle are accompanied by a number of other enumerated principles and commentaries. Of particular interest are the principles and commentaries that accompany the principle of impartiality:

1. (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

¹¹ Lorne Sossin & Meredith Bacal, “Judicial Ethics in a Digital Age” (2013) 46:3 UBC L Rev 629 at 622-23. Similarly, the National Judicial Institute, on its website for federal and provincial judges, has created a “Checklist for Using Social Media Sites.” These simply provide recommendations for maintaining personal privacy and ensuring the maximum security, to assist judges who choose to use social media sites such as Facebook and Twitter.

¹² Available at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

¹³ Sossin & Bacal, *supra*. note 12.

[...]

D. Political Activity

1. Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.
2. All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.
3. Judges should refrain from: (a) membership in political parties and political fundraising; (b) attendance at political gatherings and political fundraising events; (d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

These give some idea of the sort of social restrictions that are expected of judges in Canada so as to meet the exigencies of impartiality. They may help identify ethical issues that could arise through the use of social media, and point to the need for further principles or codes to address this new phenomenon.

At the provincial level there are various codes. For example, in British Columbia, there is the *BC Code of Judicial Ethics*¹⁴ and the *BC Justice of the Peace Ethics Code*¹⁵.

BC Code of Judicial Ethics:

- 1.00 - Judges must be truly independent and must avoid all conflict of interest.
- 2.00 - Judges must devote themselves entirely to the exercise of their judicial function.

[...]

- 2.04 - Subject to any legislation to the contrary, and as long as judicial functions do not suffer, judges may without remuneration or honorarium:

[...]

¹⁴ Provincial Court of British Columbia, *Code of Judicial Ethics* (rev. 1994), online: <http://www.provincialcourt.bc.ca/downloads/pdf/codeofjudicialethics.pdf>.

¹⁵ Provincial Court of British Columbia, *Justice of the Peace Code of Ethics*, online: <http://provincialcourt.bc.ca/downloads/pdf/justiceofthepeacecodeofethics.pdf>.

b) participate in activities related to the community, to charities, to the arts, and to sports, it being recognized that a judge isolated from society is one who cannot keep in touch with its evolution. However, judges should not participate in fund-raising activities.

[...]

4.00- Everywhere and at all times, judges should behave irreproachably.

[...]

4.02 - Judges should expect to be constantly scrutinized by the public. Consequently they should also voluntarily impose upon themselves certain restrictions on their behaviour, their associations and their public appearances.

4.03 - Judges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

[...]

5.00 - Judges should be impartial, diligent and courageous.

[...]

5.02 - Judges should not lend their prestige to the promotion of other interests.

[...]

8.00 -Judges should refrain from criticizing openly or publicly the quality of the administration of justice or the conduct of judges, other than through the appropriate channels.

BC Justice of the Peace Code of Ethics

Independence

1.00 - Justices of the Peace must both be and appear to be independent, impartial, and unbiased.

1.01 - Justices of the Peace must avoid all conflicts of interest, whether real or perceived, and are responsible for promptly taking appropriate steps to disclose, resolve, or obtain advice with respect to such conflicts when they arise.

1.02 - Justices of the Peace should not be influenced by partisan interests, public opinion, or by fear of criticism.

1.03 - Justices of the Peace should not use their title and position to promote their own interests or the interests of others.

[...]

Conduct

3.00 - Justices of the Peace are subject to ongoing public scrutiny and therefore they must respect and comply with the law and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

3.01 - Justices of the Peace should approach their duties in a calm and courteous manner when dealing with the public and others and should present and conduct themselves in a manner consistent with the dignity of the Court and their office.

In Quebec some institutions are responsible for supervising the conduct of judges and certain tribunal members.

First, the Conseil de la magistrature du Québec¹⁶ is responsible for ensuring that the judicial code of ethics¹⁷ is respected by the judges appointed by the Government of Quebec. These judges sit on the Court of Quebec, the Professions Tribunal, the Human Rights Tribunal and the Municipal Courts. In particular, the following rules, although drafted at a time when the use of social media was not prevalent, can nonetheless provide some guidance:.

[...]

2. The judge should perform the duties of his office with integrity, dignity and honour;

[...]

4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions;

[...]

7. The judge should refrain from any activity which is not compatible with his judicial office;

8. In public, the judge should act in a reserved, serene and courteous manner;

[...]

10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

¹⁶ Conseil de la magistrature du Québec,: <https://www.conseildelamagistrature.qc.ca/index.php?langue=en>.

¹⁷ CQLR, c T-16, r 1.

A Code of Ethics for Part-Time Municipal Judges¹⁸ also exists and the rules are very similar to those that apply to provincially appointed judges.

Tribunal Members

The most detailed social media policy the Working Group discovered was the *Member Social Media and Social Networking Policy* of the B.C. Workers' Compensation Appeal Tribunal (WCAT).¹⁹ The seven-page document reminds members of their duties of confidentiality and fairness and the need to take precautions when using social media to avoid creating security risks for themselves and WCAT personnel. It reminds members not to engage in communications and not to use a social networking site to obtain information regarding a matter before the tribunal. The policy states:

WCAT members, of course, may use social media outside of work hours. However, the use of social media comes with risks and challenges that are particularly acute for members, who work in a position where discretion and confidentiality are very important. Therefore, it is important for WCAT members to recognize that what they publish on the Internet may reflect on WCAT. All use of social media must be in accordance with the policy outlined below.

Policy

(a) General Principles

You are responsible for all your online activity and for what you post. If you have any doubt about anything you are considering posting, speak to Tribunal Counsel first. In addition, if you see something online that causes concern, speak to the Chair and Tribunal Counsel immediately.

The policy states that members who fail to comply may be subject to disciplinary action “up to and including dismissal” and says the use of WCAT email addresses to engage in social media or networking activity is prohibited. It suggests members keep the following points in mind when accessing or posting on social media:

- (i) Think before you post. Postings on the Internet are often very easy to find and remain accessible long after they may be forgotten by the user. Nothing is truly “private” or ever deleted on the Internet. Do not post anything you would not want to read on the front page of the newspaper.

¹⁸ Conseil de la magistrature du Québec : https://www.conseildelamagistrature.qc.ca/en/medias/fichiers/publication/code_of_ethic_part_time_municipal_judges_9.pdf.

¹⁹ See Appendix 3.

