4th International Conference on the Training of the Judiciary

25 to 29 October 2009

Sydney Australia

The Impact of Technology on Courts and Judicial Ethics: An Overview

Karen Eltis

Associate Professor, Faculty of Law, University of Ottawa (Canada)

[This paper is to be published in "Judicial Independence in Canada and the World" L. Sossin and A. Dodek eds. Toronto: University of Toronto Press, 2009]

Technology plays an incontrovertibly central role in contemporary judicial work and lives, both on and off the bench. Along with tremendous benefits, it imports substantial new challenges that increasingly impact upon judicial work and ethics. And yet, notwithstanding its growing relevance, the question of technology's ramifications for the judiciary has thusfar evaded scholarly inquiry almost entirely, leaving courts (for the most part) with little choice but to attempt to fit new technologies into outdated regimes and practices, devised with dated tools in mind.[1]

Online court records and privacy, *ex parte* email communication, inadvertently e-mailed draft decisions and the issue of government-owned and operated court servers as it relates to judicial independence[2] are but a few of the plentiful issues arising with greater – indeed disconcerting - frequency. The cumulative effect of these, it stands to

[1] As discussed below. In a different context, see Daniel J. Solove, "Panel VI: The Coexistence of Privacy and Security" (2005) 74 Fordham L. Rev. 747 at 773 observing that: "("…") many judicial misunderstandings stem from courts trying to fit new technologies into old statutory regimes built around old technologies. The problem with the statutes is that, when they try to track existing technology too closely, they become too rule-like and lose the flexibility of a standard. Basic principles get lost or forgotten in the shuffle of technicalities".

[2] In *R.* v. *Lippé*, [1991] 2 S.C.R. 114 at 144, Lamer C.J. defined "judicial independence" as "independence from government, but interpreted "government" broadly enough to include "any person or body, which can exert pressure on the judiciary through authority under the state".

reason, is ultimately to prompt courts to *revisit* the conventional construction of fundamental concepts such as disclosure, accountability, competence – even impartiality- and the balance to be struck between foundational values such as transparency and privacy in the modern age.[3]

In order to permit courts to stay current in a time of rapid if not perpetual change, and with a view to bringing some clarity to judging in times of evolving technology, the following will endeavor to provide a *first overview* of issues arising from the interplay between technology and judging. In an effort to alert courts to up-and-coming matters deriving from the use of technology, this article will concern itself first with identifying emerging issues deriving from technological change generally. It will then more specifically address two of the said issues namely, the networked environment's ramifications for out of court judicial expression and the use of online resources by judges.

With an eye towards generating practical recommendations in a crucial area previously unexplored in Canadian legal literature, the paper will adopt the following structure: Part I will provide a general introduction to the principle issues that emerging and existing technologies raises for judges. Although these cannot all be thoroughly addressed within these pages, and my objective is not to provide a comprehensive survey, I will make a few observations in an effort to weave Parts II and III – developing two matters meriting special emphasis- into a wider fabric of reflection**.**

As noted, Part II will then turn to ethics more specifically and the Internet's effect on the boundaries of acceptable "out-of-court" judicial speech[4] and association. For said

[3] See T. David Marshall ., *Judicial Conduct and Accountability* (Toronto: Carswell, 1995) and Canadian Judicial Council, Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

[4] See Ed Ratushny, "Speaking As Judges: How Far Can They Go?" (2000) 11 Nat'l J. Const. L. 293 at 296*:* where "the judge is not speaking as a judge but as a member of society ("…") The issue here is whether such speech may reflect adversely on the impartiality of the office of the judge as constituting "unjudicial"

purposes, I borrow a broad working definition of judicial ethics, namely: "Judicial ethics are the morals that guide the comportment of judges",[5] Expression and association outside the courtroom would in this vein constitute an example of judicial ethics permeating a judge's private life. Thus, for instance, it will examine how litigants might deduce perceived sympathies, apprehend bias or even lack of competence by 'googling' their judge (and her deliberation process), it will examine the difficulties related to this activity and how it pertains to the traditional "reasonable apprehension of bias" standard and "individualized justice". It will further entertain a *rapprochement* towards the more permissive German model of ethical judicial expression as instructive in light of the exposed challenges. Having raised the likelihood of the judicial deliberation process' 'traceability'**,** Part III will endeavor to highlight the difficulties that judicial Internet research (including the use of search engines and 'Wikipedia') raise, canvassing its effects on the ethical principle of competence or diligence.

Part I: Framing the Issues

In what is now said to appear like the distant past, before the day now known as 9/11 became forever etched in the world's collective memory, a meeting of the Judicial Conference headed by then Chief Justice Rehnquist was scheduled for September 11, 2001.[6] The gathering in question was to address a much decried US government proposal to monitor federal judges' electronic communications and Internet use.[7] In the midst of

---

conduct even though not performed in the capacity of a judge. In the second situation, the judge is engaging in judicial conduct, but in doing so, may be fulfilling the judicial role improperly".

[5] The Honourable Georgina R. Jackson, "Deciphering the Code: The Mystery of Judicial Ethics" (2004) 68 Sask. L. Rev. 1 at 2.

[6] The Judicial Conference of the United States is the principal policy-making body for the federal court system. The Chief Justice serves as the presiding officer of the Conference.

[7] See "*Report of the Proceedings of the Judicial Conference of the United States*" (September/October 2001), online: http://www.uscourts.gov/judconf/sept01proc.pdf: "Shortly after the Judicial Conference session began on September 11, 2001, members were informed of terrorist attacks in New York and Washington, D.C. The Conference adjourned promptly upon notification of the evacuation of the Supreme Court Building. No Conference business was conducted on that day ("…")". I have argued elsewhere that email eavesdropping presents novel challenges that need to be addressed with the Charter in mind. See Karen Eltis, "La surveillance du courrier électronique en milieu du travail: le Québec succombera t-il à l'approche permissive américaine?" (2006) 51 McGill L.J._475; and Karen Eltis, "The Emerging American

vocal protest.[8] monitoring software was installed in order to surveil judicial Internet use.[9] The proposal, touted by Congress as a push for efficiency,[10] was said to represent a significant threat to judicial independence and to manifestly violate the separation of powers.[11]

Approach to Email Privacy in the Workplace: Its Influence on Developing Caselaw in Canada and Israel" (2004) 24 Comp. Lab. L. & Pol'y J. 487.

[8] See Lisa Gill, "Judges Turn Off Monitoring--on Their Own Computers" *Newsfactor* (Aug. 9, 2001), online: http://www.newsfactor.*com/perl/story/12659.html.* See also Stefanie Olsen, "Judges Oppose Monitoring of Internet Use" *Zdnet* (Sept. 10, 2001), online: http://zdnet.com.com/2100-1105-272865.html (last visited in February 2008); Gina Holland, "Judges Brace for Web Monitoring" (2001), online: http:// www.news.excite.com/news/ap/010919/14/judges-privacy. (last visited in February 2008)
And Electronic Privacy Information Center, "EPIC Urges Federal Judiciary to End Workplace Monitoring", Epic Alert 8.16, Sept. 6, 2001, online: http://www.epic.org/alert/EPIC_Alert_8.16.html.

[9] See Gina Holland, "Panel Endorses Monitoring of Judges" *Washington Post* (August 13, 2001), online: http://www.washingtonpost.com/wp-srv/aponline/20010813/aponline175849_000.htm. See also report by Electronic Frontier Foundation, "Federal Judges Issue Internet Use Policy for U.S. Courts", online: http://w2.eff.org/Privacy/Workplace/Judiciary/20010813_aousc_monitoring_pr.html and "Judicial Policy Board Votes by Mail on Web Monitoring", *Government Technology*, online: http://www.govtech.com/gt/5940?topic=117680.

[10] See H. Josan and S. Shah, "Internet Monitoring of Federal Judges: Striking a Balance Between Independence and Accountability" (2002) 20 Hofstra Lab. & Emp. L.J. 153 at 158:

> The aim of the Initial Policy is twofold: (1) to secure the courts' computers by protecting them from viruses and hackers and (2) to ensure that employees [including the judges themselves] do not waste time browsing the Internet for leisure… , most critics were outraged with the proposed policy that all judiciary employees, including judges, must waive all expectations of privacy in communications made when using office equipment, including computers Judges have criticized the monitoring on grounds that it is an invasion of privacy and that it may violate the ECPA .

A position eventually moderated: see "Judges Ease Surveillance of Web Use" *New York Times* (Sept. 20, 2001), online: http://query.nytimes.com/gst/fullpage.html?res=9C00E0D7133BF933A1575AC0A9679C8B63.

[11] On the separation of powers and the judicial branch generally, see Cheryl Saunders, "Separation of Powers and the Judicial Branch" (2006) 11 Judicial Review 337, online: http://www.adminlaw.org.uk/docs/Professor%20Cheryl%20Saunders%20-%20July%202006.doc. More specifically in the Canadian context, s. 11(d) of the Canadian Charter of Rights and Freedoms, seeking to guarantee a fair hearing by an impartial and independent tribunal, encompasses a constitutional protection against judicial bias. Independence refers to freedom from interference from the executive or legislative branch. This aspect does not concern us at present as it relates to the tribunal's institutional, administrative and fiscal independence, rather than that of individual judges. See *Valente v.* [1985] 2 S.C.R. 673.
The impartiality component denotes a judicial state of mind, characterized by the absence of actual or perceived bias, as described by Chief Justice Lamer: "Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and

If the federal judiciary's experience in the US is any indication, the idea of monitoring judges' Internet and email use for content is far from theoretical.[12] The installation of monitoring software on judges' computers is no longer unprecedented and therefore must be soberly addressed.[13] Moreover, since technology creates new criteria for measuring judicial *productivity,* judicial dockets can be monitored with great ease and expectations of judges' workload and performance can vary as a function of technological advances,[14] arguably doing violence to both independence and

---

submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues" *R* v. *S. (R.D),* [1997] 3 S.C.R. 484.

In the U.S. guidelines were later adopted in this context. See Administrative Office of U.S. Courts, News Release "Judicial Conference Approves Recommendations on Electronic Case File Availability and Internet Use" (Sept. 19, 2001), online: http://www.uscourts.gov/Press_Releases/jc901a.pdf.
See also "Internet use policies recommended by the Committee on Automation and Technology of the Judiciary Conference of the United States ("CAT"), and later adopted by the Judicial Conference of the United States" ("Judicial Conference"). For a more detailed discussion of these see H. Josan and S. Shah, "Internet Monitoring of Federal Judges: Striking a Balance Between Independence and Accountability" (2002) 20 Hofstra Lab. & Emp. L.J. 153.

[12] See Philip Gordon, "Judge Leads Fight for Workplace Privacy", *Denver Post*, (Sept. 20, 2001), at B-07.

[13] See Michael Geist, "Computer and Email Surveillance in Canada" (2002), Report Prepared for Canadian Judicial Council citing JTAC survey (Court Technology Security: A Report of the Judges Technology Advisory Committee to the Canadian Judicial Council, 30 November 2001 at Table 2-7). According to Geist: "62 percent of respondents indicated that log-in and account activity by judges or judicial staff was monitored 29 percent of respondents indicated that dial-in and e-mail usage by judges or judicial staff was monitored 33 percent of respondents indicated that Internet usage by judges or judicial staff was monitored." And at 41:

> The data was particularly troubling in light of responses regarding the adequacy of notice and implementation of computer and e-mail monitoring. Only 50 percent of respondents indicated that they had been informed that their computer activities may be monitored, only 33 percent of users were required to sign an Appropriate Use Agreement before receiving access to the computer system,154 and a paltry 5 percent of respondents indicated that their opening log-on screen clarified the expected use of the computing equipment by judges and judicial staff.155 Furthermore, with only 14 percent indicating that the judges or judicial staff are involved in the monitoring activity, it became apparent that the judiciary was not involved in the implementation aspect of the monitoring activities.

[14] See "Computer Monitoring Guidelines" Recommended by the Judges Technology Advisory Committee (JTAC), 2002, online: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_GuidelinesCM_2002_en.pdf . See principles 3 and 4:

[3] As an overriding principle, any computer monitoring of judges, and judicial staff who report directly to judges, must have a well defined and justifiable purpose that does not encroach on deliberative secrecy, confidentiality, privacy rights or judicial independence.

[4] Content-based monitoring of judges and judicial staff is not permissible under any circumstances. Prohibited activities include keystroke monitoring, monitoring e-mail, word processing documents or other computer files, and tracking legal research, Internet sites accessed, and files downloaded by individual users.

impartiality.[15] Far less dramatically - but arguably no less significantly- the fact that court servers are *government owned* might foster a perception of infringement upon the separation of powers, thus prompting some Canadian courts to take active measures towards electronically distinct servers and tech support.[16]

Fast forward to 2006, to the trial of 9/11 bombing suspect Zacharias Moussaoui. For obvious reasons aimed at promoting transparency generally and responding to public interest in the trial specifically, the U.S. District Court for the Eastern District of Virginia decided to 'broadcast' the proceedings on the Internet, to make available testimony, evidence and the like to all, in the interest of a public trial.

