



**Canadian
Judicial
Council**



*Annual
Report
1997-98*

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Contents

Preface	v	4. Issues	29
1. The Canadian Judicial Council	1	Ethical Principles for Judges	29
General Overview	1	Appointment of Judges to Commissions of Inquiry	30
Council Members' Seminar	2	Restraints after Retirement from Judicial Office	31
2. Judicial Education	5	Specimen Criminal Jury Charges	31
Overview of Responsibilities	5	Technology and the Courts	31
Authorization for Reimbursement of Expenses	5	Appeal to Governments	31
National Judicial Institute (NJI) Programs	5	JAIN Network and Technology	32
Canadian Institute for the Administration of Justice (CIAJ) Programs	6	Computer News for Judges	32
Other Seminars Authorized under the <i>Judges Act</i>	6	Neutral Citation Standard	33
Social Context Education Initiative	7	5. Judicial Benefits	35
Study Leave Program	7	Appendices	
Authorized Leave in 1997-98	9	A. Members of the Canadian Judicial Council, 1997-98	37
3. Complaints	11	B. Committee Members	39
Overview of Responsibilities	11	C. Part II of the <i>Judges Act</i>	43
The Complaints Process	13	D. Canadian Judicial Council By-laws	47
Review of the Complaints Process	14	E. Human and Financial Resources, 1997-98	57
The 1997-98 Complaints	15	F. Position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry	59
Files Closed by the Committee Chairperson	16		
Files Closed by Panels of Council Members	24		

Preface

As our society evolves, so does the role of its judiciary.

Issues of justice and equality are continuously being framed in new ways, and judges must understand and respond to these dimensions, while retaining their special position of independence and public trust.

Judges are expected to maintain a measured distance from governments and others in order to be able to make impartial decisions. At the same time, those decisions place them at the centre of many current debates about social change and social values. As such, the requirement for impartiality must not force them to isolate themselves from their communities or be insensitive to the issues and concerns that come to them for adjudication.

To strike this balance, judges must continuously reflect on their responsibilities and actions, on and off the bench. This annual report covering the 1997-98 fiscal year discusses three initiatives of the Canadian Judicial Council to help judges do so.

- Working with the National Judicial Institute, the Council seeks to provide judges with opportunities for “comprehensive, in-depth and credible” education in Canada’s evolving social context. The Social Context Education initiative described in this report helps make judges more aware of the many dimensions of the diverse society within which they function.
- The Council has been concerned for some time that the appointment of judges to head commissions of inquiry can disrupt the work of their courts and impair their appearance of independence, particularly when inquiries operate

without deadlines and venture into partisan issues or criminal or civil wrongdoing. The Council adopted the position that such appointments should be accepted only when they would not impair the work of the court or the future work of the judge. This position was communicated to federal and provincial governments, and was received favourably.

- During the year, the Council substantially concluded its work on the *Ethical Principles for Judges*, a landmark document subsequently released for distribution to judges, lawyers, law schools, the media and the general public. Four years in the making, this document represents the results of intense consultation with judicial, legal and academic communities across the country. It is a compendium of advice to judges on the many difficult ethical issues they face in their obligations to reinforce their independence, act with integrity and diligence, assure equality to all before the law, and maintain judicial impartiality.

The Canadian Judicial Council remains dedicated to supporting judges in their complex and demanding role, and working for the effective administration of justice in Canada.



The Right Honourable Antonio Lamer, PC, C.J.C.
Chairman
Canadian Judicial Council
Spring 1999

1. *The Canadian Judicial Council*



Members of the Canadian Judicial Council at the September 1997 Annual Meeting in Quebec City

GENERAL OVERVIEW

This report covers the activities of the Canadian Judicial Council for the period April 1, 1997 to March 31, 1998. It is the 11th annual report published by the Council.

The Canadian Judicial Council was established by act of Parliament in 1971. The Council's statutory mandate is set out in subsection 60(1) of the *Judges Act* (Appendix C), which declares that its objects are "to promote efficiency and uniformity, and to improve the quality of judicial service in superior courts and in the Tax Court of Canada."

The Council has 36 members. They include the chief justices and associate chief justices, chief judge and associate chief judge of all courts whose members are appointed by the federal government. The senior judges of the Supreme Court of the

Yukon Territory and the Supreme Court of the Northwest Territories share a seat, serving alternate two-year terms. The members serving during 1997-98 are listed in Appendix A.

The Council's four areas of activity, discussed in subsequent chapters of this report, are:

- the continuing education of judges;
- the handling of complaints against federally appointed judges;
- developing consensus among Council members on issues involving the administration of justice;
- making recommendations to the federal government, usually in conjunction with the Canadian Judges Conference, on judicial salaries and benefits.

The Council is required by statute to meet once a year, but its practice for some years has been to meet twice — in Ottawa during the spring, and outside Ottawa in the fall. The Council's September 1997 meeting was held in Quebec City.

Members devote much time and effort to work carried out through standing and ad hoc committees and working groups, which deal with specific questions and continuing responsibilities of the Council. Committee membership as of March 31, 1998, is found in Appendix B.

The Council is served by an executive director, a legal officer and two support staff, located at the Council's office in Ottawa. The expenditures for the year are set out in Appendix E.

COUNCIL MEMBERS' SEMINAR

Since 1992, its 20th anniversary year, the Council's practice has been to hold a seminar for members in conjunction with its spring meeting.

The March 1998 seminar was entitled "Social Context Education: Why, What, Where, When?" and focussed on judicial education being developed and undertaken by the National Judicial Institute at the request of the Council. The origins and status of the initiative are described under Judicial Education in Chapter 2 of this report.

In introducing the seminar, Chief Justice Lamer, Chairman of the Council, recalled that the project was born of a Council resolution in March 1994 calling for social context education that is "comprehensive, in-depth and credible." He added:

I have always emphasized the importance of this project to the administration of justice in Canada. In particular, I believe that it can assist us in pursuit of equality before the law. The project is designed to make those who participate in it better judges, by making them more aware of the broader social, economic, cultural and political context within which we judges function in a society as diverse as Canada.

Seminar Participants

Judge Dolores Hansen
Executive Director, National Judicial Institute

Mr. Justice John McGarry, Ontario Court of Justice (General Division) and
Judge Donna Martinson, Provincial Court of British Columbia
Project Co-Chairs

Professor Rosemary Cairns-Way
Project Co-ordinator

Dr. Sheilah Martin, Professor Nitya Iyer and
Professor Joanne St. Lewis
Members of the Program Development Group

Mr. Justice Casey Hill, Ontario Court of Justice (General Division) and
Mr. Ed Eduljee, President of the
Heritage Institute
Members of the Advisory Committee

Prof. Cairns-Way said social context education is "education about the social backdrop against which, or out of which, individual litigants and particular issues appear before the courts. It is also about the jurisprudence which arises from new laws requiring substantive equality." The programming challenges judges to reflect on the complexity of the issues that they face and to develop their own responses to the challenges of judging in a diverse society.

She noted pilot community consultations held in Vancouver and Halifax, programs in a total of five provinces in 1997-98, and programs in all provinces by the spring of 1999.

Professor Cairns-Way noted that in its 1994 resolution the Council had highlighted gender, race and Aboriginal perspectives as important social context issues. However, in their consultations with judges, the Advisory Committee and Program Development Group, the NJI leaders

had been reminded that conditions of disadvantage lead to systemic discrimination and unequal access to justice. It is essential to take into account issues such as disability, low literacy and sexual orientation, ways in which race and gender intersect and overlap, and how poverty affects equal access to justice.

Mr. Justice McGarry underscored the time-consuming but important planning steps necessary for effective seminar development, and its benefits in securing the long-term commitment for the judges involved. A guiding principle is local delivery — “we will come to you rather than have everybody come to Ottawa.”

Dr. Martin said one of the biggest challenges about social context education is that it deals with equality and requires that we have a truly inclusive justice system.

Equality is a new concept in terms of legal principles. It is a hard concept and it has an extensive application. We know that the equality guarantees introduced in the Canadian Charter require judges and courts and analysts to view matters in context, to make comparative assessments, to look at power differentials, to focus on domination, on hierarchies and to view matters from their historical, political and social perspectives so that we are in a better position to ensure that everyone who comes before the law is treated with equal dignity, concern and respect.

Dr. Martin also noted that accommodating the concept of substantive equality into law and precedent will be one of the foremost challenges faced by our justice system. New norms must take root in modern jurisprudence. Shifts have occurred in notions of objectivity.

Social context education requires an adaptability and a “stretching into zones of discomfort. It is taking the risks to learn more. . . . it’s one that goes to the core of the fitness of our judicial system to be responsible to the many different people that this system serves.”

Judge Martinson discussed the importance of consulting community leaders, community workers and individuals from communities involved in judicial education; working through pilot projects; and conducting ongoing assessments.

Mr. Eduljee said community consultations help move beyond being parochial to being inclusive, introduce respect for judicial decision making in the courts at large and increase community confidence that they will receive justice before the courts.

Prof. Iyer spoke of the unfortunate reality of racism in our society. She said judges must be sensitive to the fact that assumptions are in fact made on the basis of race. Judges must be seen as credible, impartial and fair in the face of unfortunate prevalence of inter-racial tension and suspicion. They must strive for judicial openness and candour rather than pretending that the problem doesn’t exist and recognize that race does matter in that people have vested it with social significance. What is required is:

. . . a notion of judicial impartiality that is openly sensitive to the social significance of colour in a way that does not legitimate assumptions about racial allegiances but by acknowledging them in a sensitive way, actually does some work towards dispelling them and reducing the tendency to make assumptions based on race . . .

Mr. Justice Casey Hill concluded the seminar with the observation that law is a social mechanism and that, at times, the court is a major institution of social change and reform. Equality is a constitutional norm and a fundamental concept that must inform the courts’ over-arching obligation to be fair and impartial.

The challenge for the future as we continue to seek to dispense impartial justice, I think, is to continue the education process you began, allowing us to integrate values respective of diversity, equality and tolerance in a fashion promoting fairness to all concerned.

2. *Judicial Education*

OVERVIEW OF RESPONSIBILITIES

When the Council was created in 1971, little continuing education was available for the approximately 440 federally appointed judges. Parliament provided that the Council could, pursuant to paragraph 60(2) (b) of the *Judges Act*, “establish seminars for the continuing education of judges.” From the Council’s inception it was recognized that a judiciary in a dynamic and changing society must constantly renew its intellectual resources.

The Council addresses its role of providing opportunities for continuing education of judges through its Judicial Education Committee, which recommends education conferences and seminars to be designated for attendance by judges and reimbursement of expenses under subsection 41(1) of the *Judges Act*.¹

It should be noted, however, that judges have opportunities other than through the auspices of the Council for education and training programs. As authorized or required through provincial judiciary acts, individual courts can undertake educational programs. In addition, individual chief justices, under subsection 41(2) of the *Judges Act*, can authorize the reimbursement of expenses incurred by judges of their courts in attending certain meetings, conferences and seminars.

As discussed below, the Council’s Study Leave Committee reviews applications and recommends judges for the Study Leave Program at Canadian universities.

AUTHORIZATION FOR REIMBURSEMENT OF EXPENSES

The *Judges Act*, subsection 41(1), provides for payment of the expenses of judges attending designated education conferences.

The Council authorizes reimbursement of expenses, in most cases for a specific number of judges to attend particular seminars and conferences that the Judicial Education Committee believes will be important and beneficial to the participating judges.

The Office of the Commissioner for Federal Judicial Affairs administers the resulting claims.

National Judicial Institute (NJI) Programs

The Council works in co-operation with the National Judicial Institute (NJI), which plays a co-ordinating role in judicial education according to agreed educational standards. The NJI, a non-profit organization funded by both federal and provincial governments, designs and presents courses for both federally and provincially

¹ The *Judges Act*, subsection 41(1) provides as follows: “A judge of a superior court or of the Tax Court of Canada who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice and that the judge in the capacity of a judge is required to attend, or who, with the approval of the chief justice or chief judge of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending.”

appointed judges. The courses are designed to help judges improve the administration of justice; achieve personal growth, high standards of official conduct and social awareness; and perform judicial duties fairly, correctly and efficiently.

Ultimately, the responsibility to further their education falls on individual judges. They are encouraged to spend up to 10 sitting days a year on their continuing education, and while the demands of the Bench exert constant pressure on judges' time and energies, the NJI supports their commitment to continuous learning.

During 1997-98, the Council authorized the following NJI seminars under subsection 41(1) of the *Judges Act*. On average, 20-40 judges attended each of these seminars.

- Appellate Courts Seminar, Toronto
April 13-16, 1997
- Settlement Skills for Judges — Federal Court of Canada, Ottawa
May 15-17, 1997
- Social Context Education: Judicial Needs Assessment, Ottawa
May 12-13, 1997
- Civil Law Seminar, Ottawa
May 21-23, 1997
- Early Orientation for New Judges, Ottawa
May 26-30, 1997 and Nov. 24-28, 1997
- Settlement Skills for Judges — Atlantic Courts, Fredericton
June 12-13, 1997
- Social Context Education: Faculty Development, Vancouver
Oct. 20-22, 1997
- Atlantic Courts Seminar, Halifax
Oct. 30-31, 1997
- Criminal Jury Trials Seminar, Vancouver
Nov. 12-14, 1997

- Pre-Trial Settlement Skills Seminar, Toronto
Dec. 3-5, 1997
- Family Law Seminar, Toronto
Feb. 11-13, 1998
- Criminal Law Seminar, Montreal
March 18-20, 1998

In addition, computer courses were provided to judges of the Federal Court of Canada on December 11-12, 1997, and judges of the Manitoba Courts on February 20-21, 1998.

Canadian Institute for the Administration of Justice (CIAJ) Programs

The Canadian Institute for the Administration of Justice (CIAJ) conducted two annual seminars for federally appointed judges:

Judgment Writing Seminar, Montreal,
July 8-12, 1997, with up to 55 judges
authorized to attend.

New Judges Seminar, Ste-Adèle, Quebec,
March 1-6, 1998.

As in previous years, the Council authorized reimbursement of expenses for participating judges.

