Department of Justice Canada
Ministère de la Justice Canada

Possibilities for further reform of the Federal Judicial Discipline Process

Department of Justice Canada

JUNE 2016

Canada

ISBN 978-0-660-05753-8

Cat. No. J2-429/2016E-PDF

CONTENTS

PART 1: INTRODUCTION

The federal judicial discipline process provides a means for determining whether allegations of misconduct on the part of a federally-appointed judge are well-founded, and, if so, how best to remedy the misconduct with a view to preserving public confidence in the judiciary and the judicial system, including by removing the judge from office where appropriate. Allowing judicial misconduct to go unaddressed would seriously undermine public confidence in a branch of government with critical constitutional functions.

Recent investigations and inquiries into allegations of judicial misconduct have been marked by significant increases in costs and delays, which has prompted numerous calls for reform of the discipline process. In response to these calls, the Canadian Judicial Council (CJC), which is responsible under the *Judges Act*[1] for managing the process and establishing many of its parameters, issued a discussion paper setting out options for possible process reform.[2] Consultations followed, including with members of the judiciary and the Bar, and the CJC made changes to the discipline process effective July 2015.

However, some of the process's key parameters are set out in the *Judges Act*. As CJC officials have publicly stated, amendments to the Act will ultimately be needed in order to effectively address some of the sources of increased costs and delays. This paper thus raises additional options for reform with the goal of fostering discussion to help identify what legislative amendments and additional process changes may be needed in order to ensure that the process continues to fulfill its essential functions.

PART 2: BACKGROUND

The CJC's 2014 discussion paper provides a thorough overview of the legal and policy considerations that underpin the federal judicial discipline process. Accordingly, this part of the paper will only provide brief overviews of the origins of the process, the current process, and the CJC's 2015 process changes in order to better situate the options for possible reforms set out below in Part 3.

2.1 Origins of the Process

Under s. 99 of the *Constitution Act, 1867*, the judges of Canada's superior courts, all of whom are federally-appointed, hold office "during good behavior" until age 75, "but shall be removable by the Governor General on address of the Senate and House of

[1] All federal statutes are available at http://laws-lois.justice.gc.ca/eng/. Federal and provincial statutes can also be found on the website of the Canadian Legal Information Institute (CanLII): http://www.canlii.org/.
[2] The CJC's discussion paper is available at http://www.cjc-ccm.gc.ca/cmslib/general/CJC%20Background%20Paper%20on%20Judicial%20Conduct%202014-03.pdf.

Commons."[3]

Determining when the duty of good behavior has been breached, and what constitutes misconduct so serious that it warrants a judge's removal from office, is often a difficult task. It requires a thorough investigation and inquiry that meets the requirements of procedural fairness, and that balances the need for judges to be held accountable for their conduct with the need to ensure that judges remain sufficiently independent, both in fact and public perception, to adjudicate the disputes that come before them.

The inquiry into allegations of misconduct against Justice Leo Landreville of the Ontario superior court, undertaken in the mid-1960s, demonstrated the need for a process to investigate allegations of judicial misconduct and determine their seriousness at arm's length from the executive and legislative branches of government. When the allegations against Justice Landreville first surfaced, there existed no established process for investigating allegations of judicial misconduct. Accordingly, a public inquiry was struck under the federal *Inquiries Act* with a retired judge named as inquiry commissioner. The commissioner investigated the allegations and produced a report that was then placed before Parliament. The report, however, was widely seen to be flawed, and a special sub-committee of parliamentarians that included members of both the House of Commons and Senate was struck to hold hearings and make further inquiries.

Many days of hearings were held, during which evidence was heard, including testimony from Justice Landreville himself. The hearings had to be frequently interrupted for other parliamentary business, and many members of the *ad hoc* committee could not attend all of the hearings. In the end, Justice Landreville resigned after the Committee's report called for his removal, but the inquiries, both under the *Inquiries Act* and by Parliament, were widely seen to have been inefficient and haphazard, and to have underscored the inherent difficulties of having Parliament itself investigate allegations of judicial misconduct.[4]

It was largely in response to the experience of the Landreville inquiry that the Canadian Judicial Council (CJC) was established by amendments to the *Judges Act* in 1971.[5] Pursuant to the Act, the CJC was composed of all of Canada's federally-appointed chief and associate chief justices (that is to say the chief and associate chief justices of all the federal and provincial/territorial superior courts),[6] and it was charged with investigating

---

[3] The text of s. 99 of the *Constitution Act, 1867* is available at: http://laws-lois.justice.gc.ca/eng/Const/page-5.html#h-25.

[4] For a full account of the Landreville inquiry and its aftermath, see William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville*, Toronto: University of Toronto Press, 1996, esp. chap. 8.

[5] Martin Friedland, *A Place Apart*, Canadian Judicial Council: 1995, at p. 88. As Friedland notes, Canada's first judicial council, vested with responsibility for judicial discipline, was the Ontario Judicial Council, established in 1968 pursuant to a recommendation made in the McRuer *Report on Civil Rights*.

[6] According to Friedland, cited above, a conference of the country's federally-appointed chief and associate chief justices started meeting to discuss issues of common concern in the mid-1960s. It is effectively this conference that came to be constituted as the CJC in 1971. Today, the courts whose chief and associate chief justices make up the CJC are the provincial and territorial superior trial courts and courts of appeal, the Federal Court, the Federal Court of Appeal, the Tax Court of Canada, the Court Martial Appeal Court, and the Supreme Court of Canada.

all allegations of misconduct made against judges of Canada's superior courts at arm's length from the government. In fulfilling this mandate, the CJC was effectively given two principal tasks:

(1) investigating allegations of misconduct to determine their seriousness and whether they are well-founded; and

(2) for those allegations found serious enough to warrant a full inquiry, providing the Minister of Justice with a report that contains a thorough account of the inquiry, and a recommendation on whether the judge in question should be removed from office.

Crucially, for those allegations of misconduct deemed so serious that they may warrant removal, the end result of the judicial discipline process is a report and recommendation to the Minister. The decision whether to ask Parliament to remove the judge from office is ultimately for the Minister to make. The report to the Minister, containing a full account of the investigation and inquiry into the judge's conduct, is therefore critical because it is on the basis of this report that the Minister will arrive at her decision. Otherwise, Parliament itself may be compelled to make further inquiries, which would run contrary to the impetus for giving the CJC responsibility for investigating allegations of judicial misconduct in the wake of the Landreville inquiry.

The *Judges Act* specifies the criteria for removing a judge from office (s. 65(2)), and sets a few requirements, such as the obligation to produce a report to the Minister at the end of any inquiry (s. 65(1)), but it prescribes very little by way of procedure. With a view to ensuring a fair and effective investigation and inquiry process, the CJC has therefore established complaints procedures and a handbook governing the process before an inquiry committee, both issued as a policy, and the *Investigations and Inquiries By-laws*, issued as a regulation under para. 61(3)(c) of the *Judges Act*. These policy documents and By-laws today establish most of the parameters of the federal judicial discipline process.[7]

As the CJC noted in its 2014 discussion paper, the process has evolved over the years, but the key principles that underpin it, those that it must safeguard and advance in order to maintain public confidence in the process and, by extension, in the judiciary and judicial system, remain unchanged. These are:

- ***Judicial accountability***: Judges must be held accountable for their conduct; misconduct must be addressed, including by removal from office where appropriate. Judicial accountability also militates strongly in favour of ensuring that the public interest is well represented in any judicial discipline process.

- ***Judicial independence***: This constitutional principle holds that judges must remain independent, both in fact and public perception, to adjudicate the matters

[7] The CJC's complaints procedures, By-laws and Handbook are all available on the CJC's website: http://www.cjc-ccm.gc.ca/

before them without undue influence from anyone with an interest in the outcome of their decisions, including the other branches of government. The courts have been clear that judicial independence exists for the benefit of the judged, not the judges. It is therefore to be assessed from the perspective of the reasonable observer and in light of the public interests it is meant to serve.[8]

It is important that judges feel free to adjudicate the matters before them as they deem fair, without undue fear that a complaint will be made against them and that they may be removed from office or obliged to resign as a result. Judicial independence is also furthered by having judicial discipline processes operate at arm's length from the executive and be led (though not exclusively) by judges.[9] However, as the CJC cautioned in its 2014 discussion paper, judicial independence cannot operate so as to shield the conduct of judges from effective scrutiny.[10]

- ***Fairness***: Ensuring that a judicial discipline process is fair to complainants and to judges who are subject to it is important for two principal reasons. It is essential to maintaining confidence in the process on the part of complainants, judges, and members of the general public alike, and procedural fairness is a legal requirement to which all public decision-making processes must conform.[11]

- ***Efficiency***: This key consideration has two dimensions: time and cost. A judicial discipline process must arrive at results in a reasonable time and at a reasonable cost to the public purse. Efficiency may at times be in tension with fairness because procedural safeguards meant to ensure fairness can often lengthen a process and increase its cost.

- ***Transparency and accessibility***: A judicial discipline process must be clearly set out so that any member of the public can understand how it operates, and, by extension, information about the process must be relatively easy to access for any reasonably well-informed member of the public.

2.2 The Current Process

The current process can be divided into five stages:

(1) intake;
(2) initial review and investigation;
(3) the inquiry committee;
(4) the Council of the Whole; and

[8] See e.g. *Ell v. Alberta*, 2003 SCC 35, para. 29.
[9] *Therrien (Re)*, 2001 SCC 35, paras. 39, 57; *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11, paras. 47, 60.
[10] See the CJC discussion paper, cited above, p. 7.
[11] For a more detailed discussion of the importance of fairness to the discipline process, see the CJC discussion paper, cited above, p. 14. See also *Taylor v. Canada*, 2003 FCA 55.

(5) consideration by the Minister of Justice, with the possibility of a vote by Parliament.

For the purposes of this overview, the CJC's complaints procedures, which govern the first stage and part of the second, will be abbreviated as "CP." The CJC's *Inquiry and Investigations By-laws*, which govern most of the remainder of the CJC's process, will be abbreviated as "BL". The handbook of practice and procedure before inquiry committees will simply be referred to as "the Handbook".

Intake

Anyone may make a complaint (though pursuant to s. 63(1) of the *Judges Act*, the Minister of Justice or the Attorney General of a province may request that an inquiry committee be constituted to inquire into the conduct of a particular judge).[12] Throughout the process, the complainant is kept up to date on the progress of his or her complaint (CP para. 12), but generally takes no direct part in the complaint process.[13]

A complaint will be kept confidential unless the complainant decides to make it public.[14] The Executive Director of the CJC, who is responsible for the administrative aspects of the process, is responsible for screening out complaints that fall outside the CJC's jurisdiction, as well as complaints that "that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process" (CP para. 5).

Initial review and investigation

Complaints that are not screened out are referred by the Executive Director to the Chair or a Vice-Chair (hereinafter simply "the Chair") of the CJC's Judicial Conduct Committee (CP para. 4.3). The Chair will conduct an initial review by:

(a) seeking additional information from the complainant;
(b) seeking the judge's comments and those of their chief justice; and/or
(c) dismissing the matter if they consider that it does not warrant further consideration. (CP para. 6)

Following receipt of comments, the Chair may dismiss the matter, or:

(a) hold the matter in abeyance pending the pursuit of remedial measures;
(b) gather further information by retaining an investigator; or
(c) refer the matter to a review panel, but only if the Chair considers that it may be serious enough to warrant the judge's removal. (CP paras. 8-9, BL s. 2(1)).

[12] In such cases, the intake and initial review stages of the process are by-passed.
[13] The role of the complainant and the considerations at issue are discussed in more detail in section 3.3 below.
[14] The reasons for this policy and the considerations at issue are discussed in more detail in section 3.15 below.

Remedial measures are agreed upon in consultation with the judge and his or her chief justice, and may include anything from the judge issuing an apology to pursuing counseling (CP para. 8). In dismissing a matter, the Chair can also provide the judge with an assessment of their conduct and express concerns (*ibid*.).

If the Chair decides that the matter should be referred to a review panel because it may be serious enough to warrant the judge's removal, the Chair must issue reasons for so deciding, forward to the panel any relevant information gathered, and provide the judge with an opportunity to make submissions to the panel (CP para. 8.5).

Review panels are composed of a *puisne* judge,[15] a lay member (who is neither a lawyer nor a judge), and three members of the CJC (BL s. 2(3)). All are named by the Conduct Committee's senior member (the most senior judge on the committee who has not participated in considering the matter). A review panel's sole duty is to determine whether the matter may be serious enough to warrant the judge's removal from office. If it so finds, it will decide that an inquiry committee should be constituted (BL s. 2(4)), in which case it must issue reasons and a statement of issues for the inquiry committee to consider (BL s. 2(7)).[16] If not, the matter is remitted back to the Chair who must determine how best to resolve it (BL s. 2(5)).

Inquiry committee proceedings

An inquiry committee must be composed of an uneven number of members (generally three or five), the majority of whom shall be CJC members (named by the senior member of the Conduct Committee). However, it may not include any CJC members who have participated in any of the prior stages of the process with respect to the complaint in question (BL s. 3).

The minority of an inquiry committee's membership is usually composed of lawyers with at least 10 years' standing at the bar who are named by the Minister of Justice (*Judges Act* s. 63(3)). The Minister may, but is not obligated to, designate lawyers to sit on an inquiry committee. If none are designated, the CJC may constitute a committee of CJC members only (*ibid*.; Handbook para. 1.1).