- (ii) Use good judgment, discretion, and decorum. If you have any doubt about a posting or other activity, err on the side of caution. Do not get caught in “flame wars.” Avoid personal attacks, online fights, and hostile communications.
- (iii) Maintain professionalism, honesty, and respect. Do not behave in a manner or encourage behaviour that is illegal, unprofessional, or in bad taste. Even on a personal site and using your personal computer or device, do not engage in venting about work matters online. If you have a concern, raise it with a member of the executive team. If you publish inappropriate comments that reflect badly on WCAT in your personal space, disciplinary action may follow.
- (iv) Ensure that your social media activity does not interfere with your work commitments.
- (v) Do not identify yourself as a WCAT member on social media sites. If you identify yourself as a WCAT member, everything you post has the potential to reflect upon WCAT. You also become a portal for others who may post about WCAT. While you may control what you post, you cannot predict nor control what others, even family members, might post on your site.
- (vi) Behave in a manner that promotes a safe and healthy workplace and supports the well-being of other employees and members. Discrimination or harassment of other members or WCAT employees is prohibited, whether during work-time or on personal time. This includes any such activities using social media. WCAT members and employees must treat each other with respect and dignity.

The policy concludes: “Be aware of changes and new features of social media technology so that you can assess whether they may present additional ethical issues. Remember that if your information is public, every Tweet, Facebook update or other posting can be scoured for hints of bias.”

In Quebec, the Conseil de la justice administrative²⁰ was instituted on April 1, 1998, with powers under the Act Respecting Administrative Justice²¹ to investigate complaints made by members of the public, the president of an administrative tribunal or the Minister of Justice with regard to the conduct of the members of the following administrative tribunals:

- The Commission des lésions professionnelles
- The Tribunal administratif du Québec
- La Commission des relations du travail
- La Régie du logement

²⁰ Conseil de la justice administrative, <<https://www.cja.gouv.qc.ca/en/>> .

²¹ CQLR, c J-3.

It should be noted that this institution (the Conseil de la justice administrative) is unique in Canada as well as in all of North America. It plays a similar role to the Canadian Judicial Council on the national level and to that of the Conseil de la magistrature at the provincial level.

Its mandate is to ensure that the various Codes adopted by these tribunals concerning the conduct of their members are respected. The role of the Conseil de la justice administrative is thus to supervise the conduct of its members in order to maintain the public's confidence in administrative justice.

Although each of the four tribunals has its own Code of Ethics,²² they are all very similar. The following rules of conduct, although worded differently in each code, are mentioned in all of them and are of particular interest when attempting to determine what should be considered appropriate behavior by judges using social media:

- The member must perform his duties with dignity and integrity;
- The member must be clearly impartial and objective;
- The member shall uphold the integrity of their tribunal and defend its independence, in the best interest of justice;
- The member shall act with reserve and prudence in public;
- The member shall refrain from pursuing an activity or placing themselves in a situation that may undermine the integrity, independence and dignity of the Tribunal or discredit it;
- The member shall refrain from engaging in any activity or placing himself in any situation which could compromise the effective performance of his functions or could be a recurrent reason for recusation;
- The member must be politically neutral and not engage in any activity or partisan political participation at the federal, provincial, municipal or school level.

These Codes specify in Article 1 that their purpose is to set out rules of conduct and duties for their members in order to ensure the public trust in the impartial and independent execution of their functions. Without a doubt, improper use of social media by judges and tribunal members

²² See *Code of ethics of commissioners of the Commission des relations du travail*, CQLR, c. C-27, r. 2; *Code of ethics of the members of the Commission des lésions professionnelles*, CQLR, A-3.001, r. 4; *Code of ethics applicable to the members of the Administrative Tribunal of Québec*, CQLR, c. J-3, r. 1; *Code of ethics of the Commissioners of the Régie du logement*, CQLR, R-8.1, r.1.

can certainly undermine the public trust in our judicial system. Rules of conduct relating specifically to the use of social media may increase awareness regarding the ethical considerations prevailing and may help deter behavior that is inappropriate for judicial officers.

C. EXAMPLES OF THE IMPLICATIONS OF SOCIAL MEDIA USE BY CANADIAN JUDICIAL OFFICERS

Use of Social Media by a Judge to Promote Public Understanding of Courts and Laws

The most prolific judicial user in Canada of social media is Judge Harvey Brownstone of the Ontario Court of Justice. He was active on Twitter and currently has a Facebook page linked to his ground-breaking TV show. In 2010, Brownstone hosted an online talk show entitled *Family Matters with Justice Harvey Brownstone*²³ which was the first talk show ever hosted by a sitting Canadian judge. Eight episodes were produced for online viewing and made available for free through iTunes and on the show's website. In 2011, Family Matters began broadcasting as a television show. Fifteen episodes of the show debuted on CHCH TV on September 13, 2011 and were also broadcast on a number of other independent Canadian TV stations in addition to being available free online on the show's website www.familymatterstv.com. The website includes ads for law firms but notes that:

Justice Brownstone donates all his proceeds of the show and his book to children's charities & receives absolutely no monetary compensation in any form. Justice Brownstone does NOT endorse any of the opinions, firms, or people that appear on the set or advertise on the show or the [familymatterstv.com](http://www.familymatterstv.com) website. Justice Brownstone interviews social workers, lawyers, mediators, judges, psychologists, and everyday people to inform and entertain viewers on topics usually not discussed in a sophisticated, intelligent manner on TV. Family Matters online legal Q&A is tied closely with the show, providing free legal answers from lawyers and other legal professionals. Justice Brownstone has answered over 800 questions himself on the Q&A.

Impact of the Use of Social Media by a Judicial Officer on a Case before Them

In February 2015, the Ontario Court of Appeal ordered a new trial in an Ottawa sexual assault case²⁴ because the conduct of the trial judge while his decision was under reserve was “improper and created a reasonable apprehension of bias and lack of impartiality.” After reserving his decision, the judge sent a message to the detective in charge of the case that he

²³ <http://www.familymatterstv.com/>.

²⁴ *R. v. C.D.H.*, 2015 ONCA 102.

would like to see her in chambers after he had delivered his reasons. The judge told the officer that he had gone onto the online dating site Match.com, where the accused and complainant had met, and created a fake profile of himself. He said that had defence counsel done the same thing, she “would have been able to hang the victim with all the available information,” which included how many drinks a desired partner should consume.

