THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

March 21, 2023

Via email: lcjc@sen.parl.gc.ca

The Honourable Brent Cotter
Chair, Standing Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa ON K1A 0A4

Dear Senator Cotter:

Re: Bill C-9 – *Judges Act* Amendments

I am writing on behalf of the Canadian Bar Association in support of Bill C-9, *An Act to amend the Judges Act,* which was introduced on December 16, 2021. By replacing the existing complaints process regarding alleged misconduct with a new process, Bill C-9 changes how complaints against federally appointed judges are handled.

The CBA is a national association of 37,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. Our comments were prepared by the CBA Judicial Issues Subcommittee.

The *Judges Act* establishes a discipline process for federally appointed judges in response to complaints filed about their conduct. Recent government consultations underscored the length of time required to investigate these complaints and the consequent costs of investigation, including the potential cost of a member of the Bench being unable to fulfill their duties while defending a complaint for misconduct.

The CBA commented on the state of the judicial discipline process in its 2014 submission to the Canadian Judicial Council (CJC).[1] For judicial discipline proceedings, our 16 recommendations were to ensure that the objectives of balancing the independence of the judiciary and the public's confidence in the administration of justice were respected in the process.[2] The CJC and Justice Canada responded with their own reports which culminated in the amendments to the *Judges Act* proposed by the Minister of Justice in Bill C-9.

The CJC is a federal body accountable for managing the judicial discipline process established in the *Judges Act*. It is empowered to investigate public complaints and referrals from the Minister of

1 Review of Judicial Conduct Process of the Canadian Judicial Council (CBA: Ottawa, 2014)

2 *Ibid* at pages 2-3

Justice or a provincial or territorial attorney general about the conduct of federally appointed judges. In response to concerns about the process and its accountability, it issued a 2014 background paper with options for potential reform.[3] The CJC stated the following on the need for reform:

> [a] key aspect of ensuring access to justice for Canadians is the confidence that they have in their judges and in the justice system … [t]he Chief Justice and the Council have been calling for the past few years for reforms to be brought to the judicial conduct process, in order to make it more efficient and transparent, and we are hopeful that these reforms will be enacted soon.[4]

Justice Canada examined how to address questions surrounding judicial misconduct in its 2016 white paper[5] and online consultation. Bill C-9 follows its public consultation on potential reforms and its report which highlighted significant increases in costs and delays and the need for reforms to ensure the process was cost effective. Underscoring the potential for delays and associated costs of the current process is the judicial misconduct case of *Girouard v. Canada (Attorney General)*[6] initiated in 2012 and concluded in 2021 following exhaustive appeal and judicial review proceedings.

Bill C-9 amends the process through which the conduct of federally appointed judges is reviewed by the CJC in three significant ways:

- it creates a process for reviewing allegations not serious enough to warrant removal from office;
- it improves the process by which recommendations on removal are made to the Minister; and
- it ensures that the determination of pensionable service for judges ultimately removed from office reflects the actual time of service and does not include the time of review.

The process for screening complaints that may not be serious enough to warrant removal from office is a positive development. Bill C-9 imposes mandatory sanctions such as counselling, continuing education and reprimands in these cases. This process saves the CJC time, ensures that judicial resources are well-managed, and minimizes the amount of time a judge might potentially spend defending a frivolous complaint.

Improving the process by which recommendations can be made to the Minister of Justice will ensure that meritorious claims are moved forward, ensuring efficient use of departmental resources. Judges who face removal would have access to an appeal panel comprised of three CJC members and two judges and finally to the Supreme Court of Canada (SCC), if that Court agrees to hear the appeal. This streamlines the current process for court review of CJC decisions, which involves judicial review by two additional levels of court (the Federal Court and Federal Court of Appeal) before a judge can ask the SCC to hear their case.

It is critical that judges are able defend their conduct through a fair process[7] and be satisfied that, if they are ultimately exonerated, their pensionable service will be protected. However, it is equally

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3 Review of the Judicial Conduct Process of the Canadian Judicial Council, online.

4 See Canadian Lawyer, Canada introduces legislation to change complaints process under Judges Act, online.

5 See Possibilities for Further Reform of the Federal Judicial Discipline Process, online.

6 SCC 39379, application for leave to appeal dismissed on February 25, 2021.

7 For an excellent discussion of the duty of procedural fairness in the investigative context, see the CJC Discussion Paper at pages 12-17.

important that time spent during that process does not contribute to pensionable service if the complaint results in removal of the judge from office.

Judicial independence and judicial accountability are at the foundation of Bill C-9 and ensure the integrity of the administration of justice. If our judiciary is to be respected and trusted, the public must be satisfied that judges are both independent of external influences and accountable for their conduct on the bench.

When he reintroduced the bill, Minister of Justice Lametti said:

> Canadians need to know that the judicial system is fair to all …. Canadian society is changing and so are our expectations of judicial behaviour and accountability. While rare, complaints against judges that could result in removal from the bench should be dealt with in a more timely, cost-effective and fair manner … This bill aims to accomplish that.[8]

In our view, Bill C-9 strikes a fair balance between the right to procedural fairness and public confidence in the integrity of the justice system with the discipline of judges who form the core of that system. The proposed amendments enhance the accountability of judges, builds transparency, and creates cost-efficiencies in the process for handling complaints against members of the Bench.