An inquiry committee is given the powers of a superior court (*Judges Act* s. 63(4)). It may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention, though it must consider the reasons and statement of issues of the review panel that constituted it (BL s. 5(1)), and it will generally determine the scope of its inquiry (set out in a notice of allegations to the judge) by reference to these documents and the original complaint (Handbook paras. 3.5-3.6). The CJC Executive Director is responsible for forwarding all relevant documents produced during previous

[15] A *puisne* judge is any judge who is not a chief justice, an associate chief justice, or a senior judge with administrative and/or managerial responsibilities. Most judges are *puisne* judges.
[16] BL s. 2(7) also requires that the reasons and statement of issues be forwarded to the judge and the Minister.

stages of the process to the inquiry committee (Handbook para. 1.2). Committee hearings may be held behind closed doors but are presumptively public, and they may be required to be public by the Minister (Handbook para. 2.3; BL s. 6; *Judges Act* s. 63(6)).

An inquiry committee is expressly charged with conducting its inquiry in accordance with the principles of procedural fairness (BL s. 7), and the Handbook sets out specific guidelines aimed at ensuring that procedural fairness is observed.

Once the inquiry committee is in place, it may retain anyone necessary for the conduct of the inquiry, including inquiry counsel (Handbook paras. 3.1-3.3; BL s. 4). The judge who is the subject of the inquiry has a right to be heard and is also represented by their own counsel (*Judges Act* s. 64).[17]

Subsection 65(2) of the *Judges Act* sets out four grounds for removing a judge from office: "(a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of that [judicial] office, or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office…". CJC inquiry committees and Councils of the Whole have taken the approach that if the judge's conduct is determined to fall within any of (a) to (d), the following question, usually called the "Marshall test", should be posed:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[18]

Only if the answer to this question is yes will a recommendation for a judge's removal from office follow.

The Council of the Whole

Once all hearings are completed, the inquiry committee reports back to "the Council of the Whole" (BL s. 8; Handbook para. 5.2). If the hearing was conducted in public, the report is to be made available to the public (BL s. 8).The Council of the Whole must include at least 17 CJC members and may not include any members who sat on the review panel or the inquiry committee or otherwise took part in the prior stages of the process (BL ss. 10-11). The Council of the Whole considers the inquiry committee's report (which must include a recommendation on whether or not to remove the judge), as well as any written submissions on the report that the judge may wish to make (BL s. 11).

---

[17] This right has also been found to flow from the security of tenure component of the constitutional principle of judicial independence: see, e.g., *Therrien (Re)*, 2001 SCC 35, para. 66.

[18] This approach was first set out by the 1990 CJC inquiry into the conduct of the judges who heard Donald Marshall's appeal from his wrongful conviction.

If Council of the Whole finds that the judge's conduct falls within the scope of the criteria for removal set out in s. 65(2) of the *Judges Act*, it will apply the Marshall test to determine whether a recommendation for the judge's removal from office should be made to the Minister of Justice.

The Minister of Justice and Parliament

Once the Council forwards its recommendation on removal along with its report on the inquiry to the Minister (as required by s. 65(1) of the *Judges Act*), the Minister must decide whether to ask Parliament to proceed with a motion for removal. The Minister is not bound by the CJC's recommendation; the option to seek a judge's removal by Parliament exists whether or not the CJC recommends that the judge be removed.

2.3 The CJC's 2015 Process Changes

The CJC has from time to time made changes to the discipline process by revising its complaints procedures and By-laws. The current procedures and By-laws date from July 29, 2015. The Handbook is new and dated September 17, 2015. The process as described above takes these recent changes into account, but the following three changes are particularly significant and worth highlighting. Their implications for the process are discussed in more detail in the next part of this paper.

(1) Changes to the roles of the Chair of the Conduct Committee and review panels: This change eliminated some duplication during the investigative stage of the process by strengthening the role of the Chair (or a Vice-Chair) of the Conduct Committee and limiting the role of review panels. It also improved the transparency of the process by requiring both the Chair and review panel to explain their decisions.

Prior to July 2015, both the Conduct Committee's Chair and the review panel could, and often would, retain an investigator to establish the facts of a complaint. The Chair was not required to issue reasons for referring a complaint to a review panel, and the review panel was not required to issue reasons for constituting an inquiry committee.

Since July 2015, the role of retaining an investigator to establish the facts of a complaint is reserved to the Conduct Committee Chair. Review panels only determine whether an inquiry committee should be constituted. However, the Chair is now required to issue reasons for referring a complaint to a review panel, and the review panel is required to issue reasons for deciding that an inquiry committee should be constituted, as well as a statement of issues for that inquiry committee to consider. These new requirements serve two important functions: they add an important measure of transparency to the investigative stages of the process, and they provide an inquiry committee with guidance on the scope of its inquiry.

(2) Elimination of the role of independent counsel and promulgation of the Handbook: Until July 2015, inquiries involved two counsel in addition to counsel for the judge: counsel to the inquiry committee (also called committee counsel) and a

presenting counsel called independent counsel. Committee counsel was a lawyer retained by the committee to assist it in fulfilling its mandate, providing it with advice on evidentiary and other legal questions and assisting in drafting the committee's final report. The independent counsel, meanwhile, was appointed by the Chair of the Conduct Committee, and was charged by the CJC's By-laws with presenting all relevant evidence, both for and against the judge, to the inquiry committee, and with doing so impartially and in accordance with the public interest.[19]

In its 2015 process changes, the CJC did away with the role of independent counsel, and further opted to omit any mention of either presenting counsel or committee counsel in its revised By-laws. Section 4 of the By-laws now simply provides: "The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry." This new status quo effectively makes the two-counsel model entirely optional. An inquiry committee may retain a lawyer to present relevant evidence and another to advise it, but it need not do so.

The Handbook sets out the procedures to be followed before an inquiry committee, which may be expected to bring some consistency and predictability to how committee hearings will unfold, and help ensure procedural fairness. Parties are expected to adhere to it unless directed otherwise by an inquiry committee (para. 2.1).

(3) Composition of review panels: Review panels had previously been composed exclusively of judges. As of July 2015, they must be composed of three CJC members, one *puisne* judge, and one lay person (who is neither a judge nor a lawyer).[20]

PART 3: OPTIONS FOR PROCESS REFORM

The possibilities for further reform of the judicial discipline process set out in this Part are meant to build on the work of the CJC, particularly its 2015 process changes and 2014 discussion paper. They also take into account a 2014 submission that the Canadian Bar Association (CBA) made to the CJC in response to its discussion paper,[21] as well as issues raised in recent litigation stemming from judicial discipline proceedings. The issues raised for consideration were also informed by a thorough review of the various provincial judicial complaints processes that included interviews with key officials responsible for their administration.

An overarching question raised by almost all of the possibilities for reform discussed in this paper is how much of the process should be set out in the *Judges Act*. As noted,

---

[19] The CJC By-laws required the Chair of the Conduct Committee to appoint an independent counsel for every inquiry. The independent counsel's mandate was partly set out in the CJC By-laws, but most of it was set out in a policy published by the CJC on its website.

[20] The CJC's 2015 process changes could not affect the composition of inquiry committees because that is provided for by s. 63(3) of the *Judges Act*. The composition of both review panels and inquiry committees is addressed in detail in the next Part of this paper.

[21] The CBA's submission to the CJC, dated July 2014, is available at: http://www.cba.org/CMSPages/GetFile.aspx?guid=c1e7ed96-6531-4c75-97f4-ef2217033c66.

the *Judges Act* empowers the CJC to investigate and inquire into allegations of misconduct made against any superior court judge, but it sets out very little by way of process. Most of the process is set out in CJC policies and in By-laws made by the CJC pursuant to the *Judges Act*.

Having so much of the process set out in policy instruments and By-laws has the advantage of flexibility. The CJC can change aspects of the process as the need arises, as it did most recently in 2015. Setting down more of the process in the *Judges Act* would make it harder to change because legislative amendments can only be made by Parliament.

At the same time, the major steps of the process have by now become more settled, such that the flexibility to make changes to certain aspects of the process is perhaps no longer needed. In addition, having more of the process set out in the *Judges Act* would send a clear signal about the important, public interest nature of the process. It is arguably appropriate for the major steps of a process that engages important constitutional principles to be set out in legislation, as it is in most provinces. Setting out the key steps of the process in one place would also help make the process clearer and easier for those who are neither lawyers nor judges to understand.

In light of these general considerations, the sections of this Part of the paper will consider whether the various aspects of the discipline process discussed should be set out in the *Judges Act*.

3.1 Who May Complain and Screening Out of Complaints

Although the *Judges Act* does not expressly say so, anyone may complain to the CJC about the conduct of any superior court judge. However, like all complaint bodies, including professional discipline bodies and human rights commissions, the CJC screens complaints before considering them on their merits to ensure that they fall within its jurisdiction. Part 5 of the CJC complaints procedures makes the CJC's Executive Director responsible for screening of complaints, and sets out which complaints are to be screened out:

(a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;
(b) complaints that do not involve conduct; and
(c) any other complaints that are not in the public interest and the due administration of justice to consider.

Paragraphs (a) and (b) are of long standing and in keeping with the grounds for screening used by other complaint bodies.[22] Every complaints process must have a means of determining whether complaints fall within the terms of para. (a), or do not fall within the mandate of the body in question (para. (b)).

[22] See e.g. s. 51.4(3) of the Ontario *Courts of Justice Act*, the analogous provision applicable to Ontario's judicial discipline process.

However, para. (c) is relatively new in the context of the federal judicial discipline process. It was added as part of the CJC's 2015 process changes. It gives the Executive Director a measure of discretion to decide not to consider a complaint, but there is no definition of "the public interest and the due administration of justice". It is therefore unclear how broad this discretion is and how it might be exercised. Although the inclusion of an open-ended power to screen out complaints may have some merit as a matter of legal drafting, its rationale may not be readily apparent to the reasonable observer.

In light of the foregoing considerations:

- Should the fact that anyone may complain to the CJC be clearly set out in the *Judges Act*?
- Should the grounds for screening out of complaints be set out in the *Judges Act*?
- Should paragraph (c) of these grounds be retained in its existing form?

3.2 Anonymous Complaints

The CJC currently accepts anonymous complaints (see part 3 of the complaints procedures). The principal argument in favour of accepting anonymous complaints is that a complainant who legitimately fears reprisal because he or she is, for example, employed as a judicial assistant, clerk or other staff of the judge or the judge's court, may not make a complaint if anonymous complaints are not accepted. Assurances of confidentiality and other procedural safeguards may not suffice to encourage a complainant who truly fears reprisals to come forward.

There are arguments against accepting anonymous complaints. For example, not knowing a complainant's identity may limit a judge's ability to respond to a complaint, and may encourage some complainants to make unsupported allegations. Moreover, the judicial discipline process, like any discipline process, has safeguards for ensuring confidentiality of complainants where necessary and appropriate, including keeping complaints confidential unless the complainant decides to make them public.

In light of the foregoing considerations:

- Should anonymous complaints continue to be accepted?
- Should the approach to anonymous complaints be set out in the *Judges Act*?

3.3 Role of Complainants

The role of complainants in the judicial discipline process flows from the specific public interest purpose of the process, which is to determine whether an allegation of judicial misconduct is well founded, and, if so, how best to remedy it with a view to preserving public confidence in the judiciary and the judicial system. The focus of the process is thus not on the complainant, but on the judge's conduct and on the effect of that conduct on public confidence in the judge and the justice system.

The grounds of a complaint to the CJC might also give a complainant grounds for making a human rights complaint against the judge, or for suing the judge in tort, or provide a basis for charging the judge with a criminal offence. But this would not change the focus of judicial discipline proceedings. Lodging a complaint does not create a legal dispute between the complainant and the judge in the traditional adversarial sense. Responsibility for investigating and establishing the "case" against the judge in judicial conduct matters must be reserved to those authorized to undertake clearly defined functions that are carefully designed to ensure the requisite balance between judicial independence and accountability that underpins the discipline process.

Accordingly, the role of a complainant is best limited to that of a witness who provides information in relation to the complaint. This does not, however, mean that a complainant should have no rights in the process. As the CJC's discussion paper notes, and as the Federal Court of Appeal has found, a complainant is entitled to be kept apprised in a timely manner of developments at all stages of the complaints process, and to have their complaint dealt with impartially.[23] A complainant also retains the ability to bring an application for judicial review of a decision to dismiss a complaint. Section 3.12 below raises the possibility of having such applications proceed directly to the Federal Court of Appeal.

In light of the foregoing considerations;

- Does the current process strike the right balance in terms of the role of complainants?
- Could current practices and procedures related to keeping complainants informed be improved? How?
- Should current practices and procedures related to keeping complainants informed be incorporated into the *Judges Act*?

3.4 Complaints from Attorneys General

Subsection 63(1) of the *Judges Act* currently allows the Minister of Justice of Canada or a provincial/territorial attorney general to request an inquiry into the conduct of any superior court judge.[24] When this section is invoked, the investigative stages of the discipline process are by-passed and an inquiry committee is immediately constituted by the CJC. Since the Minister of Justice is also the Attorney General of Canada, those empowered to request inquiries under s. 63(1) will be referred to here as "AGs".

