THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Federal Judicial Discipline Process

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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. 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 further contribute to public policy discussions on judicial discipline, and in particular to comment on the issues raised in the June 2016 Justice Canada discussion paper, *Possibilities for Further Reform of the Federal Judicial Discipline Process*.

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.

The CBA provided its input to the Canadian Judicial Council (CJC) from 1995 to 1998 when its 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. In July 2014, the CBA again provided input to the Canadian Judicial Council as it considered the nature of needed reforms after a decade of experience with the operation and impact of the then current judicial conduct process. We are pleased that the CBA's 2014 submission has informed the Justice Canada discussion paper.

This submission groups the questions raised in Part 3 of the discussion paper, with comments and recommendations on the issues that the CBA is best positioned to address. For ease of reference, we provide a summary of our recommendations. We trust that these comments and recommendations will be helpful to Justice Canada and the CJC in this important work.

In developing these recommendations, the CBA has 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. We have commented generally on the balance to be achieved between legislative and policy instruments in implementing these reforms.

II. COMPLAINTS

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?*

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*, the complainant is seen as a "self-appointed representative of the public interest"[1]. 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 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.

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1 Taylor v. Canada (Attorney General), [2003] 3 FCR 3, 2003 FCA 55 (CanLII), http://canlii.ca/t/4hdg

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 preeminence 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.

RECOMMENDATION:

1. **The CBA recommends that the role of the complainant should be limited to that of a witness, not a party. Standing for the complainant to participate in the Inquiry Committee should be granted only in exceptional circumstances and on a limited basis.**

III. INVOLVEMENT OF LAY PERSONS

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?*

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 acting under the direction of the Chair of the Judicial Conduct Committee.

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. Lay persons 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:

2. **The CBA recommends lay persons be involved both in the early stages of the review process and on Inquiry Committees.**

IV. INVOLVEMENT OF LAWYERS AND PUISNE JUDGES

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?*

Lawyers have a unique perspective due to their role in appearing before courts on behalf of clients. Additionally, lawyers' responsibilities with respect to the administration of justice equip them with a perspective of the public interest that is not the same as that of a non-

lawyer. For these reasons, every review panel should include a lawyer, and lawyers should continue to sit on inquiry committees for the same reasons.

Judges should form the majority of an Inquiry Committee as they are adjudicating a complaint against a judge and therefore have the primary expertise required. Likewise, puisne judges should be represented on an Inquiry Committee and on the CJC's Judicial Conduct Committee, as the judicial conduct at issue would likely be that of a puisne judge.

The discussion paper also raises questions about the appropriate size of inquiry committees. The CBA agrees that smaller committees are more efficient and expeditious, but omitting the representation of non-CJC members is not a reason for maintaining smaller committees. To avoid evenly split decisions, a committee should have an uneven number of members.

RECOMMENDATIONS:

3. **The CBA recommends that lawyers sit on review panels and inquiry committees. Puisne judges should be represented on inquiry committees and on the CJC's Judicial Conduct Committee.**
4. **The CBA submits the importance of including representation of non-CJC members on inquiry committees outweighs the perceived advantages of smaller committees. All committees should have an uneven number of members.**

V. INQUIRY COMMITTEES

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?

Even if given notice, the CBA believes that it would be unfair for an Inquiry Committee to consider a complaint that has not been investigated by the CJC. The complaint system is designed to funnel the complaint issues into a statement for the Inquiry Committee to hear. It would be unfair for an issue not narrowed in that process to then be identified as an issue during the hearing process. It would also seem unfair for the Inquiry Committee, sitting in adjudication of the issue, to decide what is in effect a pleading of the alleged misconduct.

RECOMMENDATION:

5. **The CBA recommends that an Inquiry Committee be precluded from considering a complaint that has not been investigated by the CJC.**

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 and the media, like the one currently found in the Handbook, be incorporated into the Judges Act?*

If hearings are presumptively public, then transparency and the reasons for limiting it are important issues on which to provide reasons. However, it is not necessary to expressly state the factors to be weighed. The common law as it exists and develops would be appropriate. Any unique considerations in this context can develop alongside other cases about non-disclosure of evidence or information or in-camera hearings.

RECOMMENDATION:

6. **The CBA recommends reasons be provided for publication bans or going in camera; however, it is not necessary to set out statutory criteria for making such decisions.**

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?*

The discussion paper raises a number of questions about whether requirements or procedures should be set out in the Act, in subordinate legislation, or in policies. Generally, the CBA supports setting out substantive requirements in the *Judges Act*, procedural requirements in subordinate legislation, and procedural information in policies. Substantive requirements would include, for example, the existence or role of the committee or any decision-maker, and the existence and role of committee and presentation/independent counsel. Requirements such as the procedures to be followed by committee or presentation/independent counsel may be set out in subordinate legislation. Practical procedural information such as how to bring an application, the CJC's practice on how it addresses requests for publication bans or in-camera hearings, and how the public can obtain information, can be set out in policies.