The Council also authorized a total of 95 judges to attend as participants or speakers at a CIAJ conference on The Administration of Justice in Commercial Disputes from October 15 to 18, 1997, in Toronto.

Other Seminars Authorized under the Judges Act

The Council authorized judges to be reimbursed for their expenses in attending a variety of other seminars and conferences during the year:

- Up to 56 judges were authorized to attend the Cambridge Lectures of the Canadian Institute for Advanced Legal Studies, July 6-16, 1997, in Cambridge, England.

- Up to 62 judges were authorized to participate in the Federation of Law Societies of Canada National Criminal Law Program, July 14–18, 1997, in Halifax.
- Thirty judges were authorized to attend the Second World Congress on Family Law and the Rights of Children and Youth and the 1997 Annual Conference of the Association of Family and Conciliation Courts held in San Francisco, June 3–7, 1997.
- Two judges were authorized to attend the New Appellate Judges Seminar and two others the Senior Appellate Judges Seminar at the Institute of Judicial Administration, New York University School of Law, in July 1997.
- Twenty-five judges were authorized to attend the National Center for State Courts Fifth National Court Technology Conference, in Detroit, September 9–12, 1997.

SOCIAL CONTEXT EDUCATION INITIATIVE

In August 1996, at the request of the Canadian Judicial Council, the National Judicial Institute launched a project to develop a comprehensive program of social context education for judges.

The project is led by the full-time Co-ordinator, Professor Rosemary Cairns-Way, and two Special Directors, The Honourable Judge Donna Martinson and The Honourable Justice John McGarry, with advice and guidance of an advisory committee made up of both judges and non-judges, and support in program design from a program development group made up of prominent educators.

The project takes a three-stream approach to program development. It has introduced intensive programs that are two to three days in length,

short programs that may stand alone or be held as part of other programs, and a system for integrating social context issues into the general education programs of all courts. The project has identified judicial leaders in each court and each province to work on program integration and the organization of local conferences. It has incorporated community consultations into program development, and has held special meetings to consider the needs and concerns of judges with respect to social context education.

The Council, whose March 1994 resolution prompted the NJI project, passed a further resolution at its September 1997 annual meeting asking chief justices to provide opportunities for the judges in their courts to attend social context programs in at least the areas of gender equity, racial equity, and Aboriginal justice.

STUDY LEAVE PROGRAM

Providing opportunities for periodic leaves of absence for reflection and study is desirable to better equip judges for their judicial duties. Each year under a study leave fellowship program a number of judges undertake research, study and, in some cases teaching, at a Canadian university.

The benefits of such study leaves is well-established within and outside the judiciary. It is the Council's view that demands on judges in the era of the Canadian *Charter of Rights and Freedoms* make it even more important that judges have access to enhanced educational programs.

The Study Leave Program is operated under the joint auspices of the Canadian Judicial Council and the Council of Canadian Law Deans (CCLD). Judges are recommended for participation by the Study Leave Committee, composed of three Council members and two representatives of the

CCLD (one representing common law and one civil law jurisdictions). Members of the Committee in 1997-98 are listed in Appendix B. The Governor in Council (Cabinet) is then asked to approve the leave, as required under paragraph 54(1)(b) of the *Judges Act*.²

Programs are tailored to the needs of each judge and to those of the host institution.

The aims of the program are:

1. To enable a judge to engage in research, teaching or related activities at a Canadian law school or cognate institution, so that he or she can return to the bench better equipped to carry out judicial duties; and
2. To provide Canadian law schools and related institutions with the opportunity to have experienced jurists participate in and contribute to research, teaching and other related activities of benefit to faculty and students.

During study leave, judges continue to receive their salaries, but must cover living, travel and other expenses from personal resources.

At its March 1997 meeting, the Council considered a report from the Study Leave Committee that made a number of recommendations for changes to the Study Leave Program. The Council decided, before voting on the recommendations, to seek the views of the Minister of Justice, as leave under the program requires Governor-in-Council approval. The Minister indicated she was not prepared to accept a recommendation for study leave at a non-Canadian university. The Study Leave Committee

then reviewed and revised its recommendations, which were approved by the Council at its March 1998 meeting.

The major recommendations accepted by the Council were:

- Study leaves are to be differentiated clearly from other leave opportunities such as “re-charging” without a plan of study or research at a particular institution, where a leave of up to six months may be granted by a chief justice.
- Study leave should be available only when the background of the candidate and the proposed leave program merit a prolonged absence from the court.
- Related to the first two criteria, federally appointed judges are to be eligible for leave after seven years of service, down from 10 years. Leave is to be granted only to judges who have a clear and substantial study leave proposal which would enhance the judge’s educational background and make a significant contribution to the host institution.
- The program is reaffirmed as essentially a collaboration between the judiciary and Canadian law schools. Canadian law schools are the program’s primary partner and law the primary area of study, although a judge may apply for study leave at a cognate institution in Canada, such as a centre of criminology. A judge’s research program at a Canadian university could entail a visit to an educational institution outside Canada and, on an exceptional basis, study of complementary disciplines, such as law and philosophy or law and economics.

2 The *Judges Act*, subsection 54(1) provides as follows: “No judge of a superior court or of the Tax Court of Canada shall be granted leave of absence from his or her judicial duties for a period (a) of six months or less, except with the approval of the chief justice or senior judge of the superior court or of the chief judge of the Tax Court of Canada, as the case may be; or (b) of more than six months, except with the approval of the Governor in Council.”

- As a general rule, a study leave will be for a period of seven months and on an exceptional basis only, for up to 12 months where the extended term is required by virtue of the particular program.
- Applications to chief justices for study leave of three to six months are to be submitted by the chief justice to the Study Leave Committee for advice and comments, although not for Committee approval.

Authorized Leave in 1997-98

Leaves were approved for a number of judges for the period September 1, 1997, to March 31, 1998. At the end of their leave, judges are required to submit to the Council a report on their activities.

Mr. Justice Stephen Borins of the Ontario Court of Justice (General Division) had just commenced research in judicial education and administration of civil justice at Osgoode Hall Law School when he was obliged to abandon the program to accept an appointment to the Court of Appeal for Ontario.

Mr. Justice Pierre Boudreault of the Quebec Superior Court participated in a wide range of scholastic and professional activities at l'Université de Québec à Montréal and McGill University, including a conference on alternative dispute resolution and research in "mini-trials" procedures.

Mr. Justice Paul-Arthur Gendreau of the Quebec Court of Appeal followed a language training program and attended a number of university courses during a five-week period in Vancouver. Subsequently at l'Université Laval he took

computer courses, revised a text on civil procedures for new judges, completed a book of which he was co-author, delivered lectures and participated in law conferences and university courses.

Mr. Justice Roger Savoie of the Court of Queen's Bench of New Brunswick served as a resource person for several courses at the École de droit de l'Université de Moncton and participated as student and contributor in a Toronto seminar on pre-trial settlement skills, a session on human rights in Paris, a Montreal symposium on criminal law during a leave period cut to four months as a result of court work.

At the University of Toronto Faculty of Law, Madam Justice Karen Weiler of the Court of Appeal for Ontario served as judicial advisor to the competitive moot program, participated in a number of courses and attended various other courses and workshops on an ad hoc basis.

At the Faculté de droit de l'Université Laval, Mr. Justice Jean Richard of the Quebec Superior Court studied the evolution of the Lower Canada Civil Code and the Quebec Civil Code and the authority conferred on the courts as a result of legislation. He participated in a number of conferences and followed an intensive course on computers and the Internet.

Madam Justice Marie Corbett of the Ontario Court of Justice (General Division) undertook research into the decisions of Judge Helen Kinnear, the first federally appointed woman judge, in anticipation of the publication of Judge Kinnear's biography. As past president and founder

of the Canadian Chapter of the International Association of Women Judges, Madam Justice Corbett also attended a conference of the National Association of Women Judges in Salt Lake City, Utah.

At l'École de droit de l'Université de Moncton, Mr. Justice René P. Foisys of the Alberta Court of Appeal taught classes, judged student exercises, assisted students preparing for moot courts, judged moot courts, and attended French language cases in the Court of Queen's Bench. During a subsequent semester at the University of Alberta he taught on a number of subjects and judged various moot courts. Both law schools provided instruction in computer use.

3. *Complaints*

OVERVIEW OF RESPONSIBILITIES

An important responsibility assigned to the Canadian Judicial Council at its establishment in 1971 was to deal with complaints against federally appointed judges. It is a role that proceeds within an historical and constitutional context, and one tightly constrained by tradition and by the rules, processes and precedents that the Council itself has established over the years.

The role rests fundamentally on a distinction between judicial *decisions* and judicial *conduct*.

Judges' *decisions* can be appealed to progressively higher courts. They can be reversed or varied by the appeal courts without reflecting in any way on the judges' capacity to perform their duties, and without jeopardizing in any way their tenure on the bench, so long as they have acted "within the law and their conscience."

Treatment of judicial *conduct* may be traced to the formulation that judges "shall hold office during good behaviour" established by the English *Act of Settlement, 1701* which the Westminster Parliament enacted to prevent the removal of judges whose decisions were viewed with disfavour by the Crown or the government.

The *Constitution Act, 1867* adopts the same language in providing that judges of Canada's superior courts "shall hold office during good behaviour" and be removable only by "the Governor General on Address of the Senate and House of Commons."

The Constitution supports judicial independence and impartial justice by ensuring that judges can

be removed from the bench only by Parliament and only by breach of the standard of good conduct.

At the same time, it provides a check on the judiciary, ensuring that the principle of judicial independence does not eliminate judicial accountability. Whether judges are correct or incorrect, right or wrong in their decisions, they are not free to breach the bounds of "good behaviour."

For centuries this historic formulation has been effective both in preserving judicial independence and deterring judicial misbehaviour. Since 1701 only one judge has been removed from office by the U.K. Parliament. Canada's Parliament has never been called upon to make a decision for removal, although a number of judges whose conduct has been under question have chosen to retire or resign rather than face parliamentary scrutiny.

The Council's role comes into play under the terms of the *Judges Act* when a complaint or allegation is made that a judge in some way has breached the requirement of good behaviour, and by his or her conduct "has become incapacitated or disabled from the due execution of the office of judge."

The Council's statutory mandate is to make an independent assessment of the judicial conduct in question — not whether a judge has made an erroneous decision. This assessment can lead at most to a recommendation to the Minister of Justice that a judge be removed from office. The Minister, in turn, can only make a further recommendation to Parliament.

The Council must undertake a formal inquiry into a judge's conduct on the request of the Minister of

Justice of Canada or by a provincial attorney general, under subsection 63(1) of the *Judges Act*, but most complaints come from members of the public, most typically from individuals who are involved in some way in court proceedings.

There is no requirement that a complainant be represented by a lawyer or that a complaint be made in a specific way or on a specific form. The Council requires only that a complaint be in writing and that it name a specific judge before a complaint file will be opened. The Council has no basis for investigating generalized complaints about the courts or the judiciary as a whole, or about specific judges that complainants have not named or do not want to name. Nor does it investigate complaints about judicial officers such as masters, provincial court judges, court employees, lawyers or others, about whom many complain — wrongly — to the Council.

The complaint process inevitably risks exposing judges to unjust accusations and unwarranted public questioning of their character. This is particularly so when a complaint that was made public by the complainant is later found to be baseless, and the finding is not given the same public prominence as the original accusation. Judges are not in a position to refute such accusations publicly, or act independently to protect themselves from what they see as damage to their reputations.

All this underscores the importance of providing a process that respects judicial independence but is also fair and credible. It is the Council's policy to make the complaints process demonstrably open and fair, to examine each complaint seriously and conscientiously, and to ensure consideration of the fundamental issues involved, not just the form in which it was made or the technicalities surrounding it.

And it is against this exacting standard that the complaints process has been measured in its evolution since 1971 — most recently through the new by-laws adopted by the Council which take effect April 1, 1998, and found at Appendix F (see “Review of the Complaints Process” below).

The Council's complaints procedures were examined in detail by Professor Martin L. Friedland of the University of Toronto Law School in his 1995 report *A Place Apart: Judicial Independence and Accountability in Canada*. He said:

The Council gave me full access to all of their complaint files. My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being ‘covered up’ by the Council after a complaint was made to it. The descriptions in the Annual Report — at least for the past few years — in my view appear accurately to reflect the complaints that have been received by the Council.³

On the one hand, it is essential that those who feel aggrieved by a judge's conduct are assured of an opportunity to have their concerns reviewed. On the other, it is important to assure a judge whose conduct is in question that the matter will be resolved as promptly and fairly as possible.

These requirements are closely related to the need for openness in the Council's complaints process. Professor Friedland proposed various alternatives for making the process more visible, including the preparation of case summaries for public view. He acknowledged, however, that enhancing the visibility of the process would require considerable care because an unfounded allegation of impropriety against a judge could have serious consequences in terms of his or her credibility. It would

3 Friedland, Martin L., *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, 1995, pp. 94–95.

be unfair for the Council to publicize unfounded complaints that have not gone on to a hearing, he concluded. Summaries should avoid this unfairness.

The Council accepted this recommendation and announced on May 8, 1997, that summaries of closed complaint files would be made available at the Council office in Ottawa, starting as of April 1997. The summaries provide a brief description of each complaint and its disposition. They do not include the names of the judges or complainants, the legal proceeding, court or province involved.

If a complainant has made his or her complaint public, in closing the file the Council will generally issue a news release or have a statement available in the event of media inquiries. The Council will not make the fact of a complaint or its disposition public at its own initiative.

THE COMPLAINTS PROCESS

The initial responsibility for dealing with complaints rests with the Chairperson or one of two Vice-Chairpersons of the Judicial Conduct Committee of the Council. Their authority and responsibility are established by the Council by-laws made pursuant to the *Act*, reproduced at Appendix D.

The Chairperson or Vice-Chairperson⁴ reviews each complaint and decides on its disposition. He or she may seek comments from the judge and the judge's chief justice but, with or without such comments, may close a file with an appropriate reply to the complainant.