The Court of Appeal stated:

We agree that the conduct of the trial judge created a reasonable apprehension of bias. He conducted his own research into a website that had been the subject of evidence at trial while his decision was under reserve, contrary to the basic principle that judges and jurors must make their judicial decisions based only on the evidence presented in court on the record. Jurors are specifically told not to conduct any Internet searches about anything in the case.²⁵

In another recent case, an Ontario judge overturned a man’s conviction for assault causing bodily harm because the trial judge had used an image from Google Street View that he himself had downloaded, to make an adverse finding of credibility against the accused. In *R. v. Ghaleenovee*,²⁶ Justice Robert Goldstein of Ontario Superior Court noted the trial judge had downloaded an image after the accused had testified and did not ask for submissions on it:

In my respectful view, using an image that was downloaded from the Internet by the trial judge and not put to the witness compromised the appearance of fairness. A reasonable person would consider it unfair that Mr. Ghaleenovee was never asked to comment on the image.

...I have no doubt that the trial judge was conscientiously attempting to do his duty in conducting a search for truth... Unfortunately, however, a reasonable observer would conclude that the fairness of the trial was compromised.²⁷

Although Google Maps is not technically a social media tool, the case is another reminder of the potential pitfalls for judges venturing into the electronic world.

In *Canadian Union of Postal Workers and Canada Post Corp.*,²⁸ the Federal Court ordered the recusal of a federal final offer arbitrator appointed by the Federal Government to choose between the final offers put forward by Canada Post and the Union. At issue was the Arbitrator’s previous representation of Canada Post during a long-running pay equity dispute, as well as his former strong connections with the Conservative Party, including running three

²⁵ *Ibid.* at para 14.

²⁶ 2015 ONSC 1707,

²⁷ *Ibid.* at paras 27, 29.

²⁸ 2012 FC 975.

times as a candidate. In her decision, Justice Daniele Tremblay-Lamer also commented on the Arbitrator's Facebook page, which included in the activities and interests, links to a Conservative riding association and the page of a Conservative MP. The page also contained a list of "friends," including Labour Minister Lisa Raitt, who was responsible for appointing the arbitrator as well as being the Minister Responsible for Canada Post. The judge noted the links were created in July and November 2010 although the arbitrator claimed to have ceased all political activities and associations in January 2010.

Therefore the arbitrator must have chosen to include the links to these pages after they were created, well after the time he claims to have stopped all political activities. [...] only two years have elapsed since [the Arbitrator] halted his partisan activities and evidently maintained his interests and ties with members of the Conservative Party and the sitting government. A well-informed and not overly-scrupulous person may believe that he could be influenced by these people, even without knowing it.²⁹

Judicial Officer as a Facebook Friend

A Quebec judge was asked by defence lawyers to recuse herself from presiding over a multi-defendant drug trial because many of her "friends" on Facebook are Crown prosecutors.³⁰ The "highly unusual situation"³¹ came to light when defence lawyers for 12 people accused of drug-related charges in the Eastern Townships met privately with the Court of Quebec justice to express concerns over her Facebook page, which included prosecutor "friends" involved in the so-called Kayak mega-trial.

The judge admitted during court proceedings that she had a Facebook page under a pseudonym that was inactive. She also said that she had as many defence lawyers as Crown prosecutors who were "friends" on her Facebook page. The judge refused to recuse herself, and invited defence counsel to appeal the matter to the Quebec Superior Court. Defence lawyers opted not to proceed with an appeal, but have not ruled out the possibility in the future.

²⁹ *Ibid.* at para 95, 100.

³⁰ Luis Millan, "Judge's social media 'friends' spark concerns", *Lawyers' Weekly* (November 7, 2014).

³¹ *Ibid.*

Example of a Deliberately Mistaken Identity

During the high-profile trial of Luka Magnotta, who was charged with the slaying and dismemberment of a Chinese engineering student, the trial judge discovered that someone had created a fake Twitter account in his name.

The judge convened court while the jury was deliberating to discuss the account after reporters covering the trial began following the Twitter feed. According to Twitter, the account was apparently created in October 2012 and had no tweets in it.

The judge, who says he found out about it after receiving Twitter notifications on his personal email address, said he was “speechless.” “It’s very disconcerting because if anything is said during the day or the coming days attributed to me it is not the case. I have no such account and I want that to be clear. I’m flabbergasted.”³² No further consequences were reported.

Impact of the Use of Social Media on Conduct Issues

An Ottawa provincial court judge retired in late 2014 and apologized rather than face a disciplinary hearing over comments she posted on Facebook about two other judges.³³ The Ontario Court judge officially stepped down from the bench on Dec. 31, 2014 over remarks she said she inadvertently posted on the Facebook page of a local assistant Crown attorney in October 2012.

In the online post, the judge identified a fellow judge and regional senior justice by their initials and complained that one had given a woman a reduced sentence because she had a certain kind of cancer that “is hardly a killer . . . in fact the very same f’n cancer that (the sentencing judge) has herself... .!!!!” She also lamented that between the two judges, the situation for sentences with driving offences “is getting ridiculous,” because their sentences were “far below the mark.” “What I said was completely wrong,” she told the Ottawa Citizen. “I regret it, I shouldn’t have said it, I apologized immediately.”

In 2010, a complaint was filed with the Canadian Judicial Council alleging “sexual harassment and discrimination” by a Manitoba judge and her (now late) husband. The complaint included reference to “30 extremely distasteful sexually explicit photos” of the judge that the complainant said he had received via the internet from the husband. All of the events occurred

³² “Judge at Magnotta trial says Twitter account in his name isn’t his”, *Montreal Gazette* (December 21, 2014).

³³ “Ottawa judge to retire after Facebook post in which she mocked another judge with cancer”, *Ottawa Citizen* (January 13, 2015).

before the judge was appointed and could be described as “digital baggage.” However, the case serves as a stark reminder of the potential difficulties social media can pose for a judge and the potential impact on careers. The Inquiry Committee of the CJC has adjourned until May 2015 in the expectation and undertaking that the judge will resign as a judge before the next hearing date.

D. BACKGROUND FROM OTHER JURISDICTIONS

When considering best practices for how Canadian judges and tribunal members should use social media, it is helpful to examine how the issue has been handled in other countries, such as the United States, the United Kingdom, Australia and New Zealand. In reviewing rules and practices in other jurisdictions, however, it is important to bear in mind distinctions with the Canadian justice system. For example, in many U.S. states, judges are elected or subject to retention votes and so may use social media to raise campaign funds or seek endorsements in ways that would be unacceptable in Canada.³⁴

The Working Group commissioned two pieces of research which are located on the Centre's Website.³⁵

In addition, the following are a few key resources that provide useful background.