A detailed code of procedure for Inquiry Committees is essential to the fair, transparent and efficient conduct of Inquiry Committee proceedings. The CBA has recommended that the CJC consider the issues raised in its March 2014 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 encouraged the CJC to move forward with implementing other reforms pending the development of procedural rules. The CJC consultation raised many important issues unrelated to the Inquiry Committee process that could be addressed separately from the code of procedure. Further, some issues related to Inquiry Committees could still be addressed immediately, with a view to formalizing or building on reforms in a forthcoming code of procedure.

In most professions, including the legal profession, codes of conduct have evolved over time from statements of general ethical principles that may be 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. That said, in most cases that

come before the CJC the issue is not whether alleged misconduct contravenes accepted norms of judicial conduct. 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.

RECOMMENDATIONS:

7. **The CBA submits it is important to make progress on the development of a detailed code of procedure for Inquiry Committees.**
8. **The CBA recommends that the CJC replace its current Ethical Principles with a prescriptive code of conduct for judges.**

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?*

A. Role of Independent Counsel

Although judicial independence exists to benefit the administration of justice and the public interest, the process may have a significant personal impact on the judge. For that reason, procedural safeguards 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 2014 Background Paper, the roles of Committee Counsel and Independent Counsel were bifurcated, following the decision in Gratton[2], 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 former CJC policies and bylaws on Independent Counsel reflected this understanding and were appropriate. For example, Independent Counsel had to 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 required at least 10 years of experience, the CJC typically appointed Independent Counsel of greater seniority. The mandate of Independent Counsel as set out in the prior set of by-laws – to investigate and present the case in accordance with the public interest – properly included 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 make submissions on how the evidence

2 *Gratton v. Canadian Judicial Council*, [1994] 2 FCR 769, 1994 CanLII 3495 (FC), http://canlii.ca/t/4glp

may be interpreted or recommendations with respect to process, although not binding and, again, not in support of a particular outcome.

The role of Independent Counsel as conceived by the bylaws should have been retained and, to the extent that the most recent bylaws and procedures deviate from this conception, they ought to be changed. 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.

The role of Independent Counsel is an important, if not essential, element of preserving judicial independence and promoting judicial accountability. It ensures that allegations are investigated and presented in the public interest, without the appearance of bias or partiality. That role ought to be enshrined in the *Judges Act*, with the content of the role in regulation.

B. 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 counsel.

As an Inquiry Committee under the *Judges Act* will be made up of a majority of judges (and, if the CBA recommendations are adopted, that majority will include puisne judges) and a minority of senior members of the bar, the utility of 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 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.

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. For clarity, the role and its content should be the subject of legislation and regulation respectively.

RECOMMENDATIONS:

9. **The CBA recommends reverting to the role of Independent Counsel contemplated by the previous CJC bylaws.**
10. **The CBA recommends that the role of Committee Counsel be limited to a primarily administrative function. In the alternative, legal advice provided by Committee Counsel should be made public with the opportunity for participants to provide input. Committee Counsel should not draft reasons or question witnesses.**
11. **The CBA recommends that the roles of Independent Counsel and Committee Counsel be set out in the *Judges Act*, with the content of those roles included in regulations under the Act.**

VI. SANCTIONS AND GROUNDS FOR REMOVAL

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?*

A. Sanctions

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.

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 can issue warnings and reprimands, suspend the judge with or without pay for any period, or order specified measures such 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 only one remedy – the most drastic of all possible remedies – may make Inquiry Committees reluctant to find misconduct, resulting in judges who should be disciplined not being disciplined, or alternatively subject judges 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 closing the 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:

12. The CBA recommends that the CJC have the ability to impose non-consensual remedial measures and disciplinary sanctions short of recommending removal from office, and these ought to be enshrined in the *Judges Act*.

B. Removal

Grounds for removal from office

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

The grounds for removal are already in s. 65(2) of the *Judges Act*. The Marshall test is already recognized in judicial discipline law in Canada as the method of determining whether one or several of those grounds are met in a particular case; it is not necessary to specify this in the Act. However, specific grounds for removal already in the Act need clarification. In particular, s. 65(2)(d) requires clarification. It permits removal where the CJC is of the opinion that the judge "has become incapacitated or disabled from the due execution of the office of judge by reason of … having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office." However, the language raises questions as to whether this permits a judge to be removed from office as a result of conduct of persons other than the judge, or whether it is intended to address omissions or failures to act as well as conduct.