At first glance, this is nothing new. Information of this nature (trial proceedings, court records) has always been public with excellent reason. What it has not been is as readily accessible to such an unlimited number - and potentially infinite range - of individuals indiscriminately. Individuals who can – oftentimes anonymously- gain access to sensitive information personal to others in an unprecedented fashion. What is more, they can subsequently engage in intimidating or even threatening behavior, if not identity theft[17] facilitated by said anonymity.

---

[15] See discussion in Michael Geist, "Computer and Email Surveillance in Canada" (2002) Report Prepared for Canadian Judicial Council, online: www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_Surveillance_2002_en.pdf.

[16] See guidelines set out by the Canadian Judicial Council, including the Canadian Judicial Council's "Blueprint for the Security of Judicial Information, the Acceptable Use Policy, Computer Monitoring Guidelines" (Second edition, 2006), online: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_SecurityBlueprint_2006_en.pdf.

[17] As discussed below. See Canadian Judicial Council., "Policy for Access to Court Records in Canada", online: http://www.cjc-ccm.gc.ca/cmslib/general/Model%20Policy-final-Sept2.pdf. According to the Policy: "The reasoning, in both policies, is that releasing records to a broad audience on the Internet would expose plaintiffs, defendants and jurors to the risk of identity theft through the publication of the extensive personal information collected in civil proceedings".

Not surprisingly perhaps, and as posited below, applying the traditional standards of disclosure to the World Wide Web can and has produced very unfortunate by-products ranging from identity theft to witnesses receiving threatening messages from parties *entirely removed from the case*. That is to say parties who by virtue of the medium if nothing else now fell into the class of 'interested parties' with access to intimate details of participants of the judicial process.[18] Relatedly, just as personal data can now be collected in unmatched fashion, so too can such information be acquired respecting *the judges themselves*, thus impinging on traditional understanding of judicial ethics. This is particularly true in regard to principles relating to judicial expression and association outside the courtroom.

---

[18] Apprehension of incidents of this very nature has prompted Canada's JTAC Judges Technology Advisory Committee (JTAC) to issue a report entitled "Open Courts, Electronic Access to Court Records, and Privacy," which built upon an earlier report for the Administration of Justice Committee of the Council. This discussion paper assembled 33 conclusions including that the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy. Online http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf and http://www.ciaj-icaj.ca/english/publications/ModelPolicyAccess_CJC_Septe.pdfSee Canadian Judicial Council, "Use of Personal Information in Jugements and Recommended Protocol" (2005) For a U.S. perspective see Peter A. Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) 79 Wash. L. Rev. 307, online: http://www.law.washington.edu/wlr/archives/winnp.pdf. See also Lynn E. Sudbeck, "Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records" (2006), 51 S.D. L. Rev. 81 and Natalie Gomez-Velez, "Internet Access to Court Records - Balancing Public Access and Privacy", (2005) 51 Loy. L. Rev. 365; Andrew D. Goldstein, "Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation", (2006) 81 Chi.-Kent L. Rev. 375; Kristen M. Blankley, "Note: Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents", (2004) 65 Ohio St. L.J. 413.

Other jurisdictions such as France and its highest court (Cour de cassation) have progressively favoured anonymisation techniques however partial *:*
« Si la jurisprudence disponible sur l'internet est progressivement anonymisée, conformément à la délibération de la Commission nationale de l'informatique et des libertés no 01-057 du 29 novembre 2001 portant recommandation sur la diffusion de données personnelles sur internet par les banques de données de jurisprudence online: http://www.ahjucaf.org/-Les-decisions-sont-elles-

So too has Belgium *:* La publication sur internet est anonymisée (remplacement de l'identité des personnes physiques par des initiales). Others such as Switzerland have yet to do so *:* Suisse, Tribunal fédéral Actuellement, les décisions enregistrées dans la base de données ne sont pas anonymisées, mais figurent en texte intégral comprenant le rubrum (composition de la cour, nom du greffier, nom des parties notamment), l'état de fait, la motivation et le dispositif ». See discussion bv the Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français, online: http://www.ahjucaf.org/-Les-decisions-sont-elles-

Whereas few but the most dedicated (or scholarly interested) would take it upon themselves to conduct or even collect empirical research, the mere click of a button results in a '*bilan*' (taking stock) not only of the judges' decisions (previously available data) but of personal connections and associations. What is more, in contradistinction to an access to information request,[19] a search engine expedition can reap inaccurate if not misleading data, an aggregate of oft-unrelated and potentially unreliable morsels of information supposedly concerning the judge directly or indirectly. In consequence, judicial activities or associations previously deemed perfectly acceptable at best or innocuous if not completely irrelevant (such as membership in cultural or religious community) at the very least , now risk tainting the perception of impartiality, thereby further constricting the realm of 'ethical' expression and association outside Chambers.

Finally, as regards the cardinal principle of competence, a judge's deliberation and *decision making process* can in principle now be tracked by documenting their Internet research pertaining to a given case (what sources and with whom they may have consulted with). It stands to reason that parties will eventually take opposing this practice as ex parte or offending the bar on independent factual research.[20] In the alternative, they might demand access to such information as a matter of transparency respecting the decision making process. Did the judge allot sufficient time to the matter (productivity)? Was their 'Lexis' or 'Quicklaw' query flawed; did they 'Google' the litigant or consult with an outside party (academic). Where there is trepidation there is also hope, as the Internet and its resources can serve to attenuate judicial unfamiliarity with new science and technology. It is to such issues that we now turn.

[19] *Access to Information Act*, R.S.C. 1985, c. A-1.

[20] See David H. Tennant & Laurie M. Seal, "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case"? (2005) 16 A.B.A. Prof. Law. 2.

Part II

Judicial Profiling? How Internet Search Engines Affect the Boundaries of Out of Court Expression and Association [21]

For evident reasons pertaining to the public's confidence in the judicial system and perception of its integrity, it behooves members of the judiciary to take pains to avert the slightest appearance of bias. In Canada, of course, the Charter is only properly satisfied when fairness and impartiality are both "subjectively present and objectively demonstrated to the informed and reasonable observer", as justice must be done and seen to be done.[22] This duty unquestionably extends to judges' extrajudicial or out of court speech, conduct and associations.[23]

---

[21] See *Ratushny, supra* note 5. See also L. Barry, "Judicial Free Speech and Judicial Discipline: A Trial Judge's Perspective on Judicial Independence" (1996) 45 U.N.B.L.J 79; Y. Begue & C. Goldstein, "How Judges Get into Trouble: What They Need to Know about Developments in the Law of Judicial Discipline" (The ABA Code of Judicial Conduct) 12 Provincial Judges Journal 8; J. Webber, "The Limits to Judge's Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Honourable Mr. Justice Berger" (1984) 29 McGill L.J. 369. For a thorough analysis of questionable out of court conduct and expression see S. Shetreet, *Judges on Trial: A Study on the Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing Company, 1976) regarding 'Misconduct in Private Life' as reason for removal or discipline. For an American perspective see Leita Walker, "Protecting Judges from White's Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work**"** (2007) 20(2) Georgetown J. L. Ethics 371.

[22] As discussed by Bryden's enlightening piece in great detail. See P. Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 83 Can. Bar. Rev. 555. See Article 11 (d) of the Canadian Charter of Rights and Freedoms states : "Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". See *R. v. RD.S.*, [1997] 3 S .C .R. 484 [*R.D.S.*] para . 31. See also *Rex* v. *Sussex* [1924] 1 KB 256 at 259 Lord Hewitt CJ. See also *Judicial Review of Administrative Action*, de Smith, 4th ed. At 250 and *Administrative Law and Practice*, Reid& David, 2nd ed. At 231 and section 23 of the Quebec Charter of Human Rights and Freedoms, R.S .Q. c. C-12, which states: "Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or the merits of any charge brought against him". See *2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool*), [1996] 3 S.C.R. 919 as cited by Bryden.

[23] The appearance of bias then, may originate from both the words or conduct of the judge, indicating prejudice. Mahoney JA considered in dicta the question of whether or not "consultation by a decision maker before publishing a decision, including consultation by the judge with a law clerk" could be abused so as to entail reasonable apprehension of bias. The answer lies in "whether an informed person, viewing the matter realistically and practically, and having thought it through, would think it more likely than not" that the decision was influenced by the clerk. *Weerasing*e v. *Canada* [1994] 1 FC 330 at 338 (FCA).

Sparing an outline of the normative framework, well exposed elsewhere,[24] the obligation in question, and the related requirement of general '*retenue*' or acting in a 'reserved manner'[25] are enshrined at various levels of the normative hierarchy including constitutional, codal/statutory rules, rules on disqualification[26] and ethical principles, both formal[27] and unwritten[28]. For as Yigal Mersel observes: "ethical norms aspire to regulate the judge's comportment not only when s/he hears a specific case, but far more generally; they are overarching norms, permeating all facets of judicial conduct, embracing that

[24] See e.g. Bryden, *supra* note 23 and Ratushny, supra note 5 *inter alia*.

[25] See Gonthier J. in *Ruffo* v. *Conseil de la Magistrature,* [1995] 4 S.C.R. 267 [*Ruffo*] citing the *Universal Declaration on the Independence of Justice* (internal footnotes omitted) :

"2.10. Judges shall always conduct themselves *in such a manner as to preserve the dignity of their office* and the impartiality and independence of the judiciary. *Subject to this principle*, judges shall be entitled to freedom of belief, expression, association and assembly".

He also approved the following, from *Basic Principles on the Independence of the Judiciary*:

"8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like citizens entitled to freedom of expression, belief, association and assembly: *provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary*".

[26] For a thorough and excellent discussion of judicial disqualification see *Bryden*, *supra* note 23; In Quebec Chapter V of the Quebec Code of Civil Procedure, R.S.Q . c. C-25, (sections 234- 242) sets out rules governing the recusation of judges in civil proceedings in Quebec (sections 234-35) as well as a procedural framework for making decisions concerning the recusation of judges in such proceedings (sections 236-42).

[27] See *Canadian Judicial Council*, "Ethical Principles for Judges" (1999) 10 Nat'l J. Const. L. 261; "Ethical Principles for Judges", *Canadian Judicial Council*, 1998. See G. Jackson and A. Kent, "Teaching" Judicial Ethics: the Canadian Methodology", November 2, 2004; The 2nd International Conference on the Training of the Judiciary: "*Ethical Principles* set out the main principles and provide commentary and examples intended to sustain what is already an ethical judiciary".

[28] This analysis however only concerns itself with *extra-judicial* or out of court conduct, including speech and association. For a broader discussion, see Professor M.L. Friedland's "*A Place Apart*: Judicial Independence and Accountability in Canada. A Report prepared for the Canadian Judicial Council" (May 1995) at 84-87. "Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia". Canadian Judicial Council (August 1990) (better known as the Marshall Inquiry Committee Report). For a broader discussion see: J.S. Ziegel, "Judicial Free Speech and Judicial Accountability: Striking the Right Balance" (1996) 45 U.N.B.L.J. 177; P. Russell, "Judicial Free Speech: Justifiable Limits" (1996) 45 U.N.B.L.J. 155 at 158; W. Mackay: "Judicial Free Speech and Accountability: Should Judges Be Seen and Not Heard?" (1993) 3 N.J.C.L. 159. While it exceeds the scope of this paper to reference the US model, suffice it to note the following: "For purposes of impartiality both actual and perceived of course, and to use the American Model Code parlance, "A judge is forbidden expression that "manifest[s] bias or prejudice" against participants" (American Bar Association, *The Code of Judicial Conduct* (1990) [*Model Code*].

which transpires outside the courtroom, extending to judicial expression and social activities".[29]

In that vein, the guiding principle in Canada appears to be that "judicial freedom of expression stops where serious undermining of public confidence in the judiciary begins".[30] But how does technology- specifically the Internet, impact on the scope and substance of acceptable out of court activities, including but not limited to those (verbal and non-verbal) associational engagements previously sheltered from the public view? How indeed might online search engines in particular prompt courts to *redefine* the time honoured judicial duty to "act in a reserved manner"[31] and the perception-based standards for appropriate speech/conduct for judges outside the courtroom? To raise these questions is to begin grappling with them, as we now must.