This provision is intended to ensure that AGs, in their roles as guardians of the public interest, may oblige an inquiry to be held where, in their view, the public interest requires it. AGs have used this power on several occasions. Indeed, a majority of the inquiries held by the CJC since 1990 were in fact requested by AGs, including the only two to have culminated in recommendations for removal from the bench: the inquiries

[23] *Slansky v. Canada*, 2013 FCA 199, para. 165 (Mainville J.A. concurring); *Taylor v. Canada*, 2003 FCA 55, paras. 78-79.

[24] This section was upheld by the Federal Court of Appeal when it was challenged as an infringement of judicial independence: *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103.

into the conduct of Justice Bienvenue and Justice Cosgrove.

At the same time, s. 63(1) dates from a time when the federal judicial discipline process, like most professional discipline processes, was more rudimentary, with less developed screening and investigation procedures. Today, complaints that result in inquiries not requested under s. 63(1) are first screened, reviewed, thoroughly investigated and considered by a member of the CJC's Judicial Conduct Committee and by a five-person review panel. The investigative stages of the process are not a mere formality. On the contrary, these stages today play a critical role in the process, establishing the facts of a complaint, ensuring that it is well-founded, and providing the inquiry committee with guidance as to the appropriate scope of its inquiry. Where a complaint is made under s. 63(1), these critical stages are by-passed, raising the prospect that inquiries may be held, with attendant costs to the public purse, where not strictly necessary, and/or without any guidance as to their proper scope.[25] Perhaps as a result, almost all provincial judicial discipline processes treat complaints from an AG the same way as complaints from anyone else.[26]

While it may be argued that the public interest is best served by having AGs retain the ability to request that an inquiry be held, it may be unnecessary to have such requests by-pass the investigative stages of the discipline process. Complaints from AGs could initially be treated like complaints from any other member of the public. The right to require that an inquiry be held could remain, but only be triggered if the CJC concludes that no inquiry is necessary and dismisses the complaint.

Moreover, the current text of s. 63(1) of the *Judges Act* allows any AG to require an inquiry into the conduct of any superior court judge. While this seems appropriate in the case of the federal Minister of Justice, who is ultimately responsible for the appointment of all superior court judges, it may be out of step with the principles that generally govern relations between the different jurisdictions in Canada for provincial and territorial AGs to be able to require that inquiries be held into the conduct of judges outside of their own jurisdictions.

Each provincial and territorial AG could be limited to being able to require inquiries into the conduct of the superior court judges of their own jurisdiction and the judges of the Supreme Court of Canada (who sit in appeal of the decisions of provincial appellate courts). This would, of course, not affect the ability of a provincial or territorial AG to make a complaint about a judge outside of his or her home jurisdiction; it would simply remove that AG's ability to require that an inquiry be held into that judge's conduct.

In light of the foregoing considerations:

- Should s. 63(1) of the *Judges Act* be amended so that the right of AGs to oblige the CJC to hold an inquiry into a complaint made by them is triggered only if the

[25] In one case, an inquiry committee concluded that the full inquiry requested by a provincial attorney general was unnecessary because the allegations made against the judge were unfounded: see http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_boilard_ReportIC_200312_en.pdf.
[26] B.C. is the exception; see ss. 22.1 and 23 of the B.C. *Provincial Court Act*.

CJC dismisses the complaint?

- Should each provincial and territorial AG be limited to being able to require an inquiry into the conduct of superior court judges of his or her own jurisdiction and the judges of the Supreme Court of Canada?

3.5 Involvement by Lay Persons, Lawyers and *Puisne* Judges in the Discipline Process

The Supreme Court of Canada has found that judicial independence requires that judicial discipline processes be judge-led.[27] However, as explained in more detail below, having only judges involved in judging the conduct of judges may undermine public confidence in a judicial discipline process by raising questions about its impartiality and transparency. This section explores whether the federal judicial discipline process could benefit from greater involvement by lay persons, lawyers, and *puisne* judges.

The status quo

Provincial judicial councils generally include *puisne* judges and lawyers, and most also include so-called lay persons – individuals who are neither lawyers nor judges. The CJC, by contrast, is not only exclusively composed of judges, it is exclusively composed of the managerial judges of Canada's superior courts (the chief and associate chief justices of the federal and provincial superior courts and the senior judges of the territorial superior courts). The part of the CJC specifically responsible for day-to-day oversight of the federal judicial discipline process, the Judicial Conduct Committee, is composed exclusively of CJC members.

However, non-CJC members do serve on CJC review panels and inquiry committees. As explained in Part 2, a review panel is constituted after a complaint has been investigated, and its task is to determine, based on the record of the investigation, whether the complaint should be referred to an inquiry committee. The inquiry committee is the body who then receives submissions, hears evidence and holds public hearings with a view to providing the CJC's Council of the Whole with a report and recommendation on whether a judge should be removed from office.

All review panels are currently composed of five members: three CJC members, one *puisne* judge, and one lay person who is neither a lawyer nor a judge. The CJC currently designates all the members of a review panel. Inquiry committees are currently composed of an uneven number of members, with the majority being CJC members designated by the CJC, and the minority being lawyers with at least 10 years at the Bar designated by the Minister of Justice. To date, all inquiry committees have been composed of either three or five members. While the composition of review panels is currently set out in s. 2(3) of the CJC's By-laws, that of inquiry committees is governed by s. 63(3) of the *Judges Act*.

[27] *Therrien (Re)*, 2001 SCC 35, paras. 39, 57; *Moreau-Bébrubé v. New Brunswick*, 2002 SCC 11, paras. 47, 60.

Lay persons

Many self-regulated professions include lay persons, usually members of the public who are not members of the profession in question, in decision-making on professional discipline matters. This typically serves three functions. First, it reflects and acknowledges the important public interest values invariably at stake in the self-regulation of a profession. Be they lawyers, doctors, dentists, architects, engineers, teachers, or others, the members of a self-regulated profession typically contribute to society in such a critical way that good governance of the profession is a matter of broader public interest. Second, as a practical matter, lay persons can provide a critical touchstone for the perspective of the reasonable member of the public on matters of conduct.

Finally, the inclusion of lay persons helps address the moral hazard dilemma inherent in any form of self-regulation. Simply put, a self-regulating entity has incentives to regulate itself more laxly than may be desirable, a fact to which the reasonable member of the public is likely to be sensitive. The inclusion of lay persons in professional discipline can help to increase public confidence in a profession's discipline process by combating any perception of members of the profession looking out for their own, and placing the profession's interests above the public interest.

As the CBA rightly notes in its 2014 submission, being a judge is not just a profession; the judiciary is first and foremost a branch of government with a critical constitutional role to play. But it is precisely because of this fundamental role that public confidence is particularly important to the judiciary and its members, and that lay involvement in judicial discipline has the potential to offer the same advantages as it does to the traditional self-regulated professions, bolstering public confidence in the discipline process and improving transparency.

As a result, many provincial judicial discipline processes include lay persons, with "lay person" defined as a person who is neither a judge nor a lawyer. These lay members are generally appointed by the Attorney General, sometimes through an appointments secretariat (e.g., Ontario and Nova Scotia).[28] Lay members usually serve for terms varying from two to four years. In provinces other than Ontario, a fixed number of renewals are permitted. In Ontario, lay members serve a non-renewable four-year term, and a different lay member sits at each stage of the complaints process (i.e., investigation, review panel, hearing panel).[29] By contrast, there is no limit on term length for lay members in Quebec, where terms can always be renewed.[30] Provincial judicial discipline officials in those jurisdictions with lay involvement confirmed the advantages of including persons who are neither judges nor lawyers in judicial discipline, including the value of providing a perspective from outside the legal world.

In light of the foregoing considerations:

---

[28] Ontario *Courts of Justice Act*, s. 49(2)(g); Nova Scotia *Provincial Court Act*, s. 16(1)(g).
[29] Ontario *Courts of Justice Act*, ss. 49(15), 49(17), 51.4(1).
[30] Quebec *Courts of Justice Act*, s. 249.

- Should every review panel and inquiry committee include a lay person, defined as someone who is neither a lawyer nor a judge?
- If lay persons serve on review panels and/or inquiry committees, who should designate them? The CJC? The Minister of Justice?
- Should the role of lay persons be set out in the *Judges Act*?

Lawyers

Involving lawyers in judicial discipline, like involving lay persons, generally helps bolster public confidence in the impartiality and transparency of the process. Lawyers are not judges and can contribute the perspective of the broader legal community, who has a strong stake in effective judicial discipline. Lawyers will also often bring relevant expertise to the table.

As a result, most Canadian judicial discipline processes involve lawyers, who are usually designated by either the Attorney General or the provincial law society. Under s. 63(3) of the *Judges Act*, the Minister of Justice may designate lawyers to sit on an inquiry committee, and has always done so. As a matter of practice, because judicial discipline processes are required to be judge-led, the CJC designates one more judge to each inquiry committee than the Minister has designated lawyers. Lawyers designated by the Minister have thus comprised a minority of every inquiry committee.[31] However, lawyers do not sit on review panels.

In light of the foregoing considerations:

- Should one of the members of every review panel be required to be a lawyer? Or is having a lay (non-lawyer) member sufficient?
- Should lawyers continue to sit on inquiry committees? How many should sit on each committee?
- Who should designate the lawyer members of review panels and/or inquiry committees?
- Should any requirement that lawyers sit on review panels be set out in the *Judges Act*? Should the current *Judges Act* provision regarding the participation of lawyers on inquiry committees be changed?

Puisne *judges*

Puisne judges are judges who have no managerial role, that is, they are not chief or associate chief justices or territorial senior judges. Most judges are *puisne* judges. *Puisne* judges clearly have a strong interest in a fair and effective judicial discipline process; their confidence in the process is critical. Their involvement would also help ensure that an important perspective on the day-to-day challenges of sitting judges is

[31] The *Judges Act* allows the Minister of Justice to designate lawyers to inquiry committees but does not require her to do so. Once an inquiry is announced, the CJC's *Inquiries and Investigations By-laws* give the Minister 60 days to designate the lawyer members of the inquiry committee. If no one is designated before the deadline, the By-laws allow the Council to designate additional CJC members to complete the composition of the committee.

brought to bear. Yet, because the CJC is composed entirely of managerial judges, they currently have only one avenue for participation in the process – through review panels. One of the five members of every review panel must be a *puisne* judge.

In most provinces, non-managerial judges are represented at different stages of the discipline process, including on the body responsible for general process oversight.[32]

In light of the foregoing considerations:

- Should one of the judicial members of every inquiry committee be required to be a *puisne* judge?
- Should *puisne* judges be represented on the CJC's Judicial Conduct Committee?
- If *puisne* judges are required to be represented on review panels, inquiry committees and/or the Conduct Committee:
    - Who should select them? The CJC? The Canadian Superior Court Judges' Association?[33]
    - Should the role of *puisne* judges in this regard be set out in the *Judges Act*?

3.6 Role of Review Panels

Once a complaint is determined to be within the jurisdiction of the CJC, it is referred to the Chair (or a Vice-Chair) of the Judicial Conduct Committee, the arm of the CJC responsible for oversight of the discipline process. The Chair may ask the complainant for further details and ask for comments from the judge who is the subject of the complaint, as well as from the judge's Chief Justice. The Chair may also retain an investigator to investigate the allegations and provide the Chair with a report. If the Chair determines that the complaint may be serious enough to warrant removal, he or she will recommend that a review panel be constituted and issue reasons.[34] The reasons and record of any investigation are forwarded to the panel.

The review panel must then determine whether the complaint may indeed be so serious that it may warrant removal from office. If so, a review panel must issue reasons and a statement of issues, both of which must be considered by the inquiry committee that will then be constituted to hold public hearings into the allegations against the judge.

If a review panel finds that the complaint is not serious enough to warrant an inquiry, it is not required to issue reasons. The complaint is simply referred back to the Chair who must then determine how best to resolve it.

---

[32] See e.g. Quebec *Courts of Justice Act*, s. 248; Ontario *Courts of Justice Act*, s. 49(2).

[33] The Canadian Superior Court Judges' Association represents the interests of federally-appointed *puisne* judges from across the country.

[34] To help avoid any perception of conflict of interest, the members of the review panel are selected by the most senior member of the Conduct Committee who is not the Chair/Vice-Chair recommending that the panel be constituted: see the CJC's By-laws at ss. 1, 2(2). The composition of review panels is discussed in the previous section of this paper.

In light of the foregoing considerations:

- Should review panels be expressly required to issue reasons for recommending against an inquiry, as well as for recommending in favour of one?
- Should the composition, role, and responsibilities of review panels be set out in the *Judges Act*?

3.7 Inquiry Committees

An inquiry committee is constituted after a review panel has determined that a complaint is so serious that it may warrant the judge's removal from the bench. Inquiry committee proceedings are presumptively public, and they are the most mediatized aspect of the judicial discipline process. Due in part to its public nature, this stage of the process puts fairness concerns, particularly with respect to the judge whose reputation and livelihood are at stake, in tension with concerns for efficient and timely proceedings, which are important to preserving public confidence in the process. The CJC's 2014 discussion paper provides a thorough overview of the procedural fairness concerns in play during inquiries.[35]

As already discussed in Part 2 above, the CJC made some important changes to this stage of the discipline process in July 2015. This section of the paper and the next will consider areas where further changes may be desirable.