RECOMMENDATION:

13. The CBA recommends clarification of paragraph 65(2)(d) of the *Judges Act*.

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?*

Given that the Minister of Justice has not previously made a recommendation to Parliament pursuant to this function, it is premature to define the Minister's role in the *Judges Act*. However, there has long been uncertainty as to whether the Minister has discretion in deciding

to bring a report and recommendation before Parliament, or if the Minister has a more procedural role of introducing the matter to Parliament.

VII. LEGAL FEES

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?*

Independence of the judiciary, which is protected in the public interest and not for the interests of judges themselves, is furthered by the current practice of giving judges access to counsel paid by the government at standard government rates throughout the judicial discipline process. With the small number of complaints that have proceeded to the review panel and inquiries stages, there is insufficient data to suggest that public funds are unnecessarily spent in these proceedings. The matters that have gone to judicial review raised important constitutional and administrative law questions, the answers to which added to the body of judicial conduct law in Canada for the benefit of the public, complainants and judges, well beyond the facts of the underlying complaints.

RECOMMENDATION:

14. The CBA recommends continuation of the current practice where judges have access to counsel paid for by the government, at government rates, throughout the judicial discipline process.

VIII. TIMEFRAMES

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?*

This is not necessary, as each complaint may require different levels of investigation and timeframes for consideration at each stage. Timeframes will not necessarily improve efficiency, cost-effectiveness or transparency of the process.

IX. DISCLOSURE OF INFORMATION

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?*

As we understand it, the CJC's current approach is not to 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 is 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. 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, with a view to enhancing the public confidence in the judiciary.

First, while the CBA supports the practice of summarizing the nature, treatment and disposition of complaints in the annual report 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 would aid in fulfilling the mandate of the CJC to promote efficiency, uniformity and accountability, while maintaining the privacy of the complainant and the judge,.

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:

15. The CBA encourages the CJC to increase the sample of complaints summarized in its annual report.

16. The CBA encourages the CJC to develop a formal policy on public disclosure of information at the inquiry stage.

X. CONCLUSION

The CBA hopes that these comments and recommendations will assist Justice Canada – and the CJC – in considering specific proposals for changes to the judicial conduct review process. We would be pleased to provide further input as legislation and policies unfold.

SUMMARY OF RECOMMENDATIONS

1. The CBA recommends that the role of the complainant should be limited to that of a witness, not a party. Standing for the complainant to participate in the Inquiry Committee should be granted only in exceptional circumstances and on a limited basis.

2. The CBA recommends lay persons be involved both in the early stages of the review process and on Inquiry Committees.

3. The CBA recommends that lawyers sit on review panels and inquiry committees. Puisne judges should be represented on inquiry committees and on the CJC's Judicial Conduct Committee.

4. The CBA submits the importance of including representation of non-CJC members on inquiry committees outweighs the perceived advantages of smaller committees. All committees should have an uneven number of members.

5. **The CBA recommends that an Inquiry Committee be precluded from considering a complaint that has not been investigated by the CJC.**

6. **The CBA recommends reasons be provided for publication bans or going in camera; however, it is not necessary to set out statutory criteria for making such decisions.**

7. **The CBA submits it is important to make progress on the development of a detailed code of procedure for Inquiry Committees.**

8. **The CBA recommends that the CJC replace its current Ethical Principles with a prescriptive code of conduct for judges.**

9. **The CBA recommends that the role of Independent Counsel be reinstated in accordance with the prior CJC bylaws..**

10. **The CBA recommends that the role of Committee Counsel be limited to a primarily administrative function. In the alternative, legal advice provided by Committee Counsel should be made public with the opportunity for participants to provide input. Committee Counsel should not draft reasons or question witnesses.**

11. **The CBA recommends that the roles of Independent Counsel and Committee Counsel be set out in the Judges Act, with the content of those roles included in regulations under the Act.**

12. **The CBA recommends that the CJC have the ability to impose non-consensual remedial measures and disciplinary sanctions short of recommending removal from office, and these ought to be enshrined in the Judges Act.**

13. **The CBA recommends clarification of paragraph 65(2)(d) of the Judges Act.**

14. **The CBA recommends continuation of the current practice where judges have access to counsel paid for by the government, at government rates, throughout the judicial discipline process.**

15. **The CBA encourages the CJC to increase the sample of complaints summarized in its annual report.**

16. **The CBA encourages the CJC to develop a formal policy regarding public disclosure of information at the inquiry stage.**