Prior to the digital age, a judge's external affiliations, most notably those of cultural, familial, religious or merely leisurely ilk (as distinguished from partisan or political activity) were generally considered innocuous so long as they were appropriate in substance.[32] Deemed acceptable in *essence*, these doings were too, quite significantly, by en large beyond public access and therefore scrutiny, and were consequently unlikely to taint the *perception* of impartiality.[33]

---

[29] See Y. Mersel, *Judicial Discretion* [Hebrew] (Jerusalem: Israel Bar Editions 2006) at 33 ff [translated by author].

[30] See *Barry*, *supra* note 22; and Justice Gonthier's comments in *Ruffo supra* note 26. See also Bryden's instructive article on point *supra* note 23. Using Bryden's classification, such cases might fall under his "fifth situation" category at 586: "The final situation where disqualification arguments may succeed is where the judge has made some form of statement or engaged in behaviour that would lead a reasonable observer to conclude that the judge was either incapable of acting impartially or had failed in his or her duty to act impartially".

[31] *Ibid.*

[32] Examples of such 'benign' forms of expression or associations include Church membership, family reunions, involvement in cultural activities relating to one's ethnic or religious background (ex. participation in St-Patrick's day parade…) or even academic writing.

[33] Perception oftentimes being divorced from substance or reality, it stands to reason.

Whereas the substantive nature of said activities and the rationale governing their tolerability has remained unchanged, the perception thereof, for its part, may have. This if only because *discrete* Internet postings (verified or false) may *cumulatively* serve to generate a generally unreliable, ad hoc 'digital portrait' of the judge. For such data – accurate or not- has of course become universally available and that with unprecedented ease. Plainly put, the Internet generally and search engines specifically make "googling" the judge a far less onerous – however no more dependable- activity, thus potentially giving rise to increased and presumably frivolous allegations of partiality when resulting tidbits are amateurishly or even maliciously compiled.

The latter occurred when revered Australian High Court judge Michael Kirby was defamed by identity thieves using the internet site MySpace: "A profile page, claiming to have been written by the Australian judge, also contains sordid and sexually charged material".[34] While the outlandish allegations contained therein would probably be disregarded by anyone with good sense, other, more subtle forms of judicial besmirching – liable to be widely believed- offer cause for concern. Simply, the ready accessibility of (often false or unrelated) morsels of data purportedly respecting a judge's out of court (presumably otherwise proper) expression - rather than its questionable nature or substance - now potentially render it problematic. Problematic for aside from misleading parties, such data might in turn serve to further unnecessarily restrict the (painfully narrow)[35] scope of a judge's private expressional and associational activities,[36] thus conceivably even inviting Charter scrutiny.[37]

---

[34] Reid Sexton "Judge a Victim of MySpace Fraud" (January 7, 2007), online: *The Age*, http://www.theage.com.au/news/security/judge-a-victim-of-myspace-fraud/2007/01/06/1168104896791.html. See also Reid Sexton "High Court Judge Kirby Targeted by Malicious Internet Fraud" (January 7, 2007) online: *The Age*,http://www.theage.com.au/news/national/high-court-judge-kirby-targeted-by-malicious-internet-fraud/2007/01/06/1167777325037.html?page=2

[35] As Russell queries in his important piece on point. See See P. Russell, "Judicial Free Speech: Justifiable Limits" (1996) 45 U.N.B.L.J. 155 at 156: "to what extent should judges in their private lives as citizens be constrained from enjoying the freedoms available to all other citizens? Clearly, the constraints on judges *qua* citizens should be minimal and based solely on what is required to maintain their capability in the first realm - to discharge properly the distinctive civic and professional responsibilities of a judge".

The medium alone therefore, it stands to reason, might suffice to alter the notion of acceptable judicial expression and perceived prejudice and is visibly liable to affect the culture of judicial comportment emerging therefrom.[38] It can go as far as impugning the judge's very core identity, as discussed below. More specifically, the problem can perhaps best be expressed as one of "aggregation" of otherwise presumably inoffensive data,[39] inadvertently producing an artificially constructed "digital biography"[40] of the

---

[36] See Y-M. Morissette, « Figure actuelle du juge dans la cité » (1999), 30 R.D.U.S. 1-31. According to Professor Morissette (as he then was), the trend is towards greater openness to judicial expression : "L'idée, cependant, que le juge puisse invoquer un droit de parole, ou un droit à la liberté d'expression, progresse au Canada ("…") la tendance est vers l'ouverture ("…")". See also Justice Sopinka, "Judicial Free Speech Must a Judge be a Monk-Revisited" (1996) 45 U.N.B. L.J. 167; and *Ratushny supra* note 5.

[37] See Former Chief Justice Brian Dickson observing that "today's reality of an independent, bilingual, multicultural Canada in which civil liberties are protected by an entrenched Charter of Rights and Freedoms poses new and different challenges of a jurisprudential nature" (cited in Mellon B. Dickson C.J.C., "The Path to Improve the Accessibility of the Law in Canada" (Address to the Annual Meeting of The Canadian Bar Association, Winnipeg, August 28, 1984) [Copy provided by the Supreme Court of Canada] to Mellon 489 at 490.); *Morissette, supra* note 37 regarding judges' Charter right to free expression: "Judges, of course, do enjoy freedom of expression, however limited, see CJC *Ethical Principles, supra* at Note 28:

> **D.5**-The application of Principle D.3(d), which counsels avoidance of public participation in controversial political discussions, is more open to debate and problems of application than the other principles in this section. Judges on appointment do not surrender all of the rights to freedom of expression enjoyed by everyone else in Canada. But, the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

[38] As well as the application of principles pertaining to recusal/disqualification.

[39] This term was coined by Daniel Solove *supra* note 2 in a different context.

[40] *Ibid*. Solove coins the term, "digital biographies" to describe the same phenomenon that Rosen describes as the "dossier society". . See Solove *supra* note 2 at 53-56. In *The Unwanted Gaze: The Destruction of Privacy in America* (Random House, 2000), Jeffrey Rosen highlighted the danger of assembling data from disparate sources. Decontextualized, these tidbits can be used to draw inaccurate and potentially damaging conclusions about individuals.

judge, one which litigants and others can inexpertly assemble, misread or even manipulate.[41] As Daniel Solove observes in a different context:

> Computer databases contribute significantly to what I call the "aggregation problem." The aggregation problem stems from the fact that the digital revolution has enabled information to be easily amassed together. We often sprinkle small details about ourselves in a variety of settings as we go about our daily lives. .. But imagine if every person or entity we ever came into contact with during our lives pooled everything that they knew about us. A fact here and a detail there add up. (p.14)[42]

In this aggregative manner, the accessibility of data (often irrespective of reliability or accuracy) can increasingly cause judges' impartiality to be frivolously censured.

Not only is data purportedly pertaining to the judge's own expression and association 'fair game' but that relating to her family, colleagues and former associates might also inadvertently attach or be involuntarily or erroneously attributed to her. For as Gary Marx explains, in the technology age "[I]nformation that refers to an individual can be personal or impersonal. Any information that can be tagged to an individual is, in one sense, personal, but not all personal information involves expectations of privacy, nor, when it does, is this to the same degree".[43]

[41]Can include views expressed publicly by judges in their private capacity, prior to their appointment.

[42] See Daniel Solove, "Access and Aggregation: Privacy, Public Records and the Constitution" (2002) 86 Minnesota Law Review _1137_at 1185.

[43] Discussing privacy generally, from a sociological perspective. See Gary Marx, "What's in a Concept? Some Reflections on the Complications and Complexities of Personal Information and Anonymity" (2006) 3 University of Ottawa Law & Technology Journal 1.

In the Internet era, therefore, decontextualized and deceptive aggregations of online data ostensibly respecting a particular judge can effectively spark the apprehension of bias,[44] and tautologically even render it reasonable.

What is more, a judge's impartiality can be brought into question for arguably improper motives relating to her very identity such gender, ethnicity, religious observance (or lack thereof) and sexual orientation[45] deemed "prohibited grounds" per section 15(1) of the Charter.[46] At worse, ill-intentioned individuals (from judge shoppers to prejudiced parties) can easily stage-manage Internet data to fashion the appearance of bias, using the judge's "core identity" against her. This, it very well stands to reason, might lead to claims discriminating against judges of certain backgrounds, the effect of which might be to exclude them from sitting in a manner contrary to section 15(1) of the Charter.[47] Thusly, in addition to further constricting judicial expression (whose narrowness is already decried)[48], technology might serve to reprimand a judge's very identity (gender, cultural, religious or other) – in terms of either appointment or recusal[49]- as cultural affiliations enter disputes in an increasingly multicultural society.[50]

---

[44] See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45 at para. 66 : "The relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was".

[45] That is to say parties requesting attorneys of the same gender or cultural/religious, socio-economic background as themselves.

[46] Thus arguably leading to claims discriminating against judges or certain backgrounds, the effect of which might be to exclude them from sitting in a manner contrary to s. 15(1) of the Charter.

[47] In terms of appointment or recusal. For a general discussion of the former see K. Eltis & F. Gelinas, "*Constitutional Guarantees for the Judiciary*" (2006) Canadian Report, International Congress of Comparative Law, Utrecht [Eltis & Gelinas].

[48] See Sopinka, *supra* note 37, at 171:

> Some support a rule of total silence on the basis that almost any issue may in future come before the court. My response to this is that it is accepted that judges have views with respect to issues of the day. The fact that these views are not expressed in the context of a specific case should not be a basis for recusal. The scope of the constraint on judicial free speech should be no greater than necessary. This means it should be confined to politically contentious issues and legal questions that may become the subject of adjudication.

[49] *Ibid.*

[50] For example, CJC Lamer was a Catholic, and appears on Wikipedia as a Canadian Roman Catholic and member of the Roman Catholic Church. See Wikipedia entry on "Canadian Roman Catholics" online: http://en.wikipedia.org/wiki/Category:Canadian_Roman_Catholics. What is more Lamer "drew

Perhaps the most prominent illustration of the above-described (non-scholarly) 'judicial profiling' is that of Justice Hazel Cosgrove, the first female Supreme Court judge in Scotland, who stood accused of bias in a recent immigration case. Namely, charges that her Jewish background and membership in the International Association of Jewish Lawyers and Jurists[51] should have disqualified her from hearing a case involving the denial of asylum to a Palestinian refugee, Ms. Fatima Helow.[52] This after the party's attorneys 'googled' the judge and found that she was a member in this Jewish professional association.[53] Notwithstanding the crucial fact that Ms. Helow did not in any way claim that the judge's decision *itself* disclosed or reflected any bias.While the judge in this case was cleared of 'lacking impartiality'[54], the mere incident stands as a warning to judges regarding the ready dissemination of personal and unrelated information over

---

condemnation not only for supporting the striking down of Canada's abortion law in the pivotal 1988 Morgentaler case, but also for admitting afterward he did so on the basis of public opinion. "Had you asked me at a hearing if I was for or against (abortion), I would have said against," he said at the University of Toronto in 1998". Could his belonging to a church or his being Catholic for that matter, today constitute reason for disqualification? See online: http://catholicinsight.com/online/church/biographies/article_776.shtml. An Internet search can also reveal whether a judge served in the military (as did Lamer CJC (A former member of the Royal Canadian Artillery and Intelligence Corps), and Dickson CJC, with its own ramifications for the above-discussed).

[51] For a broader description see http://www.intjewishlawyers.org/html/about.asp.

[52] "Lady Cosgrove's impartiality when ruling on an immigration case of a Palestinian woman was compromised by being part of the International Association of Jewish Lawyers and Jurists.") See: Damien Henderson, "Judge Cleared of Jewish Bias" *The Herald* (January 17, 2007), online: http://www.theherald.co.uk/news/news/display.var.1126944.0.0.php; See also "Scottish Judge Cleared of Bias Charges" *JTA.org* (13th Feb 2007), online: http://www.martinfrost.ws/htmlfiles/scotnews07/070213_bias.html; See also "Accusation of Judge's Bias Rejected" *The Journal Online* (17 January 2007), online: http://www.journalonline.co.uk/news/1003819.aspx: "The Association's aims include the advancement of human rights, the prevention of war crimes, the punishment of war criminals and international co-operation based on the rule of law and the fair implementation of international covenants and conventions. It "is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel"".

[53] The court's opinion can be read at http://www.scotcourts.gov.uk/opinions/2007csih05.html. See Para 16 of the decision: "Upon receiving intimation of the judge's decision, those representing the petitioner chose, for whatever reason, to make further inquiry about the judge. By means of the Internet search engine Google they discovered information about her which was (and is) publicly available on various websites. One such website was that of The International Association of Jewish Lawyers and Jurists ("the Association"), www.intjewishlawyers.org.