The Chairperson may also refer the matter for consideration by a Panel of up to five members of the Council. The Chairperson, or Panel, may also request that an independent lawyer make further inquiries on an informal basis. The Panel may conclude that no further action by the Council is

warranted and direct that the file be closed with or without an expression of disapproval or regret at the conduct of the judge in question. In essence, an expression of disapproval represents the Panel's view that a complaint has a measure of validity but is not sufficient to lead to a recommendation to remove the judge involved from the bench and, therefore, there is nothing to warrant the Panel making a recommendation to the Council that a formal investigation by an Inquiry Committee take place.

If the complaint is considered sufficiently serious, the Panel may recommend that the Council formally investigate it under subsection 63(2) of the *Judges Act* in order to establish whether a recommendation for removal is called for. Under the *Act* only the full Council may order a formal investigation or recommend removal. Formal investigations are carried out by an Inquiry Committee which consists of Council members and members of the Bar appointed at the discretion of the Minister of Justice.

Only rarely does a complaint result in a formal investigation. By far the largest proportion of complaints are dealt with by the Chairperson, and a much smaller proportion go to Panels. Even more rarely — once since 1971 — the Council may recommend to the Minister of Justice that a judge be removed from the bench.

These screening procedures do not take place if the Minister of Justice or a provincial attorney general directs the Council to undertake a formal inquiry under subsection 63 (1) of the *Judges Act*, in which case the Council must do so.

Grounds for a recommendation for removal are set out in subsection 65(2) of the *Judges Act*. The Council's investigation would have to determine that the judge has become incapacitated or

⁴ Throughout the remainder of this chapter "Chairperson" can include "Vice-Chairperson."

disabled from the due execution of the office of judge by reason of:

- (a) age or infirmity;
- (b) misconduct;
- (c) having failed in the due execution of office; or
- (d) having been placed, by conduct or otherwise, in a position incompatible with the due execution of office.

REVIEW OF THE COMPLAINTS PROCESS

As the result of a request stemming from the Council's annual meeting in Halifax in September 1996, the Judicial Conduct Committee established a working group to review the complaints process and related by-laws in the light of experience since the last significant amendments were made in 1992.

After detailed study and discussion, the working group concluded that a number of by-law and procedural changes should be made to make the process more efficient, while maintaining the features of fairness for all involved.

Major policy issues were discussed by the Council at its September 1997 annual meeting and, at its mid-year meeting in March 1998, the Council approved revised by-laws to take effect April 1, 1998, (Appendix D).

Notable changes are as follows:

- Where the public interest and the due administration of justice require it, the Chairperson of the Judicial Conduct Committee is authorized to continue to deal with a matter even though the complaint has been "withdrawn" by the complainant.
- The new by-laws explicitly provide that whenever the Chairperson of the Judicial Conduct Committee proposes to close a file involving a member of the Council, an independent lawyer will be asked to review the file.
- Existing by-laws required a Council member to report any conduct of a judge of that member's court which might require attention. The scope of the obligation is expanded to include reportable conduct of any judge — whether or not he or she is a judge of the member's court — and whether or not the member has received a written complaint about the judge.
- To save the time and expense of establishing a Panel to consider a complaint, the Chairperson dealing with a file is authorized to "express disapproval" of conduct in circumstances where a judge has, himself or herself, recognized inappropriate or improper conduct and expressed regret or asked that an apology be extended to the complainant.
- Existing by-laws provided for "further inquiries" to be made into a complaint or allegation in order to provide further information that would enable a Panel to determine whether or not a formal investigation is warranted. As a result of these further inquiries, additional allegations of misconduct have sometimes come to light, and for some years it has been the Council's practice to consider them if they were serious and credible. This practice is confirmed. An existing by-law already provides the judge in question with the opportunity to respond to the "gist" of any allegations and evidence against him or her.
- The new by-laws allow for puisne judges — in addition to Council members — to participate as members of Panels reviewing files.
- The new by-laws confirm the right of an Inquiry Committee to recommend to the Council that a judge should be removed from office.
- The new by-laws specify that members of an Inquiry Committee may not be appointed from

the same court as the judge who is the subject of the inquiry.

- The new by-laws specify that independent counsel will be appointed to act at arm's length from the Council and the Inquiry Committee and to present evidence to the Inquiry Committee in the public interest.
- Barring exceptional circumstances, hearings of Inquiry Committees shall be conducted in public. Private hearings would be held only if the Committee "considers that the public interest and the due administration of justice require it." When the hearing has been held in public, the report of the Inquiry Committee will be made public.

THE 1997-98 COMPLAINTS

In 1997-98, the Canadian Judicial Council closed 195 files dealing with complaints against federally appointed judges, marginally more than

the numbers recorded in each of the previous three years.

During the year, 202 new files were opened. This was also close to the number of complaints filed with the Council in recent years.

These numbers show an essentially stable level of complaints and remain small in comparison with the thousands of decisions rendered yearly by about 1,000 judges.

Within the totals, however, proportionately more complaints are from individuals not represented in court by a lawyer, and significantly more from parties to family law disputes. It is also evident that misunderstandings persist about the Council's limited role related to judicial misconduct. Many individuals incorrectly believe that the Council provides an avenue for continuing a legal case with little financial outlay, or that it can reverse decisions or compensate complainants for what they consider unfair treatment.

Table 1
Complaint Files

	Files Opened	Carried over from previous year	Total Caseload	Closed	Carried into the new year
1990-91	85	13	98	82	16
1991-92	115	16	131	117	14
1992-93	127	14	141	110	31
1993-94	164	31	195	156	39
1994-95	174	39	213	186	27
1995-96	200	27	227	180	47
1996-97	186	47	233	187	46
1997-98	202	46	248	195	53

Table 2
Complaint Files Closed in 199798 (195)

	Closed by the Chairperson* of the Committee	Closed by Panels
After response from the judge	81	6
Without requesting response from the judge	107	-
Files "Withdrawn" or "Discontinued"	1	-
Total	189	6

*or Vice-Chairperson

Files Closed by the Committee Chairperson

Each complaint naming a federally appointed judge is considered first by the Chairperson of the Judicial Conduct Committee. The Chairperson may be able to make a decision on the basis of either the information contained in the complainant's letter, or on the basis of comments and documentation received from the judge concerned.

Of the 195 complaint files closed during the year 1997-98, 188 or 96 percent were closed by the Chairperson. In 81 of these, or 43 percent, comments were sought from the judge in question and his or her chief justice before the file was closed. The remaining 107 files were closed without seeking the comments of the judge.

In most instances when a file is closed without seeking comment or conducting further investigation it is because the complainant, either explicitly or implicitly, is asking for reversal or alteration of the judge's decision, for a new trial or hearing, or for compensation as a result of an allegedly incorrect or unlawful decision. For the most part, these are matters that must be considered by an appeal

court; the Council has no power to deal with them. These files are closed with a letter to the complainant, a copy of which is provided to the judge along with the complaint.

When it is not certain whether a matter falls within the jurisdiction of the Council, when the nature of the proceeding giving rise to the complaint is not clear, or when it appears that there may be substance to allegations of inappropriate conduct, the judge and chief justice concerned will be asked for comment. When these comments are received, the Chairperson decides what further action, if any, is warranted.

To ensure a fair and impartial process, the Council requires that the Chairperson not screen complaints involving judges from his or her own court or province.

As a further safeguard, all complaints against members of the Council, regardless of their seriousness, are reviewed by an outside lawyer.

Marital or Family Disputes

An exceptionally high proportion of complaints — 76 of 195 in 1997-98, or 39 percent — arose from marital or family disputes. This perhaps indicates

how high emotions run in family matters, and how difficult and complex are the issues they pose for judges. Examples of such complaints and how they were dealt with by the Chairperson follow.

- A respondent in a divorce trial complained about “the lack of professional behaviour, the lack of understanding, empathy and knowledge about spousal abuse, and the unfair and immoral as well as illegal proceeding which occurred in the divorce trial.” The complainant sent several letters to the Council and on each occasion was asked to specify instances of alleged inappropriate conduct on the part of the judge. She then alleged that when she appeared in court her lawyer had not been advised of the date of the hearing. The complainant said the judge told her she was wasting the judge’s time and that people who had spent real money to hire a lawyer were waiting in the next courtroom. The complainant said the judge agreed to adjourn the proceeding in order to inform her lawyer about the hearing but added that if she did not have anything valid to contribute next time, she would increase the costs for the hearing. The Reason for Judgment and a transcript of the hearing, provided by the judge, disclosed no misconduct on the judge’s part. It appeared that the judge’s main concern was to help the complainant find ways to settle her differences in a more reasonable way than returning to the court on issues that, after an 11-day trial, should have been dealt with between the parties.
- A judge was alleged to have shown hostility and lack of respect toward four relatives of two boys who were the subjects of a custody and access dispute. Of particular concern was the judge’s alleged treatment of the maternal grandmother who had made a claim, independent of her daughter, for specified access to the boys. The judge provided a copy of the transcripts which

disclosed that he had questioned the maternal grandmother’s request for independent access as the evidence showed that there was no difficulty between herself and her daughter with respect to access. It appeared that the complainants were disappointed with the outcome of the case and may not have appreciated the judge’s assessment of the petitioner’s parenting ability. The complainants were informed that it is the judge’s role to make a determination upon considering the evidence before him and the fact that his views differed from those of the complainants did not mean that he was disrespectful. There was no evidence of misconduct on the part of the judge.

- The wife in a support and property trial complained about the “very unnecessary” two-year delay in obtaining the judgment. Her counsel had written numerous letters about the delay, and she was concerned that perhaps the constant reminders might have had a negative bearing on the decision. In reply to the complaint, the judge offered a sincere apology for the delay, which was relayed to the complainant. She was informed that while the delay in the matter was unacceptable, it did not amount to misconduct requiring further action by the Council.
- A complainant made a number of allegations against a judge arising from an application in Motions Court by the complainant’s former husband to rescind arrears of support and to remove the collection of payments from the Family Support Plan. The complainant said the judge took a 15-minute recess to study the materials presented to him and when he returned to court he responded to the complainant’s comments about the arrears by saying that he had not read the material and was taking the husband’s word only. Other elements of the complaint alleged bias against

the complainant because she was a woman, that he had wrongly ordered her to appear, that he criticized the provincial government, that he disliked computers, and that he erred in fixing arrears at nil and ordering the former husband to make future payments by postdated cheques. The judge responded that he had adjourned the court for about half an hour to try to straighten out the accounting between the materials supplied by the parties, rather than send them away to prepare proper material. At the hearing, he made a number of comments about certain alleged inadequacies in the Family Support Plan. Upon being interrupted, he made what he admitted was an unfortunate choice of sarcastic language about reading the material when it should have been obvious that he had read it and straightened out the accounting. He apologized for his sarcastic remark, which was not intended to offend the parties. He denied that he was biased against women and stated that he had criticized operation of the plan, not the government, and that his comment about computers related to the fact that they had failed to keep the accounts between the parties accurate. The complainant was advised that even judges sometimes become impatient, and that the Council had no jurisdiction to review the judge's decision.

- The complainant had applied for a reduction of his support payments. He asked why his financial difficulties were not taken into consideration when the judge rendered a decision in September 1996 ordering half of his RRSP and half his rental income to be paid to his ex-wife. The judge finally accepted a year later that he could not pay the support. The complainant alleged that the judge had refused to listen to his story. He also alleged that when the judge was in private practice the judge had acted as

his lawyer and they had had disputes about the handling of his case. In the complainant's opinion, the judge's recent decisions about support payments reflected a personal vendetta against him. The transcript indicated that the parties had full opportunity to present their case and that the judge made his decision on the basis of the evidence presented. The judge confirmed that he practised law for 17 years near the community of the complainant's residence. He did not specifically recall having the complainant as a client, or having disputes with him, but he said that since his appointment to the bench he had always been sensitive to the possibility of any conflict of interest with litigants before the court. The Council advised the complainant that the Court of Appeal must deal with any dissatisfaction with the judge's decision and that if he thought the judge should not have heard his case, he should have brought his concerns to the attention of the judge for disposition.

- The complainant alleged that the judge had shown prejudice against her at the settlement conference. She alleged that the judge had made comments about her religion, about the impact of her mother's death and about support payments which were not the subject of the settlement conference. The Council noted that the dispute over access began in the fall of 1991 and that the complainant had been in court over the matter eight times, by which time the parties had established day access between the father and son. The complainant had then denied access for a month prior to the hearing in breach of a court order. It was pointed out that the discussion about religion was probably centred around denial of access at Easter. A number of other judges who had dealt with the matter had commented upon the antagonism and hostility between the complainant and the

boy's father. The tape recording of the settlement conference disclosed that the complainant had misunderstood the judge's role in the proceedings. The judge indicated her role was to tell the parties how she would decide the case if she had been the trial court judge. If the parties did not agree with her views then the case would be set for trial and the trial court judge would not know about any discussion during the settlement conference. Other comments of the judge were relevant to the proceedings. The judge indicated that in retrospect she perhaps did not realize how sensitive the complainant was to her criticism and, to the extent that it had upset her, she apologized. However, the judge said that this did not change her opinion about the case. The complainant was advised that there was no evidence of any misconduct requiring action by the Council.

- Six letters of complaint were received regarding statements made in oral reasons for judgment about the nature of a sexual relationship between a man and a girl under the 14-year age of consent. The judge, in reducing a nine-month jail sentence to community service, said the relationship was criminal, but the girl had been a "willing participant." The judge provided a detailed reply, outlining the context of the case. The only issue before the court was whether the sentence imposed by the trial court should be served in the community pursuant to the new conditional sentence legislation. The judge said that unfortunately he expressed the reasons for judgment poorly and he had used language which invited misinterpretation. The Council advised the complainants that, based on the information before it, there was no basis for further action.

Allegations of Discrimination

In a number of cases, complainants alleged that judges demonstrated bias or discrimination, whether in relation to gender, race or some other way.

