THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Review of Judicial Conduct Process of the Canadian Judicial Council

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,500 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by a working group of CBA members with experience in administrative law, Canadian Judicial Council conduct review procedures, and other professional disciplinary proceedings: Gavin MacKenzie, Molly Reynolds, Cynthia Kuehl, Brent Olthuis, Lorna Pawluk and Doug Hunt. It has been reviewed by the Legislation and Law Reform Committee of the National Office and is approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to contribute to the Canadian Judicial Council's (CJC) review of the judicial conduct process established in the federal *Judges Act* [1] and CJC's bylaws and policies.

The CBA's mandate includes two important objectives:

- the promotion of improvements in the administration of justice; and
- the maintenance of a high quality system of justice in Canada.

An independent judiciary and public confidence in the judiciary are essential ingredients of both objectives. Our comments support and reinforce these objectives. We appreciated the opportunity to meet recently with the CJC's Judicial Conduct Committee and our comments are informed by that dialogue.

The CBA provided its input to the CJC from 1995 to 1998 when the current judicial conduct process and *Ethical Principles for Judges* were being considered. The CBA supported the development of a more prescriptive Judicial Code of Conduct, beyond the guidance provided in the *Ethical Principles*, to provide more clarity for the public and to better assist federally-appointed judges in resolving ethical and professional dilemmas.

We commend the CJC for undertaking this public consultation to help determine the nature of needed reforms after a decade of experience with the operation and impact of the current judicial conduct process.

We have chosen to comment on the questions from the CJC's public consultation document that the CBA is best positioned to address, or variations on these questions. For ease of reference, we provide a summary of our recommendations. We trust that these comments and recommendations will be helpful to the CJC in this important work.

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1 RSC 1985, c J-1

II. SUMMARY OF RECOMMENDATIONS

The CBA supports the CJC's objective in undertaking this review of its judicial conduct process. In developing these recommendations, we have considered what reforms would enhance the public interest in judicial accountability while protecting judicial independence and balancing these interests with the risks to the individual judge's privacy and reputation.

1. **Support inquisitorial model akin to a public inquiry once the matter is referred to the Inquiry Committee. Build procedural protections into the process to ensure the duty of fairness is met, and an appropriate degree of prudence exercised, given the risk to a judge's reputation.**
2. **Continue role of independent counsel currently contemplated by the CJC bylaws.**
3. **Limit the role of Committee Counsel to a primarily administrative function. In the alternative, make public legal advice provided by Committee Counsel with the opportunity for participants to provide input. Committee Counsel should not draft reasons or question witnesses**
4. **Limit role of the complainant to that of a witness, not a party. Grant standing for the complainant to participate in the Inquiry Committee only in exceptional circumstances and on a limited basis.**
5. **Involve laypersons both in the early stages of the review process and on Inquiry Committees.**
6. **Allow the CJC to impose non-consensual remedial measures and disciplinary sanctions short of recommending removal from office.**
7. **Increase the number of complaint files summarized in the CJC annual reports.**
8. **Develop a detailed, formal policy on the publication of information concerning complaints at the inquiry stage.**
9. **Refrain from extending to the Chair or Vice Chair of the Judicial Conduct Committee the power to express concerns about a judge's conduct where misconduct has not been admitted.**
10. **Maintain the Review Panel stage of the complaints process.**

11. **Expand the powers of the Review Panel.**
12. **Include in procedures for Inquiry Committee proceedings a policy regarding the access and weight to be given to findings of the Review Panel.**
13. **Continue to direct complaints to the CJC, rather than to the judge's chief justice. In devising and implementing remedial measures tailored to the particular circumstances of the case, however, the CJC should take full advantage of the benefit of the judge's chief justice's proximity to the judge and the chief justice's administrative responsibilities.**
14. **Refrain from implementing an interim, internal review mechanism.**
15. **Develop a code of procedure governing Inquiry Committees in due course, but without delaying reforms that are more pressing and more readily achieved in the meantime.**
16. **Develop a more prescriptive code of conduct in due course, without delaying reforms that are more pressing and more readily achieved in the meantime.**

III. RECOMMENDED MODEL: ADVERSARIAL OR INQUISITORIAL

The model adopted to review the conduct of judges must be consistent with the fundamental imperative of judicial independence. With this in mind, an inquisitorial model provides the best fit.

Judicial independence is a fundamental constitutional principle, the purpose of which is to ensure public confidence in the impartiality of the judicial system. As the Supreme Court of Canada emphasized in *Valente v. The Queen,*[2] the guarantee of judicial independence is for the benefit of the judged, not the judges. Judicial independence must always be understood in light of the interests it is intended to serve. Any system that seeks to hold judges accountable for conduct must be consistent with the goal of advancing public confidence in the impartiality of the judicial system.

The judiciary is a branch of government. It exercises a power that may significantly affect the lives of citizens and the workings of the legislative and executive branches. In this sense, it is

2 [1985] 2 SCR 673

not analogous to a profession, and disciplinary models in the self-governing professions (such as the legal profession) are of limited comparative utility.