Composition

The *Judges Act* currently provides:

> 63. (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

In practice, when an inquiry committee is constituted, the CJC provides notice to the Minister of Justice, who designates one or two lawyers to sit on the committee. The CJC then designates one more CJC member than the Minister has designated lawyers to complete the committee's composition. Most inquiry committees have been five-person committees (three CJC members and two lawyers); a few have been three-person committees (two CJC members and one lawyer).

Most of the key considerations regarding the composition of inquiry committees were discussed in section 3.5 above. Additional considerations relating to the size of inquiry committees include:

- Smaller committees may be more efficient because it is easier for their members to schedule meetings and hearings.

[35] See the CJC's discussion paper, cited above, p. 43.

- An uneven number is generally best in order to avoid evenly split decisions in the event of dissenting views.

Inquiry scope

Section 5 of the CJC's By-laws expressly states that an inquiry committee may "consider any complaint or allegation pertaining to the judge that is brought to its attention." However, since 2015, the same section of the By-laws requires an inquiry committee to consider the reasons and statement of issues of the review panel that constituted it. Moreover, para. 3.5 of the CJC's new Handbook on inquiry committee practice and procedure states:

> The Committee normally limits itself to the "Statement of Issues" identified by the Judicial Conduct [Review] Panel (or to the contents of the request of the Minister or an Attorney General pursuant to s. 63(1) of the Act). However, the Committee may determine that some allegations do not warrant further consideration or that additional issues require consideration and examination by the Committee, provided that proper notice is given to the judge at all times.

As the CJC's 2014 discussion paper notes, the ability of an inquiry body to determine the scope of its inquiry is generally out of step with established practice in related settings, such as commissions of inquiry and professional discipline proceedings. In order to ensure fair notice to participants as to the case to be met and the questions in play, inquiry scope is largely pre-defined by Terms of Inquiry in the case of commissions of inquiry and by some form of gate-keeping entity (a conduct committee or prosecuting counsel) in the case of professional discipline bodies.[36]

The proper scope of Ontario judicial conduct inquiries was addressed by the Ontario Court of Appeal in *Hryciuk v. Ontario* (1996), 31 O.R. (3d) 1. A judge who was the subject of discipline proceedings challenged the ability of the Inquiry Judge holding hearings into complaints against him to entertain new complaints that had not first been screened and investigated by the Ontario Judicial Council. Abella J.A., as she then was, held for the Court of Appeal:

> There are, therefore, two stages in this statutory scheme which must have taken place before a provincial court judge can be removed by order of the Lieutenant Governor. The first is that a complaint must be made to the Judicial Council for investigation by that body into whether the complaint should be proceeded with publicly. The second stage, if so recommended by the Judicial Council, is a public hearing presided over by a judge of the General Division.
>
> The two-stage process represents a clear statutory intention that not all complaints about judges should be subjected to public disclosure. Any such disclosure, even if the complaint is subsequently found to be without merit, can cause irreversible damage to reputation and, more importantly, to a judge's ability

[36] The CJC makes this point in its discussion paper, cited above, at p. 53.

> to maintain public confidence in his or her judicial capacities. On the other hand, there is a significant public interest in having some complaints aired publicly for the same purpose, namely, to maintain public confidence in the judiciary. These are the competing interests the legislative scheme is designed to balance. The Judicial Council has, therefore, been charged with responsibility for screening allegations against provincial court judges, and to determine, after an investigation and/or a hearing, whether the complaint raises a genuine issue about the judge's capacity to continue to perform his or her judicial functions.
>
> In this way, judges are protected from routine vulnerability to public opprobrium when the complaints are spurious; but neither are they immune from public scrutiny when the complaint has sufficient merit that the Judicial Council recommends that an inquiry take place.
>
> The three new complaints heard by the inquiry judge after Judge Hryciuk had concluded his defence were not first made to, or investigated by, the Judicial Council. These complaints could not, therefore, be entertained by her. The language of the statute is unambiguous, and leaves no discretion to a judge conducting a s. 50 inquiry to hear new complaints not previously screened by the Judicial Council. Circumventing the statutory requirement that there be a prior vetting by the Judicial Council defeats the whole purpose of the legislative scheme, and violates the mandatory nature of the two-stage process set out in s. 46 of the *Courts of Justice Act*.

While Justice Abella's holding was clearly grounded in the language of the governing Ontario statute, the rationale she provided for why the applicable provisions did not permit the Inquiry Judge to entertain complaints that had not been investigated by the Judicial Council would also seem by and large applicable in the federal context, particularly if the investigative stages of the federal judicial discipline process are eventually incorporated into the *Judges Act*.

On the other hand, some of the CJC's 2015 process reforms addressed the scope of inquiries. As noted, an inquiry committee must now consider the reasons of the review panel for recommending an inquiry, as well as the review panel's statement of issues, in determining the scope of its inquiry. The CJC's new Handbook also confirms that an inquiry committee will generally determine the scope of its inquiry by reference to these documents and the original complaint. In practice, these measures may be expected to operate as a constraint on the scope of most inquiries.

Moreover, some flexibility will always be required. Terms of reference for a commission of inquiry that are drafted too precisely may oblige a commissioner to request an amendment to the terms of reference if he or she uncovers issues related to those that are the subject of the inquiry but that technically fall outside of its scope. Similarly, limiting the scope of a judicial conduct inquiry too strictly may create the need for a mechanism to broaden an inquiry's scope where related but essentially new allegations

of misconduct are uncovered by an inquiry. Such a mechanism would inevitably engender delays. Maintaining a reasonable measure of flexibility may be advisable.

In light of the foregoing considerations:

- Should an inquiry committee be precluded from considering a complaint that has not been investigated by the CJC?[37]
- Would a review panel's reasons and statement of issues, together with the original complaint, be sufficient to constrain the scope of an inquiry while providing the necessary flexibility? Or should there exist a mechanism for fixing more precisely the scope of an inquiry?
- If the latter:
    - What actor should determine the scope of an inquiry committee's inquiry? The review panel? The Chair of the Conduct Committee?
    - How would an inquiry's scope be broadened should this become necessary? For example, would the inquiry committee itself seek that the scope of its inquiry be broadened by making a request of the body responsible for fixing the scope of its inquiry? Would there have to be a hearing at which judge's counsel could make submissions?

Publication bans and* in camera *hearings

Subsections 63(5) and (6) of the *Judges Act* allow for publication bans and so-called *in camera* hearings that are closed to the public. They state:

> 63. […] (5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.
>
> (6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

In addition, the Handbook states:

> 2.2 The Committee hearings may be held in public or in private, unless the Minister requires that it be held in public. However, after motion made to the Committee at the first reasonable opportunity, some aspects of the hearing may be made to proceed in camera or under a publication ban where the Committee is of the opinion that it is necessary in the interests of the maintenance of order or the proper administration of justice.
>
> 2.3 Any motion seeking in camera hearings should be heard only after due notice is given to interested parties, including representatives of the media.

[37] Complaints made by AGs under s. 63(1) of the *Judges Act* would have to be exempt from any requirement of prior investigation unless such complaints are treated like all other complaints, as discussed in section 3.4 above.

Inquiry committees are currently not expressly required to issue reasons for publication bans or going *in camera*. Inquiry committees are given the powers of a superior court, which may be taken to imply that an inquiry committee should treat requests for a publication ban or an *in camera* hearing as would a superior court, including by issuing reasons. Moreover, given the level of media interest in most inquiry committee proceedings, it seems unlikely that an inquiry committee would decide on a request for a publication ban or an *in camera* hearing without issuing reasons. However, given the important interests at issue, making such a requirement express would arguably be appropriate.

It may also be appropriate to specify the considerations at issue in the *Judges Act*. The Handbook provides the following by way of considerations: "where … necessary in the interests of the maintenance of order or the proper administration of justice." The Ontario Judicial Council has adopted more detailed criteria for determining when to hold hearings *in camera* and when to issue publication bans:

> a) where matters involving public security may be disclosed, or
>
> b) where intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that the hearing be open to the public.[38]

These considerations are the same as those found in s. 9(1) of Ontario's *Statutory Powers Procedure Act*, which applies to most provincial administrative proceedings, including professional discipline proceedings for Ontario lawyers.[39]

Finally, while the Handbook states that "[a]ny motion seeking *in camera* hearings should be heard only after due notice is given to interested parties, including representatives of the media," it may be appropriate to include such a requirement in the *Judges Act*.

In light of the foregoing considerations:

- Should the *Judges Act* include a requirement for inquiry committees to provide reasons before going *in camera* or issuing a publication ban?
- Should the *Judges Act* expressly state what factors an inquiry committee should weigh when considering requests for publication bans or going *in camera*?
- Should a provision requiring notice to interested parties an the media, like the one currently found in the Handbook, be incorporated into the *Judges Act*?

Rules of procedure for inquiries

[38] See http://www.ontariocourts.ca/ocj/files/ojc/procedures-EN.pdf.
[39] See MacKenzie, Gavin, *Lawyers and Ethics: Professional Responsibility and Discipline*, Carswell: looseleaf, at 26.9; Rule 3.06 of the *Rules of Practice and Procedure* made under s. 61.2 of Ontario's *Law Society Act*.

In its 2014 discussion paper, the CJC noted that:

> … Inquiry Committees constituted under the *Judges Act* are all tasked with inquiring into the conduct of an individual judge with the aim of determining whether or not a recommendation for removal of the judge should be made. There should thus be no reason for significant variation in the procedures followed by each Inquiry Committee. Moreover, all inquiries are constituted under the auspices of the same institution, the CJC, which has longstanding institutional knowledge about the judicial discipline process. It is also noteworthy that relatively detailed procedures for disciplinary hearings for lawyers are set out in the rules and statutes of many law societies.
>
> A uniform process with a predetermined set of procedural rules may have several advantages, including: leading to more predictable inquiries; creating more consistency among inquiries held under the Judges Act; streamlining disputes about procedure; and, as will be discussed more fully below, circumventing the number of possible applications for judicial review. Such rules of practice and procedure could eventually cover issues such as: the timing and process for document collection, disclosure and production; the presentation of the evidence and documentation; the order and rules of examinations, cross-examinations, and re-examinations of witnesses; the procedure on motions; the criteria and process for seeking confidentiality orders; the criteria for grants of standing; and the specific procedural rights of those participating in the hearings of an Inquiry Committee.

As already noted, the CJC has recently issued a Handbook setting out procedure and practice guidelines for inquiry committee hearings, which covers much of the ground discussed above. The Handbook is a policy document, which makes it easy to revise as required.

For reasons of clarity and transparency, it may be appropriate for such guidelines to be expressly provided for by the *Judges Act*, and/or for the Act to require the CJC to establish such guidelines. It may also be appropriate for the Act to require that certain groups, such as the Canadian Superior Courts Judges Association, the CBA, and/or the Government, be consulted on, and/or receive notice of, the contents of, and any changes to, these guidelines.

In light of the foregoing considerations:

- Should the *Judges Act* provide for, or require the CJC to establish, procedures and practice guidelines for inquiry committee hearings?
- Should the CJC be required to consult on the contents of, and changes to, these guidelines? If so, who should be consulted?
- Should the CJC be required to provide notice on any changes to these guidelines? If so, who should be notified?

3.8 Presenting Counsel and Committee Counsel

As discussed in Part 2 above, prior to the CJC's 2015 process changes, inquiries involved two counsel in addition to counsel for the judge: counsel to the inquiry committee (also called committee counsel) and a presenting counsel called independent counsel. Committee counsel was a lawyer retained by the committee to assist it in fulfilling its mandate, providing it with advice on evidentiary and other legal questions and assisting in drafting the committee's final report. The independent counsel, meanwhile, was charged with presenting all relevant evidence, both for and against the judge, to the inquiry committee, and with doing so impartially and in accordance with the public interest. The independent counsel was appointed by the Chair of the Conduct Committee, not by the inquiry committee, and his or her mandate was set out in part in the CJC's By-laws, and in more detail in a CJC policy.

This two-counsel approach evolved in the early 1990s as a procedural fairness safeguard.[40] Inquiry committees are sometimes required to test evidence, including by cross-examination. This requires asking rigorous questions that could too easily, if undertaken by a committee member, or by counsel acting on behalf of a committee member, be taken to raise reasonable apprehensions of bias. Starting with the Gratton inquiry held in the early 1990s, an independent counsel was therefore appointed to take on the role of presenting and testing evidence, including through cross-examination. The independent counsel performed this role at arm's length from the inquiry committee and from any counsel retained by the committee to provide it with advice. This two-counsel approach has allowed most inquiry committees to adopt a more removed posture less susceptible of raising reasonable apprehensions of bias. Today, commissions of inquiry that need to test evidence in similar ways often use the same approach for the very same reason.[41]

However, during the 2012 hearings of the first Douglas inquiry committee, disagreements emerged between the independent counsel and the inquiry committee over whether the committee could use committee counsel to cross-examine witnesses, a role reserved for the independent counsel under the two-counsel model. These disagreements helped trigger complex judicial review proceedings that led to long and costly delays. In its 2014 submission to the CJC, the CBA strongly recommended maintaining the role of independent counsel, and avoiding future disagreements over the respective roles of independent counsel and committee counsel by either expressly establishing the role of committee counsel as a purely administrative one or doing away with it altogether.[42]

In its 2015 process changes, the CJC instead did away with the role of independent counsel, and further opted to omit any mention of either presenting counsel or committee counsel in its revised By-laws. Section 4 of the By-laws now simply provides: "The Inquiry Committee may engage legal counsel and other persons to provide advice

[40] See Ratushny, Ed, *The Conduct of Public Inquiries*, Irwin Law: 2009, pp. 215-61, esp. pp. 231-35.
[41] See the previous note.
[42] Submissions of the CBA to the CJC, cited above, pp. 6-9.

and to assist in the conduct of the inquiry." This new status quo effectively makes the two-counsel model entirely optional. An inquiry committee may retain a lawyer to present relevant evidence and another to advise it, but it need not do so. This is confirmed by the CJC's procedure and practice Handbook, which states:

> 3.2 The Committee may engage one or more legal counsel to assist in marshalling the evidence; interview persons believed to have information or evidence bearing on the subject-matter of the Inquiry; assist in the Committee's deliberations; conduct legal research; provide advice to Committee members on matters of procedure and on any measures necessary to ensure the impartiality and fairness of the hearing.
>
> 3.3 Legal counsel and other persons engaged by the Committee have no authority independent of the Committee and are bound at all times by the authority and rulings of the Committee.