- Remarks by Mr. Justice Ian Binnie of the Supreme Court of Canada at a social gathering in Toronto were taken by some as a slur against the gay community, prompting extensive media coverage and a request for an immediate investigation. By the time the complaint was received, Mr. Justice Binnie had already sent a letter of apology to the Dean of the Osgoode Hall Law School, host of the banquet where he had spoken. He explained that as he read from a booklet on fraternity ritual he was reminded of an expression he had read years earlier describing a production of *MacBeth* as a "faggoty dress-up party." His letter continued: "The expression popped out last Saturday without any reflection on my part about its precise signification. I don't consider the word 'faggoty' to be appropriate, nor is the pejorative attitude that lies behind it acceptable, nor do I subscribe to it. Sometimes, as here, expressions that stick in your mind lose their original edge and significance with the passage of time. Individuals are deserving of equal consideration and respect and I certainly regret the fact that what was intended to poke fun at Phi Delta Phi was taken literally by some of the students." The Council advised the complainant that the Chairperson of the Judicial Conduct Committee had concluded, considering the context and the apology, that "this single inadvertent, descriptive comment made in a social context, unfortunate as it is, does not demonstrate evidence of misconduct requiring any further action of this

Council pursuant to its mandate under the *Judges Act*.” A media release was issued on March 16, 1998.

- An unrepresented litigant in a family law case alleged that the judge’s decision not to grant an adjournment, and her decision on the merits of the case, were motivated by racism. The judge provided a detailed history of the matter as presented to her on the day set for trial, indicating numerous delays in a custody proceeding of urgency. She said she had reflected on what could have been done differently to have avoided the offence taken and could not think of anything. The only context in which the complainant’s race was raised during the trial was evidence presented that the complainant had also made allegations of racism against other court officials whose recommendations he disagreed with. The evidence showed that the complainant did not accept responsibility for what went wrong in his life but had a pattern of blaming others. The judge said the issue of his race or racism allegations against others played no part in her decision. The complainant was informed that only an appeal court could modify or change the judge’s decision. There was no evidence of racial discrimination or other misconduct.
- Two complaints concerned the conduct of a judge who presided at a bail hearing of an accused charged with second degree murder of his common law wife’s lover and aggravated assault of the common law wife. The deceased’s sister complained that the judge made inappropriate remarks and often defended the accused’s action. The common law wife referred to comments contained in the transcript, related the circumstances of the tragic event, and indicated why she felt the judge erred in his conclusions. The judge responded that the complainants had evidently misunderstood

the situation when they suggested that he was in any way defending the accused’s actions or that he failed to appreciate the violence that had occurred. He noted that considerations in a bail hearing are very different than those at trial and his remarks were directed solely to the question of the accused’s detention. He said the events described in the complainants’ letters were very different from those disclosed in evidence presented at the hearing and if presented could well have changed his consideration. Nothing he had said was intended to cause any further grief to the complainants. He regretted that his remarks were taken to imply that he was favouring the accused, that he did not appreciate the seriousness of the violence that had occurred, or that he suggested any blame on the second complainant for asserting her civil rights. The Chairperson found that the judge’s observations were made for the purpose of giving Crown counsel the opportunity to make specific submissions. The judge’s interpretation of the evidence was not open to a finding of misconduct, although it could be reviewed by the Court of Appeal.

Alleged Unfairness

In some instances, complaints arise from perceptions that judges have been harsh or unfair in their treatment of litigants or in their decisions.

- An elderly person had willed a large part of his estate to the son of an employee working in the retirement home where he lived prior to his death. Two complainants, representing 13 nephews and nieces of the deceased person, said the judge’s validation of the will was unjust and wouldn’t have been rendered if he had known the whole story. They said the relatives had been denied their right to inheritance and feared that the retirement home employee would act in the same way to influence other residents. The complainants were advised that the judge’s role

is to analyze evidence and apply the law. If one party contends that the judge has erred in his interpretation, they may appeal to a court of appeal. Only legislatures can amend laws. If the complainants believed the law in question was unjust or unclear, they could write the governmental authorities concerned to express their point of view. In this instance, there was no misconduct on the part of the judge.

- The lawyer for a plaintiff in a professional negligence action complained of repeated intervention by a judge during the trial. He said the judge had appeared to be acting as a supplementary counsel for the defence. An expert witness had also complained that the judge had tried to upset her and cross-examine her. In another case, the complainant said an appeal court had made observations about the judge's conduct toward lawyers, finding some observations of the judge to be inappropriate. The transcript of the trial giving rise to the complaint indicated that the hearing had lasted 11 days and that the judge had intervened frequently in proceedings. The judge explained that in such a complicated case, his task was not to remain passive but rather to act in order to be able to render a clear decision. He felt he had to ask for clarifications in order to obtain responses. Because the expert witness had tended not to reply to questions, the judge acknowledged he may have appeared impatient. The transcript indicated that the plaintiff objected frequently and that the judge considered many interjections as baseless or premature, leading to a number of exchanges between lawyers and the judge. The Chairperson advised that the appeal court was the proper forum to decide whether the judge's interventions prevented the plaintiff from presenting his evidence. The judge's conduct did not justify the Council's intervention in terms of its mandate, given the technical nature of the case, difficulties of some witnesses in their testimony, and the judge's attempt to understand the facts necessary to render his decision.
- Six complainants wrote, apparently on the basis of media reports, to complain about a judge's charge to the jury in a widely publicized criminal case. The complainants were sent materials relevant to their complaint pending the decision of the Court of Appeal on the Crown's appeal. After the Court of Appeal's decision dismissing the appeal, a further letter was sent to the complainants, advising them that there was no evidence of misconduct on the part of the judge, although it was understandable why, on the basis of the media reports, the complainants would want to draw the matter to the Council's attention. Some media reports had distorted the judge's decision and misconstrued the judge's comments.
- The complainant, in an eviction proceeding, alleged that the judge did not allow him to enter in evidence affidavits from witnesses as to his character. He alleged the judge went out of his way to insult his character although he had refused to hear evidence on that question. The judge had made a point, in his written decision, of saying that he was a "combative, volatile and somewhat irrational individual." Costs had been awarded against him although he had "won," and he did not feel he could appeal the case. He felt he had been libelled. The judge indicated that the affidavits dealt with the impact of an incident on other tenants' enjoyment of the premises, which didn't seem to him to be relevant. The judge's finding with respect to the complainant's character was based on the evidence before him, and was necessary to explain the conditions he imposed on the complainant's continuing occupation of his unit. The complainant was advised that the Council has no authority to review whether

a judicial decision was right or wrong, or second-guess a judge on admissibility of evidence or credibility of witnesses.

- The complainant alleged that her brother, who had been sentenced to 4 1/2 years in prison, had not been given the benefit of a “restorative justice approach.” She stated that the judge’s comments exceeded the bounds of what was necessary to stress the seriousness of the crimes. Despite the fact that her brother expressed a strong desire to embark on a difficult course of restorative measures the judge did not think anyone should place great reliance on a minimal effort made by her brother, given his past history. The judge had questioned what her brother’s own children would think of some of his actions and the complainant saw this as an unfair attack on her brother’s relationship with his children. The judge stated that the complainant did not report his comments accurately and her criticisms did not take into account the facts presented before him. He explained that, when there is a reasonable prospect for rehabilitation, this is taken into account in determining the actual sentence. However, in this case, the accused’s lengthy record, mature age and the severe impact of his actions on his victims were aggravating factors far more serious than the mitigating factors presented by the complainant. The accused had an opportunity to describe his rehabilitation efforts but did not do so, and submissions from defence and Crown counsel did not include any “restorative measures.” The complainant was advised that the material did not provide evidence of any misconduct on the part of the judge.

Complaints Against Council Members

Council members are not immune to complaints, and a number of files involving Council members, including the following, were dealt with in 1997-98.

- The Chinese Canadian National Council (CCNC) complained in a news release, and subsequently in a formal letter to the Canadian Judicial Council, about questions asked by Chief Justice Antonio Lamer in the course of argument of a case before the Supreme Court of Canada. Chief Justice Lamer responded directly to the CCNC, before the complaint was received, offering his apologies “if I have offended the Chinese community,” and noting that his questions were directed against the use of stereotypes in establishing credibility. The complaint was referred to the Chairperson of the Judicial Conduct Committee, who expressed regret that the CCNC felt aggrieved by the statements and said he understood the sensitivities that generated the organization’s complaint. His view, supported by outside counsel, was that the remarks could not be characterized as misconduct requiring a recommendation for a formal investigation under the *Act*. In a letter to the CCNC, the Council said it was apparent from the context that the Chief Justice’s remarks were hypothetical in nature. It was clear from a full review of the transcript that Chief Justice Lamer’s purpose was to test the propositions being put to the Court by counsel in argument and to explore the dangers of a trial judge taking into account race or racial stereotypes when assessing the credibility of witnesses. The Council noted that the complaint had helped to focus attention on “an important and often misunderstood aspect of the conduct of judicial processes, particularly at the appellate level. Under our legal tradition, often of necessity, hypothetical questions are posed by judges during the course of argument of a case. The purpose of doing so is to illuminate for the Court the full implications of the matters at issue from both a factual and a legal perspective . . . For this reason, exchanges between counsel and judges during the course of legal arguments

are often wide-ranging, probing and exploratory in nature. It is in the interests of the administration of justice that the ability of counsel to engage in such unrestricted advocacy, and the ability of judges to engage in frank and wide-ranging discussion with counsel, continue." A media release was issued on January 23, 1998.

- A complaint was prompted by a newspaper article based on an interview with a chief justice about the courts' interpretation of the *Canadian Charter of Rights and Freedoms*. The complainant disagreed with the views reported, arguing that the chief justice gave as much or more legal weight to money as to the primacy of the law, and put himself in the position of a legislator. The chief justice said that during an interview of more than an hour he had discussed the exercise of the courts' jurisdiction related to the *Charter*. He explained the choices before the court when a case of discrimination is at issue, indicating that in some circumstances judges must take into account the ability of taxpayers and governments to pay. Outside counsel reviewed the complaint and agreed with the conclusion that, while the complainant disagreed with the views expressed and had the right to his opinions on the issue, there was no indication of misconduct on the part of the chief justice.
- A complainant alleged actual or apprehended bias on the part of two chief justices, and a conflict of interest on the part of another judge. He said the first chief justice, because he chairs a provincial judicial council, should not have heard an appeal against his conviction for making harassing calls to a court employee. Following the dismissal of that appeal, he applied before the second chief justice for leave to appeal to the Court of Appeal. That application was dismissed on the grounds that no such appeal is available. He made a complaint that

the second chief justice was in a conflict of interest as he had control over the court employee. An application to the Court of Appeal to review the dismissal of his application for leave to appeal was in turn dismissed on the basis that it was not permitted by the *Criminal Code*. The complaint against the judge alleged that the judge should not have heard an application involving a lawyer because the judge had been a bencher of the Law Society when the complainant had made a complaint against the lawyer some years earlier. He also alleged the judge should have disqualified herself because her former firm was counsel in an injunction matter. The complainant was advised that the material he provided disclosed no evidence to support the allegations of a conspiracy, oblique motive or other judicial misconduct on the part of the chief justices or judge. He was informed that the existence of real or apprehended bias or impartiality is a question of law that should have been raised at the opening of his hearings. The Council had no mandate to make determinations in these matters. The file was reviewed by independent counsel who agreed with the conclusion.

- An unrepresented litigant in an action taken against his investment brokers wrote asking that the Council change some of the court's decisions. He described the procedures and decisions taken in his case in the last four years. His action had been dismissed by a first judge, and within his appeal a second judge had granted his application to enter an affidavit, ordering that security be paid for appeal costs. He said his difficulties related mainly to the content of his statement of claim and the orders for security for costs. He claimed he had been discriminated against by many judges and wrong had been done to him by the two judges. He alleged a personal relationship between the second

judge and the defendant's lawyer. The second judge was asked for comments on his friendship with the lawyer. He said he knew of the lawyer by reputation as he would know of other lawyers appearing in court. He had no personal or social contact with the lawyer, although years earlier at a business lunch the lawyer had introduced him to a journalist who wished to write a series of articles about judges. The complainant was informed that the Council could not change the decisions and there was no evidence of any misconduct on the part of the judges. Because one of the judges complained against was a Council member, independent counsel reviewed the file and agreed with the disposition.

- A complainant alleged a variety of wrongdoing by three judges and a chief justice over a series of actions dating back to an inquiry into the complainant's handling of trust funds as the former guardian of his sister's children. The gist of the complaints against the judges related to failure to consider evidence and erroneous statements of the facts and law. The complainant alleged that the chief justice did not address his complaint against the Referee who conducted the original inquiry. The complainant asked the Council to "use whatever power [it has] to bring about a formal independent review and investigation or cause this matter to be formally and properly addressed in some other way." As a result of his unsuccessful attempt to reopen his case he alleged "some form of cover-up" or conspiracy to protect a justice official. The complainant was informed the Council had no jurisdiction with respect to one judge who had died two years previously. An appeal of the decision of the Referee or judge was the only recourse available to the complainant. The allegations of bias, cover-up or conspiracy were found to be unsubstantiated. The material sent

by the complainant disclosed no indication of any misconduct that would justify any further action by the Council. Independent counsel reviewed the file and agreed with its disposition.

File Discontinued

As indicated in Table 2, one file was closed as "discontinued" during the year.

- The Council ended its consideration of a number of complaints against Mr. Justice A.L. Sirois of the Saskatchewan Court of Queen's Bench about his comments related to spousal assault and sexual assault. As a result of a complaint in September 1996, from the Attorney General of Saskatchewan, and other complaints received subsequently, the Chairperson of the Judicial Conduct Committee directed that an independent fact-finding investigation be conducted and this report was completed in January 1998. Mr. Justice Sirois resigned before the findings could be further considered. Under the *Judges Act*, the Council has no authority to examine the conduct of judges who have resigned office. A media release was issued on February 27, 1998.

Files Closed by Panels of Council Members

A total of six files were closed after consideration by Panels of the members of the Council. A Panel may be designated to deal with a particular file when the Chairperson managing the file feels that an expression of disapproval might be warranted or, in more serious cases, that there might be reason for a Panel to recommend to the Council that a formal investigation be undertaken. In addition, three files that had been closed in previous fiscal years were dealt with by Panels and "re-closed" during 1997-98, resulting in a total of nine files being considered by Panels during the year.

Three of the six files closed by Panels were referred to three-member Panels and three to two-member Panels. Members of the Council were named in two of the files.