The maintenance of public confidence mandates – as noted in the Friedland Report (*A Place Apart)*, quoted with approval in *Moreau-Bérubé v. New Brunswick (Judicial Council)*[3] – that "[j]udges should be accountable for their judicial and extra-judicial conduct". By the same token, the process of judicial accountability must be consonant with the principle of judicial independence. While there is some inherent conflict between the two principles, there is a fine balance to be struck. As the Court noted in *Moreau-Bérubé*, the pursuit of this balance must "animate the review process".

An inquisitorial model, similar to a public inquiry commission, best advances the public interest and ensures judicial independence. As noted in the CJC Background Paper, any individual complaint must be subrogated to the CJC's need to investigate and inquire into the conduct of the judge. In other words, the CJC's joint goals – to advance the public interest and uphold the integrity of the judicial office – take precedence. Pursuit of these goals is rendered more difficult (and, indeed, is potentially impossible) in an adversarial system that pits two parties against each other. By contrast, an inquisitorial model designed to explore the available evidence without fear or favour, and to test that evidence through the examination and cross-examination of witnesses in the search for truth, is consistent with and enhances those goals.

An adversarial model carries with it significant risks to judicial independence. First, an adversarial model contemplates a *lis* between the judge and the complainant or the Independent Counsel. Any characterization of the judicial conduct process that suggests that a *lis* exists in this context would be potentially devastating to judicial integrity. Scrutiny of judicial conduct ought not to be seen as an opportunity for an individual complainant to "prosecute" a judge. Judicial independence requires that a judge be able, without external influence, to adjudicate matters. The threat of a prosecution at the hands of an unhappy litigant undermines the constitutional protection of judicial independence.

Nor can one recognize a *lis*, in the traditional sense, between the judge and any other player in the Inquiry Committee setting. While security of tenure and financial security – two of the three "essential conditions of judicial independence" recognized in *Valente* – appear to focus on the impacts on judges as individuals, it cannot be overemphasized that judicial independence exists to support the administration of justice, not to protect the individual judge. In this sense,

3 [2002] 1 SCR 249

the individual judge who is the focus of the proceedings stands in a very different position than the typical litigant in an adversarial or disciplinary process.

At the same time, where the outcome of the Inquiry Committee proceedings is not removal from office, judges must be able to return to their judicial duties and command the necessary respect to carry out their office. The process must facilitate and not undermine the judge's position and continued role. Adopting a judicial accountability model akin to a professional discipline proceeding would be problematic. The public spectacle of a "judge on trial" serves to undermine the judicial office. As noted in the Friedland Report, any model in which the process serves to compromise the privacy and reputation of a judge also threatens judicial independence. Further, as the CJC is composed of judges, the possibility that one group of judges could be "unsuccessful" in a "prosecution" of a fellow judge may also undermine confidence in the judiciary.

The inquisitorial model was clearly intended by Parliament. The *Judges Act* clearly contemplates an inquiry, not a trial or hearing. Under subsection 63(1), a Minister of Justice or Attorney General of a province can initiate their own "inquiry" by submitting a request to the CJC, which must then inquire into the conduct of the judge. Upholding the constitutionality of this provision in *Cosgrove v. Canada,*[4] the Federal Court of Appeal noted that security of tenure, one of the essential conditions of judicial independence, is protected by the fact that only the Governor General, at the direction of the Senate and House of Commons, may remove a judge from office. Further, the limitation that an Inquiry Committee can only make a recommendation to the CJC, which, in turn, can only make a recommendation to the Minister of Justice, is consistent with an inquisitorial system, and inconsistent with an adversarial model. Any concern about the exclusive ability of the Minister of Justice or Attorney General to initiate an inquiry process is mitigated by the fact that it is an inquiry process, not a decision-making process. Within this context, the inquisitorial model, as a whole, acts as a critically important procedural safeguard.

An inquisitorial model permits the facts to be laid before the Inquiry Committee and furthers scrutiny of judicial conduct in a transparent manner. Fairness is achieved for the complainant, the public and the judge in such a system, as all evidence can be canvassed and reviewed without any party bearing the burden of proof.

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4 [2008] FC 941

Specific procedural safeguards must be and have been built into the model. An inquiry, such as the Inquiry Committee proceedings, must be conducted with regard for principles of fairness, the extent of which will be governed by the seriousness of the potential outcome. While the incorporation of principles of fairness may at first blush seem more consistent with an adversarial process, those principles are not at odds with an inquisitorial model. Indeed, the inquisitorial model has sufficient flexibility to incorporate enhanced principles of fairness in order to arrive at the proper balance between judicial accountability and judicial independence. The current model, for example, ensures fairness to the participants and interested persons through the provision to the judge of notice and an opportunity to be heard, and the provision of advice as to the process and the outcome to the complainant. Those principles of fairness can be further protected in Inquiry Committee proceedings by clarifying and reinforcing the roles of Independent Counsel and Committee Counsel, as described in the section below.