[54] The court's opinion can be read at http://www.scotcourts.gov.uk/opinions/2007CSIH05.html .

the Internet and its availability to litigants and potential frivolous claims or manipulation.[55]

In this manner, technology can be said to reawaken and indeed transform the recurring issue of the relevance of a judge's personal traits[56] and whether a party's explicit request for a 'custom–made judge' (that is to say one whose gender and ethnicity conform to the litigant's specifications or correspond to their own portrait) might be legitimately entertained if not approved.[57] In other words, as the debate regarding "individualized justice" attracts consideration and the notion of incorporating cultural sensitivity and "cultural pluralism into the law"[58] - with its benefits and foibles - gains momentum[59] the enhanced capability to look up and indeed 'recreate' a judge's (or

[55] The judge's ethnicity is well known as she is the first Jewish appointment to that level court.

[56] See e.g. Bertha Wilson, "Will Women Judges Make a Difference?"(1990) 28 Osgoode Hall L.J. 507; Peter McCormick and Twyla Job, "Do Women Judges Make a Difference? An Analysis by Appeal Court Data" (1993) 8-SPG Can. J.L. & Soc'y 135; See Constance Backhouse, "The Chilly Climate for Women Judges " (Paper presented to the "Adding Feminism to Law: The Contributions of Madame Justice L'Heureux-Dubé" workshop, Ottawa, September 2002); See also Justice Maryka Omatsu, titled "On Judicial Appointments: Does Gender Make a Difference?" (also citing the work of Carol Gilligan regarding social context) in Peter Fletcher ed. *Ideas in Action: Essays on Politics ands Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) at 176. For a US perspective see C. Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982); J. Gruhl, C. Spohn & S. Welch, "Women as Policymakers: The Case of Trial Judges" (1981) 25 Am. J. of Pol. Sci. 311.

[57] See James Stribopoulos & Moin A. Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall L.J. 315; Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation" (2004) 90 Va. L. Rev. 301.

[58] See Pascale Fournier, "The Ghettoisation of Difference in Canada: 'Rape by Culture' and the Danger of a 'Cultural Defence' in Criminal Law Trials" (2002) 29 Man. L.J. 81 and Jennifer Choi, "The Viability of a "Cultural Defence" in Canada" (2003) 8 Can. Crim. L. Rev. 93. According to Choi: "a good starting point for defining "cultural defence" is put forth by Lyman, as a defence to "("...") negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition." *Ibid.* at _96__. Professor Etherington gives a similar definition in a working document on reform of multiculturalism and justice issues: "("...") an independent substantive defence or, as an alternative, the manner in which evidence of cultural differences could be allowed to buttress the assertion of one of our traditionally accepted defences, excuses or justifications." *I*d(cited by Choi at 96) .

[59] Up to now particularly with regard to cultural defences. See Jennifer Choi, "The Viability of a 'Cultural Defence' in Canada" (2003) 8 Can. Crim. L. Rev. 93.

judicial nominee's) identity online is bound to enliven the issue of a party's entitlement to a judge conforming to their ethnic, gender or religious specifications.[60]

Whereas the impact of a judge's personal characteristics might certainly form the object of proper study as in the "personal attributes" model,[61] these legitimate studies[62] – however contentious - are distinguished by use of recognized scholarly methodology[63] and by their scholarly objectives. It bears repeating that beyond the legitimate discussion on point and emphasizing the contribution of social context edification,[64] digital judicial biographies (compiled by litigants or parties external to the case) can easily serve as

---

[60] Composition of juries of course remains a contentious matter in the United States: See e.g. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Norris v. Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); Warren Sheri Lynn Johnson, "Litigating Racial Fairness after *McCleskey v. Kemp*" (2007) 39 Colum. Hum. Rts. L. Rev. 178. *McCleskey v. Kemp*, 478 U.S. 1019 (1986). Kenneth J. Melilli, "*Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges", 71 Notre Dame L. Rev. 447 (1996); Regina Graycar, "The Gender of Judgment" (1998) 32 U.B.C. L. Rev. 1; Tanya E. Coke, Note, "Justice May be Blind but is she a Soul Sister? Race Neutrality and the Idea of Representative Juries" (1994) 69 N.Y.U. L. Rev. 327 at 331 ("that the public believes that all-white juries put minority defendants and victims at a disadvantage -- is reason to worry about prevalence of non-representative trial juries").

[61] C. Neal Tate & Panu Sittiwong, "Decision making in the Canadian Supreme Court: Extending the Personal Attributes Model across Nations" (1989) 51:4 J. Pol. 900.

[62] See e.g. Fiona M. Kay, Cristi Masuch & Paula Curry, "Growing Diversity and Emergent Change: Gender and Ethnicity in the Legal Profession" in Elizabeth Sheehy & Sheila McIntyre, eds., *Calling for Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006); Anne Boigeol, "Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary" in Ulrike Schultz & Gisela Shaw, eds., *Women in the World's Legal Professions* (Portland: Hart, 2003) at 401; Eliane Botelho Junqueira, "Women in the Judiciary: a Perspective from Brazil" Oxford: Hart, 2003_____at 437 [FULL CITE NEEDED PLEASE]; and Patricia Yancey Martin, John R. Reynolds & Shelley Keith, "Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis" Chicago: University of Chicago Press, 2002 [PLEASE COMPLETE CITE].

[63] Initiated and performed by scholars using scientific methods as opposed to disgruntled or merely inexperienced parties to a case on an ad hoc basis.

[64] See Margo L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Rev. 71 discussing social context education:

> when undertaking any analysis of cultural difference, a judge must be particularly aware of his or her own bias (es), whether in the form of race, class or gender bias The judge must also try to be aware of bias in the information collected and presented. Is the information regarding the "community values or traditions... Judges must be made aware of their own socio-cultural leanings and the means to overcome them, so as to achieve the proper balancing of rights in exercising their discretion and duties.

pretext for judge shopping and even racist, sexist or homophobic accusations directed at members of the judiciary whereby integral components of the judges very identity can be invoked as in themselves indicative of prejudice[65] or unsuitability for judicial office.[66]

What then can and must we do? A helpful starting point for a pragmatic, flexible approach is one premised upon the rationale underlying the rules and principles governing judicial expression. Far too often, jurists and law makers generally are prone to 'extreme' reactions when it comes to new technologies; that is to say that many of us tend to either ignore cyber-problems as too complex to address or even 'impossible' to regulate. Others attempt to 'over regulate', 'reinventing the wheel' by fashioning normative mechanisms far too specific or narrowly tailored to keep up with evolving technology, as Solove observes: "when they try to track existing technology too closely, they become too rule-like and lose the flexibility of a standard. Basic principles get lost or forgotten in the shuffle of technicalities". Instead, a purposive however progressive and contextual interpretation of the flexible principles already in place, informed by the perspective of comparative inquiry, would appear to serve us best.

For our purposes, in order to carefully assess whether the impugned statements or conduct have in fact given rise to a reasonable apprehension of bias, we must – as we have always done - inquire the following: "What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that [the decision maker] whether consciously or unconsciously, would decide fairly"[67].

In other words, the test is whether "a reasonably informed bystander would perceive bias on the part of an adjudicator".[68]

---

[65] As the hypothetical Lamer CJC example, *supra* note 51 seeks to demonstrate.

[66]See Eltis & Gelinas, *supra* note 48.

[67] See C*ommittee for Justice and Liberty* v. *National Energy Board,* [1978] 1 S.C.R. 369.

[68] It is clearly beyond the scope of this endeavor to provide a comprehensive discussion of judicial recusal. Such discussions are widely available. Most recently, see Bryden, *supra* note 23. The test encompasses a

Importantly, the Canadian judiciary benefits from a strong "presumption of judicial integrity" and are "assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairy on the basis of its own circumstances".[69] It remains that a judge must avoid engagements in activities that cause her impartiality or the appearance thereof "may reasonably be questioned".[70]Nevertheless, and while a thorough exposition of the normative framework evades present purposes and scope, "the threshold for a finding of real or perceived bias is high[71] and evaluated contextually".[72]

---

two fold requirement. Namely, the person considering the bias must be reasonable, as must the apprehension of bias itself in the context. See *Newfoundland Telephone Co*. v. *Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623; See also *Wewaykum Indian Band* v. *Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

[69] *R* v. *S (R.D.)* [1997] 3 S.C.R. 484 at ___ [PAGE CITE] citing *US* v. *Morgan*, 313 US 409 (1941) at 421. This crucial presumption emanates from two distinct sources: the Judicial Oath of Office and the provisions of the Judicial Code of Conduct respecting impartiality; *R* v. *Smith & Whiteway Fisheries Ltd.* [1994] 133 N.S.R. (2d) 50 (C.A.) at 60, 61; *R* v. *Lin* [1995] B.C.J. No. 982 QL. As Richard Devlin observes: "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. See Devlin, Richard F. "*We Can't Go On Together With Suspicious Minds:Judicial Bias and Radicalized Perspective in R v. R.D.S.*" [1995], 18 Dalhousie L.J. 408. As Judges are presumed to be both fair and impartial, disqualification, in practice, is quite rare. Thus, in the words of Justice l'Heureux-Dube, "*before finding a reasonable apprehension of bias, the reasonable person would require some* ***clear evidence*** *that the judge in question had acted improperly used his or her perspective in the decision making process; this flows from the presumption of impartiality of the judiciary*" *R v. S. (R.D.)* [1997] 3 S.C.R. 484.

[70] The test for judicial disqualification is one *of reasonable apprehension of bias* (See de Grandpre J. in *Committee for Justice and Liberty* [1978] 1 S.C.R. 369 at 394; *R.* v. *Valente* [1978] 1 S.C.R. 369 at 394). This is to say that if the judge's words or conduct give rise to such an apprehension, he is deemed to have exceeded his jurisdiction, thereby warranting disqualification. The test being an objective one, actual bias need not be shown, nor must it exist for that matter. A similar test exists in England, as per Lord Denning in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304 at 310: "in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself...it does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial nevertheless, if rightminded persons would think that, in the circumstances there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand". As stated by the English courts. See *R. v. Higgins*, [1895] All E.R. Rep. 914; [1895] 1 Q.B. 563; *R v. Sunderland Justices* [1901] 2 K.B. 357, per Vaughan Williams, L.J.

[71] "("…") allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving bias ("...") One overriding principle from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather, it must be considered in the context of the circumstances, and in light of the whole proceeding" (In *R.* v *S* (R.D.) *supra* note 70).

Again and plainly put: "In light of the strong presumption of judicial impartiality, the standard refers to an apprehension based on serious grounds. Each case must be examined contextually and the inquiry is fact-specific".[73]

For purposes of Internet 'judicial profiling', the direction offered by the above stated principles, it would appear, is threefold: First the logic underlying our expressed desire for a multicultural judiciary of varied experience[74] dictates that attention best be focused more concretely on a judges' expression and/or activities – rather than her (immutable) core identity and personal characteristics might.[75] As this better serve us in circumscribing the apprehension of bias and further aid in averting frivolous – if not discriminatory allegations.[76] This is not to say that the notion of "individualized" justice cannot and should not be properly entertained. Instead, it is merely to suggest that Internet search engines do not constitute a suitable and reliable mechanism for advancing such claims in a serious fashion. For as Jennifer Nedelsky writes in *The Nature of Judgment* "although no given litigant at either the trial or appellate level could expect a judge who shares their backgound and experience, every litigant could expect a judge with wide experience in talking with, listening to, trying to persuade people from diverse backgrounds".[77]

---

[72] This is to say that "*if the judges words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be*".

[73] *Wewaykum Indian Band* v. *Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45.

[74] See K. Eltis and F. Gélinas, "Constitutional Guarantees for the Judiciary: The Appointment Process", Netherlands Comparative Law Association (Résultats de rapport: Rapport technique au Congrès d'Utrecht sur le sujet des "garanties constitutionnelles pour l'autorité judiciaire" Conference proceeds, Utrecht, 2006.

[75] *Ibid*. With regard to appointments as well. In that regard generally see Michael J. Bryant, "Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process", (2004) 24 Supreme Court Law Review 29, at 38-39. See also Sébastien Grammond, "Transparence et imputabilité dans le processus de nomination des juges de la Cour suprême du Canada" (2006) R.G.D. Vol. 36 No. 4.

[76] This is not to say that the notion of "individualized" justice cannot and should not be properly entertained. Instead, it is merely to suggest that Internet search engines do not constitute a proper and reliable mechanism for advancing such claims in a serious fashion.

[77] See report prepared for National Judicial Institute (2001) [on file with author].

