Canadian Judicial Council

Proposals for Reform to the Judicial Discipline Process for Federally-appointed Judges

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1 Introduction

1.1 The Canadian Judicial Council (CJC) was created by Parliament in 1971 with the adoption of the *Judges Act*. A key reason was to vest in the judiciary the authority to make recommendations about the fitness of a judge to remain in office.

1.2 Since 1971, the process of review of misconduct allegations against judges has been adapted on several occasions. Most recently, in July 2015, the CJC adopted changes to its *By-laws* and *Procedures* after engaging in public consultations about making the process more transparent and efficient.

1.3 Further changes to the process would further improve efficiency and take into account evolving public expectations. Such changes would require some amendments to the *Act*.

1.4 Recently, the Department of Justice (DOJ) issued a *Discussion Paper* regarding the judicial discipline process. The CJC welcomes this initiative and has engaged in constructive dialogue with the Minister of Justice and her officials in regard to possible legislative options for change.

1.5 This Paper presents the CJC's position in respect of further changes to the judicial discipline process for federally-appointed judges. This Paper does not address other possible changes to the *Act* in respect of the CJC or the administration of judicial affairs generally.

2 Constitutional Framework

2.1 Judicial involvement in the review of misconduct allegations against judges is a constitutional imperative. While the actual removal of a federally-appointed judge remains a prerogative of Parliament – through a joint resolution of both Houses – the judiciary must retain the authority to assume a primary role in the actual review of allegations of misconduct.

2.2 Justice Gonthier, in *Therrien* (2001 SCC 35), makes the following point in adopting the reasoning of Professor H. P. Glenn:

> . . . in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H. P. Glenn in his article "Indépendance et déontologie judiciaires" (1995), 55 R. du B. 295, at p. 308:
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> > [translation] If we take as our starting point the principle of judicial independence -- and I emphasize the need for this starting point in our historical, cultural and institutional context -- I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

2.3 Judicial independence, which exists for the benefit of the public, means that the government cannot be seen to discipline the same judges who frequently adjudicate disputes involving the government.

2.4 While the primary responsibility must rest with the judiciary, this does not mean that others cannot be involved in the process of review. At the present time, under the CJC's *Complaints Procedures*, lay persons serve on review panels. A review panel constitutes the last stage of the screening process and has the responsibility of deciding whether or not a matter should be referred to a public inquiry, to consider recommending the judge's removal.

2.5 Within the constitutional principle described above, there is no impediment to involving more individuals to participate in the review of allegations of misconduct against judges, including members of the public.

3 Applicable Standards

3.1 Subsection 65(2) of the *Act* provides as follows:

> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
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> (a) age or infirmity,
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> (b) having been guilty of misconduct,
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> (c) having failed in the due execution of that office, or
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> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
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> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

3.2 The CJC recommends that this provision remain unchanged. The standards defined here have been interpreted and applied for many years and cover the entire range of possibilities that could justify the removal of the judge.

3.3 In respect of these standards, the "Marshall Test" has been elaborated by the CJC and affirmed by the Supreme Court of Canada. The test relies on the concept of public confidence in the judiciary:

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

3.4 The CJC recommends that the test not be included in the legislation. There may be an unforeseen requirement, in the future, to adapt the test to a particular circumstance. In particular, the test relies on the idea that the judge's own conduct must be at issue; however, the *Act* clearly provides that a judge may be unfit to remain in office "by his or her conduct or otherwise."

3.5 Furthermore, the test is focused exclusively on the possibility of a judge's removal. As will be noted below, the CJC recommends that a range of outcomes be defined in the legislation to address misconduct that does not warrant a judge's removal from office.

3.6 These outcomes, in the nature of remedial measures or sanctions, must be defined in a manner that fosters public confidence in the judiciary and respects principles of judicial independence.

3.6.1 At the present time, the only true sanction that can be imposed on a judge who engages in misconduct is bleak: recommend their removal.

3.6.2 Some judges hold the view that the imposition of sanctions or remedial measures on a judge undermines the judge's authority and violates the principle of judicial independence. Some argue that superior court judges are constitutionally immune from interim discipline. Indeed, some have argued that the "expression of concern" currently given to some judges who have engaged in misconduct constitutes an attack on judicial independence.

3.6.3 The CJC respectfully disagrees with this position. The public rightfully expects that judges will face consequences if they engage in misconduct. We reject the notion that any transgression must be ignored unless it is so grave as to warrant a judge's removal. In several instances in the past, judges have agreed to a series of measures (which could only be characterized as sanctions) in order to avoid a recommendation for removal. The CJC is of the view that remedial measures and sanctions, as appropriate, will enhance public confidence in the judiciary and its ability to oversee the conduct of judges.