RECOMMENDATION:

1. **Support an inquisitorial model akin to a public inquiry once the matter is referred to the Inquiry Committee. Build procedural protections into the process to ensure the duty of fairness is met, and an appropriate degree of prudence exercised, given the risk to a judge's reputation.**

IV. ROLE OF INDEPENDENT COUNSEL AND COMMITTEE COUNSEL

Role of Independent Counsel

Although it must be emphasized that judicial independence exists to benefit the administration of justice and the public interest, it must also be recognized that the process may have a significant personal impact on the judge. For that reason, procedural safeguards in the current model should be maintained and reinforced in the inquisitorial model in future, including the right to know the allegations and receive full disclosure of the evidence to be explored at the Inquiry Committee. These procedural protections provide an appropriate measure of fairness to the participants without derogating from the purposes of the inquisitorial model. This is similar in some ways to a coroner’s inquest, at which the issues to be explored are delineated and full disclosure to the participants is given in advance.

Judicial conduct review differs significantly, however, because the recommendation to remove a judge from the bench is made by an Inquiry Committee composed primarily of judges. This risks a perception of bias, namely that judges reviewing one of their own will not be impartial. The role of Independent Counsel mitigates this perception.

As noted in the CJC s Background Paper, the roles of Committee Counsel and Independent Counsel were bifurcated, following the decision in *Gratton*,[5] to permit the Independent Counsel to investigate and present the case in accordance with the public interest and to act at arm's length from the CJC and the Inquiry Committee. While this independence differs from a typical inquisitorial model, in which commission counsel both presents the evidence and advises the commission, and may take directions from the commission, the typical inquisitorial process is not exposed to the same risk of perceived partiality. To maintain judicial accountability and confidence in the judiciary, it is important to keep an arm's length relationship between the CJC and Inquiry Committee on the one hand and Independent Counsel on the other.

While the involvement of Independent Counsel may resemble aspects of the more adversarial professional disciplinary process, the adoption of any adversarial model is problematic for the reasons discussed above. An inquisitorial model, with enhanced procedural protections including the role for Independent Counsel, is best equipped to balance the principles of accountability and independence.

The current CJC policies and bylaws on Independent Counsel reflect this understanding and are appropriate. For example, Independent Counsel must have at least 10 years' experience and be recognized as a leader in the bar. These criteria establish that Independent Counsel have a certain skill set and reputation to carry out the assigned duties in the public interest and work independently of the Inquiry Committee and the CJC. Although the bylaws require at least 10 years of experience, the CJC typically appoints Independent Counsel of greater seniority. A change to the bylaws to reflect this practice may be appropriate, although not necessary.

The mandate of Independent Counsel – to investigate and present the case in accordance with the public interest – properly includes pre-inquiry interview of witnesses and marshalling of all of the evidence. The evidence should be canvassed and presented neutrally, but tested, including through cross-examination where needed. This is not with the intention to achieve a particular partisan outcome, as in an adversarial model, but rather necessary to expose all of the evidence, in a fair and public forum, in pursuit of the truth. Independent Counsel can also

5 Gratton v. Canadian Judicial Council, [1994] 2FC 769

make submissions on how the evidence may be interpreted or recommendations with respect to process[6] , although not binding and, again, not in support of a particular outcome.

The role of Independent Counsel as conceived by the bylaws should be retained. While not a zealous prosecutor, Independent Counsel should, in the public interest, investigate the matter fully, provide notice of and put forward the allegations determined appropriate for review by the Inquiry Committee, marshal all the facts and advance all the evidence, including through cross-examination as deemed necessary.

Role of Committee Counsel

The role and necessity of Committee Counsel is less clear. In most tribunals, counsel to the tribunal (whether committee counsel or independent legal counsel) is necessary only because members of the tribunal do not have legal experience. For example, the Law Society of Upper Canada does not make use of committee counsel (often referred to as independent legal counsel) for its professional disciplinary hearings. By contrast, discipline committees of the regulated health professions, where members are not usually legally trained, typically do retain such counsel.

As an Inquiry Committee under the *Judges Act* will be made up of a majority of chief and associate chief justices and a minority of senior members of the bar, the utility of having Committee Counsel to provide legal advice is questionable. Certainly, the involvement of Committee Counsel in the administration of the inquiry enhances efficiency. However, an administrative coordinator might suffice.

If the position of Committee Counsel is retained, the role must be very clearly defined. Committee Counsel does not represent any participant or interest in the proceeding, and should not descend into the arena. If the Inquiry Committee wishes to explore a particular issue, Independent Counsel's responsibility is to consider that issue and present relevant evidence.

If Committee Counsel provides legal advice to the Inquiry Committee, that advice should be given in public with a full opportunity for input and response by the participants to the process. This is consistent with the role of Committee Counsel in other proceedings.