The files dealt with by Panels were as follows:

- A complainant alleged that in his reasons for judgment a trial judge exhibited “ethnocentrism, a strong bias against Aboriginal peoples, their rights, their culture, and the legitimacy of their claims, and a distinct lack of cultural sensitivity.” After receiving comments from the judge, the file was referred to a three-person Panel. The Panel dealt with the file after the Supreme Court of Canada declined to entertain an appeal of the appeal court’s decision to order a new trial because of an apprehension of bias. The Panel found that in his reasons for judgment the judge invoked unnecessarily disparaging and offensive language on matters of little or no relevance to the determination of the case. While it concluded that there was no malice or false motive involved, and that no investigation pursuant to subsection 63(2) of the *Judges Act* was warranted, the Panel directed that the file be closed with a letter to the judge expressing its disapproval of some of his language. The Panel advised the complainant that it was conscious of the fundamental importance of judicial independence in judicial decision making, and that it is fundamental to the rule of law that judges exercise and candidly articulate independent thought in their reasons for judgment. Nevertheless, the Panel also recognized that judicial freedom of expression has inherent constraints arising out of the judicial office itself. Freedom of expression must be balanced with the need for public accountability, ultimately, to preserve public confidence in the judiciary.
- A senior official of a provincial government complained about the conduct of a judge who presided over two serious criminal trials where the judge declared mistrials, in one case after four years of proceedings. The complainant alleged that the conduct disclosed a record of significant judicial mismanagement and an apprehension of bias against the Crown, and that it appeared the judge had been in inappropriate contact with the defence counsel during the course of proceedings. The judge’s comments were provided to the complainant, whose response was sent to the judge for further comments. The file was referred to outside counsel. A three-member Panel concluded that in one of the two cases of concern, the judge did in fact have inappropriate *ex parte* contacts with defence counsel, but the conduct was not serious enough to warrant a recommendation for a formal investigation. The judge was advised of the Panel’s disapproval of his conduct, and the complainant was advised accordingly.
- A complainant alleged that a chief justice should not have removed the trial judge in a case in which the complainant’s Aboriginal band was a party. He also alleged that the chief justice had said during a telephone conference call that he would not put a judge of the Jewish faith on a case involving war crimes, or an Aboriginal judge on cases involving Aboriginal matters, at least not immediately following the appointment of the judge to the bench. The complainant believed the remarks were discriminatory and an unjustified affront to Aboriginal peoples and members of the Jewish faith. The head of a national Jewish organization joined in supporting the complaint in a separate letter of complaint to the Council. In response, the chief justice said he had replaced the trial judge

after learning that he was personally acquainted with members of the band that was a party to the court action. He said he did so in order to prevent the trial being spoiled or delayed by motions based on “a reasonable apprehension of bias” on the judge’s part, even though the judge’s objectivity was not in question. With respect to the telephone conference, the chief justice said that, on the basis of his experience with Jewish judges on his court, he “said and intended to say” that he would not ask them to preside “against their wishes” at a war crimes trial or proceeding involving the Holocaust. In the same way, “I would not appoint an aboriginal judge, against his or her wishes, to preside at a trial involving aboriginal rights.” A three-member Panel found no evidence of misconduct or any basis for further action. The chief justice had replaced the trial judge in good faith and after careful consideration. With respect to the differing versions of what was said during the telephone conference, the Panel accepted the chief justice’s explanation. The Panel acknowledged that it would be totally unacceptable for a judge “to state he considered a Jewish judge ineligible to preside over a war crimes case, or that he would never assign a Jewish judge to such a case but, as set out in (the chief justice’s) letter, that is not what he said or meant to say.”

- The head of an association complained that members of the association were obliged to appear before a judge who, according to news reports, was in serious financial difficulties. He alleged that the judge’s financial situation might cause prejudice to the concept of impartiality. The file was referred to an outside counsel, whose report was considered by a two-member Panel. The Panel concluded that, at the time of the complaint, the financial situation of the judge could be considered alarming and prejudicial to the judicial image. Although the Panel

concluded that an inquiry under subsection 63(2) of the *Judges Act* was not warranted, it expressed disapproval about the judge’s financial situation at the time of the complaint and the fact that he took a significant amount of time to start finding ways to regulate his financial difficulties. The Panel said the judge should be vigilant in dealing with his financial situation.

- A lawyer, on behalf of a client, complained that the judge had discussed the client’s case publicly with several people in the community prior to receiving final submissions and issuing his decision. The matter had been appealed on the basis of an apprehension of bias, but the client also requested that a complaint be filed regarding the conduct of the judge. The lawyer subsequently sent a further complaint about a chambers matter in which the judge was highly critical of the lawyer’s client and commented negatively on acceptance of the client as a purchaser of estate property. The file was held in abeyance pending the decision of the court of appeal, which ordered a new trial on the basis of a reasonable apprehension of bias. The judge subsequently acknowledged that his public comments on the case were “ill-considered, unfortunate and inappropriate” and expressed his sincere regret at the inconvenience that his mistakes had caused. A two-member Panel expressed disapproval with respect to the conduct of the trial, but concluded that there was no basis for further action by the Council. The Panel concluded that there was no evidence of misconduct in relation to the chambers matter.
- A lawyer who acted on his own behalf in a civil action alleged that in a motion hearing, the judge rendered a decision without hearing both sides and without fully apprising himself of the nature of the issue before him. The lawyer felt

that he had been treated in a disrespectful manner, and ordered out of the court. The judge admitted that he had been “curt” in dismissing the complainant’s position, and extended an apology to the complainant. A two-member Panel advised the complainant that it had expressed its disapproval of the judge’s conduct and concluded that there was no basis for further action by the Council.

In addition to these six files closed by Panels during the year, Panels also considered three other files that had been closed in previous years but, on the basis of new information brought to the Council’s attention, had been reopened for further consideration. These files consisted of the following:

- A three-member Panel considered complaints against Chief Justice Isaac and Associate Chief Justice Jerome of the Federal Court of Canada. The complaint against Chief Justice Isaac was first closed by the Panel on October 9, 1996, and the related complaint against Associate Chief Justice Jerome was closed by the Panel on February 19, 1997. The Panel made public its findings in both cases. In the case of Chief Justice Isaac, the Panel expressed its disapproval of his handling of two aspects of a matter involving a meeting with J.E. Thompson, then Assistant Deputy Attorney General of Canada, Civil Litigation, regarding delays in the Federal Court, Trial Division. However, the Panel concluded Chief Justice Isaac’s conduct did not warrant further action by the Council. In the case of Associate Chief Justice Jerome, the Panel found that his handling of proceedings in the cases that gave rise to the Panel’s inquiry “fell short of the standard of diligence which could reasonably be expected of a case management judge.” It also found inappropriate his

handling of matters arising from the meeting between Chief Justice Isaac and Mr. Thompson. Having expressed its disapproval, the Panel concluded, as in the case of Chief Justice Isaac, that the conduct of Associate Chief Justice Jerome did not warrant further action by the Council.

The files were reopened in 1997-98 upon receipt, from the Hon. Allan Rock, then Minister of Justice, of documents that had been filed in the Supreme Court of Canada in proceedings before that Court relating to the two cases. Comments were sought from both judges on this material, then the file was held in abeyance pending the outcome of the case before the Court.

The reasons for judgment of the Supreme Court of Canada (*Canada v. Tobias*) were released in September 1997. In the judgment, the Court expressed a “concern” that the Canadian Judicial Council had made its conclusions regarding the complaints public while a request for a stay of proceedings was still making its way through the courts. The judgment also noted that, when it reached its findings, “the Judicial Council did not have the benefit of all the material that was before this Court.”

In November 1997, the same Panel that had originally considered the two complaints completed its deliberations on the new material filed, the judges’ comments and the reasons of the Supreme Court of Canada and it affirmed its earlier findings with respect to each complaint. The Panel, in a letter to the Minister, stated that, “there is nothing in the documentation provided by Mr. Rock, considered in the context of all material it now has, including the results of its most recent inquiries, to warrant modifying its earlier disposition or reasons in relation to these files.”

Responding to the Supreme Court of Canada's expression of concern, the Council's letter to the Minister stated that the Panel's decision to make its report public was not taken lightly. "In the Panel's view," the letter said, "it would have been intolerable to allow the cloud of potentially serious misconduct to hang over the chief justices for an indefinite period of time. Indeed, the Panel remains of the view that the public interest in the expeditious fulfilment of its statutory responsibility in this matter exceeded any *sub judice* interests with respect to the merits of the cases in question." The Panel noted that it was nearly a year between the Council's disposition of the complaint against Chief Justice Isaac and the Supreme Court's decision. The Panel also noted that a "Panel of the Canadian Judicial Council fulfils a function quite different from and independent of that of the courts. . . . The courts deal with legal issues before them framed by the parties to litigation. This Council . . . must assess the capacity of a judge to fulfil the judge's function."

The letter to the Minister, released publicly on November 13, 1997, stated that "the Panel considers it important that the *obiter dicta* of the Supreme Court of Canada in relation to this issue not be adopted as the basis of an absolute rule by the Council in dealing with future complaints filed with it. . . . [I]n some situations . . . the public interest requires that the conduct issues be addressed expeditiously in spite of pending litigation."

- A complaint file originally closed in 1995-96, reopened and reclosed in the same year in light of new information, was reopened a second time in 1996-97 to permit independent counsel to interview two judges involved and the complainant, who had been a plaintiff in proceedings concerning default on a mortgage and breach of contract. The complainant alleged improper access to the presiding judge by

another judge whose former law firm was one of the defendants to the action. He alleged bias on the part of the presiding judge and conflict of interest on the part of the second judge, as well as breach of his right of confidentiality because the presiding judge had discussed the case with another lawyer. On the basis of the interviews, the independent counsel concluded that the allegations of the complainant were totally unfounded. A three-member Panel directed that the file again be reclosed.

4. Issues

ETHICAL PRINCIPLES FOR JUDGES

The Council made significant progress during 1997-98 in its initiative to develop a statement of principles providing guidance to judges on the ethical and professional questions they face.

In August 1997, the Working Committee, which was established in late 1994-95 to develop the principles, convened a successful seminar of approximately 60 judges from across Canada. The judges attending the seminar had received the first complete draft of the principles although during the previous months all federally appointed judges had been sent draft chapters. The overriding concern among seminar participants was to ensure that the document would be seen as providing ethical guidelines for judges and informing the public about them, rather than serving as a discipline document that limits the independence of judges.

As a result of the seminar, important revisions were made to the draft and in November 1997 a complete draft was sent to all federally appointed judges for comments. At the end of February 1998 a slightly revised version of the document was distributed to representatives of the legal community, national legal associations, law deans, chief provincial court judges and deputy ministers of justice.

At the end of 1997-98, the Working Committee was continuing to consider letters and submissions from judges and others. The Committee was also beginning to formulate its position on the composition, method of appointment and terms of reference of an advisory committee, which it regards as an integral and important part of the ethical principles document and its administration. The August seminar was advised that such a

committee exists within the Judicial Conference of the United States — the closest equivalent in the United States to the Canadian Judicial Council — and is viewed as an integral part of the U.S. federal non-disciplinary Code of Conduct. The committee provides advisory opinions on ethical questions to U.S. federally appointed judges.

Canada has no code of conduct for federally appointed judges and no evident statutory basis for such a code. But efforts to develop a code of conduct date back to the 1970s, and Professor Friedland endorsed the concept in his 1995 report.

There is general recognition that it is both desirable and difficult to set down what judicial conduct is appropriate and acceptable, and what is not.

Standards of what is acceptable evolve and change. Codifying “good” behaviour in any context is difficult enough, but the difficulty becomes greater with the evolution of the context in which judges and their courts work.

Initial efforts to develop practical guidance for judges led to the publication in 1980 of two books — *A Book for Judges* by retired Chief Justice J.O. Wilson, and *Le livre du magistrat* by retired Chief Justice Gerald Fauteux. Further efforts begun in 1985 ultimately resulted in the 1991 publication of *Commentaries on Judicial Conduct*.

An effort to move from these distinguished works of scholarship to an actual code began in 1994, resulting in a discussion document in the autumn of 1995. The document noted that “the word ‘code’ may not be the best one to describe what is intended.” What was intended, the document noted, was “not a list of prohibited behaviours with attached sanctions” but an “emphasis on the maintenance of a high level of judicial conduct rather

than on cataloguing misconduct.” Its purpose was to assist judges in resolving ethical and professional dilemmas and help the public understand the legitimate expectations they may have of judges as they carry out their public duties and live their lives in their communities. It was to have no formal link to the judicial conduct processes of the Council.

These distinctions remain crucial to the Working Committee’s continuing refinement of the ethical principles, which are expected to be the most comprehensive treatment of the subject to date in Canada. Sections of the document will explore judicial independence and its relationship with judicial impartiality and the constitution; judicial integrity, and its importance in sustaining public confidence in the judiciary; the diligent performance of the whole range of judicial duties; assuring equality according to law; and maintaining and enhancing confidence in the impartiality of the judiciary.

APPOINTMENT OF JUDGES TO COMMISSIONS OF INQUIRY

The Canadian Judicial Council has been concerned for some time about the possible impairment of the independence of courts and individual judges arising out of the appointment of judges as commissioners to conduct public inquiries.

The Council passed resolutions in 1978 and 1979 recommending guidelines that would ensure such appointments do not unduly impair the effective operation of courts. In September 1997, the Judicial Independence Committee reported to the Council that it had struck a sub-committee to determine whether the existing criteria were still appropriate in the current environment.

The Committee reported to the Council’s mid-year meeting in March 1998, that its review indicated the use of judges for such commissions “potentially gives rise to many problems.” Such appointments may require judges to be absent from their courts

for prolonged periods, which can create disruption in the work of the court and a considerable burden on his or her colleagues. Moreover, modern practices in the operation of inquiries create a dynamic for constant expansion of their scope and lengthy examination and cross-examination of an ever-expanding list of witnesses.

Commissioners may be asked to accept appointments before they have seen the terms of reference, or deadlines established within terms of reference which may be unrealistic.