One matter we did not address with the House of Commons Committee on Justice and Human Rights is whether Bill C-9 should include an intermediate level of appeal from a final decision of the CJC to the Federal Court of Appeal or whether the only avenue of appeal from a decision of an appeal panel is to the Supreme Court of Canada (SCC), with leave from that Court. The CBA supports the creation of an appeal to the Federal Court of Appeal which the aggrieved judge may access by right prior to proceeding, if necessary, to seek leave to appeal to the SCC.

The CBA respects the challenging work of the CJC. We trust that it performs its judicial discipline duties with the greatest care, particularly given the gravity of the ultimate penalty available to them, recommending the removal of a judge. This consequence is effectively a lifetime result, as the possibility of a judge subject to removal successfully reapplying for an appointment is remote.

We see two compelling reasons to create an appeal by right to a court below the SCC.

First, as a matter of natural justice, it ensures a right of external judicial oversight to the discipline process. For a judge subject to an appeal panel decision, obtaining leave to appeal to the SCC may be difficult. Cases with otherwise meritorious grounds may not meet the test on which the SCC grants leave to appeal, namely that it must raise an issue of national importance. This threshold may be so unattainable that a judge subject to a decision of an appeal panel may not obtain an appeal or judicial review if the CJC has acted in error.

Second, the judiciary is such a vital part of Canada's governance that the public must be assured that judicial discipline is carried out in an open and accountable manner, with clear avenues of appeal and redress. Since the CJC process does not adhere to the open courts principle and a public appeal may therefore not be available, the public can perceive it as lacking transparency. An appeal by right from the CJC's decision offers an opportunity to shed light on the process within the CJC.

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8 See Press Release, Canada introduces legislation to change complaints process under Judges Act, online.

As mentioned, leave to appeal is difficult to obtain within the scope of the SCC's threshold for granting leave to appeal. Pursuant to s. 40(1) of the *Supreme Court Act:*[9]

> ... an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Generally, 10 percent or fewer leave applications are granted by the SCC. For example, "(i)n 2021, the Supreme Court of Canada granted leave to appeal in approximately 8.5% of the leave applications it decided. This was a slightly higher percentage than in 2019 or 2020, driven primarily by the lower number of leave applications in 2021 compared to those earlier years."[10]

The SCC itself notes:

> Of the approximately 600 leave applications submitted each year, only about 80 are granted. The possibility of succeeding in getting an appeal heard is in general remote. Each application for leave to appeal is considered carefully by the Court. The Court never gives reasons for its decisions. It is important to remember that the Court's role is not to correct errors that may have been made in the courts below.[11]

The SCC's statistics show a high of 12 percent leave applications granted in 2012, to a low of 7 percent in 2019 and 2020.[12]

This contrasts with the wider basis for an appeal to the Federal Court of Appeal from various federal agencies, as set out s. 28 of the *Federal Courts Act.*[13] The combined effect of s. 28(2) and ss. 18 to 18.5 of that *Act* grant wide rights of appeal. Section 18.1(4) states:

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal.
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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9 R.S.C. 1985, c. S-26

10 Paul-Eric Veel, *Getting Leave to the Supreme Court of Canada: 2021 by the Numbers*, publication of Lenczner, Slaght, LLP.

11 Supreme Court of Canada website: What are the chances of success in getting an appeal heard? online.

12 Supreme Court of Canada website, statistical summary, online.

13 R.S.C., 1985, c. F-7

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

These wider rights of appeal allow an aggrieved judge who has been disciplined ample scope to review that decision before an independent reviewing court. Just as no court is perfect, no disciplinary system or adjudicator is beyond error. This is the reason for the existence of appeal courts. Despite the CJC's care in making a decision and recognizing that its hearing members are highly qualified experts, it cannot be assumed that it will come to the correct result every time or that there will never be a procedural error. In our society, convicted persons, plaintiffs and defendants, and those whose livelihoods, property or futures are at stake, must be able to seek curial review of decisions affecting them in a meaningful way. Expanding the scope of appeal under the *Judges Act* allows this review to occur in a forum specifically designed to address errors of the decision-makers below.

The necessity for an additional level of appeal is made even more clear insofar as the SCC itself has stated "*the Court's [SCC's] role is not to correct errors that may have been made in the courts below".*[14] If the CJC acted erroneously in determining whether a judge was fit for office, both that judge and society deserve to have the errors reviewed and, if appropriate, corrected.

Another benefit of a wider right of appeal is that the Federal Court of Appeal is likely to issue detailed reasons why it views the CJC's decision as correct or in error. The aggrieved judge and the public will know why an independent court came to its conclusion, enhancing the CJC's credibility through the transparent review of its process and decision-making. The SCC does not give reasons for granting or refusing leave to appeal.

Knowing why a decision is made, particularly when it involves discipline against a judge, is vital to maintaining the credibility of the court in question and preserving the public's respect for the independence of the judiciary. Judges are, and must remain, independent of government. The *Act of Settlement* of 1701, s. 99 of the *Constitution Act, 1867*, and numerous Court decisions have emphasized the importance of judicial independence.[15]

Moreover, the judicial branch is a critical part of our democratic governance and must be accountable to and accepted by the public. By creating a clear, open process for judicial discipline, where the CJC'S actions can be meaningfully appealed to an appeal court, and by having review proceedings conducted in open court, the public will retain confidence in the judicial discipline system's integrity. Justice will be seen to have been done.

We encourage you to adopt Bill C-9, recommending an amendment to the appeal process.

Yours truly,

(original letter signed by Steeves Bujold)

Steeves Bujold, he/him-il/lui

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14 Supra 5: online.

15 For further elaboration, see Hogg, Constitutional Law of Canada (5th ed. Supplemented), ch. 7.