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6 As noted by the CJC in its Report on the Boilard Inquiry

Finally, Committee Counsel should not be involved in drafting reasons. Judicial independence and judicial accountability require that the conduct of judges be reviewed primarily by their peers. In the professional discipline context, Committee Counsel are increasingly discouraged from drafting reasons, to minimize the risk, or perception of risk, that the reasons do not reflect the views of the tribunal charged with making the decision. That principle applies with even greater strength here. Committee Counsel drafting reasons arising from an Inquiry Committee hearing would undermine judicial independence and accountability.

The role of Committee Counsel should be reconsidered and possibly eliminated in favour of an administrative coordinator. If it is to continue, the role should be limited to providing administrative support and legal advice, in a public forum, and not extend to questioning witnesses or drafting reasons.

RECOMMENDATIONS:

2. **Continue role of independent counsel currently contemplated by the CLC bylaws.**
3. **Limit the role of Committee Counsel to a primarily administrative function. In the alternative, make public legal advice provided by Committee Counsel with the opportunity for participants to provide input. Committee Counsel should not draft reasons or question witnesses.**

V. ROLE OF COMPLAINANT

The complainant is not a necessary or proper party to the proceeding in an inquisitorial model. Making the complainant a party could create a *lis* between the complainant and the judge and risks creating the perception of external influence and undermining judicial independence.

The purpose of the inquiry is not to vindicate an individual complainant's rights or interests, and the review of the judge's conduct is not limited to a single complaint. As noted by the Federal Court of Appeal in *Taylor v. Canada,*[7] the complainant is seen as a "self-appointed representative of the public interest". The complainant's rights or interests are superseded by the overall public interest in the process.

The inquiry is not the forum to explore a judge's findings in a single case. That is for the appellate courts. In that setting, the "complainant" (*qua* appellant) is properly a party. In a

7 2003 FCA 55

review of judicial conduct, the impact of the impugned conduct on public confidence in the judiciary is paramount. Particular findings, and the impact of judicial decisions on the complainant's particular interests, are not the focus.[8]

That is not to say that the process for reviewing judicial conduct should ignore the interests of the complainant. Complainants should receive notice of the proceedings, be advised of the ultimate decision and be interviewed and involved in the investigation as appropriate in the case – as a witness, for instance – which provides the complainant an opportunity to participate without prosecuting the judge. These steps are consistent with the need for transparency in the Inquiry Committee's procedures, but do not necessitate giving the complainant party status.

There may be exceptional circumstances where standing is appropriate because the complainant's personal reputation is at issue or will be explored in the proceeding. Standing should not be granted simply because the complainant's credibility will be challenged. That will be the case in almost every proceeding. Something more is necessary, of sufficient gravity that the interests of the complainant would not be sufficiently protected by the involvement of the Independent Counsel in marshalling and fairly presenting evidence.

Even in these exceptional circumstances, standing should not necessarily give rise to the right to call or examine witnesses, to make submissions or to full participation. We recommend a very narrow view of standing in these circumstances, to avoid turning the inquisitorial process into a *de facto* adversarial one.

The role of the complainant should also be viewed in light of the need for efficiency. It is not in the public interest for an inquiry to proceed at length. The addition of a "party", whose interests may be inconsistent with the public interest, threatens the efficiency of the process.

Given the unique role of the judiciary as a branch of government such that the traditional view of a *lis* between the judge and the complainant would be inappropriate, the need for an inquisitorial model described above and the pre-eminence of the public interest, the complainant should remain presumptively a witness. In those extraordinary circumstances where a larger role is warranted, only very limited standing ought to be granted.

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8 This is reflected in the test for removal set out in *Marshall*.

RECOMMENDATION:

4. **Limit the role of the complainant to that of a witness, not a party. Grant standing for the complainant to participate in the Inquiry Committee only in exceptional circumstances and on a limited basis.**

VI. INVOLVEMENT OF LAYPERSONS

At present, public complaints about federally-appointed judges are screened by specified members of the CJC – all of whom are Chief Justices – or by the CJC Executive Director who acts under the direction of the Chair of the Judicial Conduct Committee in this respect.

Lay participation has been a prominent and increasingly important feature in complaints and professional discipline processes of regulated professions for many years. Self-governing professions are vulnerable to public suspicion that their governing bodies act in the interest of members of the profession rather than in the public interest. Lay participation in the complaints and discipline process tends to alleviate this suspicion and increase public confidence in the process. Laypersons frequently bring a valuable outside perspective to complaints about professionals and can serve to enhance the transparency and objectiveness of the proceeding.

This is equally true of the judicial conduct review process. Members of the Ontario Judicial Council (OJC), for example, include (in addition to Chief Justices, other senior judges and lawyers) four persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General. They are regularly assigned to participate in the OJC's process for determining whether a complaint should be dismissed, referred to the Chief Justice of the Ontario Court of Justice or referred for a public hearing.

