THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

February 8, 2023

Via email: Mcu@justice.gc.ca

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8

Dear Minister Lametti:

Re: Bill C-9, *Judges Act* Amendments – Conduct Review Process

We write on behalf of the Canadian Bar Association and its Judicial Issues Subcommittee (CBA Subcommittee) about Bill C-9, *An Act to amend the Judges Act* which makes important changes to the judicial conduct review process. We urge the federal government to amend the Bill to include an intermediate level of appeal from a final decision of the Canadian Judicial Council (CJC) to the Federal Court of Appeal.

The CBA is a national association of over 37,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The Judicial Issues Subcommittee addresses policy issues relating to judicial appointments, compensation, discipline and independence.

The CBA Subcommittee made a submission[1] on Bill C-9 to the House of Commons Standing Committee on Justice and Human Rights in February 2022 and appeared before the Committee in November 2022. It also relies on previous submissions[2] dealing with the federal judicial discipline process.

We now address a new matter, whether Bill C-9 should include an intermediate level of appeal from a final decision of the CJC to the Federal Court of Appeal or whether the only avenue of appeal from a decision of an appeal panel is to the Supreme Court of Canada (SCC), with leave from that Court. The CBA Subcommittee supports the creation of an appeal to the Federal Court of Appeal which the aggrieved judge may access by right prior to proceeding, if necessary, to seek leave to appeal to the SCC.

The CBA Subcommittee respects the challenging work of the CJC. We trust that it performs its judicial discipline duties with the greatest care, particularly given the gravity of the ultimate penalty available to

[1] Bill C-9, *Judges Act Amendments*: online
[2] See: Review of Judicial Conduct Process of the Canadian Judicial Council - online and Federal Judicial Discipline Process – online.

them, recommending the removal of a judge. This consequence is effectively a lifetime result, as the possibility of a judge subject to removal successfully reapplying for an appointment is remote.

In the CBA Subcommittee's opinion, there are two compelling reasons to create an appeal by right to a court below the SCC.

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

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

As mentioned, leave to appeal is difficult to obtain within the scope of the SCC's threshold for granting leave to appeal. Pursuant to s. 40(1) of the *Supreme Court Act*[3]:

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

Generally, 10 percent or fewer leave applications are granted by the SCC. For example, "(i)n 2021, the Supreme Court of Canada granted leave to appeal in approximately 8.5% of the leave applications it decided. This was a slightly higher percentage than in 2019 or 2020, driven primarily by the lower number of leave applications in 2021 compared to those earlier years."[4]

The SCC itself notes:

> Of the approximately 600 leave applications submitted each year, only about 80 are granted. The possibility of succeeding in getting an appeal heard is in general remote. Each application for leave to appeal is considered carefully by the Court. The Court never gives reasons for its decisions. It is important to remember that the Court's role is not to correct errors that may have been made in the courts below.[5]

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[3] R.S.C. 1985, c. S-26

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

[5] Supreme Court of Canada website: What are the chances of success in getting an appeal heard? – online.

The SCC's statistics show a high of 12 percent leave applications granted in 2012, to a low of 7 percent in 2019 and 2020.[6]

This contrasts with the wider basis for an appeal to the Federal Court of Appeal, from various federal agencies, as set out s. 28 of the *Federal Courts Act.*[7] The combined effect of s. 28(2) and ss. 18 to 18(5) of that *Act* grant wide rights of appeal. Section 18.1(4) states:

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

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

The necessity for an additional level of appeal is made even more clear insofar as the SCC itself has stated "*the Court's [SCC's] role is not to correct errors that may have been made in the courts below".*[8] If the CJC acted erroneously in determining whether a judge was fit for office, both that judge and society deserve to have the errors reviewed and, if appropriate, corrected.

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

The CBA Subcommittee believes that knowing why a decision is made, particularly when it involves discipline against a judge, is vital to maintaining the credibility of the court in question and preserving the public's respect for the independence of the judiciary. Judges are, and must remain, independent of

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[6] Supreme Court of Canada website, statistical summary - online.
[7] R.S.C., 1985, c. F-7
[8] Supra 5: online).

government. The *Act of Settlement* of 1701, section 99 of the *Constitution Act, 1867*, and numerous Court decisions have emphasized the importance of judicial independence.[9] Moreover, the judicial branch is a critical part of our democratic governance and must be accountable to and accepted by the public. By creating a clear, open process for judicial discipline, where the CJC'S actions can be meaningfully appealed to an appeal court, and by having review proceedings conducted in open court, the public will retain confidence in the judicial discipline system's integrity. Justice will be seen to have been done.

We would be happy to meet with you to discuss amending Bill C-9 at your convenience. We urge the federal government to amend the Bill to ensure that an additional level of appeal be included before that to the SCC.

Yours truly,

(original letter signed by Julie Terrien for Steeves Bujold and Indra Maharaj)

Steeves Bujold
President, Canadian Bar Association

Indra Maharaj
Chair, Judicial Issues Subcommittee

[9] For further elaboration, see Hogg, Constitutional Law of Canada (5th ed. Supplemented), Chapter 7.