A February 2014 article in the University of Miami Law Review entitled "Why Can't We Be Friends? Judges' Use of Social Media,"³⁶ provides an excellent introduction to social media issues for judges in the United States. The paper cites several cases of judges behaving badly on social media, policy decisions in multiple states, and examples of good usage of social media. It seeks to answer many controversial subjects regarding social media such as whether or not judges should have social media accounts and how attenuated a Facebook "friendship" can be.

To help judges avoid becoming an example of what *not* to do on social media, the American Bar Association (ABA) released [Formal Opinion 462, Judges' Use of Electronic Social Networking Media](#), in February, 2013.³⁷ Overall, the ABA opinion is pro-social media, saying "[w]hen used with proper care, judges' use of [social media] does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forums of social connection such as US Mail, telephone, email, or texting." In fact, "judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach." The opinion reminds judges that they must be incredibly wary of the ramifications of who they socialize with on sites like Facebook. For example, liking, sharing, or leaving comments on social media posts by political candidates can be viewed as having an

³⁴ Sossin & Bacal, *supra*. note 11.

³⁵ http://wiki.modern-courts.ca/Social_Media_and_the_Courts_IWG: "The Use of Social Media by Judges" by Bruce Laregina; "Issues Arising from the use of Social Media" by Andrew Deak.

³⁶ John G. Browning, "Why Can't We Be Friends? Judges' Use of Social Media" (2014) 68 U Miami L Rev 487.

³⁷ American Bar Association, Formal Op. 462 (Judges' Use of Electronic Social Networking Media).

inappropriate connection with that politician. As a general guideline, the opinion reminds judges that traditional ethical standards still apply to new technologies.

The Model Code requires judges to “maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.” Thus judges must be very thoughtful in their interactions with others, particularly when using ESM (electronic social media). Judges must assume that comments posted to an ESM site will not remain within the circle of the judge’s connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge’s knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.³⁸

The paper offers one final piece of advice to judges: “While judges should proceed with caution when using social networking platforms—as they should with any communication platform—they should still proceed.”³⁹

In the United Kingdom, the most notable document is a 2012 joint statement on social media use issued by the senior presiding judge Lord Justice Goldring and the senior president of tribunals for England and Wales Sir Jeremy Sullivan.⁴⁰ The stated goal of the policy, entitled “*Blogging by judicial office holders*,” was to “maintain public confidence in the impartiality of all courts and tribunal judicial office holders in England and Wales.” While the policy does not explicitly prohibit social media use, it heavily restricts what judges and tribunal officers are allowed to do online and mentions the possibility of disciplinary action in response to any breach. The bulk of the brief statement (it is a single-page document) is as follows:

Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people’s blogs) must not identify

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ http://www.familylaw.co.uk/system/redactor_assets/documents/491/Blogging_by_Judicial_Office_Holders.pdf.

themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.

The above guidance also applies to blogs which purport to be anonymous. This is because it is impossible for somebody who blogs anonymously to guarantee that his or her identity cannot be discovered. Judicial office holders who maintain blogs must adhere to this guidance and should remove any existing content which conflicts with it forthwith. Failure to do so could ultimately result in disciplinary action.⁴¹

⁴¹ *Ibid.*

E. CANADIAN ACADEMIC PERSPECTIVES

Two recent articles by respected Canadian academics have reviewed the issues associated with social media use by judges and make important contributions to this discussion.

In “Does Avoiding Judicial Isolation Outweigh the Risks Related to ‘Professional Death by Facebook’?”,⁴² University of Ottawa law professor Karen Eltis says “a delicate balance” needs to be struck in articulating guidelines for judicial social networking:

Foremost, perhaps, is the correct balance to be struck between two essential values. On the one hand, preventing judicial isolation, noting that the judge’s proximity to and immersion in the community is always of the essence... On the other hand, pre-empting the sort of unfortunate occurrences that risk tarnishing the image of individual judges and the justice they impart.

The paradox here is evident – judges should not be cut off from the community they serve but must at the same time – most cautiously guard against impropriety and maintain a certain distance from those who come before them. Reconciling these two competing currents is indeed the greatest challenge in developing guidelines for judicial use of the internet, broadly speaking, and respecting social media in particular.⁴³

Eltis recommends mandatory social media training for judges, with particular emphasis on the “indelible nature” of electronic social media use, the “illusory perception of anonymity that tends to embolden unnecessarily” and the risk of third-party use of replicated posts.⁴⁴ This would represent an important new educational focus for the National Judicial Institute.

She also suggests that courts adopt guidelines for social media use which are clearer than the current requirement that “judges use their discretion as they would in the brick and mortar world.” She suggests that the restrictions should be “minimally intrusive” and directly linked to the values of independence and impartiality.

[...] social networking (and Internet access more broadly) is increasingly being construed as a basic right. Accordingly, it stands to reason that absolutist policies seeking to entirely proscribe, rather than moderately/reasonably regulate judicial use in the digital age, will be met with resistance (as unnecessarily infringing on freedom of expression as well as fostering judicial isolation.) Instead, it appears more likely that policies imposing narrowly tailored restrictions, logically related and adapted to the judicial office (and values such as restraint and impartiality) will prevail. Restricted judicial use of social media (guided by the adoption of

⁴² 2014 Laws 636, online: <http://www.mdpi.com/2075-471X/3/4/636>.

⁴³ *Ibid.* at 638.

⁴⁴ *Ibid.* at 641.

proportional or minimally intrusive limitations) appears to be the burgeoning direction of most jurisdictions, as views on the point crystallize.⁴⁵

In “Judicial Ethics in a Digital Age,”⁴⁶ Lorne Sossin, Dean of Osgoode Hall Law School, and his research assistant, Meredith Bacal, ask whether the Judicial Council’s 20th-century ethical principles need to be updated in order to “adapt to the realities of 21st-Century life.” They suggest the existing guidelines are “insufficient to adapt to the disruptive potential of new technology” but say judges don’t need precise rules respecting how to navigate the world of social media and developing technologies.