Recently, the Inquiry Committee charged with inquiring into the conduct of Justice Camp of the Federal Court, the first inquiry committee established since the CJC's 2015 process changes, issued directions to counsel (dated April 22, 2016).[43] These directions set out a two-counsel model for the inquiry very similar to the one used by all previous inquiry committees, including many of the fairness safeguards once included in CJC By-laws and policies. The Committee's directions are discussed in more detail below.

General considerations

The new status quo has the advantage of greatly diminishing the likelihood of conflict between the inquiry committee and presenting counsel by making the committee responsible for appointing, and defining the role of, any presenting and advisory counsel. It may also have the advantage of flexibility. A presenting counsel may, but need not, be retained for every inquiry.

However, the new status quo also has disadvantages. First, from the perspective of the general public, the complainant, and the judge who may become the subject of an inquiry, it provides less clarity and predictability as to how inquiry committee proceedings can be expected to unfold. Most inquiry committees may in fact be expected to continue employing the two-counsel model as the Camp Inquiry Committee has done, retaining a lawyer to act as committee counsel and one to act as presenting counsel to present and test all relevant evidence. But if so, this is nowhere specified.

On the text of s. 4 of the CJC's revised By-laws and para. 3.2 of the Handbook, an inquiry committee could retain a presenting counsel to fulfill the role that independent counsel once fulfilled or a more limited version of that role, more than one presenting counsel to present different perspectives of a given issue, or none at all. An inquiry

[43] Available at: http://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-04-22%20Inquiry%20Committee%20-%20Camp%20J%20-%20Directions%20to%20Counsel.pdf (accessed May 5, 2016).

committee may or may not include the fairness safeguards included by the Camp Inquiry Committee, and may or may not exhort presenting counsel to take the public interest into account. An inquiry committee could also retain any number of research or advisory counsel. Each of these possibilities would have quite different procedural, efficiency, and cost implications.

Second, the new status quo does not necessarily include an actor expressly charged with considering the broader public interest. While all of the actors in inquiry committee proceedings would generally be expected to conduct themselves in accordance with the broader public interest, how a given actor understands what the broader public interest requires may be affected by that actor's role and perspective. As the CBA noted in its 2014 submission to the CJC, a presenting counsel expressly charged with operating at arm's length from the inquiry committee in presenting all relevant evidence impartially and in accordance with the public interest helps improve public perceptions of the fairness, transparency, and even-handedness of the process. In direction 6, the Camp Inquiry Committee has exhorted its presenting counsel to fulfill her responsibilities in accordance with her best judgment of what the public interest may require. However, as noted, this is merely a practice direction issued by one inquiry committee. Nothing guarantees that future committees will issue a similar direction. The Handbook does not suggest it.

Third, as the Federal Court of Appeal found, the role of independent counsel was one of the safeguards ensuring fairness for the judge.[44] The possible absence of a fairness safeguard in a future inquiry is important for two reasons. A process that is fair to the judge in both fact and perception can only help bolster confidence in the process, particularly on the part of judges, who are those most directly affected by it. A fairer process also helps avoid judicial review proceedings, which have been a key source of rising costs and delays.

As the CJC itself noted in its 2014 discussion paper, professional discipline processes have, since the 1970s, moved away from using procedures that resemble those of commissions of inquiry, and toward using procedures increasingly resembling those used before courts, with their additional safeguards for ensuring fairness. This is simply because professionals who face discipline proceedings have a lot at stake. In many cases livelihoods hang in the balance. To someone facing such dire consequences, fairness will likely appear all-important, and the willingness to challenge proceedings on grounds of unfairness will generally be very high. It is therefore unsurprising that professional discipline processes have adopted so many of the safeguards found in court proceedings, including impartial adjudicators who perform their functions with a view to avoiding reasonable apprehensions of bias, and prosecuting counsel who operate at arm's length from adjudicators and any legal advisors they may have. By helping make the process more fair, perhaps in fact and certainly in appearance, such safeguards help avoid applications for judicial review on grounds of unfairness.

[44] *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, para. 65.

The stakes in judicial discipline inquiries are no lower than in discipline hearings for other professionals. In fact, they are arguably higher. Many professional discipline hearings are held because an offence may warrant a fine, a temporary suspension, or another form of punishment that need not result in the end of a career. By contrast, if a complaint reaches an inquiry committee, it is because a five-person review panel has determined the complaint to be so serious that it may warrant removal from office. In light of the foregoing, the potential absence of a fairness safeguard from inquiry committee proceedings would appear at odds with the reality of judicial discipline inquiries today, and may, in the end, only serve to make judicial review applications more likely.

The directions issued by the Camp Inquiry Committee appear to confirm the importance of a presenting counsel perceived to be fulfilling his or her duties in accordance with the public interest and at arm's length from the inquiry committee. They not only contain an exhortation to the presenting counsel to fulfill her functions in accordance with the public interest, but exhortations to fulfill her duties in a manner that is fair to the judge, that will "enhance public confidence in the judiciary", that is in accordance with the law, and that is "free of direction from the Inquiry Committee or any outside influence."[45] The directions also note that should the Committee find it necessary to make requests of presenting counsel in respect of her duties, it will do so "in the course of the hearing, and the participants will have an opportunity to make submissions." Finally, the directions underscore that "[t]here will be no communications between the Inquiry Committee and either Presenting Counsel or counsel for Justice Camp outside of the hearing, unless all participants in the inquiry agree to the communication in advance."[46] It may be argued that such rules and instructions clearly meant to guarantee procedural fairness during inquiry committee proceedings ought to be set out in statute or a By-law, rather than left for individual inquiry committees to set out in *ad hoc* directions.

Additional considerations specific to presenting counsel

To the extent that the new model is meant as a solution to the conflicts between the independent counsel and the inquiry committee that marred the first Douglas inquiry, it is difficult to assess the likelihood of recurrence. To our knowledge, if such conflicts have arisen before, they do not appear to have interfered with the effectiveness of other inquiries. Clear definition of roles, akin to the directions issued by the Camp Inquiry Committee, may suffice to prevent such conflicts altogether, or greatly reduce their likelihood. In addition, some of the issues related to the role of independent counsel that arose on judicial review in *Douglas* could be specifically addressed. For example, as discussed in section 3.12 below, presenting counsel could be precluded from applying for judicial review. Solicitor-client privilege could also be expressly made inapplicable to the relationship between presenting counsel and other actors.[47]

---

[45] Camp inquiry committee directions to counsel, cited above.
[46] Camp inquiry committee directions to counsel, cited above.
[47] During the first Douglas inquiry, the conflict between the independent counsel and the inquiry committee culminated in two applications for judicial review, one brought by Douglas A.C.J. and one by the independent counsel. After the independent counsel abruptly resigned, whether communications

It may be worth noting that some provincial judicial discipline processes expressly make provision for the appointment of a presenting counsel. For example, the procedures of the Ontario Judicial Council provide for the appointment of a "presenting counsel" to operate at arm's length from the hearing panel while presenting all relevant evidence. The procedures define the presenting counsel's role as follows:

> 2. The Council shall, on the making of an order for a hearing in respect of a complaint against a judge, engage Legal Counsel for the purposes of preparing and presenting the case against the Respondent.
>
> 3. Legal Counsel engaged by the Council shall operate independently of the Council.
>
> 4. The duty of Legal Counsel engaged under this Part shall not be to seek a particular order against a Respondent, but to see that the complaint against the judge is evaluated fairly and dispassionately to the end of achieving a just result.
>
> 5. For greater certainty, Presenting Counsel are not to advise the Council on any specific matter set for a public hearing in which he or she has been engaged as Presenting Counsel. All communications between Presenting Counsel and the Council shall, where communications are personal, be made in the presence of counsel for the Respondent, and in the case of written communications, such communications shall be copied to the Respondents.

By contrast, in New Brunswick, a presenting counsel is appointed to act as a quasi-prosecutor, but the *Provincial Court Act* provides for the appointment of presenting counsel by, and subject to the direction of, the hearing body.[48] In Quebec, the *Courts of Justice Act* provides for the appointment of counsel by the hearing body, but counsel is neither implicitly nor explicitly described as fulfilling a role similar to that of a prosecutor. The text of the applicable provision implies that counsel is under the direction of the hearing body.[49]

Additional considerations specific to committee counsel

The CBA has argued that since inquiry committees include judges and lawyers, a committee counsel to provide the committee with legal advice is not strictly necessary. If inquiry committees are to keep the power to retain committee counsel, the CBA suggested that the role of committee counsel be carefully circumscribed and be limited

---

between the independent counsel and the CJC were subject to solicitor-client privilege then became a central question on judicial review. The Federal Court found that the communications were not privileged. See *Douglas v. Canada*, 2014 FC 299.

[48] New Brunswick *Provincial Court Act*, ss. 6.9(1)(b), 6.9(2), 6.10(4).

[49] Quebec *Courts of Justice Act*, s. 281; see also *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, paras 72- 74.

to administrative functions. Committee counsel should not, in the CBA's view, be allowed to take part in the hearings or in the drafting of reasons.[50]

Provincial judicial discipline processes generally do not expressly provide for the appointment of committee or advisory counsel. Ontario is one of the few exceptions. Subsections 51.6(4) and (5) of the *Courts of Justice Act* expressly allow a hearing body to retain advisory counsel, but limit the role of such counsel, requiring that any legal advice provided by counsel to the hearing body be shared with all other parties, who must then be given an opportunity to make submissions on the advice provided.[51]

In light of the foregoing considerations:

- How should the broader public interest best be represented during inquiry committee proceedings? Through presenting counsel? Is that possible if presenting counsel is subject to the direction of the inquiry committee?
- Should every inquiry involve presenting counsel? How should the role of presenting counsel be defined?
- Should every inquiry committee be authorized to retain committee counsel? How should that role be defined?
- If the roles of presenting counsel and committee counsel are expressly provided for and defined, should this be done in the *Judges Act* or in the CJC's By-laws?

3.9 Council of the Whole

Once an inquiry committee has completed its hearings, it produces a report with a recommendation on whether the judge should be removed from office to the rest of the CJC, called Council of the Whole, who must then vote on whether it agrees with the recommendation of the inquiry committee and produce the report to the Minister required by s. 65(1) of the *Judges Act*. Council of the Whole is composed of all 39 CJC members,[52] but s. 10(2) of the CJC's By-laws sets quorum for meetings of Council of the Whole at 17.

Consideration by Council of the Whole flows from the provisions of the *Judges Act*, particularly s. 65(1), which tasks the whole of the CJC, not an inquiry committee, with providing a report of any inquiry to the Minister. Council of the Whole may request further inquiry by the inquiry committee on a given point and hear evidence, but, in practice, the only information not before the inquiry committee that it considers is submissions by the judge who is the subject of the inquiry. Until 2010, the judge could make submissions in writing and make an oral statement to Council of the Whole. Since 2010, the judge may only make written submissions.

While the Council of the Whole stage of the process is currently mandatory because of

[50] Submission of the CBA to the CJC, cited above, pp. 8-9.
[51] Ontario *Courts of Justice Act*, ss. 51.6(4) and (5).
[52] Any CJC members who have considered the complaint in question at prior stages of the process (e.g. as members of the review panel or the inquiry committee) cannot consider it again as part of Council of the Whole: see the CJC By-law, s. 11(2).

the wording of the *Judges Act*, the exact purpose of this phase of the process, and its relationship to the inquiry committee phase, is not clear or well-defined. Inquiry committees are expert bodies with a majority of judges who produce a report of their own following a thorough inquiry. Allowing an inquiry committee's report to be the final report on the basis of which the Minister must decide whether to ask Parliament to remove the judge would shorten the process.

On the other hand, chief and associate chief justices are judicial managers who have considerable collective experience with matters of judicial conduct. Council of the Whole brings the collective judicial conduct expertise of at least 17 of the country's chief and associate chief justices to bear on the matters that reach it. Council of the Whole also arguably has an important role to play in developing an approach to judicial misconduct that not only furthers the principles that underpin the judicial discipline process, but that is consistent over time and provides guidance to current and future judges. Council of the Whole, or some version of it, remaining as a stage of the discipline process may also have implications for limiting judicial review proceedings, which is discussed in section 3.12 below.