Lay involvement in the complaints and discipline process need not compromise judicial independence. In the OJC model, for example, complaints are investigated by a two-member subcommittee of the Council, consisting of a judge and a community member. The report of this complaints subcommittee is referred to a review panel consisting of two judges, a lawyer and a community member.

Similarly, a complaints subcommittee of the CJC might include the Chair and Vice Chair of the Judicial Conduct Committee together with a community member. If the Chair had a conflict with the proceedings, the Vice-Chair and a community member would suffice.

In the interests of transparency, obtaining valuable outside perspectives and enhancing public confidence in the CJC's complaints and discipline process, the participation of community members should be incorporated into both the early stages of the review process and the Inquiry Committee stage.

RECOMMENDATION:

5. **Involve laypersons both in the early stages of the review process and on Inquiry Committees.**

VII. DISCIPLINARY AND REMEDIAL MEASURES

At present, the CJC is not empowered under the *Judges Act* to take any disciplinary or remedial measures other than recommending the removal of a judge from office. This extreme remedy is almost never imposed.

Provincial and territorial statutes, by contrast, grant judicial councils the powers to impose a wide range of sanctions and remedial measures. Provincial and territorial judicial councils are empowered to issue warnings and reprimands, to suspend the judge with or without pay for any period, or to order such specified measures as apologizing to a complainant, receiving continuing education or undergoing treatment as a condition of continuing to preside as a judge.

The *Judges Act* should be amended to grant a broader range of sanctions to the CJC. Providing for only one remedy – the most drastic of all possible remedies – may have the effect of either (1) making Inquiry Committees reluctant to find misconduct, resulting in judges who should be disciplined not being disciplined, or (2) subjecting judges who are guilty of misconduct to the ultimate penalty of removal from office though the misconduct warrants a lesser sanction.

The CJC has incorporated remedial measures into the early stages of its review process, perhaps as a result of the inadequacy of a disciplinary regime that permits only one sanction. Where the judge has acknowledged inappropriate conduct, the Chair of the Judicial Conduct Committee may give the judge an assessment of the conduct and express concerns about that conduct. Whether or not the judge admits misconduct, a Review Panel may also, when closing a file, give its assessment of the judge's conduct and express concerns about it.

With the judge's consent, either the Chair or a Review Panel, in consultation with the judge's chief justice, may recommend counselling or other remedial measures to the judge to address problems raised by the complaint. These measures may lead to the closing of a file.

While the CBA encourages the CJC to continue to make use of consensual remedial measures, a transparent and effective disciplinary process requires the CJC to have the ability to impose non-consensual remedial measures and disciplinary sanctions short of recommending removal from office.

RECOMMENDATION:

6. **The CJC should have the ability to impose non-consensual remedial measures and disciplinary sanctions short of recommending removal from office.**

VIII. PUBLICATION OF TREATMENT OF COMPLAINTS

As we understand it, the CJC's current approach is to not comment on the existence or nature of a complaint unless it has already become public, whether made public by the complainant, as a result of public proceedings, or otherwise. At that point, the CJC may issue a press release or comment publicly on the nature of the complaint and the identity of the complainant. Once a complaint has been publicly acknowledged by the CJC, it typically issues press releases or other public comment at various stages of the proceeding. The CJC has become progressively more transparent about the details of proceedings at the inquiry stage, posting all documents filed with an Inquiry Committee and all decisions on its website.

However, the CJC discloses far less information about complaints that have yet to progress to an inquiry phase. In its annual report, the CJC does not disclose the names or details of complaints that were not otherwise made public or did not proceed to an inquiry phase. The CJC's consultation document affirms that this practice is sensitive to the privacy and reputation of judges, in the interest of maintaining public confidence in the judiciary. In its annual report, the CJC provides statistics on the number of complaint files opened and closed in a given year, as well as the number of complaints at each stage of the review process. The annual report also summarizes the nature and disposition of a representative "handful of specific complaints" from the previous year. The information in the annual report on the number of complaint files opened and closed demonstrates how many complaints are dismissed at an early stage.

The privacy and reputation of judges subject to complaints closed before proceeding to any public phase support the current CJC practice not to comment unless the complaint is already public. If the CJC enacts a formal policy on this practice, it should allow and acknowledge discretion to be exercised by the CJC Executive Director and members of the CJC to determine

what degree of disclosure would properly balance the judge's reputation and privacy with public confidence in the judiciary in the particular circumstances of the complaint.

We offer two recommendations to improve the current approach to publicizing information about the nature and treatment of complaints, with a view to enhancing the public confidence in the judiciary.

First, while the CBA supports the practice of summarizing in its annual report the nature, treatment and disposition of complaints while protecting the anonymity of the complainant and the judge, the small sample– in the 2012-2013 annual report, nine specific complaints – may be insufficient to give the public and judges an accurate overview of the many complaints received by the CJC each year. Further, the majority of complaints received by the CJC are dismissed at the investigative stage by the Chair or Vice Chair of the Judicial Conduct Committee. Additional disclosure of the kinds of complaints dismissed and the reasons for dismissal, while maintaining the privacy of the complainant and the judge, would aid in fulfilling the mandate of the CJC to promote efficiency, uniformity and accountability.