Rather, they need information, insight and guidance about the nature and implications of social media and developing technologies. Social networking has changed the way in which information is disseminated. Without clarity and consistency in the standards judges are expected to abide by, the public’s confidence in the judiciary and the justice system may be jeopardized.⁴⁷

They suggest a social media guideline for Canadian judges should include the following:⁴⁸

- A definition of social media;
- A general principle that judges should be free to participate in social media platforms subject to a series of precautions;
 - Judges who engage in social media have a responsibility to understand the implications of social media – for example, judges who wish to maintain a Facebook page should consider available privacy settings and take reasonable steps to protect communications intended to be private;
 - Judges have a special responsibility to be informed about and responsive to their court’s social media policies and practices;
 - Judges should be accountable for their conduct on social media, whether in the sense of the content they write/post (the provisions of the existing Ethical Principles dealing with political speech, etc, would have equal application in this context) and in their expressions of support (a “like” of a Facebook page, a retweet of a Twitter post, etc);
 - Judges should be vigilant to avoid the specific variety of conflicts to which social media can give rise – for example, neither sending nor replying to any direct

⁴⁵ *Ibid.* at 641.

⁴⁶ Sossin & Bacal, *supra.* note 11,

⁴⁷ *Ibid.* at 630.

⁴⁸ *Ibid.* at 663-64.

social media contacts from counsel who have or are likely to have a matter before the judge, and exercising caution in the “follows” and “likes” in which they participate; and

- Judges may choose to establish a “personal” or “professional” presence on social media but they should understand that in the eyes of the public, all of their activity will be measured against the standard of public confidence in the justice system. All home pages for Judges should indicate clear caveats as to the nature and purpose of the Judges’ presence. However, while a journalist or member of a company may indicate that the views expressed in a blog or on a twitter feed are “my own”, this distinction is not applicable in the same way for Judges. The scope for Judges to demarcate a social media presence that is personal is necessarily circumscribed by the nature of the judicial role, the evolving expectations of the public and the overarching commitments all judges must make to the administration of justice.

F. RECOMMENDATIONS

As demonstrated by the results of the survey, the examples of the use of social media by Canadian judicial officers (defined to include judges and tribunal members), and the Canadian academic perspectives, this discussion paper addresses a timely, if not urgent, topic. Not only must individual judicial officers participate in addressing the implications of the use of social media in personal and professional contexts, but given the constitutional context in which there are provincial and federal courts and tribunals, there are also many institutions and organizations which are or should be involved. The members of the IntellAction Working Group agree that it would be in the public interest if recommendations were made that might assist in grappling with the complexities that the medium of digital communication has on the traditional expectations that judicial officers manifest independence and impartiality.

The following recommendations are directed at judicial officers as individuals and to the institutions, organizations and associations which should be involved in addressing the implications of the use of social media by judicial officers. Along with these recommendations, we have included comments and suggestions relating to the institutional use of social media.

Part 1: Personal and Professional Use of Social Media by Judicial Officers

1. All judicial officers have a duty to ensure that they understand the advantages, disadvantages and risks of the use of social media in personal and professional contexts and conduct themselves accordingly;
2. Existing policies, principles, codes of conduct or guidelines are inadequate to respond to that duty;
3. Until such time as more guidance is provided, judicial officers should use social media with caution, keeping in mind the above principles.

Part 2: Consideration should be given by:

Chief Judges/Chief Justices of provincial and territorial courts and the Council of Canadian Chief Judges / The Canadian Judicial Council in conjunction with the National Judicial Institute/ The Chair/President/Chief Judge of all federal tribunals and all provincial/territorial tribunals/ The Council of administrative justice in Quebec, to:

4. Creating mandatory education programs to address the advantages, disadvantages and risks of the use of social media in personal and professional contexts for all judicial officers;
5. Creating one-on-one or small group on-site training programs to address the advantages, disadvantages and risks of the use of social media by judicial officers in personal and professional contexts;
6. Developing “promising practices” in the use of social media in personal and professional contexts. For courts which include per diem deputy judges (such as in Small Claims Courts and Municipal Courts) and for tribunal members, these promising practices should take into consideration the fact that these appointments are often time-limited and the judicial officer may eventually return to the legal profession where a social media presence may be more appropriate.
7. Amending codes of conduct for all judicial officers to incorporate social media issues relating to personal and professional use. The Member Social Media and Social Networking Policy of the Workers’ Compensation Appeal Tribunal at Appendix 3 is a policy these institutions may want to consider;
8. Ensuring that human and technological resources are made available to all judicial officers to respond to the risks of using of social media in personal and professional contexts; and
9. Developing a policy to respond to unfair, defamatory or inappropriate attacks against judicial officers, using social media.

Part 3: Associations of Judicial Officers

Professional associations, such as the Society of Ontario Adjudicators, the Canadian Council of Administrative Tribunals, British Columbia Council of Administrative Tribunals, the Canadian Association of Superior Court Judges, the Canadian Association of Provincial Court Judges, should consider:

10. Offering to assist their leadership in the development of codes of conduct and promising practices; and
11. Contracting with educational institutions such as the National Judicial Institute to offer training and programs to address the advantages, disadvantages and risks of the use of social media for their members.

Part 4: Institutional Use of Social Media

As indicated in the introduction, this discussion paper focuses on the use of social media by individual judicial officers and not by courts and tribunals as institutions. However, some respondents to the survey raised concerns about the use of social media by courts and tribunals which gives rise to the recommendation that courts and tribunals should consider developing and implementing an institutional policy for the use of social media by the court or the tribunal that could, among other things:

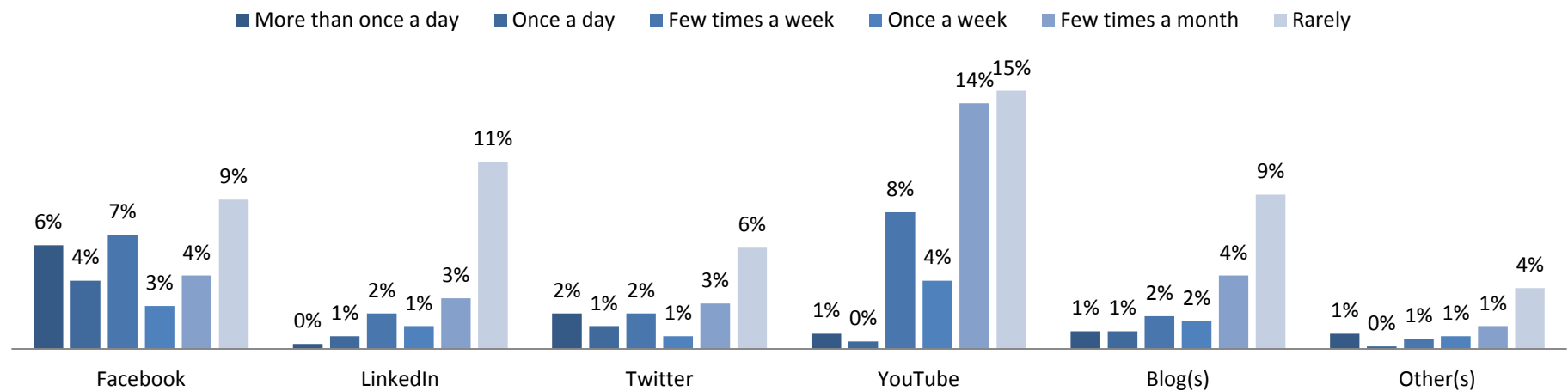
11. Alert the parties, counsel and the public to the release of all decisions;
12. Provide information on the court or tribunal;
13. Provide access to interactive videos or FAQ's to assist members of the public and users of courts and tribunals; and
14. Possibly create a forum for feedback by the public and users of court and tribunal services.