Second and relatedly, a purposive interpretation of the principles of apprehension of bias, as well expressed by by Buergenthal J. of the ICJ,[78] are most relevant to ensuring we stay the course and maintain a principled stand (rather than be swayed by knee-jerk responses) in the Internet age:". .A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court .. .".[79]

Third, in order to shore up the principles of justice and fairness (encapsulated in the traditional standard) in light of the concerns relating to constructing or misperceiving a spurious digital portrait of the judge,[80] careful emphasis must be placed on the "reasonable" criteria by which the apprehension of bias is assessed. That is to say whether the impugned judicial expression or association would lead a *reasonable* person to apprehend bias.[81] That is nothing new. The standard mandating recusal if and whenever "impartiality might reasonably be questioned" or in the presence of the "reasonable apprehension of bias" remains unaltered. But the renewed emphasis of *reasonableness* as an *aide-mémoire* is of the essence, for while the reasonable person may well be tech savvy and avail him or herself of the use of Internet search engines, the sensibleness of assembling a "digital judicial biography" based on an ad hoc compilation

---

[78] In his dissenting opinion regarding the legal framework governing disqualification in the Israeli Fence case re: petition to disqualify Elarby J.

[79] Cited in Yuval Shany and Sigall Horowitz, "Judicial Independence in the Hague and Freetown: A Tale of Two Cities", (2008) 21 Leiden Journal of International Law 113 (discussing judicial impartiality and disqualification in the international context), online: http://journals.cambridge.org/download.php?file=%2FLJL%2FLJL21_01%2FS092215650700475Xa.pdf&code=4433dca0befcfae508c095f29250a990 (last visited March 12, 2007). See also T. Meron, "Judicial Independence and Impartiality in International Criminal Tribunals", (2005) 99. AJIL 359.

[80] Or even misrepresenting and distorting judicial activities.

[81] See "Disqualification of Federal Judges for Personal Bias" (1949) 16 The University of Chicago Law Review 349, online: http://links.jstor.org/sici?sici=0041-9494(194924)16%3A2%3C349%3ADOFJFP%3E2.0.CO%3B2-C.

of data from unverified sources that may or may not be accurate at best or misleading – or based on improper considerations pertaining to the judge's identity at worse – is by most accounts of questionable prudence.

Although technological evolution certainly invites renewed reflection, it does not necessarily follow that the normative framework itself must be reinvented, Rather, the concerns that new technologies raise can very often be properly addressed at the level of *interpretation* of what are often malleable standards, fashioned to survive the these advances and others. For reasons that are easily understood, "true impartiality does not require that the judge have *no sympathies* or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view" [emphasis added].[82] Particularly since – as previously noted- the desirability of maintaining a multicultural, diverse judiciary,[83] mandates the acceptance if not encouragement of cultural affiliations. Anything less, it is tendered would surely have an undesired chilling effect of judges causing them, to paraphrase Justice Sopinka, to completely withdraw from society[84] or indeed voiding judges of the very humanity which we expect them to exhibit.

A final thought informed by comparative inquiry

Lastly, and while entertaining more substantive recommendations in any great depth far exceeds the scope of this present reflection, suffice it to remark on the worth of comparative inquiry in examining the standards governing proper out of court judicial expression in the Internet age. While the traditional standard's usefulness is by no means outlived – subject, as noted, to a purposive, contextual interpretation and to added

---

[82] Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) at 12.

[83] As part of society and enshrined in Charter, as noted above. On the merits of a diverse judiciary see Richard Devlin, A. Wayne MacKay and Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a "Triple P" Judiciary" (2000) 38 Alta. L. Rev. 734.

[84] As some presumably had when the Marshall Report emerged *supra* note 29. As Justice Sopinka explains: "Some had withdrawn completely from society". See *Sopinka, supra note 37.* See also H. Mellon, "Meeting the Public: The Charter and the Judiciary (2002) 21 Windsor Y.B. Access Just. 33.

emphasis on reasonableness, it is worth noting that conceptions of the boundaries of judicial expression are subject to diverging understandings.[85] Most notably, in contradistinction to the traditional English conception of said limitations, whereby judges must err on the side of refraining from any activity that might be perceived as having a political flavour,[86] the German view is one that tolerates - if not welcomes - the 'political judge',[87] cognizant of the counterproductive effect of complete judicial isolation from society (the so called "chilling effect").

While at first curious and perhaps even radical to Canadian ears, the German perspective is of interest in that it conceives a measure of judicial social and political involvement – even active- as appropriate if not desirable. Having deemed that such participation allows judges to immerse themselves in their community, such immersion, which for historical reasons that can easily however painfully be understood,[88] is deemed

[85] See B. Krix, "The 'Political Judge' and the Principle of Impartiality in Germany", online: http://www.iojt3conference.net/docs/ponencia10.pdf

[86] As summarized by Shimon Shetreet: "Judges do not make public comments on particular cases tried in their courts nor, generally, are they available for press interviews on general questions or on matters relating to law, courts and the administration of justice. Moreover, they do not reply to criticisms passed upon them by the Press. As Lord Denning said in one case "from the nature of our office we cannot reply to criticism. We cannot enter into public controversy. We must rely on our conduct itself to be its own vindication". See Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, Amsterdam, North-Holland Publishing Company, 1976. Bryden *supra* note 23 discusses the "modern" approach to disqualification generally (rather than expression specifically) in greater detail: the modern English approach, employs a bifurcated analysis, in which a distinction is drawn between situations where disqualification is automatic and situations in which disqualification flows from a reasoned perception that the judge may lack impartiality. The second approach, which I will describe as the Canadian approach-though it seems to have found favour in Australian, New Zealand and South African decisions as well-employs a unified "reasonable apprehension of bias" test". Significantly, that is changing in Canada, as indicated by Justice Sopinka, and Professors Morisette (as he then was) *supra note 37*; See Karim Benyekhlef, "L'indépendance institutionnelle du pouvoir judiciaire: légitimité et participation au débat public") **(**1996) 45 U.N.B. L.J. 37; and *Mackay, supra* note 29.

[87] See H. Patrick Glenn, "Limitations on Judicial Freedom of Speech in Germany and Switzerland" (Jan. 1985) 34 International and Comparative Law Quarterly 159, online: (summary)

http://www.jstor.org/pss/759440

[88] See B. Krix, "The 'Political Judge' and the Principle of Impartiality in Germany", online: http://www.iojt3conference.net/docs/ponencia10.pdf "The image of the judge that we have in Germany today has been affected to a large extent by the experiences that the Germans have made with their judges during the Nazi-era"; See also I. Cotler, "The New Human Rights and Anti-Jewishness" (2004) 38 Intl. Jewish Lawyers and Jurists 24 , online: http://www.intjewishlawyers.org/docenter/frames.asp?id=9285; See also Shannon Smithley "The Study of the Past as Exercise in Political Theory and the History of Ideas",

necessary for preventing that which is far worse than improper speech. Silent acquiescence in the face of abuses or taken to the extreme atrocities; silence by the guardians of democracy which legitimizes the unspeakable.[89] That the duty to rise vocally against injustice is not stifled but indeed bolstered when donning the judicial robe lies at the heart of that approach.

Accordingly, section 39 of the *German Judicial Act* [90] confirms and reflects this vision, one that is scornful of judicial neutrality and instead encourages socio-political involvement.[91] Thus, on the heels of the unfathomable intellectual and judicial silence compounding the atrocities of the Holocaust: "the [German] Parliamentary Council (Parlamentarischer Rat), the legislative body assigned with the task to draft the constitution, discussed the image of the judge already in 1948/9. It was intended to create a new judge character that would typify the role of the judge as a representative of the judicature... The judiciary should cease regarding political matters as something inferior that one should keep out of. According to the council it was a misinterpretation

---

(2006) 7 German Legal Journal 2, online: http://www.germanlawjournal.com/article.php?id=707; Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, Darker Legacies Of Law In Europe, 205, 225 (Christian Joerges and Navraj Singh Ghaleigh eds., 2003).

[89] For in the word of Elie Wiesel " . . .silence encourages the tormentor, never the tormented". As per Elie Wiesel (In the Nobel Acceptance Speech delivered by Elie Wiesel (December 10, 1986): "I swore never to be silent whenever and wherever human beings endure suffering and humiliation. We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented".

[90] German Judiciary Act (sections 38-43 DRiG) : Section 39 German Judiciary Act reads: *In and outside office a judge shall conduct himself, in relation also to political activity, in such a manner that confidence in his independence will not be endangered.* See http://www.iuscomp.org/gla/statutes/DRiG.pdf Section 39 Maintenance of independence. Krix: "References to how judges are to conduct themselves ethically are to be found in the Basic Law (Articles 92, 97 GG), in the German Judiciary Act (sections 38-43 DRiG)and in the respective judiciary acts of the German *Länder*.

[91] Justice Barbara Krix "Ethic for judges, a worldwide discussion" DRiZ 2003, 149. See also B. Krix, "Etica Giudiziara: Lo Stato dela Discussione Sulla Deontologia in Germania" online: http://www.associazionemagistrati.it/pubblicazioni/Deontologia_napoli/12_Krix.pdf (Italian); See also B. Krix, "The 'Political Judge' and the Principle of Impartiality in Germany", online: http://www.iojt3conference.net/docs/ponencia10.pdf

of the notion of impartiality to think that a judge could be politically neutral. In fact, they called for the political judge, but not for a judge active in or for a political party. The political judge should speak in the spirit of democracy, of social equality, of social understanding and of human rights... These were the guidelines of the Parliamentary Council for the *German Judiciary Act*"[92]

As Patrick Glenn teaches in the same vein: "Continental judges have traditionally enjoyed greater individual political freedom than their common law counterparts. This phenomenon is related to judicial authority in general (relates it to young age and training: "standards of conduct are generally those that can be met and tolerated by a large number of people whose adult and professional lives are still before them. It is therefore frequently accepted that a judge may engage in political activity and membership in a political party or politically active union is often tolerated…".[93]

It follows from the above said that ethical principles indeed boundaries respecting judicial political involvement in Germany specifically and the continent generally are to a certain degree comparatively fluid,[94] necessarily giving rise to the tension between the need to provide firm guidance and the nebulosity of certain activities in this context.[95]

---

[92] *Ibid.*

[93] See *Glenn*, *supra* note 88.

[94] *Ibid.* Interestingly however, an illustration of the above-mentioned 'cultural defence' is an incident of a German judge who apparently crossed even those 'fluid' boundaries by asserting that religious imperatives excuse a Muslim man from bowing to the prohibiting on spousal abuse: See "German Justice Failures", *Der Spiegel*, (March 29, 2007), online: http://www.spiegel.de/international/germany/0,1518,474629,00.html: "("…") the judge argued, the woman should have "expected" that her husband, who had grown up in a country influenced by Islamic tradition, would exercise the "right to use corporal punishment" his religion grants him.The judge even went so far as to quote the Koran in the grounds for her decision. In Sura 4, verse 34, she wrote, the Koran contains "both the husband's right to use corporal punishment against a disobedient wife and the establishment of the husband's superiority over the wife.""

[95] For an American perspective see Merle W. Loper, "Free Expression and Judicial Speech: A General Framework from One American Perspective" (1996), 45 U.N.B. L.J. 105. See also *Mackay*, *supr*a note 29, at 171:

> There is beginning to emerge a more modern conception of the role of the judge which is more tolerant of elements of subjectivity. Those who support this version of the judge argue that to completely factor out all subjective perceptions would make judging mechanical and inhuman. It would also be virtually impossible to do. This more subjective and human judge is not to be

Although Canadian thinking has traditionally allied itself with the '*mère patrie's* more reserved view of "when in doubt out" [96], the German perspective appears to be gaining adherents.[97] While pragmatically speaking - and for good reason - the above-exposed

---

> substituted for the objective judge. The challenge is to put the two roles together. The argument for representation in the judiciary follows from this paradigm: more perspectives leads to more open-mindedness, more ways of seeing things. This in turn destroys stereotypes that may otherwise not be confronted if the dominant image of objectivity is not challenged.

For a somewhat different perspective see Karim Benyekhlef (who disagrees with McKay's position but not his general criticism of excessive constraints on judicial expression. (See Karim Benyekhlef, "L'indépendance institutionnelle du pouvoir judiciaire : légitimité et participation au débat public" **(**1996) 45 U.N.B. L.J. 37 at 55) In his words : "Nous ne croyons pas que l'expression de telles opinions ait pour effet d'entacher l'impartialité du juge, à moins qu'elles ne visent précisément l'objet d'un litige à lui être soumis ou les parties appelées à plaider devant lui. C'est là, croyons-nous, à l'instar du professeur Webber le véritable sens de la règle de l'impartialité : «Bias concerns the persons involved in a dispute, or the application of law to the particular facts in question; it does not concern judges' views on the merits of legal rules, principles, or arguments>>". citing J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29 R.D. McGill 369, at 390: "("…") De même, il importe que la magistrature puisse défendre ses décisions si celles-ci sont attaquées. La défense participe alors du débat et peut amener la magistrature à modifier ou à altérer sa position à l'issue d'une discussion publique et ouverte."
Citing the silence of German judges regarding the Nazi era: "La magistrature ne saurait rester dans sa tour d'ivoire, refusant le débat public du revers de la main au nom d'une impartialité quasi aristocratique, à l'heure où le public scrute les comportements, les actions et les décisions de tous les corps publics. .. La liberté d'expression du pouvoir judiciaire doit s'articuler autour de la promotion et de la défense des valeurs constitutionnelles et démocratiques qui fondent la société canadienne."