Having Council of the Whole remain a mandatory stage of the process raises a number of closely related questions. First, precisely how should its role be defined in relation to that of the inquiry committee? Should it approach the matter before it as if it were the primary decision-maker, arriving at its own view of the evidence? Or should it take an approach more akin to the reasonableness standard of review in administrative law, asking only whether the inquiry committee's conclusions are generally reasonable (i.e. fall within a range of reasonable outcomes) in light of its findings of fact?

Second, should Council of the Whole remain as close as reasonably possible to a Council of the whole CJC? Bringing together a large number (currently a minimum of 17) chief justices, associate chief justices and senior judges to decide a judicial conduct matter may raise logistical and other challenges susceptible of leading to process delays. Would a smaller body be able to discharge the same functions more easily or efficiently?[53]

Third, are Council of the Whole's powers adequate? Subsection 63(4) of the *Judges Act* currently gives Council of the Whole all the powers of a superior court, including:

> (a) the power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

[53] If Council of the Whole becomes a smaller body, it may be appropriate to call it something else, something more reflective of its size and role. This would also likely require an amendment to the *Judges Act*. As noted above, the Act's current wording (at s. 65) suggests that it is the CJC as a whole who is responsible for reporting to the Minister.

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

In addition, s. 12 of the CJC's By-laws state:

> 12. If the Council [of the Whole] is of the opinion that the Inquiry Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry Committee with directions.

Should Council of the Whole's powers be consolidated into a single provision and incorporated into the *Judges Act*? Should any powers other than those currently set out in the *Judges Act* and the By-laws be expressly enumerated or more clearly defined? For example, should Council of the Whole expressly have the power to not only refer a matter back to the inquiry committee for further inquiry, as is currently the case, but also the power to have a particular matter investigated by a new inquiry committee where appropriate in light of the requirements of procedural fairness?

Finally, what procedures should Council of the Whole adopt? Should the judge only be able to make submissions in writing, as is currently the case, or should the judge be able to make an oral statement, as had been the case until 2010? Should any such matters be left for Council of the Whole to determine, or should some be specified in the *Judges Act*?

In light of the foregoing considerations:

- Should Council of the Whole remain as a stage of the discipline process?
- If so:
    - How should its purpose be defined or clarified?
    - Would a smaller body be able to discharge the same or similar functions more easily or efficiently?
    - Are the Council of the Whole's powers adequate? Should it have the power to have a new inquiry committee inquire into a particular matter where appropriate in light of the requirements of procedural fairness?
    - Should Council of the Whole's powers be consolidated in a single provision and incorporated into the *Judges Act*?
    - What procedures should be adopted by Council of the Whole? Should the judge have the ability to make an oral statement or written submissions only? Should this be left for the CJC By-laws to specify or be incorporated into the *Judges Act*?

3.10 Range of Sanctions for Misconduct and Grounds for Removal from Office

Range of sanctions for misconduct

The possible range of sanctions that may be imposed for judicial misconduct is very limited at the federal level. The *Judges Act* expressly empowers the CJC to investigate allegations of judicial misconduct with a view to determining whether a judge should be removed from office, but it is silent on the possibility of sanctions short of removal. As a result, while the CJC has made use of warnings and expressions of concern, alternative remedies like apologies, undergoing courses of treatment, or continuing education have only been imposed with the agreement of the judge. By contrast, provincial judicial councils are generally empowered to impose a wide range of sanctions for judicial misconduct without the agreement of the judge. This includes warnings, reprimands, apologies to the complainant, suspensions from judicial duties with or without pay, and courses of continuing education, counselling, or treatment.[54]

As the CJC explained in its 2014 discussion paper, there are a variety of reasons why remedial measures imposed with the consent of the judge are indisputably a valuable and highly effective disciplinary tool.[55] Over time, they help establish standards of appropriate conduct and the appropriateness of certain remedies for certain types of misconduct. They may also give a complainant greater closure, and they *de facto* create a strong deterrent to engaging in similar misconduct in the future. Where a judge reoffends after having admitted the inappropriateness of the conduct once before, the CJC is also justified in pursuing a more serious sanction, including an inquiry that may lead to removal from office.

At the same time, the CBA has argued that a transparent and effective discipline process requires the discipline body to be able to impose non-consensual sanctions that are appropriate in the circumstances.[56] A process where only expressions of concern and removal from office may be imposed without consent risks producing incongruous outcomes where the sanction does not appear to match the gravity of the misconduct. This may operate to the advantage or to the detriment of the judge, but the result either way may be a loss of confidence in the process.

Finally, in considering an appropriate range of remedial options, it is worth bearing in mind the importance of public confidence to the judicial office and the ability to exercise judicial functions. In *A Place Apart*, Professor Friedland argued that suspension without pay is incompatible with the dignity of the office of a judge who is to continue serving as a judge. He also suggested that such a sanction may not be constitutional.[57] However, judges facing allegations of misconduct have been removed from duty with pay while investigations into their conduct ran their course.[58]

In light of the foregoing considerations:

---

[54] CJC discussion paper, cited above, p. 38.
[55] CJC discussion paper, cited above, pp. 39-40.
[56] Submission of the CBA to the CJC, cited above, pp. 12-13.
[57] Friedland, cited above, p. 140.
[58] For example, Douglas A.C.J. and Girouard J. both stopped sitting while investigations and inquiries into their conduct ran their course.

- Should the range of sanctions for misconduct short of removal be expanded? If so:
    - What sanctions should be available? Expressions of concern? Courses of continuing education or counselling? Suspension without pay? Others?
    - Should the range of sanctions be set out in the *Judges Act*, or should the CJC be empowered to impose sanctions short of removal with the specific sanctions left for the CJC to specify by way of By-laws?

Grounds for removal from office

As noted in the process overview in Part 2 of this paper, s. 65(2) of the *Judges Act* sets out four grounds for removing a judge from office: "(a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of that [judicial] office, or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office…". CJC inquiry committees and Councils of the Whole have taken the approach that if the judge's conduct is determined to fall within any of (a) to (d), the following question, usually called the "Marshall test", must be asked:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

Only if the answer to this question is yes will a recommendation for a judge's removal from office follow.

The grounds for removal in s. 65(2) appear broad enough to encompass the full range of circumstances that may warrant removal from the bench. They have never been found to be too narrow or overly broad. At the same time, the Marshall test arguably places the focus of proceedings that may lead to a judge's removal from office precisely where it ought to be: on the public confidence required for a judge to fulfill his or her judicial duties. Since the Marshall test has stood the test of time, it may be argued that it should be incorporated into the *Judges Act*, with the CJC expressly charged with applying it.

In light of the foregoing considerations:

- Should the Marshall test be incorporated into the *Judges Act*, with the CJC expressly charged with applying it?

3.11 Role of the Minister of Justice

The roles of the Minister of Justice and of Parliament at the end of the judicial discipline process are critical. As noted, Parliament's role as the body tasked with actually removing a judge from office is set out in s. 99(1) of the *Constitution Act, 1867*.[59] While

[59] The role of Parliament is discussed in more detail by the Federal Court in *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769 (T.D.), paras. 35-46.

the impact of an allegation of judicial misconduct on public confidence in the judge and the justice system are assessed through the various stages of the judicial discipline process, s. 99(1) unambiguously gives the final word on such matters to Parliament, the ultimate representative of the public in Canada.[60]

By contrast, the Minister of Justice's role at the end of the judicial discipline process is nowhere set out. It is commonly accepted that the Minister's role is to receive the report required of the CJC by s. 65(1) of the *Judges Act* and to decide whether to ask Parliament to remove the judge. In *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, at para. 64, the Federal Court of Appeal described the Minister's role in the following terms:

> As explained above, the Council has no power to remove a judge from office. That can be done only by the Governor General on the joint address of the Senate and House of Commons. If the question of removal is to be put before Parliament, it is the Minister who does so. It is open to the Minister to put the question to Parliament, or to decline to do so. Like all acts of an Attorney General, the Minister's discretion in that regard is constrained by the constitutional obligation to act in good faith, objectively, independently and with a view to safeguarding the public interest. It is presumed, in the absence of evidence to the contrary, that the Minister will fulfil that obligation.

The Minister's role, so defined, is consistent with the Minister's status, set out in s. 4 of the *Department of Justice Act*, as the "official legal adviser of the Governor General" responsible for, among other things, superintendence of "all matters connected with the administration of justice in Canada not within the jurisdiction of the governments of the provinces."[61] It is also arguably consistent with the Minister of Justice's traditional role as interlocutor between the judicial branch and the executive and legislative branches of government, a role that implies a duty to preserve and further public confidence in the judiciary and justice system.

In order to more clearly define the role of the Minister of Justice, should a provision capturing the spirit of the words of the Federal Court of Appeal in *Cosgrove*, quoted above, be included in the *Judges Act*? Are there aspects of the Minister's role not captured by the Federal Court of Appeal's words that should be expressly included in the *Judges Act*?

In light of the foregoing considerations:

- Should the Minister's role in receiving the CJC's report and recommendation be

---

[60] Section 71 of the *Judges Act* expressly preserves Parliament's role as set out in s. 99(1) despite the provisions of that same Act empowering the CJC to investigate allegations of judicial misconduct. That section states:

> 71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge, a prothonotary of the Federal Court or any other person in relation to whom an inquiry may be conducted under any of those sections.

[61] Canada *Department of Justice Act*, s. 4.

clarified in the *Judges Act*? If so, in what terms?

3.12 Judicial Review

Judicial reviews of the CJC fall into two broad categories: those brought by complainants challenging dismissal of a complaint by the CJC, and those brought by judges who are the subject of discipline proceedings. As already noted, the latter category of applications has been a particular concern because it has led to increasing costs and delays.

As the Federal Court found in *Douglas v. Canada*, 2014 FC 299, immunizing decisions of the CJC and its committees from review by the courts would "offend the principle that all holders of public power should be accountable for their exercises of power."[62] The Court also went on to note that the availability of judicial review was in fact important to the efficacy of the judicial discipline process:

> [122] [… T]he efficacy of the design created by Parliament in 1971 would be compromised if judicial review were unavailable. The outcome of the Council and Inquiry Committee's work is a report with recommendations to the Minister of Justice. Absent the availability of judicial review, the Minister, and ultimately Parliament, would be required to assess whether the process that had led to the report was conducted within the Council's statutory authority, and was procedurally fair and free of errors of law. […]
>
> [123] [… T]he Minister and Parliament are wholly ill-equipped to adjudicate the potentially wide array of legal arguments that may be raised in respect of the judicial conduct proceedings. A judge who is subject to the CJC and Inquiry Committee's investigation or inquiry would be deprived of the opportunity to test the fairness and legality of the proceedings in a court of law. That the judge may "appeal" the outcome to the Minister of Justice and, ultimately, to Parliament is not an answer if those bodies lack the capacity to assess those issues.

Complainants who disagree with a decision to dismiss a complaint must, of course, also be able to apply for judicial review, particularly since complaints dismissed by the CJC never reach the Minister and Parliament.

While procedural fairness concerns militate in favour of judicial review remaining an option for complainants and judges alike, judicial review applications could be expedited by having them proceed directly to the Federal Court of Appeal (FCA) or directly to the Supreme Court of Canada with leave. The Council of the Whole stage of the process could also be formalized as a quasi-appellate stage, which could help limit judicial review of inquiry committees.

---

[62] *Douglas v. Canada (A.G.)*, 2014 FC 299, para. 119. See also *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220 cited in *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, para. 35; *Dunsmuir v. N.B.*, [2008] 1 S.C.R. 190, paras. 31, 52, 159.

Expediting judicial review proceedings

Having judicial reviews proceed directly to the FCA would save one, in some cases two, levels of review.[63] The decisions of the FCA would be subject to appeal to the Supreme Court, but only with leave of that Court. Direct applications for judicial review to the FCA are not novel; the Court has a great deal of experience hearing judicial review applications directly from administrative tribunals. Subsection 28(1) of the *Federal Courts Act* contains a list of federal administrative tribunals whose decisions are directly reviewable by the FCA. The CJC and its committees could simply be added to the list. Judicial review proceedings could then be further expedited by establishing timeframes for hearing and determination by the FCA.

Judicial review by the FCA has one disadvantage. The Council of the Whole, composed of a minimum of 17 CJC members, currently acts *de facto* as a second order level of review of the work of inquiry committees. Where an application for judicial review is brought in respect of Council of the Whole, having three superior court judges from the FCA (the FCA sits in panels of three) sit in judicial review of at least 17 of their colleagues may appear duplicative or even counter-intuitive to the reasonable observer.

Judicial review applications could also proceed directly to the Supreme Court with leave of that Court. Having the country's final court of appeal sit in judicial review of the Council of the Whole would seem less duplicative. Moreover, in some cases, direct review by the Supreme Court would also have the advantage of further expediting judicial review proceedings by saving an extra level of review.

Direct applications for judicial review to the Supreme Court would also have a few disadvantages. No other administrative tribunal has its decisions directly reviewable by the Supreme Court. This is in part because of the volume of the Court's caseload, but also in part because the Court is only rarely called upon to decide matters without the benefit of consideration by a lower court.[64]

These concerns could be addressed in part by having judicial reviews from different stages of the process proceed directly to different courts. For example, judicial review applications of Council of the Whole could be brought directly to the Supreme Court, while other judicial review applications, such as those of decisions to screen out or dismiss complaints, which are taken at earlier stages of the process and generally do not lead to process delays, could be brought to the FCA.