The members of the IntellAction Working Group and the Board of the Canadian Centre for Court Technology are optimistic that this important work will prompt appropriate interest, practical responses and further research into the concerns identified in this discussion paper.

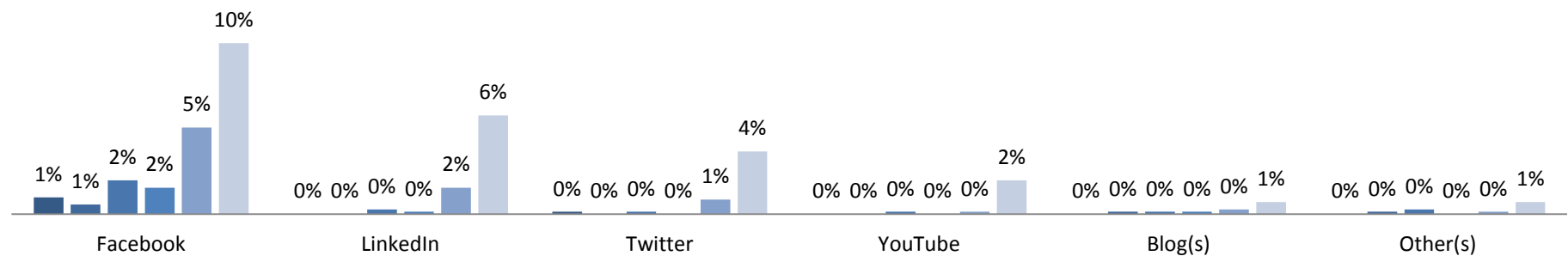
Appendix 1 – Reported Use of Social Media by Judicial Officers

The following represent percentages of all judicial officers who responded to the survey, whether they ever visit social media or not. Please note that “Once a month” was an option in the questionnaire’s choice of answers, between “Few times a month” and “Rarely”, but it has not been included in these graphs because not a single participant has used this choice in answering the following sets of questions.

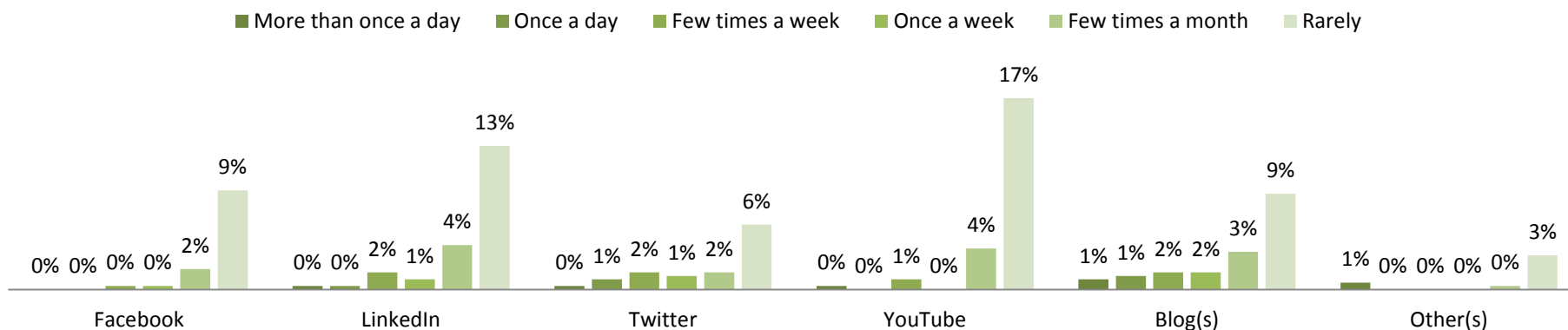
Frequency judicial officers visit social media websites in a personal capacity



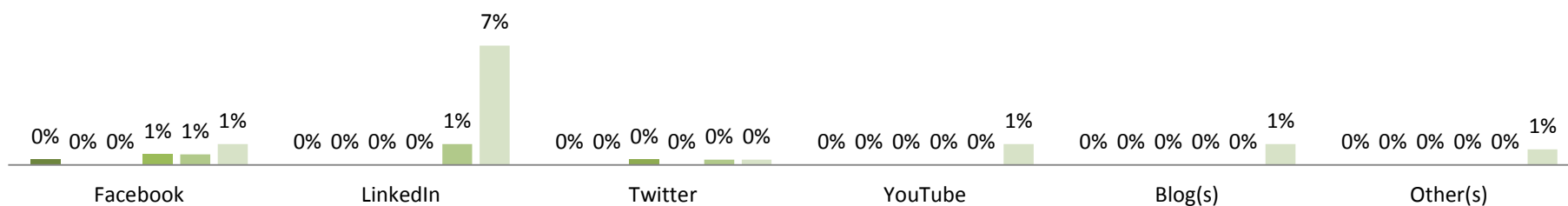
Frequency judicial officers contribute to social media websites in a personal capacity



Frequency judicial officers visit social media websites in a professional capacity



Frequency judicial officers contribute to social media websites in a professional capacity



Appendix 2 – Comments of Judicial Officers Regarding their Use of Social Media for Research in Cases before Them

The following represent responses to the question “Do you think using social media to research background information (other than legal issues) without disclosing this research to the parties raises ethical or legal concerns?” We identify “typical responses” as those which are similar in content and reflect the majority of responses, and “unique responses” as outliers, but perhaps of interest to readers of this report.