3.6.4 Indeed, a judge who engages in misconduct and is sanctioned for that misconduct cannot be said to lose his authority or the public confidence to act. This is because the very act of imposing a sanction is a result of a decision, by the judge's peers (and lay persons) that no further action needs to be taken and that the judge can continue to hold office. This public vote of confidence is a critical part of the remedial process and is infinitely preferable to removal of a judge where the gravity of the misconduct does not so warrant. Such action restores confidence not only in the judge but in the judiciary as a whole.

3.6.5 The CJC therefore recommends that the authority to impose sanctions and remedial measures be formalized in the *Act*, in keeping with the remedial and rehabilitative objectives of the early stages of the discipline process.

3.6.6 The CJC recommends that any sanction or mandatory remedial measure should be imposed only after a rigorous process of independent decision-making. This precludes the possibility of "alternate" models, such as referring a matter to a judge's Chief Justice for resolution. The Chief Justice of a judge subject to allegations of misconduct can fulfill an invaluable role in the review process; however, decision-making on these issues must rest with individuals who are "one step removed" from day to day interaction with the judge and should, whenever possible, include lay representation.

3.7 The CJC proposes that the authority to impose sanctions or remedial measures be exercised only by a Review Panel or by a Judicial Discipline Committee (as described below).

3.8 The range of sanctions or remedial measures, at these stages of review, should include the authority to:

3.8.1 express concern to the judge about their conduct;

3.8.2 issue a private or public reprimand;

3.8.3 give a warning, including a warning about the consequences of any future misconduct;

3.8.4 order the judge to apologize to the complainant or to any other person;

3.8.5 order that the judge take specified measures, including – but not limited to – counselling, coaching, treatment or training.

3.9 The CJC recommends that a Judicial Discipline Committee have the further authority to suspend a judge – without pay but with benefits – for a period of up to 30 days.

3.10 The CJC recommends that a sanction imposed on a judge – including a suspension – may be appealed to a CJC Appeal Tribunal (as defined below).

4 Process of Review

4.1 At this time, the process of review of allegations against judges falls within two broad categories: early screening and public inquiries. The purpose of the early screening process is to determine whether a matter is serious enough to warrant a formal, public hearing into a judge's conduct. This two-step approach is followed in many other jurisdictions and recognizes that many complaints are found, after preliminary review, to be clearly without merit.

4.2 The CJC proposes that these two broad categories remain as cornerstones of the process of review.

4.3 **Early Screening**: The CJC proposes that the existing process of administrative review be maintained at the first screening stage. The CJC further proposes that the criteria for screening remain the same, with the exception of the "public interest" criteria, which should be omitted.

4.4 Where a complainant asks for a reconsideration of a decision to summarily dismiss their complaint, the CJC proposes that the matter be automatically sent to a member of the Judicial Conduct Committee, as is the current practice. The exception in this regard is for cases of abuse of process, which would continue to be dismissed at the intake stage.

4.5 The CJC also recommends that anonymous complaints continue to be accepted as valid. As is the case now, only those allegations that appear serious, and which include supporting evidence, are considered. The case law supports this view. Further, advances in technology can facilitate anonymous reporting. No one would argue that the CJC should ignore – for example – a video of a judge engaging in serious misconduct on the simple basis that the video was received anonymously. The CJC is of the view that there is no requirement to include, in the legislation, a provision regarding anonymous complaints.

4.6 The role of complainants in the early screening process is very important. At this time, the CJC ensures that complainants are aware of the manner in which their complaint was reviewed and of the outcome of the review. The CJC is of the view that complainants could be provided more information, at each step of the process, about the nature of the review. However, some discretion must be retained by the CJC to ensure that information is not provided to a complainant where such information

would prejudice ongoing court cases involving the judge subject of the complaint. The early screening process is not public in nature and there are other privacy interests to take into account: those of the complainant; of the judge; of the litigants; of the lawyers. The CJC is of the view that any criteria in regard to disclosure to complainants can be defined in regulations or procedures.

4.7 The CJC further proposes that the existing authorities of the Judicial Conduct Committee member, during early screening, remain. This includes the ability to express concern and the ability to recommend and agree to (but not impose) consensual remedial measures. In such cases, consent of both the judge and their Chief Justice must be obtained.