[96] See *Bryden supra* note 23 at 558 and generally at 555: "("…") the Canadian law governing the disqualification of judges is steeped in English historical tradition ("…")". Bryden does however note an evolution: "("...")over the past decade divergent strands have been emerging in the decisions of Commonwealth courts when addressing the issue of judicial impartiality." See also *Ratushny* supra note 5: "a judge must not engage in partisan public debate on controversial issues. To do so would detract from the perceived neutrality of such a judge".

[97] See *Mackay, supra* note 29, at 174. Particularly, MacKay seems to echo this view arguing that:

> knowing where individual judges stand on broad social and political issues is crucial to the administration of justice. Once one accepts that judges have views on broad social and political issues, the litigants are better served by knowing the judge's perspective in advance. The guarantee of freedom of expression contained within the Charter should thus expand and protect judicial expression outside the court. The judge must, of course, not prejudge the issue at hand. On the other side of the coin, the equality values entrenched in the Charter provide some limitations to judicial expression in and out of court. Prejudicial comments or views issued from the Bench regarding vulnerable groups, specifically those protected in section 15 of the Charter, ought to be censured. Needless to say, the values expressed by the Charter provide guidelines to judicial speech uttered outside the courtroom as well.

And at 175: "Any expansion of judicial free speech must be accompanied by effective mechanisms of accountability for abuse of this freedom. Judicial speech and accountability should go hand in hand".

See also Karim Benyekhlef, "L'independance institutionnelle du pouvoir judiciaire : legitimite et participation au debat public" (1996) 45 U.N.B. L.J. 37, arguing :

rationale pertaining to Continental judges (in light of their training and career path) does not lend itself to direct application Canadian circumstances, we might nevertheless glean a measure of perspective from the German experience for interpretation of proper judicial conduct in the Internet age, rather than adopt it in its entirety. In other words, the German counterpoint can presumably smooth the progress of our understanding of the time honoured "*reasonable* apprehension of bias" (emphasis added) standard might function in the Internet age, when ad hoc aggregations of cyberdata risk eliciting knee-jerk reactions.

In fact, the conventionally stringent English view itself may have relaxed, edging closer to its continental counterpart.[98] Another prominent example, bearing the hallmark of the above-described - on which to conclude this aspect of the discussion is the English case of *Locabail (U.K.) Ltd. v. Bayfield Properties.*[99] There, the Court of Appeal adopted a contextual approach to assessing bias remarking that:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. *We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge* (emphasis

---

En raison de l'importance du nouveau rôle confié aux tribunaux par l'avènement de la Charte canadienne en 1982, ces derniers sont de plus en plus souvent l'objet d'une attention scrupuleuse de la part des médias et du public. Afin d'assurer l'indépendance de l'institution judiciaire, il convient alors de reconnaître aux juges et à l'institution elle-même une plus grande liberté d'expression. Cette liberté d'expression apparaît nécessaire afin de permettre aux tribunaux d'expliquer et, parfois, de justifier la portée et les conséquences socio-politiques de leurs décisions.

[98]as evidenced by the (oft-criticized) *Pinochet* case in which "Lord Browne-Wilkinson went out of his way to emphasize that mere involvement by a judge in charitable work for an organization that had an interest in a case would not normally form the basis for his or her automatic disqualification Thus, he stated: "Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties" ("…")". See *Bryden supra* note 23.

[99] Online: http://www.uniset.ca/lloydata/css/2000QB451.html . For a detailed exposition of the law of disqualification in the UK see Bryden *supra* note 23: "In England, most non-financial situations will be assessed using the "real danger of bias" test in a manner that may not be fundamentally different than the approach a Canadian court would take using the "reasonable apprehension of bias" test".

added). Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)… . By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the ease; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected he evidence of that person in such outspoken terms as to throw doubt upon his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him…".

For our purposes, as concerns over misinformed, miscompiled, frivolous or even malicious accusations directed at members of the judiciary in the Internet age proliferate for above-exposed reasons, the above described standpoint and above drawn distinction between appropriate and unsuitable activities or characteristics can provide us with broader perspective. It can serve to inform our perceptions of the reasonableness of further restricting judicial expression and association in light of search engines and permit us to assess the "apprehension of bias" contextually and in a manner that is proportional to the imperatives of the technology age, in keeping with a desire to maintain a vibrant, multicultural judiciary of varied backgrounds and interests.

Part III. A Modern Twist on *jura novit curia*[100] A Word on Independent Judicial Internet Research

Competence is – needless to say- a vital ethical principle,[101] thus rendering judicial comfort with basic precepts of technology and science of the essence in this web-dependent society.[102] According to the Canadian Judicial Council's *Ethical Principles for judges*: "Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office." In effect, a Court is presumed to know the law and expected to be cognizant of and sensitive to social context.[103] In today's reality, that cannot but include often intricate concepts, which the 'experts' themselves have yet to address, let alone resolve.

Unmistakably – and whilst the exact degree of requisite expertise remains to be determined- judges must possess some understanding of the fundamental notions of science and technology in order to grasp the related issues permeating cases and to adequately filter and assess evidence. This without excessive reliance on and disclosure

---

[100] J. R. Fox, *Dictionary of International and Comparative Law* (Oceana Publishing Inc:Dobbs Ferry, New York, 1992). "("…") the court is not restricted to the law presented by the parties, but is free to under take its own research." See also, J. Bell, "Comparing Precedent", (1997) Cornell L.Rev. 1243 at 1274. "("…") many civilian systems operate with the principle curia novit legem, the judges will conduct their own research on precedent."

[101] *jura novit curia- la cour connaît le droit* ('the court knows the law', sometimes translated as "the court knows the lay") for an in-depth discussion see online: http://law.bepress.com/cgi/viewcontent.cgi?article=4295&context=expresso. Of course, as Mashaw cautions: "Many arguments about judicial competence are vague about their normative foundations because 'competence' can convey a concern for either 'authority' or 'capacity.' Because 'capacity' is also a functionalist argument for allocating 'authority,' this conceptual confusion seems almost inherent in the interpretive debate". See Jerry Mashaw, "Between Facts and Norms: Agency Statutory Interpretation" (2005) 55 U. Toronto L.J. 497, at 502.

[102] See Tennant and Seal, "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?", online: http://www.abanet.org/judicialethics/resources/TPL_jethics_internet.pdf.

[103] "Lawyers and academics can help the judiciary along this path with their legal arguments and writings, but in the end the judges have to make the decisions. They must be enlightened decisions, aware of the social fabric of our time, with our finger on the pulse of humanity." Constance R. Glube, former Chief Justice of Nova Scotia in her essay *The Role of the Judge*, from the text Justice Beyond Orwell (Les Éditions Yvon Blais Inc. 1985) at 486.

to support staff – or even expert testimony- which can be problematic.[104] Not surprisingly then, as Justice Thomas Moyer correctly observes**: "**courts have … been forced to *react*, often without the requisite scientific training or education; forced to make an informed decision regarding whether scientific evidence is a cutting-edge breakthrough or what has been called "junk science." At times judges before the expert community itself.[105]

A more recent and well-known example coming to us from the United States is that of the childhood vaccine controversy. An American judge was unenviably forced to rule in a case where parents alleged an ingredient in such a childhood vaccine caused (or precipitated) their daughter's autism. In a landmark decision, the court ruled in favour of the parents on the specific set of facts,[106] despite the fact that "scientists don't know if a vaccination — independent of fever or infection — can cause such a stress."[107] As this case illustrates, the judge –although not proficient in science or medicine- is nonetheless said to have 'made a decision about science before scientists'.[108] This is certainly true in Canada where "the United States, which has installed a specialized network of patent courts to resolve disputes, Canada has shifted the burden to Federal Court judges who

---

[104] And in order to avoid situations such as that of an English judge who recently informed the parties before him that he did not know what a website was. See Lewis Page, "Judge in Tech Trial doesn't know what website is". *The Register* (May 17 2007), online: http://www.theregister.co.uk/2007/05/17/judge_website_shocker/.

[105] U.S. Supreme Court Justice Steven Breyer once observed: "a judge is not a scientist and a courtroom is not a scientific laboratory," but that "to do our legal job properly we [need] to develop an informed, though necessarily approximate, understanding of the state of (". . .") scientific art". Cited by C.J. Thomas Moyer and Stephen P. Anway in "Biothechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment", (2007) 22 Berkeley Tech. L.J. 671 at 673.

[106] The girl is said not to be "typically autistic". See Mike Stobbe and Marilynn Marchione "Analysis: Vaccine-Autism Link Unproven" *ABC News* (March 7, 2008), online: http://abcnews.go.com/Health/wireStory?id=4407197.

[107]As per Dr. Edwin Trevathan, a pediatric neurologist who heads the CDC's birth defects center "There are no scientific studies documenting that childhood vaccinations cause or worsen mitochondrial diseases, but there is very little scientific research in this area, said Chuck Mohan, executive director the United Mitochondrial Disease Foundation, a Pittsburgh-based group that raises money for research". Online: http://abcnews.go.com/Health/WireStory?id=4407197&page=3.

[108] Interview with Dr William Schaffner, ABC *Good Morning America* (March 6, 2008), online: http://abcnews.go.com/Health/MindMoodNews/wireStory?id=4395652.

have little or no scientific expertise to bring to the drug litigation".[109]

In light of the complexity of matters increasingly begging judicial attention, indeed resolution, coupled with rising exportations of broadly defined competence and a deluge of 'expert' evidence, judges are turning to the Internet generally and search engines (such as Google) or even Wikipedia for much-needed guidance: "to check facts, to look up information about companies embroiled in litigation, and to challenge statistics presented by attorneys in court".[110] That is true for scientifically or technically complex cases,[111] which may require specialized knowledge, as it is for ordinary matters.[112]

---

[109] See Jacqui McNish, "As Patent Cases Clog Courts, Drugs are a Lawyer's Best Friend" *The Globe and Mail* (Special Report on Business Column, March 12, 2008): "In a widely quoted drug patent decision in 1993, former Federal Court judge Francis Muldoon complained that an 'unschooled judge cannot perceive the truth among all the chemical or other scientific baffle-gab.'"

[110] Online : http://www.news.com/Search-engines-take-the-stand/2100-1032_3-5211658.html "Dozens of judges have penned opinions describing Google as a valuable--and sometimes crucial--source of knowledge." "If a judge is taking as proof facts that are reported in any public medium that pertain to individual actions by persons involved in a case, that is troubling, said George Fisher, a Stanford University law professor. "Those are the sorts of facts that are supposed to be proved in the courtroom under the rules of evidence". See William Wilkerson, "The Emergence of Internet Citations in Judicial Opinions: Examining the Supreme Court of the US and the US Courts of Appeals" *Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, DC*, Sep 01, 2005, o*nline:* http://www.allacademic.com/meta/p42035_index.html.

[111] See Edward Cheng, "Independent Judicial Research in the Daubert Age" (2005) 56 Duke L. J. 1263 at 1266. As Cheng argues: "The adversary system is particularly illsuited at handling specialized knowledge procedural safeguards: One safeguard would be to restrict independent research only to sources that are citable and publicly available".

[112] As judges progressively assume the function of gatekeepers of expert exidence. Regarding Quebec, see Denis Ferland discussing Changes to CCP in his Report "la révision de la procedure civile: une nouvelle culture judiciaire", online: http://www.justice.gouv.qc.ca/francais/publications/rapports/crpc-rap2.htm. In the US context see Adam J. Siegel, "Setting Limits on Judicial, Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium", (2000) 86 Cornell L. Rev. 167, 202-03:

> In Kumho Tire Co. v. Carmichael, the Supreme Court significantly broadened the scope of the judicial gatekeeping role previously set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., holding that federal district judges must ensure that all admitted scientific, technical, and other specialized expert testimony is both relevant and reliable. Faced with the challenge of making scientifically, technically, and legally sound admissibility determinations, many generalist trial judges will inevitably be tempted to educate themselves on the nature and substance of the complex matters requiring their attention. While some judges may rely on court-appointed technical advisors, scientific reference manuals, or privately sponsored judicial seminars for assistance, other judges may venture into cyberspace, review scientific journal articles not

In the U.S., for instance, according to the *New York Times*, "more than 100 judicial rulings have relied on Wikipedia, beginning in 2004, including 13 from circuit courts of appeal, one step below the Supreme Court".[113] Presumably, that number has only increased in the four years since. The same of course holds true for Internet search engines such as Google, as an enlightening CNET news article recounts. Colourful anecdotes include that of "an enterprising federal judge in New York did his own Google search to demonstrate that a watch, jeans and handbag retailer named Alfredo Versace was infringing the trademarks of the famous Gianni Versace design house".[114] In effect, the European Court of Human Rights, World Intellectual Property Office- WIPO, the Swiss Federal Council, High Court of England and Wales, United States (U.S.) Federal Courts, inter alia[115] all apparently resort to search engines like Google and Wikipedia itself.