	Typical Responses	Unique Responses
“Yes - Strongly”	<i>We are bound to decide a case on the basis of material presented in open court;</i> <i>Equivalent to gathering evidence without any cross examination or even letting a party know what the evidence is. That is not even close to applying the rules of evidence we profess to adhere to.</i> <i>(many more along those lines)</i>	<i>You're kidding, right?</i> <i>There are exceptions to every situation. I have answered that I would be very concerned about the use of social media in these circumstances, in part, because it may lead to information about facts that were not before the court - no different than a jury looking about the internet about the case before it;</i> <i>You are erroneously assuming that the writer understands Facebook, twitter, linked in, etc, which is not the case.</i>
“Yes”	<i>Works against transparency;</i> <i>A judicial officer ought not to be conducting separate research. It is unfair to the parties whether they are informed or not;</i> <i>(many more along those lines)</i> <i>I have concerns about the credibility of anything that appears on social media;</i> <i>There is no way to verify the accuracy of the background information [...]</i> <i>(a few along this line)</i>	<i>I would definitely like some guidance about this;</i> <i>I would welcome a forum to have discussion around the pros and cons of using social media. At the moment, I do not know enough about the various media to really be informed. I am wary and strongly opposed because on the face of it seems to compromise judicial independence, have the potential for creating or being perceived to have bias. It certainly must compromise our security on some level. [...]</i> <i>I am not familiar enough with this technology to arrive at a strong view on these questions. I know enough however to conclude that the use of this technology can lead to very awkward situations. [...]</i>
“Unsure”	<i>Not being a user of social media, I find some of your questions confusing. I have no way of assessing the implications, one way or the other;</i>	<i>We are forbidden by policy to use social media.</i>

	<i>Sometimes I am not sure what you mean by social media. I have an email address, work and personal. I do not use Facebook, LinkedIn, Twitter, etc. I have heard that Twitter is a good source to follow news and I may try this.</i>	
"No"	<i>I only use it to understand what is coming before me in a general way (e.g. medical evidence). I never use social media to look at anything that pertains directly to the case;</i> <i>If it assists in understanding a general background issue, done confidentially and kept that way;</i> <i>Context in which background information would be shared is important. Clearly no place in reasons for judgement.</i>	<i>I cannot comprehend what this means: "research background information while judgment has been reserved";</i> <i>I think social media interactions between judicial officers should be routine, but in a setting where access is restricted, that is, it's not open to the public. Obviously a judicial officer shouldn't rely on social media, because it can be unreliable and biased, to research facts about a case; However, social media can be useful to obtain background to understand context and facts;</i> <i>The activity of doing research is a commonly accepted activity. What has changed is the method and source. If conducting research using more traditional source like a dictionary does not call for disclosure, why would using social media need to be disclosed?</i>
"No - Strongly"	<i>(only 2 unique comments were recorded)</i>	<i>The information is available in a public forum;</i> <i>Given all of the concerns that have arisen around the "hackability" of individual and organizational social media accounts, I am loathe to expose myself either professionally or personally to this risk. I have seen through my work that it is not uncommon for people to have their entire accounts taken over by individuals seeking to do harm to them. I also know how easily discourse on social media can be misconstrued, taken out of context, or copied into entirely different documents. Finally, I do not wish to be networked with random individuals, nor do I care to share personal information with anyone but my nearest and dearest.</i>

Appendix 3

WCAT Member Social Media and Social Networking Policy

WCAT

Workers' Compensation
Appeal Tribunal

**WCAT Member Social Media
And Social Networking Policy**

Human Resources Policy #16	Last Modified: April 8, 2015
Effective Date: February 1, 2012	

Introduction

Social media and social computing refer to the wide array of internet-based tools and platforms that increase and enhance the sharing of information. They allow users to create and edit “profiles” that can be viewed by others. Facebook, LinkedIn, YouTube, blogs, Twitter, and other public forums are examples of social media. Most if not all of these sites are searchable, and capable of being tracked as well as traced.

WCAT members, of course, may use social media outside of work hours. However, the use of social media comes with risks and challenges that are particularly acute for members, who work in a position where discretion and confidentiality are very important. Therefore, it is important for WCAT members to recognize that what they publish on the Internet may reflect on WCAT. All use of social media must be in accordance with the policy outlined below.

Policy

(a) General Principles

You are responsible for all your online activity and for what you post. If you have any doubt about anything you are considering posting, speak to Tribunal Counsel first. In addition, if you see something online that causes concern, speak to the Chair and Tribunal Counsel immediately.

The policy on Appropriate Use of Government Resources applies to all online activities using WCAT equipment.

The WCAT Code of Conduct for Members applies to all online activities, including social media. Therefore, the use of social media by WCAT members must be in accordance with the WCAT Code of Conduct for Members, including item #2.7, which addresses outside activities (the Code of Conduct is set out in Appendix 12 to the MRPP):

2.7 Outside Activities

Members must ensure that their outside activities do not interfere with the impartial, effective, and timely performance of their responsibilities. Members must not engage in activities that bring WCAT into disrepute. Unless so authorized by the chair, members must not perform outside activities in a manner that appears to be officially supported by or connected to WCAT, or appears to represent WCAT opinion or policy. Members must not use their position in WCAT to lend weight to the public expression of a personal opinion. Members must not use WCAT letterhead for personal correspondence or non-WCAT related matters.

Members are free to engage in political activities so long as they are able to maintain their impartiality and the perception of impartiality in relation to their duties and responsibilities. Members' political activities must be clearly separated from activities related to their role as members.

Members must not engage in political activities during working hours or use WCAT facilities, equipment, or resources in support of such activities.

Members will not introduce partisan politics at the local, provincial, or national levels into the workplace. This does not apply to informal private discussions among co-workers.

The BC Public Service Agency Standards of Conduct and the BC Public Service Agency Policy Statement – Discrimination and Harassment in the Workplace also apply.

If you are a member of the Law Society of BC, you must also follow the *Legal Profession Act*, Law Society Rules and the *Professional Conduct Handbook* when dealing with social media. Remember that the Canons of Legal Ethics require that a lawyer's conduct at all times should be characterized by candour and fairness.

Keep the following points in mind when accessing or posting on social media:

- (i) Think before you post. Postings on the Internet are often very easy to find and remain accessible long after they may be forgotten by the user. Nothing is truly "private" or ever deleted on the Internet. Do not post anything you would not want to read on the front page of the newspaper.
- (ii) Use good judgment, discretion, and decorum. If you have any doubt about a posting or other activity, err on the side of caution. Do not get caught in "flame wars." Avoid personal attacks, online fights, and hostile communications.
- (iii) Maintain professionalism, honesty, and respect. Do not behave in a manner or encourage behaviour that is illegal, unprofessional, or in bad taste. Even on a personal site and using your personal computer or device, do not engage in venting about work matters online. If you have a concern, raise it with a member of the executive team. If you publish inappropriate comments that reflect badly on WCAT in your personal space, disciplinary action may follow.
- (iv) Ensure that your social media activity does not interfere with your work commitments.
- (v) Do not identify yourself as a WCAT member on social media sites. If you identify yourself as a WCAT member, everything you post has the potential to reflect upon WCAT. You also become a portal for others who may post about WCAT. While you may control what you post, you cannot predict nor control what others, even family members, might post on your site.