Second, once a complaint is at an inquiry stage, a formal policy would be helpful to the public, the Inquiry Committee, Independent Counsel, the CJC, the complainant and the judge, setting out:

- what information may be publicly disclosed and in what manner;
- who has the authority to make disclosure decisions;
- the process for making submissions on confidentiality, redaction and public disclosure generally;
- the process for seeking access to information not published by the CJC; and
- the extent to which members and representatives of the CJC may comment publicly on proceedings before an Inquiry Committee.

RECOMMENDATIONS:

7. **Increase the number of complaint files summarized in the CJC annual reports.**

8. **Develop a detailed, formal policy on the publication of information concerning complaints at the inquiry stage.**

IX. ROLE FOR CHAIR

The current complaints procedures provide that, when closing a file after a judge has acknowledged that their conduct was inappropriate, the Chair or Vice Chair of the Judicial

Conduct Committee may give the judge an assessment of the judge's conduct and express concerns about that conduct. A Review Panel also has the authority to close a file and give the judge an assessment of the impugned conduct, regardless of whether the judge has acknowledged that the conduct was inappropriate.

The Chair or Vice Chair of the Judicial Conduct Committee has limited access to information about the complaint. The Chair or Vice Chair reviews the complaint, the judge's comments on the complaint, and the judge's Chief Justice's comments on the complaint, but has no mandatory investigative function. As such, the Chair or Vice Chair is not similarly placed to the Review Panel, which receives as a matter of course a report from its outside counsel on the investigation conducted and the facts gathered.

The CJC's mandate will not be furthered by authorizing members of the Judicial Conduct Committee to comment on conduct that the judge does not admit was inappropriate and the Chair or Vice Chair considers minor enough to dismiss. If the Chair or Vice Chair believes that the matter is serious enough to warrant censure, the complaint should be forwarded to a Review Panel for further review. If the cursory review by the Chair or Vice Chair of the Judicial Conduct Committee – or, as recommended above, a complaints subcommittee – leads to the conclusion that the matter should be closed, there is unlikely a fair basis, in the absence of an investigation, for expressing concern to a judge who has not acknowledged any wrongdoing. The interests of the public would not be served by permitting the initial decision maker to censure the judge subject to a complaint when the matter is not serious enough to refer onward and the judge does not view their own conduct as inappropriate. Public confidence in the judiciary would not be enhanced by additional criticisms of judges launched by CJC members who do not have access to full factual records and investigative reports.

RECOMMENDATION:

9. **Refrain from extending to the Chair or Vice Chair of the Judicial Conduct Committee the power to express concerns about a judge's conduct where misconduct has not been admitted.**

X. ROLE FOR REVIEW PANEL

We understand that the Executive Director of the CJC undertakes an initial screening of all complaints received from anyone other than an Attorney General. If a complaint file is opened, the Chair or Vice Chair of the Judicial Conduct Committee reviews the complaint, the judge's

comments on the complaint, and the judge's Chief Justice's comments on the complaint. Unless the Chair or Vice Chair of the Judicial Conduct Committee closes the file, the complaint then proceeds to a Review Panel, composed of federally-appointed judges, a majority of whom are members of the CJC.

The Review Panel may retain outside counsel to investigate the facts surrounding the complaint, interview witnesses and provide a report to the Review Panel. The Review Panel does not hold hearings or weigh evidence but may receive written submissions from the judge. The Review Panel does not have powers to summon witnesses or compel disclosure of documents. If the Review Panel finds the complaint is serious enough that it could result in removal of the judge, it can constitute an Inquiry Committee.

The Review Panel is an essential stage of the process, giving the CJC an opportunity to gather additional facts before determining whether the complaint warrants a full inquiry, and the judge subject to the complaint some rights of participation. This is the first chance for the judge to have a dialogue about the matter with the CJC through interviews with the outside counsel, written responses to questions posed by the outside counsel and written submissions after receiving disclosure of the evidence relevant to the complaint. It also gives the complainant an opportunity to meet with the outside counsel and explain the complaint, which is helpful to complainants less capable in drafting and to the CJC in determining the seriousness of the conduct under scrutiny.

The Review Panel permits the CJC to investigate both the allegations in the complaint and the judge's perspective, to determine whether it warrants proceeding to an Inquiry. The investigation conducted by the Chair or Vice Chair of the Judicial Conduct Committee is extremely narrow – no facts are collected beyond the written complaint, the judge's comments, and their chief justice's comments. This preliminary investigation is insufficient to ground the decision to constitute an inquiry. The Review Panel stage permits the collection of additional facts and analysis before determining whether to engage the largely public, expensive and invasive inquiry process.