One example of many cited in the CNet piece is that of an Australian judge (federal court) who denied a visa request from a Sri Lankan national claiming

---

presented by the parties, or consult colleagues off the record. However, the extent to which judges can properly engage in such practices has become a matter of great debate and uncertainty due to the divergent teachings of Kumho, the Code of Conduct for United States Judges, 28 U.S.C. §§ 144 and 455 (the federal judicial disqualification statutes), and the Federal Rules of Evidence.

[113]See Noam Cohen, "Courts turn to Wikipedia- but selectively", *New York Times* January 29, 2007 online: http://www.nytimes.com/2007/01/29/technology/29wikipedia.html. According to the article: "The Supreme Court thus far has never cited Wikipedia.) "Wikipedia is a terrific resource," said Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, in Chicago. "Partly because it so convenient, it often has been updated recently and is very accurate." But, he added: "It wouldn't be right to use it in a critical issue. If the safety of a product is at issue, you wouldn't look it up in Wikipedia"". See also *Margolies*, *infra note 138*, citing Boim v. Fulton County School Dist., 494 F.3d 978, 983 (11th Cir. 2007) (citing Wikipedia for the number of school shootings in the years preceding the incident underlying the appeal); Lands Council v. McNair, 494 F.3d 771, 785 (9th Cir. 2007) (Smith, C.J. specially concurring) (citing Wikipedia for background information on an author relied on by majority); Sedrakyan v. Gonzalez, 237 F. App'x 76, 77 (6th Cir. 2007) (citing Wikipedia for geographical information); Courtney v. Halleran, 485 F.3d 942, 943-44 (7th Cir. 2007) (citing Wikipedia for historical information); Exxon Mobil Corp. v. Comm'r, 484 F.3d 731, 732 n.1 (5th Cir. 2007) (citing Wikipedia for the definition of "accrual"); Matthews v. Ishee, 486 F.3d 883, 894 (6th Cir. 2007) (citing Wikipedia for an explanation of "sarcasm").

[114] See Declan McCullagh, "Search Engines Take the Stand" CNET News.com (May 13, 2004), online: http://www.news.com/2100-1032_3-5211658.html.

[115] See for example in the England Kay v. the Commissioner of Police of the Metropolis; in the Ždanoka v. Latvia case before the European Court of Human Rights; and in Media General Communications, Inc. v. Rarenames, WebReg case decided by the WIPO Administrative Panel, among others. Source: Margha L. Arias, "Wilkipedia and its use as a court source", Internet law, (March 6, 2007), online: http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1668.

persecution. “The Court justified the rejection remarking that the claim was "exaggerated," since the man – claiming to be a well known filmmaker in his homeland – did not turn up any hits on a Google search: "His name does not appear when put into a search engine such as Google, “one member of the government tribunal observed “I would have expected--if he indeed has the notoriety and is as well-known as he claims--that his name would have appeared at least in some context”.[116] One the one hand, and with regard to intricate or obscure matters in particular, “The Internet and search engines might be considered a helpful tool for improving judicial competence in the face of intricate scientific and technological challenges.[117]

The lone recent scholarly writing on point argues[118] that judges facing unfamiliar and complex scientific admissibility decisions can and should engage in independent library research to better educate themselves about the underlying principles and methods.[119] While at first glance seemingly helpful in aiding judges to reassume their rightful place of competence amongst a deluge of “expert” evidence, independent research or investigations by judges – cyber or otherwise – is certainly not beyond criticism.

First: in contradistinction to traditional[120] Civilian/ inquisitorial systems where judges are expected to conduct their own investigation, independent judicial searches are

[116] See Declan McCullagh, “Search Engines Take the Stand” CNET News.com (May 13, 2004), online: http://www.news.com/2100-1032_3-5211658.html. See also Molly McDonough, “In Google We Trust? Critics Question How Much Judges, Lawyers Should Rely on Internet Search Results”, (2004) 90 A.B.A. J. 30; David H. Tennant & Laurie M. Seal, “Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?”, (2005) 16 A.B.A. Prof. Law. 2.

[117] See Cheng, *supra* note 112. See also Cheng, “Should Judges do Independent Research”, online: http://www.ajs.org/ajs/publications/Judicature_PDFs/902/Cheng_902.pdf.

[118] In the U.S. context.

[119] Notwithstanding the prohibition on *ex parte* or independent factual investigations as discussed by Cheng, *supra* note 112.

[120] As distinguished from hybrid systems such as Quebec. See Lac d’Amiante du Quebec Ltee v. 2858-0702 Quebec Inc. , [2001] 2 S.C.R. 743 at 761 discussing Quebec’s “mixed” system.

– to a certain extent- frowned upon at Common Law.[121] They have been viewed with some degree of suspicion as an affront to the adversarial tradition[122] or even the 'principle of judicial unpreparedness'.[123] Thus, "unlike judicial education programs, which have been largely uncontentious and well received, independent research is likely to be controversial, in part because the idea of judges unilaterally doing research conflicts with widely held adversary system values".[124]

---

[121] See P. Glenn *Droit québécois et droit français : communauté, autonomie, concordance.* (Montréal: Editions Yvon Blais: 1993); See Douglas Brooker, "*Va Savoir!* The Adage 'Jura Novit Curia' in Contemporary France" (2005) Brepress Working paper 845 at 44, online: http://law.bepress.com/expresso/eps/845/ As Brooker explains: "to Common Lawyers what Civilians take for granted: the judge is actively involved in examining all aspects of the parties case including arguments of law. This activity does not invariably involve intervention *jura novit curia* but speaks instead to the court's duty to decide correctly, a duty which may at times require intervention *jura novit curia*, particularly where party argument is not fully developed".

[122] *Ibid*. Brooker at 31 citing Damaška: "Mirijan Damaška captures the most extreme black-letter consequence of the adage, writing that *jura novit curia* authorises a judge to reach a decision based on, "a legal theory that has not been subject to the arguments of counsel" for the parties"; M. Damaška, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986): "Damaška's *jura novit curia* breaches *le principe de la contradiction* and *les droits de la défense* because the successful party receives judgement in her favour on legal grounds her opponent has been unable to challenge." That having been said, in Civilian systems: *Le principe de la contradiction* and *les droits de la défense* do not, however, prohibit a court from intervening so as to decide according to its own point of law.*I*n France, intervention *jura novit curia* may be required by *le principe d'égalité devant la justice* which is meant to guarantee that all citizens receive equal treatment from the courts and that no one should be treated either less favourably than anyone else. *Le principe d'égalité devant la justice* may impose a duty on the court duty to intervene with its own point of law because it is the courts' duty to decide according to the 'applicable' law in all cases, regardless of the legal argument on which parties base their case". See *NCPC* Article 1015: nº 21-893, 5 juillet 1985, Gaz. Pal. 1985, 2, 742; see also 16 juin 1999, R.F.D.A. 2000 no 2 at 359, note Yves Brard, in which the *Conseil* overturned a decision of the Administrative Court of Appeal which decided on a point of law raised of its own motion without providing the parties with an opportunity to argue the point".

[123] N. Andrews, "The Passive Court and Legal Argument", (1988) Civil Justice Quarterly, 125 at 128-29. See Brooker, *supra* note 122 at 31: "Common Law notions of fair process and precedent assume each party has notice of all matters of fact and law that inform the decision, prior to judgment…. "Spelled out, 'research' refer to a type of *jura novit curia* that permits a court to participate in the parties' adversarial proceeding without prompting from the parties themselves".

[124] See Edward Cheng, "Independent Judicial Research in the Daubert Age" (2005) 56 Duke L. J. 1263, online: http://www.law.duke.edu/shell/cite.pl?56+Duke+L.+J.+1263#H1N4: "judges are indeed deeply concerned and divided about the issue of independent research. After all, it goes to the heart of their roles and responsibilities in the legal system. To many judges, doing independent research when confronted with new and unfamiliar material seems the most responsible and natural thing to do. To others, it represents the worst kind of overreaching and a threat to long-cherished adversarial values". (convergence of systems?).See also "US Judges use Wikipedia as a courtroom source", *The Guardian*, online: http://www.guardian.co.uk/technology/2007/jan/30/wikipedia.news.

Prior to the advent of the Internet age, this was true for two principal reasons: first, and most importantly, the imperatives of the adversarial process and second the presumption of judicial knowledge of the law and all that is necessary for its interpretation. Consequently, in the extreme, independent judicial research has even been said to offend the principle of competence it is meant to bolster, for seemingly "a court that really knows the law would not have to undertake its own research".[125]

Such was the criticism attracted by a Lord Denning's infamous first decision as a Law Lord in *Rahimtoola* v. *Nizam of Hyderabad* [1958] AC 379. As Paterson recounts,[126] Denning, "spent the better part of the summer" undertaking independent research in to the law ("…").[127] "The four other Law Lords participating in the decision unanimously rebuked Denning's independent research and dissociated themselves from his judgement specifically on the grounds… Key decisions of Denning, based on his own research, were criticised or overturned on appeal because they violated the parties' rights to notice and a full defence". [128]

Of course this case is somewhat extreme, but examples of independent judicial research drawing disapproval are not hard to find. Closer to home, the Supreme Court of

---

[125] According to Brooker, *supra* note 122 at 32: "The act of judicial research need not involve or imply a complete absence of knowledge. It does however imply partial knowledge, legal uncertainty, complexity or judicial dissatisfaction with the parties' legal argument".

[126] A. Paterson, *The Law Lords* (Toronto: University of Toronto Press, 1982) as cited by Brooker *supra* note 122 at 32.

[127] *Ibid*. As per Paterson: "Denning joined a unanimous court as to the outcome of the case, but based his judgment on issues and points of law that had not been considered either by counsel or by the lower courts. Denning justified his action, stating, (at 423-24) that, "the law on this subject is of great consequence and, as applied at present, it is held by a great many to be unsatisfactory".

[128] *Ibid*, at 35. Noting however that unlike simple Internet searches: "Denning's case judicial research was motivated by a desire to change the result that would have followed from the application of the law that had been pleaded by the parties or to rewrite what he consisted to be "bad" law." At 33, "judicial research, *à la* Lord Denning, was a radical departure from the Common Law adversarial tradition of judicial reliance on party argument, which F. A. Mann's described as the 'principle of judicial unpreparedness'".

Canada's use of judicially secured social science evidence in *Askov*[129] elicited a certain degree of concern from scholars, including the researcher hose work was cited:[130] Says Manfredi: "According to Baar himself, the Court's use of legislative facts suffered from two fatal flaws. First, by relying on evidence obtained through its own efforts, the Court avoided even the minimal critical review provided by the adversary process".[131]

In reality, the permissibility of independent judicial research is far from clear.[132] However contradictory, firm evidence suggesting that judges are in fact at liberty to engage in such pursuits is not lacking. As Chief Justice Brian Dickson instructed: "The judge may also do further independent research if, in his or her opinion, the importance of the matter requires it, or if a point was inadequately researched by counsel. In the event that the case appears to turn on a point not raised by counsel in the factums or referred to in oral arguments, counsel will be recalled and given an opportunity to address the new concerns of the court".[133] This view was echoed at the trial level: "Judges can independently secure information. This may come from individual research, general reading or continuing education".[134]

---

129 *R. v. Askov*, [1990] 2 S.C.R. 1199.

[130] See Carl Baar, "Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy Making" (1993) 72 Can. Bar. Rev. 305.

[131] See Christopher P. Manfredi, James B. Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada" " (2004) 49 McGill L.J. 741 n 49. See also Baar, *supra* note 131.

[132] George D. Marlow, "From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process" (1998) 72 St. John's L. Rev. 291; and Jack B. Weinstein, "Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?" (1994) 36 Ariz. L. Rev. 539.

[133] The Rt. Hon. Brian Dickson, "A Life in the Law: The Process of Judging" (2000) 63 Sask. L. Rev. 373 at 380.