The Committee also expressed concern that serving on an inquiry has the potential to harm the future work of a judge by impairing his or her appearance of independence. This may arise, for example, if terms of reference require the judge to determine whether ministers or officials have made a correct policy decision, any potential finding having clear partisan implications. More commonly it can arise through the development of an apparent adversarial situation as between the appointing government and the appointee. Public disputes can erupt between government and commission over the production of documents, costs of the inquiry and its duration, casting a judge-commissioner in the role of foe of government. It is increasingly likely that governments and individuals under investigation may proceed personally against a commissioner in judicial review applications, a process which detracts from judicial dignity and detachment.

The position of the Council, as stated in 1978, has been that “a judge should feel bound to accept” an invitation to conduct a public inquiry. The Committee proposed, and the Council adopted at its March 1998 meeting, a revised statement to be transmitted to each first minister, minister of justice, and attorney general identifying considerations that should be addressed before such appointments are accepted. The statement is included as Appendix F to this report.

RESTRAINTS AFTER RETIREMENT FROM JUDICIAL OFFICE

The Council has considered a number of issues related to designations and activities of federally appointed judges after retirement.

The Judicial Independence Committee, the Administration of Justice Committee and the Judicial Benefits Committee all considered suggestions that the Council should take action of some kind about federally appointed judges who had retired and subsequently returned to the practice of law. In particular, the committees discussed whether a retired judge may use the Queen's Counsel (Q.C.) designation, or "The Honourable."

At its March 1998 mid-year meeting, the Council concluded that others, and in particular granting authorities and provincial law societies, are the appropriate bodies to deal with these matters and that the Council would not pursue the subject further.

SPECIMEN CRIMINAL JURY CHARGES

At the Council's September 1997 annual meeting, both the Administration of Justice Committee and the Trial Courts Committee recommended that federal and provincial governments be encouraged to assist in the development of specimen criminal jury charges.

At an earlier national symposium on jury instructions convened by the National Judicial Institute, it had been suggested that a national committee be created for this purpose. However, the same purpose was already being served by work in the Ontario Court of Justice under the leadership of Mr. Justice David Watt.

In November 1997, Chief Justice Lamer wrote to the Minister of Justice, noting "an urgent need for reform of criminal jury instructions" and asking the Minister to seek support at federal, provincial and territorial levels for funding of the Ontario

project. Chief Justice Lamer said he hoped the Ontario initiative could form the basis for a national product which could be followed by judges across the country.

At its March 1998 mid-year meeting the Council was advised that the Department of Justice and several provinces would be contributing to funding for the project.

TECHNOLOGY AND THE COURTS

The Council is keenly aware that developments in computer technology have great potential to increase efficiency in the work of judges and the operation of courts, to improve uniformity and timeliness, and to achieve significant cost savings. The Council has pressed ahead with a number of independent initiatives to exploit and share technology, and it has supported the work of the Commissioner for Federal Judicial Affairs.

Appeal to Governments

In the Council's view, lack of government funding has severely limited the courts in their ability to realize the improvements available from new technologies. In October 1997, Chief Justice Lamer wrote on behalf of the Council to all ministers of justice urging them to provide necessary funds and assistance for new technologies and to establish procedures to ensure adoption of technological improvements on an ongoing basis.

Chief Justice Lamer's letter to the federal Minister of Justice said funding for the three "national" courts — the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada — had been very supportive, but other initiatives were making it extremely difficult for judges to keep up to date. He cited the publication of federal statutes and regulations only on CD-ROM, to which most federally appointed judges lacked access.

In his letter to provincial and territorial ministers, Chief Justice Lamer said he had been informed that support in the area of computer technology for superior court judges in the provinces and territories was “uneven to say the least, and, more often than not, woefully inadequate or even non-existent.” The unequal level of support was disconcerting “because of the possibility that the quality of judicial performance may be adversely affected thereby.”

JAIN Network and Technology

The Commissioner for Federal Judicial Affairs, reported to the March 1998 meeting of the Council that approximately 500 federally appointed judges were now subscribing to JAIN — the Judicial Affairs Information Network.

Computer News for Judges

Uniquely among Council committees, the Judges Computer Advisory Committee draws most of its members from the ranks of puisne judges. The Committee examines new information technologies and advises the Council of emerging issues and appropriate applications in the judicial system.

The Committee’s newsletter, *Computer News for Judges*, has become an important reference for judges seeking to keep up to date on the application of technologies to their work. The newsletter is circulated to about 575 federally appointed judges and sent to all provincial and territorial court chief judges for distribution by their offices to interested provincially/territorially appointed judges.

Three editions of the newsletter were published in 1997-98.

In Number 23, Winter-Spring 1997, CNJ reported on the results of two surveys — the conservation and distribution of judgments by Canadian courts and computer use by federally

appointed judges. The issue also related the good experience of judges from the Supreme Court and Court of Appeal of Nova Scotia who participated in a computer course with the assistance of the National Judicial Institute.

In Number 24, Summer 1997, CNJ offered a primer to judges on using the Internet, including how to use search engines, the features of electronic mail, lists and specialized sites. It also outlined the steps taken to design the Web site created by the Superior Courts of British Columbia, and discussed the purposes and features of the Web site of “La magistrature de la francophonie” (the Francophonie judiciary) and the “Jugenet” discussion list. The issue also presented a discussion paper from the Office of the Commissioner for Federal Judicial Affairs about its information network JUDICOM.

In Number 25, Fall-Winter, 1997-98, CNJ reported on the Fifth National Court Technology Conference — CTC5 — held in Detroit, September 9–12 1997. Some highlights:

- The need for a strategic focus on the trend of technological change, anticipating the integration of case management, office automation, records management, testimony, evidence and legal research.
- The advent of the electronic bench book, which provides judges with electronic versions of manuals and statutory materials on laptop computers for use during trial.
- An overview of changes in rules of court at U.S. federal and state levels as new practices resolve such issues as the need for signatures to ensure authenticity, and the insistence of hard copies of documents.
- The implications of the “Year 2000 Problem” for future lawsuits before Canadian courts, and for judges in their own computer environment.

Neutral Citation Standard

Canada lacks a national system for the identification of court decisions. In Canada and elsewhere, the method of citing case law is based on paper publication of judicial decisions. With the advent of electronic publishing media, the potential exists for much more rapid and widespread access to court decisions, but the use of these tools is restricted by the lack of an official method of citation for electronic documents.

In August 1997, Professor Daniel Poulin, a technical adviser to the Committee, convened an ad hoc meeting of representatives of the Federation of Law Societies of Canada, law librarians and legal publishers to consider the issue. The matter was discussed further at a conference in Toronto in November 1997 entitled *The Official Version — A National Summit to Solve the Problems of Authenticating, Preserving and Citing Legal Information in Digital Form*. Most of the 200 participants supported development of a neutral citation standard.

Prof. Poulin's paper on the subject explains that a national standard can be created only if a consensus is achieved among the judiciary, governments, academia and publishers, and adequate funding obtained. In Canada, much of the work has already been done by the Council through its adoption in 1996 of *Standards for the Preparation, Distribution and Citation of Canadian Judgments in Electronic Form*. An ad hoc Canadian committee was

established in August 1997 to develop and promote a standard, with early plans to refine the proposal and broaden its membership to ensure representation of all parts of the country. Members of the committee include Martin Felsky and Denis Marshall, the two other technical advisers to the Council's Judges Computer Advisory Committee.

The Judges Computer Advisory Committee unanimously recommended, and the mid-year meeting of the Council in March 1998 unanimously endorsed, the development of a neutral citation standard.

5. *Judicial Benefits*

For decades, the questions of how and how high to set judges' salaries have been subjects of debate.

Since 1981, a triennial, independent process has existed for review of judges' salaries, with a measure of automatic annual adjustment based on the Industrial Composite (Aggregate) Index. However, a freeze of judicial salaries imposed in 1992 still applied in 1996-97 and the work of five triennial commissions remained largely unimplemented by successive governments.

The most recent commission, chaired by David Scott, an Ottawa lawyer, reported in September 1996. Judges awaited the government's response through the remainder of 1996-97, and it was not until nearly the end of the 1997-98 fiscal year that the government's formal response to the Scott Commission was released. The following day, consequential amendments to the *Judges Act* were tabled in the House of Commons in the form of Bill C-37, in anticipation of parliamentary review and approval early in 1998-99.

The government accepted the Scott Commission's recommendation for a phased-in salary increase of 8.3 percent. Bill C-37 proposed to phase the increase in by 4.1 percent per year over two years, effective April 1, 1997.

Retirement provisions under the proposed legislation would permit retirement when a judge has served on the bench for a minimum of 15 years

and the sum of age and years of service equals at least 80. The existing provision required a minimum age of 65, and a judge who retired before 65 had no right to a pension at all, no matter what the length of his or her judicial service.

The bill incorporated the Scott Commission proposal permitting judges of the Supreme Court of Canada to retire with a full pension after serving a minimum of 10 years on that Court, but limited the provision to those judges who have reached the age of 65 years.

Bill C-37 proposed a three-member Judicial Compensation and Benefits Commission to report every four years. The first Commission would begin work on September 1, 1999, and report within nine months. The Minister of Justice, who could refer specific issues to a Commission at any time, would be required to table the Commission's report in Parliament within 10 days of the start of the next sitting, and respond to the report within six months.

The judiciary would nominate one member of the Commission, the Minister of Justice a second, and these two individuals would nominate the third member, who would chair the Commission.

Appendix A

MEMBERS OF THE CANADIAN JUDICIAL COUNCIL, 1997-98

<p>The Right Honourable Antonio Lamer, P.C. Chief Justice of Canada <i>Chairman</i></p>	<p>The Honourable René W. Dionne Senior Associate Chief Justice of the Superior Court of Quebec</p>
<p>The Honourable Allan McEachern Chief Justice of British Columbia <i>First Vice-Chairman</i></p>	<p>The Honourable Patrick D. Dohm Associate Chief Justice of the Supreme Court of British Columbia</p>
<p>The Honourable Pierre A. Michaud Chief Justice of Quebec <i>Second Vice-Chairman</i></p>	<p>The Honourable Catherine A. Fraser Chief Justice of Alberta</p>
<p>The Honourable Edward D. Bayda Chief Justice of Saskatchewan</p>	<p>The Honourable Constance R. Glube Chief Justice of the Supreme Court of Nova Scotia</p>
<p>The Honourable Norman H. Carruthers Chief Justice of Prince Edward Island</p>	<p>The Honourable James R. Gushue Chief Justice of Newfoundland</p>
<p>The Honourable Donald H. Christie Associate Chief Judge of the Tax Court of Canada</p>	<p>The Honourable Benjamin Hewak Chief Justice of the Court of Queen's Bench for Manitoba</p>
<p>The Honourable Lorne O. Clarke Chief Justice of Nova Scotia</p>	<p>The Honourable T. Alex Hickman Chief Justice of the Trial Division of the Supreme Court of Newfoundland</p>
<p>The Honourable J.-Claude Couture Chief Judge of the Tax Court of Canada</p>	<p>The Honourable William L. Hoyt Chief Justice of New Brunswick</p>
<p>The Honourable Joseph Z. Daigle Chief Justice of the Court of Queen's Bench of New Brunswick</p>	<p>The Honourable Ralph E. Hudson Senior Judge of the Supreme Court of the Yukon Territory <i>(to June 1997)</i></p>
<p>The Honourable André Deslongchamps Associate Chief Justice of the Superior Court of Quebec</p>	<p>The Honourable Julius A. Isaac Chief Justice of the Federal Court of Canada</p>
	<p>The Honourable James A. Jerome Associate Chief Justice of the Federal Court of Canada</p>

NOTES:

1. Except that the Chairman and Vice-Chairmen are listed first, members are listed here in alphabetical order.
2. The senior judges of the Supreme Courts of the Yukon Territory and the Northwest Territories alternate on the Council every two years.

The Honourable Joseph P. Kennedy
Associate Chief Justice of the Supreme Court
of Nova Scotia
(from July 1997)

The Honourable Lyse Lemieux
Chief Justice of the Superior Court of Quebec

The Honourable Patrick J. LeSage
Chief Justice of the Ontario Court of Justice

The Honourable Kenneth R. MacDonald
Chief Justice of the Trial Division of the
Supreme Court of Prince Edward Island

The Honourable Donald K. MacPherson
Chief Justice of the Court of Queen's Bench
for Saskatchewan

The Honourable R. Roy McMurtry
Chief Justice of Ontario

The Honourable Gerald Mercier
Associate Chief Justice, Family Division
of the Court of Queen's Bench for Manitoba

The Honourable W. Kenneth Moore
Chief Justice of the Court of Queen's Bench
of Alberta

The Honourable John W. Morden
Associate Chief Justice of Ontario

The Honourable Jeffrey J. Oliphant
Associate Chief Justice of the Court of Queen's
Bench for Manitoba

The Honourable J. Edward Richard
Senior Judge of the Northwest Territories
(from July 1997)

The Honourable Richard J. Scott
Chief Justice of Manitoba

The Honourable Heather J. Smith
Associate Chief Justice of the Ontario Court
of Justice

The Honourable Barry L. Strayer
Chief Justice of the Court Martial Appeal Court
of Canada

The Honourable Allan H.J. Wachowich
Associate Chief Justice of the Court of Queen's
Bench of Alberta

The Honourable Bryan Williams
Chief Justice of the Supreme Court of
British Columbia

Appendix B

COMMITTEE MEMBERS

EXECUTIVE COMMITTEE

Chief Justice Antonio Lamer (*Chairperson*)
 Associate Chief Judge Donald H. Christie
 Chief Justice Joseph Z. Daigle
 Chief Justice Lyse Lemieux
 Chief Justice Kenneth R. MacDonald
 Chief Justice Allan McEachern
 Chief Justice Pierre A. Michaud
 Associate Chief Justice John W. Morden
 Associate Chief Justice Jeffrey J. Oliphant
 Associate Chief Justice Heather J. Smith
 Associate Chief Justice Allan H.J. Wachowich

STANDING COMMITTEES

ADMINISTRATION OF JUSTICE COMMITTEE

Associate Chief Justice Allan H.J. Wachowich
 (*Chairperson*)
 Chief Justice Joseph Z. Daigle
 Associate Chief Justice André Deslongchamps
 Associate Chief Justice Patrick D. Dohm
 Chief Justice James R. Gushue
 Chief Justice Patrick J. LeSage
 Chief Justice Kenneth R. MacDonald
 Associate Chief Justice Jeffrey J. Oliphant
 Mr. Justice J. Edward Richard

FINANCE COMMITTEE

Chief Justice Kenneth R. MacDonald (*Chairperson*)
 Associate Chief Judge Donald H. Christie
 Associate Chief Justice René W. Dionne
 Chief Justice William L. Hoyt
 Chief Justice W. Kenneth Moore

JUDICIAL BENEFITS COMMITTEE

Chief Justice Constance R. Glube (*Chairperson*)
 Associate Chief Justice André Deslongchamps
 Associate Chief Justice Patrick D. Dohm
 Chief Justice Catherine A. Fraser
 Associate Chief Justice Gerald Mercier

JUDICIAL CONDUCT COMMITTEE

Chief Justice Allan McEachern (*Chairperson*)
 Chief Justice Joseph Z. Daigle (*Vice-Chairperson*)
 Associate Chief Justice John W. Morden
 (*Vice-Chairperson*)
 Associate Chief Judge Donald H. Christie
 Chief Justice Antonio Lamer
 Chief Justice Lyse Lemieux
 Chief Justice Kenneth R. MacDonald
 Chief Justice Pierre A. Michaud
 Associate Chief Justice Jeffrey J. Oliphant
 Associate Chief Justice Heather J. Smith
 Associate Chief Justice Allan H.J. Wachowich

JUDICIAL EDUCATION COMMITTEE

Chief Justice Catherine A. Fraser (*Chairperson*)
 Chief Justice Norman H. Carruthers
 Chief Justice Lorne O. Clarke
 Associate Chief Justice René W. Dionne
 Chief Justice Benjamin Hewak
 Chief Justice T. Alex Hickman
 Chief Justice William L. Hoyt
 Mr. Justice Ralph E. Hudson (*ex officio*)
 Associate Chief Justice Joseph P. Kennedy
 Chief Justice Donald K. MacPherson
 Chief Justice W. Kenneth Moore
 Associate Chief Justice John W. Morden

NOTES:

1. Committee membership is generally established at the Council's annual meeting, held in the autumn.
2. These lists show Committee membership as at March 31, 1998.