The Review Panel does not, and should not, have the same mandate as an Inquiry Committee. However, certain powers delegated to Inquiry Committees could usefully be delegated to Review Panels for the purpose of gathering facts and assessing the seriousness of the alleged conduct. For example, a Review Panel may benefit from the authority to summons evidence from witnesses if necessary for its investigation, to hold a private hearing to determine

whether the complaint could result in removal, and to recommend remedial measures other than closing the file or proceeding to an inquiry.

It is not currently clear from the CJC's policies whether an Inquiry Committee established by a Review Panel has a right to access the Review Panel decision, whether the Inquiry Committee is bound to follow the findings of the Review Panel, or whether Independent Counsel should be granted access to the evidence gathered by the outside counsel (which could expedite Independent Counsel's investigation and reduce duplication of work). The critical screening role of the Review Panel would be negated if an Inquiry Committee or Independent Counsel could override the Review Panel's decisions regarding complaints that should not proceed to a hearing. The procedures for Inquiry Committee proceedings, discussed below, should clearly indicate what weight will be given to previous Review Panel decisions.

RECOMMENDATIONS:

10. Maintain the Review Panel stage of the complaints process.

11. Expand the powers of the Review Panel.

12. Include in procedures for Inquiry Committee proceedings a policy regarding the access and weight to be given to findings of the Review Panel.

XI. ROLE OF THE JUDGE'S CHIEF JUSTICE

As a result of their managerial responsibilities and their familiarity with the judges of their courts, chief justices are often better positioned than the CJC to devise and implement remedial measures tailored to address specific instances of judicial misconduct.

Perhaps in recognition of these advantages, in some jurisdictions the judge's chief justice has a more prominent role in the resolution of complaints. In British Columbia, Manitoba and Nova Scotia, complaints about the conduct of provincially appointed judges must be addressed in the first instance to the chief justice of the judge's court before they may be referred to the province's judicial council. Similarly, in the United States complaints about federal judges are considered first by the chief judge of the judge's circuit, who may conduct a limited inquiry to determine whether corrective action has been or may be taken without the need for a formal investigation.

Requiring complaints to be referred to a judge's chief justice in the first instance risks compromising the consistency and transparency that are essential to maintaining public

confidence in the system. The public should know that legitimate complaints about judicial misconduct will be subject to a disciplinary process conducted by a respected body consisting of chief justices from across the country with appropriate representation of members of the bar and the community.

The premature involvement of the judge's chief justice may result in prejudgment. A chief justice commenting on a complaint at an early stage may, in some cases, make it inappropriate for an inquiry committee to refer the matter back to the chief justice for remedial action. In other cases, the chief justice may be the complainant.

Nevertheless, the CJC should take full advantage of the proximity and administrative responsibilities of the judge's chief justice. At present, the CJC's *Complaints Procedures* provide that after reviewing the complaint file the Chair may seek the comments of the judge's chief justice and that any consensual remedial measures must be reached in consultation with the judge's chief justice. The CJC should continue to involve the judge's chief justice in these ways.

RECOMMENDATION:

13. **Continue to direct complaints to the CJC, rather than the judge's chief justice. In devising and implementing remedial measures tailored to the particular circumstances of the case, however, the CJC should take full advantage of the benefit of the judge's chief justice's proximity to the judge and the chief justice's administrative responsibilities.**

XII. NEED FOR AN INTERNAL PROCESS TO REVIEW DECISIONS OF INQUIRY COMMITTEE

The Inquiry Committee is responsible for hearing a complaint that is serious enough to warrant a judge's removal from office. A complaint arrives at the Inquiry Committee in one of two ways: directly where the complaint is referred by an Attorney General or federal Minister of Justice; or indirectly after a complaint has been screened by the Executive Director of the CJC, reviewed by the Chair or Vice Chair of the Judicial Conduct Committee and investigated by the Review Panel. By the time the complaint arrives at this point, it has been vetted by three bodies.

The CJC Background Paper identifies delay resulting from interim judicial review as a possible justification for an interim, internal review mechanism. Interim judicial review applications significantly lengthen and complicate the proceedings, with the concern being the degradation of justice received as a result of undue delay. There may also be a jurisdictional concern,

particularly whether CJC and Inquiry Committee decisions are subject to judicial review, although the Federal Court takes the position that it has such jurisdiction.[9]

We acknowledge the importance of transparency and access to justice. Any interim procedure would be subject to the CJC directive that the Inquiry Committee conduct its inquiries "in accordance with the principles of fairness".[10] This means any internal procedure would be less complicated, expensive and time consuming than judicial review.

This would most likely increase access to the process for complainants, but we question whether it would produce better results for either the complainant or the judge whose conduct is under scrutiny. The existence of an interim procedure could result in a greater number of interim applications than are currently entertained by the courts and, in any event, the interim procedure itself could also be subject to judicial review.