4.8 **Further review**: Where the initial screening process results in a decision to proceed with a further review, as part of the early screening process, this should be done in a way that allows any concerns about a judge's conduct to be pursued as a set of allegations to be tested in an adversarial setting, as opposed to the current model that leads to an inquiry with no prosecuting counsel.

4.9 The CJC recommends that where the initial screening stage results in a decision to further review allegations against the judge, counsel (JCC Counsel) be appointed under the authority of a designated member of the CJC's Judicial Conduct Committee, and tasked with presenting the case against the judge, including the sanction sought against the judge if the allegations are later deemed meritorious. Counsel may be retained by the member of the Judicial Conduct Committee before or after a Review Panel makes a determination. This JCC Counsel may investigate in order to gather relevant information. Full disclosure to the judge (including any investigation report) would take place at this stage. This process can be defined in procedures or regulations.

4.10 In this model, JCC counsel acts essentially in a prosecutorial fashion, with full opportunity given to the judge to respond to the allegations and, as may be required, to make submissions regarding sanction.

4.11 A Review Panel (which should include layperson representation) becomes the decision-making body at this stage. After hearing representations from the judge (who can of course be represented by counsel), the Panel determines if the matter warrants a public hearing.

4.12 Where the Review Panel decides that the matter does not require a public hearing, it may dismiss the matter. In doing so, it may impose a sanction or remedial measure against the judge.

4.13 Where the Review Panel decides to refer the matter to a public hearing, JCC Counsel continues carriage of the matter and presents a fulsome case in respect of the allegations against the judge.

4.14 The inclusion of lay persons in the process enhances public confidence. The CJC recommends that the criteria for appointment of lay persons be public and follow a process clearly understood by the public. The CJC recommends that it continue to designate members of Review Panels. This authority can be defined in regulations or procedures.

4.15 The CJC recommends that the Minister designate two non-judicial members to sit on Judicial Discipline Committees (subject to 5.6 below). Given the nature of the last stage of review, this authority should be maintained in the legislation (as is presently the case for inquiry committees).

5 Public Review

5.1 The CJC proposes that a public hearing be the responsibility of a five-member "Judicial Discipline Committee," deemed a Superior Court, to be constituted as follows:

5.1.1 Three members of the CJC, designated by the Senior Member of the Judicial Conduct Committee of the CJC. These three members have had no prior involvement in the matter;

5.1.2 Two non-judicial members, designated by the Minister of Justice (subject to 5.6 below). The non-judicial members may be lawyers or lay persons. In the latter case, individuals should receive training with respect to key principles of constitutional law, administrative law and judicial ethics.

5.2 The CJC recommends that the process before the Committee be one of assessing, in an adversarial setting, the evidence presented by JCC Counsel, with the right of the judge to cross-examine witnesses, present evidence and make representations.

5.3 The CJC recommends that this public hearing constitute the last step in the process of review of allegations. At this final stage, the Judicial Discipline Committee's mandate is to make a determination on whether or not to recommend, to the Minister of Justice, that the judge be removed from office.

5.4 The CJC recommends that the Judicial Discipline Committee be required to provide written reasons for its decision. In the event the recommendation is that the judge not be removed from office, the CJC recommends that the Committee have the authority to impose a range of sanctions or remedial measures (as discussed above).

5.5 Subject to a possible appeal process, as described below, there would be no further involvement by the CJC.

5.6 The CJC recommends that the right of an Attorney General to require a public hearing be retained and not be subject to any prior screening by the CJC. However, where the AG of Canada does so request, she should decline to appoint non-judicial members to the Judicial Discipline

Committee. Alternately, a different process might be contemplated to appoint non-judicial members.

5.7 With respect of the authority of provincial AGs, the CJC takes no position on whether or not it should be limited to complaints about superior court judges of their own jurisdiction. Should no such limitation be imposed, it would be important that AGs have the authority to require a public hearing into the conduct of any judge of the federal courts, and not just those of the Supreme Court of Canada.

6 Role of the Minister of Justice

6.1 The CJC agrees with the characterization of the role of the Minister, at the last stage of the process, as presented in the DOJ's discussion paper.

6.2 The CJC recommends that the Minister of Justice, as she has done in the *Déziel* matter, make public her decision for accepting or rejecting a recommendation from the CJC in respect of a judge's removal from office. Where the Minister's decision is to reject the CJC's recommendation, the Minister should provide reasons for her decision.

7 Appeal Process

7.1 A key concern for all those interested in recent judicial discipline cases is that judicial review of these matters has been cumbersome and subject to many vagaries.