- (vi) Behave in a manner that promotes a safe and healthy workplace and supports the well-being of other employees and members. Discrimination or harassment of other members or WCAT employees is prohibited, whether during work-time or on personal time. This includes any such activities using social media. WCAT members and employees must treat each other with respect and dignity.

(b) Confidentiality and privacy

WCAT members have access to extensive personal information about the parties that appear before WCAT. The obligations to keep information confidential that bind all WCAT personnel also apply to all online activities. Members must comply with the *Freedom of Information and Protection of Privacy Act*, and with the confidentiality provisions in the *Workers Compensation Act* (Act). Section 260 of the Act states that members, officers, employees and contractors of WCAT must not disclose any information obtained by them or of which they have been informed while performing their duties and functions, except where disclosure is necessary to perform their duties. Item #1.3 of the WCAT Members' Code of Conduct states:

1.3 Confidentiality

As a result of their duties, members acquire confidential information. In accordance with section 260 of the WCA [the *Workers Compensation Act*] and section 30 of the ATA, members must not disclose to anyone such confidential information except as may be necessary to discharge their obligations under Part 4 of the WCA or when required by law or authorized under FIPPA (item 15.1) [the *Freedom of Information and Protection of Privacy Act*].

Therefore, WCAT members:

- Must maintain confidentiality.
- Must avoid discussing WCAT business on a social media site with anyone. This includes discussing WCAT business with another WCAT employee or member.
- Must not disclose or publish sensitive work-related information.

Be very careful not to disclose any confidential personal information, even harmless remarks.

(c) Security

There are also security considerations that must be taken into account when posting on or accessing social media.

WCAT members must take all necessary precautions to avoid creating security risks for themselves and other WCAT personnel.

Do not mention other WCAT members or employees without their express consent and even then, do not identify them as WCAT members or employees.

Be very aware of your own and others' security. A member's social media site could provide information to someone who is dissatisfied with a decision and wants to do harm. Consider not posting a picture of yourself. Consider using your first name only. Do not post personal information such as your address or telephone number or if you do, ensure that the information is protected by privacy settings.

Remember how easy it is to find something on the Internet. People only need "Google" your name or search for you on a social media website.

Do not reveal more personal information about yourself than is necessary.

Even if you do not identify yourself as a WCAT member, be aware that others may make the connection.

Do not post pictures or video recordings of WCAT premises, WCAT events, or other WCAT employees or members.

Be aware that one of the key security issues with social media sites such as Facebook is their very popularity, which makes them attractive as targets for hackers and unscrupulous marketers. There are viruses and worms, and "bots" (fake profiles) designed to breach Facebook security.

If you see a contravention of this policy that involves a health and safety risk to any individual, report it to a member of the executive team or your supervisor immediately.

(d) Maintaining WCAT's independence, integrity, and impartiality

WCAT members:

- must avoid impropriety;
- must avoid lending the prestige of the office to the public expression of personal views;
- must not detract from the dignity of WCAT or publish anything that may reflect adversely on WCAT;
- must not demonstrate or hold out special access to WCAT or favouritism;
- must not engage in political activities that are restricted by the Code of Conduct for Members (item #2.7);
- must not comment on WCAT matters; and,
- must avoid association with issues that may come before WCAT or organizations that frequently come before WCAT.

Consider whether joining certain networks would give the appearance of undermining your independence, integrity, or impartiality.

Do not give advice to anyone about workers' compensation matters, the appellate process or anything in relation to WCAT's work on a social media site or network. This applies both to general questions and most forcefully to questions relating to specific cases.

Do not express views for or against any law or policy that is a matter of current political debate that touches on WCAT's business. For example, do not express views about matters in the area of workers' compensation.

Do not discuss your job responsibilities at WCAT on the Internet.

Be aware that others may recognize you as a WCAT member. Be careful to avoid the perception that your communications represent WCAT, or you may adversely affect perceptions about the quality or objectivity of your work, or about WCAT's role as an independent and impartial decision-maker.

Keep your social media participation personal. Learn about privacy settings. It is strongly recommended that you use them to set your privacy settings as tightly as possible. Think carefully about Facebook or other "friend" requests, especially from someone you do not know.

Avoid having a person who is a representative before WCAT as a "friend." A member who has a representative as a "friend" must place that representative on their conflict list.

Regularly screen your social media or websites to ensure that nothing is posted contrary to the best interests of WCAT. Should such items appear, contact Tribunal Counsel Office and then immediately delete them.

Manage the impact of your position and status. Because of WCAT's role as an independent tribunal and the final level of appeal, a greater degree of scrutiny and accountability attaches to members' roles. Members should use extreme care in selecting the content of their communications.

(e) Fairness

WCAT members:

- must not engage in *ex parte* communication.

Be vigilant about attempts by parties or their representatives to communicate with you on an *ex parte* basis.

Do not view a party, representative or witnesses' pages on a social networking site unless they are a "friend" who is on your conflict list. Do not use a social networking site to obtain information regarding a matter before WCAT.

As a member, be aware of the rules regarding bias and reasonable apprehension of bias and ensure any potential issues flowing from your use of social media are properly canvassed in an appeal if necessary (see item #17.3 of the *Manual of Rules of Practice and Procedure*).

Be aware of changes and new features of social media technology so that you can assess whether they may present additional ethical issues.

Remember that if your information is public, every Tweet, Facebook update or other posting can be scoured for hints of bias.

Beware of posting to a website “anonymously” as it is possible in some circumstances for someone to determine your identity based on your IP address (internet protocol address).

(f) Use of WCAT email addresses

The use of a WCAT email address to engage in social media or network activity clearly identifies association with WCAT. Therefore, the use of WCAT email addresses to engage in social media or networking activity is prohibited.

Subject to the common law, WCAT members should not have an expectation of privacy when using WCAT equipment.

(g) Effect of non-compliance

Members who fail to comply with this policy may be subject to disciplinary action up to and including dismissal. See Appendix 12 of the *Manual of Rules of Practice and Procedure*, Code of Conduct for Members.