If significant delay due to interim judicial review applications is a widespread concern, the more direct response might be a rule that precludes judicial review applications until a decision has been rendered. If this is not a feasible option, we recommend continued reliance on administrative law principles that govern interim judicial review proceedings.

RECOMMENDATION:

14. Refrain from implementing an interim, internal review mechanism.

XIII. PROCEDURES

The CJC Background Paper notes certain gaps in procedures governing Inquiry Committees. These gaps include:

a) which entity has the authority to establish the scope of the Inquiry Committee hearing: the Review Panel that decides to constitute an Inquiry Committee; the Inquiry Committee itself; or the Independent Counsel charged with issuing a notice of allegations against the subject judge and presenting the evidence on the allegations to the Inquiry Committee;

b) whether the reasons of the Review Panel are to be disclosed to the Inquiry Committee, and whether those reasons are to limit or otherwise inform the scope of the Inquiry Committee hearing;

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9 Review of the Judicial Conduct Process of the Canadian Judicial Council, Background Paper, 25 March 2014, pp. 54-56

10 Canadian Judicial Council Inquiries and Investigations By-Laws, s. 7

c) the ability of the Inquiry Committee to add or modify allegations against the subject judge that do not arise from a complaint that has undergone the scrutiny of the initial screening stages by the CJC;

d) the process and timelines for providing the subject judge with disclosure of evidence gathered by the Independent Counsel;

e) the authority of the Inquiry Committee to issue subpoenas requiring witnesses to attend for interviews with the Independent Counsel in advance of the Inquiry Committee hearing;

f) the confidentiality of evidence gathered by the Independent Counsel and adduced in the Inquiry Committee hearing, including whether material can be filed confidentially, in what circumstances evidence should be posted online either during or after the Inquiry Committee hearing, whether witnesses can be excluded from the hearing before they testify, and whether transcripts of evidence should be made publicly available before the conclusion of the hearing;

g) the extent to which members and representatives of the CJC can comment publicly on Inquiry Committee proceedings;

h) the process for hearing viva voce evidence, including whether the Independent Counsel has primary authority for calling and examining all witnesses, including the subject judge, whether the complainant has standing to examine witnesses, whether the complainant has a right to funding for counsel when appearing as a witness, and the process by which the Inquiry Committee members may ask questions of witnesses, including whether the Inquiry Committee's counsel may examine witnesses;

i) the authority of the Inquiry Committee to make rulings on particular allegations before the entire hearing with respect to all allegations has been completed, and the authorization for the subject judge or the Independent Counsel to request such interlocutory rulings; and

j) the process for bringing interlocutory motions regarding substantive or procedural matters.

Many of these issues, and others not listed above, are addressed in this submission in response to other questions. However, they demonstrate that a detailed code of procedure for Inquiry Committees is essential to the fair, transparent and efficient conduct of Inquiry Committee proceedings. The CBA recommends that the CJC consider the issues raised in response to all its questions and in its Background Paper when drafting rules of procedure for Inquiry Committees, with a view to determining the concerns or suggestions that may be addressed or implemented by clear procedural rules.

We recognize that it takes time to consider, draft and approve a code of procedure applicable to all Inquiry Committee proceedings. We encourage the CJC to move forward with implementing other reforms pending the development of procedural rules. The CJC consultation raises many important issues unrelated to the Inquiry Committee process that

could be addressed separately from the code of procedure. Further, certain issues related to Inquiry Committees could still be addressed immediately, with a view to formalizing or building on those reforms in a forthcoming code of procedure.

RECOMMENDATION:

15. **Develop a code of procedure governing Inquiry Committees in due course, but without delaying reforms that are more pressing and more readily achieved in the meantime.**

XIV. NEED FOR A MORE PRESCRIPTIVE CODE OF CONDUCT

In most professions, including the legal profession, codes of conduct have evolved over time from statements of general ethical principles that are sometimes difficult to apply in practice to particular cases, to more prescriptive rules of professional conduct for the breach of which professionals may be disciplined.

The CJC should in due course replace its current *Ethical Principles* with rules of conduct that expressly prescribe conduct for which judges may be disciplined. The CBA recognizes, however, that most cases that come before the CJC are not cases in which the issue is whether alleged misconduct contravenes accepted norms of judicial conduct, and that to develop a code of conduct for judges would be a time-consuming exercise and present unique challenges.

We recommend that the CJC plan to develop a more prescriptive code of conduct, but without delaying reforms to its judicial conduct review process that are more pressing and more readily achieved in the meantime. The CBA would be pleased to offer input and assistance in the development of a Judicial Code of Conduct.

RECOMMENDATION:

16. **Develop a more prescriptive code of conduct in due course, without delaying reforms that are more pressing and more readily achieved in the meantime.**

XV. CONCLUSION

The CBA hopes that these comments and recommendations will assist the CJC in assessing the need for reform. We would be pleased to provide further input as the CJC develops specific proposals for changes to the judicial conduct review process.