APPEAL COURTS COMMITTEE

Chief Justice Catherine A. Fraser (*Chairperson*)
 Chief Justice Edward D. Bayda
 Chief Justice Norman H. Carruthers
 Chief Justice Lorne O. Clarke
 Chief Justice James R. Gushue
 Chief Justice William L. Hoyt
 Chief Justice Julius A. Isaac
 Chief Justice Allan McEachern
 Chief Justice R. Roy McMurtry
 Chief Justice Pierre A. Michaud
 Associate Chief Justice John W. Morden
 Chief Justice Richard J. Scott
 Chief Justice Barry L. Strayer

JUDICIAL INDEPENDENCE COMMITTEE

Chief Justice Richard J. Scott (*Chairperson*)
 Associate Chief Judge Donald H. Christie
 Chief Justice Constance R. Glube
 Chief Justice Allan McEachern
 Chief Justice R. Roy McMurtry
 Associate Chief Justice Gerald Mercier
 Chief Justice Pierre A. Michaud
 Associate Chief Justice Heather J. Smith
 Chief Justice Barry L. Strayer
 Chief Justice Bryan Williams

TRIAL COURTS COMMITTEE

Mr. Justice J. Edward Richard (*Chairperson*)
 Associate Chief Judge Donald H. Christie
 Chief Judge J.-Claude Couture
 Chief Justice Joseph Z. Daigle
 Associate Chief Justice André Deslongchamps
 Associate Chief Justice René W. Dionne
 Associate Chief Justice Patrick D. Dohm
 Chief Justice Constance R. Glube
 Chief Justice Benjamin Hewak
 Chief Justice T. Alex Hickman
 Mr. Justice Ralph E. Hudson (*ex officio*)
 Associate Chief Justice James A. Jerome
 Associate Chief Justice Joseph P. Kennedy

Chief Justice Lyse Lemieux
 Chief Justice Patrick J. LeSage
 Chief Justice Kenneth R. MacDonald
 Chief Justice Donald K. MacPherson
 Associate Chief Justice Gerald Mercier
 Chief Justice W. Kenneth Moore
 Associate Chief Justice Jeffrey J. Oliphant
 Associate Chief Justice Heather J. Smith
 Associate Chief Justice Allan H.J. Wachowich
 Chief Justice Bryan Williams

AD HOC COMMITTEES**JUDGES COMPUTER ADVISORY COMMITTEE**

Judge Pierre Archambault (*Chairperson*)
 Mr. Justice N. Douglas Coe
 Mr. Justice Morris Fish
 Madam Justice Donna McGillis
 Mr. Justice John McQuaid
 Associate Chief Justice Jeffrey J. Oliphant
 Madam Justice M. Anne Rowles
 Madam Justice Lawrie Smith

Advisors:

Dr. Martin Felsky
 Professor Denis Marshall
 Professor Daniel Poulin

SPECIAL COMMITTEE ON EQUALITY IN THE COURTS

Chief Justice Constance R. Glube (*Chairperson*)
 Chief Judge J.-Claude Couture
 Chief Justice Lyse Lemieux
 Chief Justice Patrick J. LeSage
 Associate Chief Justice Allan H.J. Wachowich

STUDY LEAVE COMMITTEE

Chief Justice Edward D. Bayda (*Chairperson*)
 Chief Justice Benjamin Hewak
 Associate Chief Justice John W. Morden
 Dean Louis Perret
 Dean Peter MacKinnon

**WORKING COMMITTEE ON ETHICAL PRINCIPLES
FOR JUDGES**

Chief Justice Richard J. Scott (*Chairperson*)

Mr. Justice Thomas Cromwell

Chief Justice Allan McEachern

Madam Justice Elizabeth McFadyen

Chief Justice R. Roy McMurtry

Chief Justice Pierre A. Michaud

Ms. Jeannie Thomas

NOMINATING COMMITTEE

Chief Justice Patrick J. LeSage (*Chairperson*)

Chief Justice Donald K. MacPherson

Chief Justice Pierre A. Michaud

Appendix C

PART II OF THE JUDGES ACT

Following is the text of Part II of the *Judges Act*, which governs the Canadian Judicial Council. It is taken from the 1997 Office Consolidation of the *Act*.

PART II CANADIAN JUDICIAL COUNCIL

INTERPRETATION

Definition of "Minister"

58. In this Part, "Minister" means the Minister of Justice of Canada.

CONSTITUTION OF THE COUNCIL

Council established

59.(1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

- (a) the Chief Justice of Canada, who shall be the chairman of the Council;
- (b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;
- (c) subject to subsection (2), one of the senior judges, as defined in subsection 22(3), of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories;
- (d) the Chief Justice of the Court Martial Appeal Court of Canada; and
- (e) the Chief Judge and Associate Chief Judge of the Tax Court of Canada.

Successive terms of senior judges

(2) The senior judges referred to in paragraph (1)(c) shall succeed each other on the Council every two years.

Successor to senior judge

(3) In the event of the death or resignation of a senior judge referred to in paragraph (1)(c) during the term of that judge on the Council, the judge who succeeds that judge as senior judge of the same court shall become a member of the Council for the remainder of the term.

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6.

Objects of Council

60. (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.

Powers of Council

- (2) In furtherance of its objects, the Council may
- (a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;
 - (b) establish seminars for the continuing education of judges;
 - (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
 - (d) make the inquiries described in section 69.
- R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26.

Meetings of Council

- 61.** (1) The Council shall meet at least once a year.

Work of Council

- (2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

By-laws

- (3) The Council may make by-laws
- (a) respecting the calling of meetings of the Council;
 - (b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and
 - (c) respecting the conduct of inquiries and investigations described in section 63.

R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

Employment of counsel and assistants

- 62.** The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.
- R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 157, s. 16.

INQUIRIES CONCERNING JUDGES***Inquiries***

- 63.** (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Investigations

- (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court or of the Tax Court of Canada.

Inquiry Committee

- (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

Powers of Council or Inquiry Committee

- (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
- (a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
 - (b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

Prohibition of information relating to inquiry, etc

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27.

Notice of hearing

64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his own behalf.

R.S., c. J-1, s. 31; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

REPORT AND RECOMMENDATIONS

Report of Council

65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Recommendation to Minister

(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

- (a) age or infirmity,
- (b) having been guilty of misconduct,

- (c) having failed in the due execution of that office, or
- (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5.

EFFECT OF INQUIRY

66. (1) [Repealed, R.S., 1985, c. 27 (2nd Supp.), s. 6]

Leave of absence with salary

(2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Annuity to judge who resigns

(3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council.

R.S., 1985, c. J-1, s. 66; R.S., 1985, c. 27 (2nd Supp.), s. 6.

67. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

INQUIRIES CONCERNING OTHER PERSONS***Further inquiries***

69. (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

- (a) a judge of a superior court or of the Tax Court of Canada, or
- (b) a person to whom section 48 of the *Parliament of Canada Act* applies,

should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Applicable provisions

(2) Subsections 63(3) to (6), sections 64 and 65 and subsection 66(2) apply, with such modifications as the circumstances require, to inquiries under this section.

Removal from office

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

R.S., 1985, c. J-1, s. 69; 1992, c. 1, s. 144(F), c. 51, s. 28; 1993, c. 34, s. 89.

REPORT TO PARLIAMENT***Orders and reports to be laid before Parliament***

70. Any order of the Governor in Council made pursuant to subsection 69(3) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

REMOVAL BY PARLIAMENT OR GOVERNOR IN COUNCIL***Powers, rights or duties not affected***

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

Appendix D

CANADIAN JUDICIAL COUNCIL BY-LAWS

INTERPRETATION

Interpretation 1. The definitions in this section apply in these by-laws.

- Act
« Loi »
Chief Justice
« juge en chef »
- “Act” means the *Judges Act*.
- “Chief Justice” includes the Chief Judge of the Tax Court of Canada and the Senior Judge of the Northwest Territories and the Yukon Territory.
- complaint
« plainte »
- “complaint” means a complaint or an allegation.
- Council
« Conseil »
- “Council” means the Canadian Judicial Council established by section 59 of the Act.
- First Vice-Chairperson
« premier vice-président »
- “First Vice-Chairperson” means the Vice-Chairperson who has been a member of the Council longer than the other Vice-Chairperson.
- Second Vice-Chairperson
« second vice-président »
- “Second Vice-Chairperson” means the Vice-Chairperson who is not the First Vice-Chairperson.

PART 1

ORGANIZATION OF THE COUNCIL

OFFICERS

- Chairperson 2. The Chief Justice of Canada, designated by paragraph 59(a) of the Act as the Chairperson, shall be the Chief Executive Officer of the Council.
- Vice-Chairpersons 3. (1) The Chairperson may designate two members of the Council to be Vice-Chairpersons of the Council, at least one of whom shall be an elected member of the Executive Committee.
- Term of Vice-Chairperson (2) The Vice-Chairpersons shall hold office at the pleasure of the Chairperson.
- Duties of Vice-Chairpersons 4. The First Vice-Chairperson or, in the absence of the First Vice-Chairperson, the Second Vice-Chairperson, shall act in the absence or incapacity of the Chairperson.

OFFICE OF COUNCIL

- Office of Council 5. The office of the Council shall be in the National Capital Region.
- Appointment of Executive Director 6. The Chairperson shall appoint an Executive Director who is not a member of the Council.

Duties of Executive Director 7. (1) The Executive Director shall have charge of the office of the Council, be responsible for all matters generally ascribed to the position and perform all duties required by the Chairperson, by the Council or by any of its committees.

Acting Executive Director (2) If for any reason the Executive Director is unable to act, the Chairperson may appoint an Acting Executive Director.

COUNCIL MEETINGS

Annual meeting 8. (1) There shall be an annual meeting of the Council. Unless the Executive Committee directs otherwise, the meeting shall be held in September.

Mid-year meeting (2) Unless the Executive Committee directs otherwise, there shall be a mid-year meeting of the Council in the National Capital Region in March.

Date and place (3) The Executive Committee shall fix the dates of the meetings and, for the annual meeting, the place, but if it fails to do so, the date and place shall be fixed by the Chairperson.

Notice of meeting 9. The Executive Director shall give each member of the Council at least 30 days notice of the date, time and place of any annual or mid-year meeting of the Council.

Special meetings 10. (1) Special meetings of the Council may also be called by the Chairperson, by the Executive Committee or at the written request of not fewer than 10 members of the Council.

Date and place (2) The date and place for any special meeting shall be fixed by the Executive Committee, except a meeting called by the Chairperson for which the Chairperson shall fix the date and place.

Notice of special meeting (3) Notice of the date, time, place and purpose of any such special meeting shall be communicated to every member of the Council in any manner that the Executive Director, in consultation with the Chairperson, considers expedient taking into account the importance or urgency of the meeting.

Adjournment 11. A meeting of the Council may be adjourned to any date and place that the Council may decide.

Presiding officer of Council 12. The presiding officer at all meetings of the Council shall be
 (a) the Chairperson;
 (b) in the absence of the Chairperson, the First Vice-Chairperson;
 (c) in the absence of the Chairperson and the First Vice-Chairperson, the Second Vice-Chairperson; or
 (d) in the absence of the Chairperson and the Vice-Chairpersons, the senior member of the Council present at the meeting.

Quorum 13. A majority of the members of the Council constitutes a quorum.

Voting 14. Voting at meetings of the Council shall be by a show of hands unless a vote by secret ballot is requested by at least 10 members.

Attendance of non-members at Council meetings 15. The Council may authorize any person who is not a member of the Council to attend, but not to vote, at a meeting of the Council.