In addition, an express provision could be included in the *Judges Act*, precluding applications for judicial review by judges facing inquiry proceedings until Council of the Whole has reported. This provision could be bolstered by formalizing Council of the

---

[63] At the discretion of the Chief Justice of the Federal Court, judicial review applications can be case managed by prothonotaries, whose decisions are subject to appeal to a Federal Court judge. Appeals from the decisions of prothonotaries contributed to the delays in the judicial review proceedings arising from the Douglas inquiry.

[64] References, which may only be brought by the federal government, are the only obvious exception.

Whole as a reconsideration stage, a remedy that judges facing inquiries must exhaust before applying for judicial review.

Finally, in the first Douglas inquiry, the independent (presenting) counsel applied for judicial review. This is the only time a judicial review proceeding was commenced by someone other than a complainant or the judge who is the subject of the inquiry. As already discussed, in the context of judicial discipline proceedings, the principal purpose of judicial review is to ensure procedural fairness for judges and complainants. Presenting counsel has no rights at stake. Should the two-counsel model be restored going forward, there is arguably no need for presenting counsel to be able to apply for judicial review, and this could be specifically precluded.

In light of the foregoing considerations:

- Should judicial reviews be expedited by having them proceed directly to the FCA? Directly to the Supreme Court with leave?
    - Should judicial reviews of the Council of the Whole proceed directly to the Supreme Court with leave, with other judicial reviews proceeding directly to the FCA?
- Should judicial reviews by judges facing inquiries be expressly precluded until Council of the Whole has reported? What would this entail for the Council of the Whole stage?
- Should timeframes for hearing and determination of judicial reviews be established? At the FCA? At the Supreme Court?
- If the two-counsel model is reinstated, should presenting counsel be precluded from applying for judicial review?

3.13 Legal Fees

Currently, the legal fees of counsel to an inquiry (be they committee counsel or presenting counsel) and all legal fees incurred by a judge in the course of discipline proceedings are paid by the federal government. All counsel must bill based on the Department of Justice tariff, which establishes hourly rates for any outside counsel retained by the Department. These rates are heavily discounted and are not the rates at which a lawyer would normally bill.

However, despite the tariff, the cost of paying legal fees incurred by judges facing discipline proceedings has recently risen sharply. The most important contributor to increased costs by far has been a rise in the number and complexity of judicial review proceedings. Options for expediting and limiting judicial review proceedings were explored in the previous section of this paper. This section will focus on options for reducing the incurring of legal fees.

Current practice

The government's current practice is to pay all legal fees incurred by a judge in the course of discipline proceedings, including those incurred during the investigation stage,

during inquiry committee proceedings, and during judicial review proceedings, if any. This practice has attracted some criticism on two general grounds:

- Canadians facing legal proceedings, including those facing serious criminal charges and those who are professionals facing professional discipline bodies, do not have their legal fees paid by the government unless they qualify for some form of legal aid.

- Paying judges' legal fees encourages excessive litigation. More specifically, it encourages judges subject to discipline proceedings to judicially review outcomes unfavourable to them because they face no adverse consequences if they lose. Since judges necessarily remain in office while conduct proceedings are on-going, lengthening discipline proceedings may also in some circumstances benefit a judge by, for example, allowing him or her to obtain the years on the bench necessary to qualify for a pension.[65]

It is important to first be clear about the scope of the government's practice of paying legal fees incurred in the course of judicial discipline proceedings. If allegations of misconduct against a judge give rise to legal proceedings such as a criminal prosecution, a civil suit or a human rights complaint, the judge must, like any other Canadian who does not qualify for some form of legal aid, pay any legal fees incurred in mounting a defence against the charges. Only if allegations of misconduct give rise to a complaint to the CJC will a judge have his or her legal fees paid by the government, and only in respect of the judicial discipline process.

The rationale for this practice flows in part from the constitutional nature of the judicial office and the judicial discipline process. The process is constitutionally required, flowing from both s. 99 of the *Constitution Act, 1867* and the security of tenure component of the constitutional principle of judicial independence. Subsection 99(1) requires that superior court judges hold office during good behavior and be removable only by Parliament. The security of tenure component of judicial independence requires that, before a judge can be removed from office, the judge be given an opportunity to be heard and adduce evidence at a hearing.[66] While it is true that professionals in other fields do not have the legal costs they incur during discipline proceedings paid by the government, they do not occupy offices expressly provided for, and protected by, the Constitution. Because judges are constitutionally guaranteed their offices during good behavior and removable only by Parliament, a judge should arguably not be forced to resign his or her office simply because of the prohibitive cost of mounting a defence to allegations of misconduct.

It is also important to consider the nature of a judge's day-to-day functions. The end result of a judge's job – to adjudicate disputes fairly and in accordance with the law – is in almost every case a litigant who is at best disappointed, and in some cases angry at

[65] Where a judge does not hear cases while discipline proceedings are on-going because of the seriousness of the allegations, lengthening proceedings also places a strain on the judge's court.
[66] *Therrien (Re)*, 2001 SCC 35, para. 39

the judge for failing to see matters his or her way. In some cases, a disgruntled litigant will be tempted to file a complaint with the CJC. Indeed, we understand that disgruntled litigants do so on a regular basis. Allegations of misconduct and the discipline process must not be allowed to become a means of getting back at a judge for having decided a case a certain way.[67] Ensuring that judges can decide cases free of the concern that a disgruntled litigant may seek to force him or her to incur costs in defending against a complaint furthers judicial independence, and thus serves the public interest.

Some may argue that the optional nature of judicial review proceedings brought by a judge means that the practice of paying legal fees should not apply to such proceedings. However, as noted in the previous section of this paper, judicial review forms an integral part of the discipline process. Accordingly, the rationales for paying a judge's legal fees should arguably also apply to legal fees incurred in the course of any judicial review proceedings stemming from the judicial discipline process.

At the same time, payment by the government of a judge's legal costs must be subject to such reasonable limits as are necessary for ensuring public confidence in the discipline process. Thus, while no process is perfect and some delay may occur from time to time in discipline proceedings, excessive and costly delays due to unfounded applications for judicial review brought by the judge will undermine public confidence in the process, particularly where they allow a judge facing imminent removal to accrue pensionable service.

Options for reform

Options for reform include measures for discouraging excessive litigation by way of judicial review, such as:

(1) A judge could be required to repay the costs of bringing a judicial review application where the reviewing court found the application to be frivolous or vexatious.

(2) A reviewing court could also be empowered to impose costs payable by the judge where the court considers it appropriate in the circumstances even if the application was not found to be frivolous or vexatious.

(3) A judge could be initially required to pay his or her own legal fees on judicial review, with the reviewing court empowered to award the judge all or part of

[67] Several courts have relied upon a similar rationale to find that payment by the government of legal fees incurred by a judge in the course of discipline proceedings is not only beneficial for judicial independence, but is in fact mandated by it, and thus a constitutional requirement. The Quebec Superior Court and Quebec Court of Appeal have both arrived at this conclusion in respect of legal fees incurred by provincial court judges in the course of discipline proceedings: *Ruffo c. Québec (Ministère de la Justice)*, [1997] J.Q. 3658 (C.S.Q.) (Q.L.); *Fortin c. Procureur général du Québec*, [2002] J.Q. no. 6861 (C.S.Q.) (Q.L.); *Hamann c. Québec (Ministère de la justice)*, [2001] J.Q. no. 2046 (C.A.Q.) (Q.L.). In its 2006 decision in *Bourbonnais v. Canada (A.G.)*, 2006 FCA 62, the Federal Court of Appeal found in obiter that the same reasoning would apply to federally-appointed judges.

those costs should it deem it appropriate in the circumstances.

(4) The policy of paying a judge's legal fees on judicial review could exclude judicial review applications brought once it has been determined that a complaint does not warrant removal from office.

Option (1) would discourage frivolous and vexatious litigation, and would seem entirely consistent with the purpose of paying a judge's legal fees. The terms "frivolous" and "vexatious" have well-established meanings in the case law. A reviewing court could simply apply the existing jurisprudence to determine whether they apply. The finding could then act as an automatic trigger for repayment of legal costs.

Option (2) may also help discourage excessive litigation without deterring a judge from pursuing a legitimate matter on judicial review. The reviewing court could be empowered to determine, based on existing rules for awarding costs and/or on other factors expressly set out in the *Judges Act*, that although an application for judicial review did not rise to the level of frivolous or vexatious, an award of costs payable by the judge is nonetheless appropriate in the circumstances. The reviewing court could be expected to be sensitive to the important interests at stake, including the need to deter unnecessary litigation, and the importance of not deterring judges facing inquiries from raising legitimate matters on judicial review. However, as an added measure, these could be prescribed as factors to be considered by the reviewing court.

Option (3) may be seen as inconsistent with the purpose of paying a judge's legal fees because, under this option, the cost of bringing a judicial review application may still deter a judge from pursuing a legitimate matter on judicial review. However, the extent of any inconsistency could be mitigated by making entitlement to full cost recovery by the judge the general rule so long as a judge's application was found by the reviewing court to have had some merit.

Finally, regarding Option (4), not paying a judge's legal fees for judicial review applications brought once it has been determined that a complaint does not warrant removal from office would seem fully consistent with the purpose of paying a judge's legal fees as explained above. Where removal from office is not a possibility, a judge's security of tenure is not in jeopardy, and the rationale for paying a judge's legal fees is simply not applicable. To our knowledge, no judicial review applications have been brought by judges not facing potential removal from office. However, such applications may occasionally be brought if the range of non-consensual sanctions for misconduct is expanded.

In light of the foregoing considerations:

- Should a judge be required to repay the costs of bringing a judicial review application if the reviewing court finds that the application is frivolous or vexatious?
- Should a reviewing court also be empowered to impose costs payable by the judge even if the application was not found to be frivolous or vexatious?

    - If so, should the reviewing court be expressly required to consider factors such as the need to deter unnecessary litigation, and the importance of not deterring judges facing inquiries from raising legitimate matters on judicial review?
- Should a judge be initially required to pay his or her own legal fees on judicial review, with the reviewing court empowered to award the judge all or part of those costs should it deem it appropriate in the circumstances?
    - If so, should full cost recovery by the judge be the rule unless the application was found by the reviewing court to be frivolous or vexatious?
- If the range of non-consensual sanctions for misconduct is expanded, should the policy of paying a judge's legal fees exclude judicial review applications brought after it has been determined that a complaint is not serious enough to warrant removal from office?

3.14 Timeframes

Many administrative processes, including some provincial judicial discipline processes, impose timeframes for the completion of different procedural steps in order to help ensure a more timely and efficient process. The federal judicial discipline process currently includes very few timeframes. Establishing additional timeframes may help minimize delays.

If new timeframes are to be established, the appropriate legislative instruments will need to be considered. Should they need to be changed, establishing them in a regulation or via the CJC's By-laws would provide greater flexibility than establishing them in the *Judges Act*.

In light of the foregoing considerations:

- Should timeframes be established in respect of certain stages of the process, such as review by the Chair of the Conduct Committee, review by a review panel, completion of the inquiry committee's report once hearings have concluded, and/or review by Council of the Whole?
- How should they be established? In the *Judges Act*? In a regulation? In the CJC's By-laws?

3.15 A Public Process: Striking a Balance among Confidentiality, Transparency, and Accountability

Given its overarching goal of maintaining public confidence in the judiciary and the judicial system, the judicial discipline process must be understandable by, and visible to, the general public. At the same time, a number of important considerations, including the weighty consequences at stake for judges accused of misconduct, speak to the need for a careful balance. This tension exists at all stages of the process, but the competing considerations make it appropriate to strike the balance in different ways at different stages.

When a complaint is referred to an inquiry committee, the judicial discipline process becomes presumptively public. As already discussed in section 3.7, a CJC inquiry committee can, like any professional discipline tribunal, hold hearings behind closed doors and issue publication bans, but these are exceptional measures taken only for compelling reasons that outweigh the important considerations in favour of open hearings and public access.

However, during the stages of the process that precede the inquiry committee stage, key considerations militating in favour of confidentiality are in play. This raises an important question: how should such considerations be balanced with other key principles that underpin the discipline process, particularly transparency and accountability of judges for their conduct?

Complainants cannot be precluded from making their complaints public. Moreover, some have argued that at no time during a judicial discipline process is any degree of confidentiality regarding complaints appropriate. The Toronto Star, for example, has recently launched a broad-based challenge under s. 2(b) of the Charter (right to freedom of expression) to the provisions of Ontario's *Courts of Justice Act* governing confidentiality in Ontario's judicial discipline process.[68] The Star's s. 2(b) arguments reference judicial accountability and process transparency considerations.

On the other hand, for many of the same reasons already discussed under "Anonymous Complaints" in Section B above, there are strong arguments for ensuring that complainants can make complaints that remain confidential unless and until the matter is found to be so serious that it may warrant the judge's removal and an inquiry is held. Complainants in vulnerable positions may not come forward and complain if all complaints are presumptively public.