[134] Regarding judicially secured evidence see Judge J. Williams, "Grasping a Thorny Baton ... A Trial Judge Looks at Judicial Notice and Courts' Acquisition of Social Science" (1996) 14 Can. Fam. L. Q. 179 at fn 68 also citing P.C. Davis, "There is a Book Out ... An Analysis of the Judicial Absorption of Legislative Facts" (1987) 100 Harv. L. Rev. 1539 at 1541.

And as Cheng observes in the American context, this issue is far from clearly defined and the judges themselves are intensely divided on the tolerability of judicially secured data: "One might expect that there would be clear and well-established rules governing independent research, but unfortunately there are not. Few cases have explicitly addressed the issue... ex parte prohibitions only obliquely address the issue of library research, because their focus is arguably on informal communications that lack a citable or publicly available record." "In many ways, independent research is a natural extension of the recent trend toward judicial education programs in science. Those programs are built on the premise that if judges learn more about scientific principles and methods, they can more comfortably and competently handle scientific admissibility questions. The problem with judicial education programs is that they necessarily suffer the limitations of being broad in scope and separated in time. Independent research enables judges to refresh their memories and plug gaps in their knowledge".

In fact, just as independent judicial research attracted disapproval in *Askov* so to did the Supreme Court of Canada's failure to arguably do the same, draw criticism in *Morin*.[135] But the Internet and its investigative tools, for obvious reasons chiefly relating to reliability, exacerbates the above-outlined concerns (in terms of the adversarial system and the principles of fundamental justice), traditionally stated against judicially secured information, *a fortiori*. Once again therefore, the problem of trustworthiness, perpetually haunting Internet sources,[136] resurfaces. Judges, not unlike anyone else for that matter,[137]

---

[135] According to Baar, *supra* note 131:

> An important element of the Supreme Court of Canada's recent constitutional judgments on criminal court delay was the use of quantitative data and social facts. However, use of this evidence was deficient in significant and diverse ways. In the Askov case, the court went beyond the evidence submitted by the parties, gathered its own data, but failed to test its conclusions against the earlier evidence. Later, in the Morin case, the court placed too much reliance on the adversary process, accepting invalid evidence that undermined its conclusions. In both Askov and Morin, court processes led to ineffective or incorrect use of material that, properly used, could have improved both the results and the reasons in these cases.

[136] See, e.g., John Broughton, *Wikipedia: The Missing Manual* (Pogue Press/O'Reilly, 2008); and review by Nicholson Baker, "The Charms of Wikipedia", *New York Review of Books*, (March 20, 2008), online: http://www.nybooks.com/articles/21131.

but more so by reason of their role, must take tremendous precautions to assure that the information obtained is reliable or risk undermining the ethical principle of equality, and tainting judicial reasoning and indeed public confidence.[138]

As Justice Binnie wrote with regard to the judicial obligation to provide reasons for judgment: "Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice not only be done but must be seen to be done…".[139]

---

[137] See generally Elie Margolies, "Surfin' Safari – Why Competent Lawyers Should Research on the Web" (2006) 10 Yale J. L. & Tech. 82. See also Lynn Foster & Bruce Kennedy, "Technological Developments in Legal Research" (2000), 2 J. App. Practice & Process 275; Alvin M. Podboy, "The Shifting Sands of Legal Research: Power to the People", (2000) 31 Texas Tech. L. Rev. 1167; Patrick W. Spangler, "The New World Versus the Old World of Legal Research", (2006) 20-APR CBA Rec. 48 and Michael Whiteman, "The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct", (2000) 11 Alb. L.J. Sci. & Tech. 89.

[138] Williams, *supra* note 135; In effect, judges are held to provide reasons for their decisions. This obligation to provide reasons was clarified by the Supreme Court of Canada in *R. v. Sheppard*, [2002] S.C.R. 869, 2002 SCC *[Sheppard*]. See also Hon. J. Saunders, "The Morality of Judicial Reasoning" (2001) National Judicial Institute [on file with author]. According to Justice Saunders: "in a constitutional democracy there is an ethical obligation upon the judiciary to reason and to communicate that reasoning which is distinct from simply pronouncing a result; Of the ten propositions advanced by Binnie, J. (in *Sheppard*) as an instructive but not exhaustive list to bear in mind when considering the duty of a judge to give reasons, the first in my opinion is perhaps the least remembered.
1. "The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office". Also See Justices Georgina Jackson and Adele Kent, "*Teaching Judicial Ethics: the Canadian Methodology"*, Presented at, the 2nd International Conference on the Training of the Judiciary, November 2, 2004. available at http://www.nji.ca/nji/internationalforum/JebtJacksonJudicial%20Ethics.pdf
[

Observing that "The Open Court Principle is a Hallmark of a Democratic Society. To What Extent Does That Inform a Judge's Ethical Obligation to Communicate and Reason" Justice Saunders cites the following passage from Piero Calamandrei, *The Crisis in the Reasoned Opinion (*27from *Procedure and Democracy*, in The World of Law, II The Law *as* Literature (Simon and Shuester: New York: 1960) at p 683*)*:

"The most important and most typical indication of the rationality of the judicial function is the reasoned opinion. In all modern codes of procedure, whether civil or criminal, a reasoned opinion is prescribed as one of the requisites of the decision... The requirement that there be a reasoned opinion is considered so important in Italy that it has been placed in the Constitution, where it is stated that "all judicial acts must be reasoned" (A.111).

[139] As per the *Sheppard* decision, *supra note 139*. For an excellent discussion on reasons for judgment and their role, see Edward Berry, *Writing Reasons: A Handbook for Judges* (Victoria: E-M Press, 1998).

Public access to the Court's 'thought processes' are an integral element of much-cherished transparency and form the basis for the public's confidence in the judiciary. These 'thought processes' however, cannot be subject to proper scrutiny – be it public, academic, or for appellate purposes[140] - unless the sources that nourish it are clearly and verifiably identifiable.

Again, comparative inquiry is instructive and helpful in allowing us to gage the issues that Canadian courts engaging in Internet research might face. Thus, for instance, in *Apple v. Does* [141] a judge who made repeated references to Wikipedia attracted widespread criticism and scorn. Another judge in the US was reversed on appeal "based not upon the submissions of counsel but rather upon its own Internet research."[30] The Bluebook recognizes that "[m]any internet sources . . . do not consistently satisfy traditional criteria for cite-worthiness."[35] But it appears that the scorn in question was not primarily elicited by fears of undermining the adversarial process but by the vicissitudes of cyber-resources and unskilled, ad hoc use thereof. For indeed, as Tennant and Seal point out:

"The impermanence of the internet, as content is modified and/or migrates to other locations, means that a citation to a URL today may not lead to the exact same information tomorrow. For example, if a judge cites a Wikipedia entry in an opinion by using the URL, and the entry is subsequently modified, the reader of the opinion who tries to access the entry will not get the same information the judge relied on. In addition, reliability, authoritativeness, and accuracy are all important concerns, since there is often

[140] On this last point see discussion in *Sheppard*.

60See *O'Grady v. Superior Court*, 44 Cal.Rptr. 3d 72available at http://www.eff.org/files/filenode/Apple_v_Does/H028579.pdf See also http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1668

[141] See "US judge use Wikipedia as a courtroom souce", online: *The Guardian*, http://www.guardian.co.uk/technology/2007/jan/30/wikipedia.news. The Register in UK said citing wiki is ample ground for overturning case *apple v doe;* "New Age judge blasts Apple", online: *The Register*, http://www.theregister.co.uk/2006/05/28/apple_vs_does/; "Apple v. Does it mean anything?", online: Internet Cases, http://blog.internetcases.com/2006/05/26/apple-v-does-it-mean-anything/ :"The court relied on Wikipedia as well in its opinion — no less than ten times!"

no way to know anything about the author of internet content, or be assured that the information has not been tampered with".[142]

Hence**,** some argue that "citation of an inherently unstable source such as Wikipedia can undermine the foundation not only of the judicial opinion in which Wikipedia is cited, but of the future briefs and judicial opinions which in turn use that judicial opinion as authority".[143] While entertaining concrete recommendations more thoroughly at this stage is well beyond the province of this endeavor, suffice it to tentatively note the following. Ultimately, we cannot blind ourselves to the exceptionally intricate matters facing courts – matters often requiring specialized knowledge in science and technology. Faced with such exigencies and held to what might easily be considered unreasonable expectations of competence, judges would arguably be remiss to confine their comprehension to simple reliance on a multitude of 'experts' and their jargon or even resort to private consortiums teaching judges science – as they have in the United States;[144] in the absence of clear guidelines on point; They can continue to 'Google' in fear, uncertainty, or in an uninformed manner – but surely they cannot be oblivious to the Internet revolution, which has touched us all.

---

[142] David H. Tennant & Laurie M. Seal, *supra note 21*.

[143] See Noam Cohen, "Courts turn to Wikipedia- but selectively", *New York Times* January 29, 2007, online: http://www.nytimes.com/2007/01/29/technology/29wikipedia.html. For example, according to the New York Time article: "New York Tax practitioner Ryesky, "took exception to the practice", Stephen Gillers, a professor at New York University Law School, saw this as crucial: "The most critical fact is public acceptance, including the litigants," he said. "A judge should not use Wikipedia when the public is not prepared to accept it as authority. For now, Professor Gillers said, Wikipedia is best used for "soft facts" that are not central to the reasoning of a decision. All of which leads to the question, if a fact isn't central to a judge's ruling, why include it?".

The Tennessee Court of Appeals agrees: Given the fact that this source is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable. Accordingly, we do not find that it constitutes persuasive authority: *English Mountain Spring Water Co. v. Chumley*, WL 2756072 (Tenn.Ct.App., October 25, 2005).

[144] In addition to publications and seminars, that curriculum features a twofold 'staple' event: the "National Judges' Science School" (an annual case-conference focusing on select issues such as Evidence, Expert Witnesses and Causation in 2006 (See: http://einshac.org/scienceSchool.htm)) and the "National Judges' Medical School" (See: http://einshac.org/medicalSchool.htm). As noted (and as these web addresses clearly indicate, ASTAR is part of the *Einstein Institute for Science, Health, and the Courts (EINSHAC)* private consortium).

Instead, the more reasonable direction, it appears, is one firmly anchored in the principle of *proportionality*. That is to say one that strives to strike the correct or finest balance between maintaining competence and promoting transparency, in a way that respects the adversarial process, public and appellate review.

Since the crux of the problem relating to cybersources in particular seems to stem from the untracebility of sources, thereby doing transparency and the adversarial process violence, the ability to distinguish between proper and improper sources, the dangers of over reliance and the importance of proper citation must be fostered. Uniform, verifiable guidelines for judicial use of Internet resources must soon be developed. As Judge Williams remarks "It is often difficult to determine from reviewing a case what *the source* of the information the judge is using is, brief or some individual endeavour of the judge. Too often judges refer to material without identifying its source". Therefore, some of the difficulties might be in part alleviated (although not resolved) by cultivating the ability to distinguish between proper and improper sources, issuing guidelines for judicial research on the internet, including proper citation.

In a word, there is a need to implant a common language to refer to and cite Internet sources, thus subjecting them to the public and appellate scrutiny. Publicity and transparency are – and must continue to be understood as a bulwark against misuse or abuse of power and a means to promote confidence in the judicial system, without which no justice can be done let alone seen to be done. While the Internet can be said to assist in doing precisely that, great care must be taken to ensure that the availability of a deluge of data unscreened and oftentimes unreliable does not ultimately serve to undermine the very confidence on which the judicial system rests.

A Final Word

The illusion of accuracy fostered by Internet resources – both in terms of judicial out of court expression and activities and independent research, seems to lie at the root of

many of the hardships associated therewith. Approaching the networked environment with cautious openness – rather than trepidation or unbridled enthusiasm is a simple but helpful stance. The Internet age –with its promise and hurdles – cannot bypass the judiciary and reflection must ensue to ensure that the benefits of technology are harnessed towards the better administration of justice – rather than subverted for undermining public confidence or further curtailing necessary judicial activities.

Although advances in science and technology do, without question, at times cry out for rethinking outdated constructs, too often has it become almost instinctual to seek out 'new and improved' standards, whereas reverting to existing frameworks – informed but not necessarily transformed- by technological change and enlightened by comparative inquiry is more *à propos*.

The stated objective of the above was modest and preliminary. It constituted a first attempt to bring some direction to the discussion regarding the Internet's effect on courts and judicial ethics. It sought to foster awareness of the effect of technology use on judging, to identify and guard against some of the risks associated with said technological changes and to nurture a process of reflection thereupon. Once these issues are identified and characterized, it will of course be possible to devise strategies aimed at palliating the difficulties in question.