7.2 The CJC recommends that a decision of a Judicial Discipline Committee be final, subject only to a right of appeal, after the process is concluded, based on normal standards of appellate review (which, for greater certainty, could be defined in legislation).

7.3 As the Supreme Court noted in *Moreau-Bérubé*, traditional judicial review, in the context of judicial discipline, is not necessarily best suited to the particular and constitutional characteristics of the discipline process:

> The [provincial] Council is eminently qualified to render a collegial decision regarding the conduct of a judge, including where issues of apprehension of bias and judicial independence are involved. There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.

7.4 There is a constitutional imperative, in our view, that the conduct of superior court judges can only be reviewed by superior court judges. In so doing, judges are not acting as a federal board or tribunal, but as a collegium of senior justices of the superior courts, as that office is understood by the Preamble and section 99 of the *Constitution Act, 1867*.

7.5 Given this constitutional framework and the very nature of the judicial discipline process for superior court judges, the CJC recommends that an appeal of a decision of a Judicial Discipline Committee be heard by a "CJC Appeal Tribunal," constituted for that purpose by five CJC members (as defined below). None of these members would be from the same jurisdiction as the judge subject to the complaint, and none would have had prior involvement in the matter.

7.6 Acting as an appeal body, the CJC Appeal Tribunal – deemed a superior court – would address any legal issue arising out of the proceedings, based on normal standards of appellate review (which could be defined in the legislation for greater certainty). For certainty, a privative clause should be included in the legislation.

7.7 The CJC recommends that a further right of appeal, with leave, rest with the Supreme Court of Canada.

7.8 As a result, the CJC recommends that the current review by the "Council of the Whole" be abolished.

8 Administrative matters

8.1 With respect to the judicial discipline process, a number of administrative considerations must be taken into account.

8.2 **Employment of counsel and assistants**: The CJC's authority to retain legal advisors and other professionals is essential to ensure the integrity of the process. This authority must continue to exist for the CJC or its committees, including the proposed Judicial Discipline Committee. In keeping with principles of institutional and judicial independence, retainers for professional services should not require any approval by the Executive Branch. Accordingly, the CJC recommends that section 62 of the *Judges Act* be retained in its current form. In exercising this authority, the CJC is of course required to respect the provisions of the *Financial Administration Act* and be accountable for the expenditures incurred.

8.3 **Costs for public hearings**: As a matter of principle, judges should be reimbursed for legal fees incurred to defend against allegations of misconduct (see below). However, where allegations of misconduct are established after a public hearing, a question arises about the legitimacy of having all costs paid from the public purse. For that reason, the CJC recommends that a Judicial Discipline Committee, and the CJC Appeal Tribunal, both have explicit authority to make orders regarding costs.

8.4 **Legal fees for judges**: As servants of the public, with constitutional security of tenure, judges should be reimbursed for reasonable legal fees incurred in relation to the office they hold. However, the current regime provides no clear parameters for reimbursement of legal fees for discipline matters.

8.5 The CJC recommends that the government set parameters that define: the circumstances in which legal fees will be reimbursed; the maximum hourly and total amounts that will be disbursed (subject to exceptional circumstances); the types of procedures or services that will not be reimbursed. Such parameters should be developed in consultation between the Minister of Justice, the Canadian Superior Court Judges Association and the CJC.

8.6 The CJC further recommends that the amount of legal fees for judges, and the scope of legal services to be reimbursed, be subject to review by an **assessment officer**, appointed in accordance with a general mandate defined in consultation between the Minister of Justice, the Canadian Superior Court Judges Association and the CJC.

8.7 With respect to **legal challenges before the courts**, judges should be required to pay their own legal fees in the first instance. As is the normal rule, a reviewing court could award the judge costs as may be appropriate. This would include the appeal before the CJC Appeal Tribunal and any appeal to the SCC.

8.8 The DOJ discussion paper raises the possibility of identifying **time frames** for various stages in the process. While some matters have been inordinately lengthy, those have been truly exceptional in occurrence. Other than inquiries and matters that are subject to prolonged litigation, the process of review of complaints by the CJC is very timely. In total, over 90% of all matters are concluded within 3 months, with about 75% of all matters concluded within 6 weeks. The CJC is of the view that there is no need to establish time frames for the early screening stages of the process. For the formal, last stage of the process, mandatory time frames may result in further litigation or dismissal of serious allegations against a judge. The CJC is of the view that mandatory time frames should not be defined in the legislation.