Judicial independence considerations also arguably militate strongly in favour of maintaining confidentiality unless a complainant has decided to make his or her complaint public.[69] It is important to remember that where a complaint does not lead to a judge's removal from office, the judge must be able to return to his or her duties on the bench. Wholly unfounded allegations of misconduct are not infrequently made against a judge, usually by a litigant unhappy that the judge in question ruled against them. Moreover, in light of the nature of the judicial role and office, the extent to which judges can publicly defend themselves against allegations of misconduct is limited. As a result, disclosure of such allegations before any investigation has taken place to ascertain key facts may serve to unjustifiably undermine public confidence in the judge.

The distinction between the confidentiality of complaints and of information gathered in the investigation of complaints is also critical. Regardless of whether a complaint is

---

[68] See https://www.thestar.com/news/gta/2014/10/10/sweeping_secrecy_surrounding_complaints_against_judges_challenged_by_star.html (accessed April 10, 2016).

[69] See the discussion of public interest privilege in *Slansky v. Canada*, 2013 FCA 199, and in particular the reasons of Mainville, J.A at paras 150-155.

made public, confidentiality of information gathered in the investigation of a complaint is important because, as the Federal Court of Appeal has found,[70] it promotes full and frank disclosure by those with information relevant to a complaint. Most investigative processes, from police investigations to other types of professional discipline investigations, operate with a high degree of confidentiality for that same reason.[71] Confidentiality at the investigation stage will in many cases also be important in order to ensure protection of the legitimate privacy interests of the judge who is the subject of the complaint, as well as of others providing information as part of the investigation.[72]

At the same time, where a complaint has been made public, it makes little sense to withhold general information about the progress of the complaint through the discipline process. Withholding such information does nothing to promote public confidence in the process, and may serve to make the process appear unnecessarily opaque. Moreover, once the process with respect to a complaint that was not referred to an inquiry committee has run its course and the complaint is resolved, there is arguably a compelling public interest in making public the fact of the complaint and its resolution, together with such details as can be released about it without identifying the judge, the complainant, and any key witnesses that may need to be protected, and without undermining the effectiveness of the process going forward. Releasing as many details about each complaint as is consistent with the purpose of confidentiality at the initial stages of the process helps the general public understand the role of the CJC, and fosters confidence that the process is fulfilling its central role of holding judges to account for their conduct.

In practice, the foregoing considerations are difficult to balance because some complainants choose to make their complaints public and some do not, and, once made public, some complaints attract national media attention while others do not. In an attempt to be as transparent as possible without undermining judicial independence or compromising the effectiveness of investigations, the CJC has adopted a practice of issuing information by way of press release on the progress of complaints at pre-inquiry stages of the process that have garnered a certain amount of attention[73] (although the CJC keeps complainants informed as to the progress of a complaint whether or not the complaint has attracted media attention and a press release is issued).

While the CJC's current practice strikes a balance between transparency and confidentiality, it may be seen by some as arbitrary. At the very least, it may be argued that the same practice should be clearly followed for all complaints that have been made public regardless of how much media interest they have garnered. The general public may also benefit from a clear, more formal articulation of the important role of confidentiality during the pre-inquiry stages of the discipline process in the form of a statutory provision, regulation, or policy instrument.

---

[70] See the previous note.
[71] Friedland, cited above, at p. 135.
[72] *Slansky v. Canada*, 2013 FCA 199, at paras. 150-155.
[73] CJC discussion paper, cited above, p. 37.

Moreover, as the CJC suggested in its 2014 discussion paper, making additional information available about the judicial discipline process would improve the process' transparency, and would also further the objective of greater accountability. This additional information could include:

- how many complaints were screened out on each of the grounds for screening out complaints;
- how many complaints were closed at each stage of the process;
- the median time taken for a complaint to pass through each stage of the process; and
- brief descriptions of each complaint, subject to the confidentiality considerations discussed above.

Additional information such as this could be provided on the CJC's website or by way of its annual report.

In light of the foregoing considerations:

- What information should be provided about complaints in the pre-inquiry stages of the discipline process?
    - What factors should be considered in deciding what information to provide and when?
    - Should this be set out in the *Judges Act*? In a regulation/By-law? In a policy instrument?
- What, if any, additional information should the CJC provide about the judicial discipline process?
- Should the information the CJC is required to provide about the process be set out in the *Judges Act*? In a regulation? In the CJC's By-laws?

PART 4: CONCLUSION

Canada's judiciary is justly renowned for its outstanding quality and integrity. Canadians are extremely well-served by a superior court judiciary that is professional, hard-working, diligent and competent, and that continually strives to serve the public interest.

The judicial discipline process is one component of a wider system designed to safeguard a strong, independent and high quality judiciary. While beyond the scope of this paper, it must be supported by a judicial appointments process that ensures that those who are appointed to judicial office are of the highest personal and professional probity. The two go hand in hand.

The Government is committed to ensuring a fair, transparent, efficient, and cost-effective judicial discipline process that holds judges to account for their conduct while respecting judicial independence. Only a process that simultaneously upholds these principles can command the confidence of the general public and the judiciary alike.

The Government welcomes the views of all interested stakeholders and members of the public on the questions posed in this paper. It requests that any comments be provided by August 31, 2016. All comments will be reviewed and considered before any amendments to the *Judges Act* are proposed.

LIST OF QUESTIONS FOR DISCUSSION

This section reproduces the list of questions raised for discussion under each section in Part 3.

3.1 Who May Complain and Screening Out of Complaints

- Should the fact that anyone may complain to the CJC be clearly set out in the *Judges Act*?
- Should the grounds for screening out of complaints be set out in the *Judges Act*?
- Should paragraph (c) of these grounds be retained in its existing form?

3.2 Anonymous Complaints

- Should anonymous complaints continue to be accepted?
- Should the approach to anonymous complaints be set out in the *Judges Act*?

3.3 Role of Complainants

- Does the current process strike the right balance in terms of the role of complainants?
- Could current practices and procedures related to keeping complainants informed be improved? How?
- Should current practices and procedures related to keeping complainants informed be incorporated into the *Judges Act*?

3.4 Complaints from Attorneys General

- Should s. 63(1) of the *Judges Act* be amended so that the right of AGs to oblige the CJC to hold an inquiry into a complaint made by them is triggered only if the CJC dismisses the complaint?
- Should each provincial and territorial AG be limited to being able to require an inquiry into the conduct of superior court judges of their own jurisdiction and the judges of the Supreme Court of Canada?

3.5 Involvement by Lay Persons, Lawyers and *Puisne* Judges in the Discipline Process

Lay persons

- Should every review panel and inquiry committee include a lay person, defined as someone who is neither a lawyer nor a judge?
- If lay persons serve on review panels and/or inquiry committees, who should designate them? The CJC? The Minister of Justice?
- Should the role of lay persons be set out in the *Judges Act*?

Lawyers

- Should one of the members of every review panel be required to be a lawyer? Or is having a lay (non-lawyer) member sufficient?
- Should lawyers continue to sit on inquiry committees? How many should sit on each committee?
- Who should designate the lawyer members of review panels and/or inquiry committees?
- Should any requirement that lawyers sit on review panels be set out in the *Judges Act*? Should the current *Judges Act* provision regarding the participation of lawyers on inquiry committees be changed?

Puisne judges

- Should one of the judicial members of every inquiry committee be required to be a *puisne* judge?
- Should *puisne* judges be represented on the CJC's Judicial Conduct Committee?
- If *puisne* judges are required to be represented on review panels, inquiry committees and/or the Conduct Committee:
    - Who should select them? The CJC? The Canadian Superior Court Judges' Association?
    - Should the role of *puisne* judges in this regard be set out in the *Judges Act*?

3.6 Role of Review Panels

- Should review panels be expressly required to issue reasons for recommending against an inquiry, as well as for recommending in favour of one?
- Should the composition, role and responsibilities of review panels be set out in the *Judges Act*?

3.7 Inquiry Committees

Inquiry scope

- Should an inquiry committee be precluded from considering a complaint that has not been investigated by the CJC?
- Would a review panel's reasons and statement of issues, together with the original complaint, be sufficient to constrain the scope of an inquiry while providing the necessary flexibility? Or should there exist a mechanism for fixing more precisely the scope of an inquiry?
- If the latter:
    - What actor should determine the scope of an inquiry committee's inquiry? The review panel? The Chair of the Conduct Committee?
    - How would an inquiry's scope be broadened should this become necessary? For example, would the inquiry committee itself seek that the scope of its inquiry be broadened by making a request of the body responsible for fixing the scope of its inquiry? Would there have to be a hearing at which judge's counsel could make submissions?

Publication bans and in camera hearings

- Should the *Judges Act* include a requirement for inquiry committees to provide reasons before going *in camera* or issuing a publication ban?
- Should the *Judges Act* expressly state what factors an inquiry committee should weigh when considering requests for publication bans or going *in camera*?
- Should a provision requiring notice to interested parties an the media, like the one currently found in the Handbook, be incorporated into the *Judges Act*?

Rules of procedure for inquiries

- Should the *Judges Act* provide for, or require the CJC to establish, procedures and practice guidelines for inquiry committee hearings?
- Should the CJC be required to consult on the contents of, and changes to, these guidelines? If so, who should be consulted?
- Should the CJC be required to provide notice on any changes to these guidelines? If so, who should be notified?

3.8 Presenting Counsel and Committee Counsel

- How should the broader public interest best be represented during inquiry committee proceedings? Through presenting counsel? Is that possible if presenting counsel is subject to the direction of the inquiry committee?
- Should every inquiry involve presenting counsel? How should the role of presenting counsel be defined?
- Should every inquiry committee be authorized to retain committee counsel? How should that role be defined?
- If the roles of presenting counsel and committee counsel are expressly provided for and defined, should this be done in the *Judges Act*, or in the CJC's By-laws?

3.9 Council of the Whole

- Should Council of the Whole remain as a stage of the discipline process?
- If so:
    - How should its purpose be defined or clarified?
    - Would a smaller body be able to discharge the same or similar functions more easily or efficiently?
    - Are the Council of the Whole's powers adequate? Should it have the power to have a new inquiry committee inquire into a particular matter where appropriate in light of the requirements of procedural fairness?
    - Should Council of the Whole's powers be consolidated in a single provision and incorporated into the *Judges Act*?
    - What procedures should be adopted by Council of the Whole? Should the judge have the ability to make an oral statement or written submissions only? Should this be left for the CJC By-laws to specify or be incorporated into the *Judges Act*?

3.10 Range of Sanctions for Misconduct and Grounds for Removal from Office

Range of sanctions for misconduct

- Should the range of sanctions for misconduct short of removal be expanded? If so:
    - What sanctions should be available? Expressions of concern? Courses of continuing education or counselling? Suspension without pay? Others?
    - Should the range of sanctions be set out in the *Judges Act*, or should the CJC be empowered to impose sanctions short of removal with the specific sanctions left for the CJC to specify by way of By-laws?

Grounds for removal from office

- Should the Marshall test be incorporated into the *Judges Act*, with the CJC expressly charged with applying it.?

3.11 Role of the Minister of Justice

- Should the Minister's role in receiving the CJC's report and recommendation be clarified in the *Judges Act*? If so, in what terms?

3.12 Judicial Review

- Should judicial reviews be expedited by having them proceed directly to the FCA? Directly to the Supreme Court with leave?
    - Should judicial reviews of the Council of the Whole proceed directly to the Supreme Court with leave, with other judicial reviews proceeding directly to the FCA?
- Should judicial reviews by judges facing inquiries be expressly precluded until Council of the Whole has reported? What would this entail for the Council of the Whole stage?
- Should timeframes for hearing and determination of judicial reviews be established? At the FCA? At the Supreme Court?
- If the two-counsel model is reinstated, should presenting counsel be precluded from applying for judicial review?

3.13 Legal Fees

- Should a judge be required to repay the costs of bringing a judicial review application if the reviewing court finds that the application is frivolous or vexatious?
- Should a reviewing court also be empowered to impose costs payable by the judge even if the application was not found to be frivolous or vexatious?
    - If so, should the reviewing court be expressly required to consider factors such as the need to deter unnecessary litigation, and the importance of not deterring judges facing inquiries from raising legitimate matters on judicial review?
- Should a judge be initially required to pay his or her own legal fees on judicial

review, with the reviewing court empowered to award the judge all or part of those costs should it deem it appropriate in the circumstances?
    - If so, should full cost recovery by the judge be the rule unless the application was found by the reviewing court to be frivolous or vexatious?
- If the range of non-consensual sanctions for misconduct is expanded, should the policy of paying a judge's legal fees exclude judicial review applications brought after it has been determined that a complaint is not serious enough to warrant removal from office?

3.14 Timeframes

- Should timeframes be established in respect of certain stages of the process, such as review by the Chair of the Conduct Committee, review by a review panel, completion of the inquiry committee's report once hearings have concluded, and/or review by Council of the Whole?
- How should they be established? In the *Judges Act*? In a regulation? In the CJC's By-laws?

3.15 A Public Process: Striking a Balance between Confidentiality, Transparency and Accountability

- What information should be provided about complaints in the pre-inquiry stages of the discipline process?
    - What factors should be considered in deciding what information to provide and when?
    - Should this be set out in the *Judges Act*? In a regulation/By-law? In a policy instrument?
- What if any additional information should the CJC provide about the judicial discipline process?
- Should the information the CJC is required to provide about the process be set out in the *Judges Act*? In a regulation? In the CJC's By-laws?