AMENDMENT OF BY-LAWS

Amendments	16. (1) Subject to section 17, these by-laws may be amended by a majority vote of all the members of the Council on notice in writing of the proposed amendment being given to the Executive Director not less than 30 days before the meeting of the Council at which the amendment will be considered.	Vice-Chairperson	(2) The Chairperson may from time to time designate a Vice-Chairperson to act as Chairperson of the Executive Committee, and the Vice-Chairperson so designated shall have the authority and responsibility of the Chairperson of the Committee subject to the right of the Chairperson of the Council to resume the chairmanship at any time.
Notice	(2) On receiving the notice the Executive Director shall, not less than 10 days before the meeting, cause a copy of the notice to be communicated to every member of the Council.	Members	20. (1) Three members of the Council shall be elected to the Executive Committee at each annual meeting and shall hold office for three years.
Waiving of notice period	17. The notice period for a change to these by-laws can be waived by agreement of two thirds of the members present at a meeting of the Council.	Eligibility	(2) A member of the Executive Committee whose term expires at an annual meeting shall not be eligible for re-election until the following annual meeting.
COMMITTEES		Vacancy	21. (1) When a member of the Executive Committee ceases to be a member of the Council before the expiry of his or her term, the Executive Committee may appoint another member of the Council as a replacement member of the Committee until the next annual meeting of the Council.
Composition	18. (1) There shall be an Executive Committee of the Council consisting, in addition to the Chairperson, of nine members of the Council who shall be elected by the Council from among its members.	Replacement	(2) In the case described in subsection (1), the Council shall elect one of its members as a replacement at its next annual meeting.
Additional member	(2) If the Chairperson appoints as one of the Vice-Chairpersons a Council member who is not elected to the Executive Committee, that Vice-Chairperson shall be an additional member of the Executive Committee.	Duration of term	(3) A member of the Executive Committee elected under subsection (2) shall hold office until the expiry of the term of office of the person being replaced.
Chairperson	19. (1) The Chairperson shall preside over all meetings of the Executive Committee.		

- Powers and duties of the Executive Committee

22. The Executive Committee is responsible for the supervision and management of the affairs of the Council and has all the powers vested in the Council except the following:

 - (a) the making of by-laws;
 - (b) the appointment of members of the Executive Committee and standing committees other than as provided in these by-laws; and
 - (c) the powers of the Council referred to in Part 2.
- Quorum

23. A majority of the members of the Executive Committee constitutes a quorum.
- Functioning of the Committee

24. (1) Subject to subsection (2), meetings of the Executive Committee shall be held at the intervals, in the manner, at the place and on the notice that the Executive Committee may from time to time determine.

(2) The Chairperson, a Vice-Chairperson or any three members of the Council may, at any time, call a special meeting of the Executive Committee.
- Special meetings

25. (1) A resolution consented to in writing or by any electronic method, by all members of the Executive Committee, shall be as valid and effectual as if it had been passed at a meeting of the Executive Committee duly called and held.
- Resolution

(2) The resolution shall be filed with the minutes of the Executive Committee and shall be effective on the date stated on it or, if no date is specified, when it is filed.
- Minutes

Standing Committees

- Standing Committees

26. There shall be a standing committee of the Council on each of the following subjects:

 - (a) judicial conduct;
 - (b) judicial education;
 - (c) judicial salaries and benefits;
 - (d) judicial independence;
 - (e) administration of justice;
 - (f) finance;
 - (g) appeal courts;
 - (h) trial courts; and
 - (i) nominations.
- Membership

27. Subject to sections 28 to 30, each standing committee shall have a minimum of five members who shall be elected at each annual meeting. The Chairperson of each such committee shall be elected annually by the members of the committee from among their number.
- Membership of Judicial Conduct Committee

28. (1) The members of the Executive Committee shall constitute the Judicial Conduct Committee.

(2) The Chairperson of the Council shall designate one of the Vice-Chairpersons of the Council to be the Chairperson of the Committee, who shall hold office at the pleasure of the Chairperson of the Council.

(3) The Chairperson may, after consultation with the Chairperson of the Committee, designate one or more Vice-Chairpersons of the Committee.
- Chairperson of the Judicial Conduct Committee
- Vice-chairperson of the Judicial Conduct Committee
- Appeal Court and Trial Court Committee

29. (1) The members of the Appeal Courts Committee and the Trial Courts Committee shall, respectively, consist of the Council members who are members of those courts.

Chairperson	(2) The Chairperson of each of those Committees, respectively, shall be the Chief Justices of the Appeal Court and the Trial Court of the province or territory in which the next annual meeting of the Council is to be held.	Other candidates	36. Despite the report of the Nominating Committee, any member of the Council may nominate at the annual meeting any eligible member of the Council for election to the Executive Committee or to a standing committee.
Election of Nominating Committee	30. At every annual meeting the members of the Council shall elect a three-member Nominating Committee.	Finance Committee	37. The Finance Committee shall prepare for the Executive Committee the Council's annual budget for presentation to the Commissioner for Federal Judicial Affairs.
Vacancy	31. Any vacancy in a standing committee arising between annual meetings of the Council may be filled by appointment made by the Executive Committee.	Report	38. (1) At each meeting of the Council, the Finance Committee shall present a current report on the financial affairs of the Council.
Necessary modifications	32. Section 23, subsection 24(1) and section 25 apply, with any modifications that are necessary, to any Committee of the Council.	Supervision of financial affairs	(2) The Finance Committee shall supervise the financial affairs and operations of the Council and its committees, and undertake any further financial assignments that the Council or its Executive Committee may direct.
<i>Mandate of Standing Committees</i>			
Mandate	33. Each standing Committee shall define its mandate and be responsible for the achievement of its objectives.		
Duties of Nominating Committee	34. (1) The Nominating Committee shall nominate candidates for membership of the Executive Committee and of all standing committees.	Ad hoc committees	39. (1) The Chairperson, the Executive Committee or the Council may establish ad hoc committees and prescribe their powers and duties.
Representation	(2) The Nominating Committee shall consider and, if possible, nominate candidates who will furnish regional and jurisdictional representation.	Membership	(2) The Chairperson, the Executive Committee or the Council shall designate the members of ad hoc committees and may include in the membership puisne judges.
Report of Nominating Committee	35. A written report of the nominations proposed by the Nominating Committee shall be sent to the members of the Council at least 30 days before each annual meeting of the Council.		

PARTICIPATION AT SEMINARS AND MEETINGS

Seminars and meetings
 40. For the purpose of subsection 41(1) of the Act
 (a) the Council may authorize judges to attend seminars and conferences for their continuing education; and
 (b) the Chairperson may authorize judges to attend meetings, including seminars, conferences or Council committee meetings, relating to the administration of justice.

PART 2 COMPLAINTS

REVIEW OF COMPLAINTS

Duties of the Chairperson of the Judicial Conduct Committee
 41. (1) The Chairperson of the Judicial Conduct Committee shall carry out the duties set out in this Part with respect to complaints against judges.

Duties of Vice-Chairperson
 (2) The Chairperson of the Committee may assign to a Vice-Chairperson of the Committee complaints for which the Vice-Chairperson shall be responsible.

Precision
 (3) For greater certainty, in this Part, “Chairperson of the Committee” means the Chairperson of the Judicial Conduct Committee, or a Vice-Chairperson of that Committee with respect to the complaints assigned to the Vice-Chairperson.

NON-PARTICIPATION

Non-participation
 42. The Chairperson of the Council, and any member of the Council who is a judge of the Federal Court, shall

not participate in the consideration of any complaint under this Part unless the Chairperson considers that the public interest and the due administration of justice require it.

RECEIPT OF COMPLAINT

Complaints to be in writing
 43. Complaints made to the Council against a judge shall be in writing.

Communication by Council member
 44. (1) A Council member shall draw to the attention of the Executive Director in writing any conduct of a judge — whether or not the member received a complaint about the judge — that, in the view of the member, may require the attention of the Council.

Letter same as complaint
 (2) If the Council member has not received a written complaint about the judge, the member’s letter shall be treated in the same manner as any other complaint received by the Council.

Referral to Executive Director
 45. Every complaint received by the Council shall be referred to the Executive Director who will send a copy of it to the Chairperson of the Committee for review.

Withdrawal
 46. After a complaint file has been opened, upon receipt of a letter from the complainant asking for the withdrawal of his or her complaint, the Chairperson of the Committee may:
 (a) close the file; or
 (b) proceed with consideration of the file in question, on the basis that the public interest and the due administration of justice require it.

REVIEW BY CHAIRPERSON OF THE JUDICIAL CONDUCT COMMITTEE

Review by Chairperson and request for comments

47. The Chairperson of the Committee shall review the complaint and may inquire into the matter by requesting comments from the judge concerned and from his or her chief justice.

Further inquiries

48. The Chairperson of the Committee may cause further inquiries to be made if more information is required for the review or if the matter is likely to be referred to a Panel under section 53 and more information appears to be necessary for the Panel to fulfil its function.

Opportunity to respond

49. If further inquiries are caused to be made, the judge concerned shall be provided with an opportunity to respond to the gist of the allegations and of any evidence against him or her and the judge's response shall be included in the report of the further inquiries.

Closing of the file by Chairperson

50. (1) Subject to section 51, the Chairperson of the Committee, having reviewed the complaint and any report of inquiries, may close the file and shall advise the complainant with an appropriate reply in writing if
 (a) the matter is trivial, vexatious or without substance; or
 (b) the conduct of the judge is inappropriate or improper but the matter is not serious enough to warrant removal.

Expression of disapproval

(2) If a judge recognizes that his or her conduct is inappropriate or improper, the Chairperson of the Committee who closes the file under paragraph (1) (b) may, when the circumstances so require, express disapproval of the judge's conduct.

Complaint involving a member of the Council

51. When the Chairperson of the Committee proposes to close a file that involves a member of the Council, the Executive Director shall refer the complaint and the reply to an independent counsel who will provide his or her views on the matter, and either incorporate his or her comments into the reply or request that the Chairperson of the Committee give the complaint further consideration.

Copy of complaint and reply sent to judge

52. The Executive Director shall provide to the judge concerned and to his or her chief justice, a copy of the complaint, together with a copy of the reply to the complainant.

REVIEW BY PANEL

Referral to Panel

53. The Chairperson of the Committee shall refer any file that is not closed under subsection 50(1) to a Panel designated under section 54, together with the report of further inquiries, if any, and any recommendation that the Chairperson may make.

Composition of Panel

54. (1) The Chairperson of the Committee shall designate a Panel of up to five members selected from the Council, excluding judges who are members of the court of which the judge who is the subject of the complaint is a member.

Puisne judges

(2) Despite subsection (1), the Chairperson of the Committee may select some members for a Panel from among puisne judges, excluding judges who are members of the court of which the judge who is the subject of the complaint is a member.

Majority of Panel

(3) The Chairperson of the Committee shall select the majority of Panel members from the Council whenever possible.

Chairperson of Panel (4) The Chairperson of the Committee shall designate a member of the Panel as Chairperson of the Panel.

Review by Panel 55. (1) The Panel shall review the matter and the report of the further inquiries, if any, and may cause further inquiries to be made. The Panel shall

- (a) decide that no investigation under subsection 63(2) of the Act is warranted, close the file and advise the complainant and the judge concerned, with an appropriate reply in writing if
 - (i) the matter is trivial, vexatious or without substance, or
 - (ii) the conduct of the judge is inappropriate or improper but the matter is not serious enough to warrant removal; or
- (b) recommend to the Council that an investigation under subsection 63(2) of the Act should be undertaken, and provide a report to the Council and to the judge concerned that specifies the grounds set out in subsection 65(2) of the Act that may be applicable.

Expression of disapproval (2) In closing the file under subparagraph (1)(a)(ii), the Panel may, when the circumstances so require, express disapproval of the judge's conduct.

Non-participation 56. After the Panel has completed its review of a complaint, the members of the Panel and the Chairperson of the Committee who has reviewed the complaint shall not participate in any further consideration of the same complaint by the Council.

REVIEW OF THE PANEL'S REPORT BY THE COUNCIL TO DETERMINE IF AN INVESTIGATION UNDER SUBSECTION 63(2) OF THE ACT IS REQUIRED

Review by Council 57. (1) The Council shall consider the Panel's report to determine if an investigation under subsection 63(2) of the Act is warranted.

Designation of subsequent Inquiry Committee (2) Before the Council considers a Panel's report, the Chairperson of the Committee shall designate up to five members of the Council, excluding members of the court of which the judge who is the subject of the complaint is a member, to serve on any subsequent Inquiry Committee that may be constituted under subsection 63(3) of the Act.

Chairperson of the Inquiry Committee (3) The Chairperson of the Committee shall designate a member of the Inquiry Committee as Chairperson of the Inquiry Committee.

Non-participation (4) The members so designated shall not participate in any deliberations of the Council in relation to the matter in question.

Written submissions 58. The judge who is the subject of the complaint shall be entitled to make written submissions to the Council as to why there should or should not be an investigation under subsection 63(2) of the Act.

Review by Council 59. After considering the Panel's report and any submissions of the judge concerned, the Council shall decide

(a) that no investigation under subsection 63(2) of the Act is warranted because the matter is not serious enough to warrant removal, in which case, the Council shall advise the complainant and the judge with an appropriate reply in writing, including an expression of disapproval of the judge's conduct when the circumstances so require; or

(b) that an investigation shall be held under subsection 63(2) of the Act because the matter may be serious enough to warrant removal, and advise the judge concerned accordingly.

INQUIRIES

Investigation Conducted by an Inquiry Committee under subsection 63(2) of the Act

Members of Inquiry Committee 60. The Inquiry Committee that conducts an investigation under subsection 63(2) of the Act shall be composed of the members designated by the Chairperson of the Committee under subsection 57(2) together with any additional members appointed by the Minister under subsection 63(3) of the Act.

Appointment of independent counsel 61. (1) The Chairperson of the Committee shall appoint an independent counsel in relation to the investigation who shall act at arm's length from both the Council and the Inquiry Committee.

Duties of independent counsel (2) The independent counsel shall have carriage of the complaint before the Inquiry Committee, acting in accordance with the law and counsel's best judgment of what is required in the public interest.

Additional complaints against judge 62. The Inquiry Committee may consider other complaints about the judge that are brought to its attention during the course of its investigation, subject to the judge's being given notice of the additional complaints and having an opportunity to respond to them.

Public investigation 63. Subject to subsection 63(6) of the Act, the Inquiry Committee shall conduct its hearing in public except that, in exceptional circumstances, it may hold all or any part of the hearing in private if it considers that the public interest and the due administration of justice require it.

Inquiry Procedures 64. The Inquiry Committee shall conduct its investigation in accordance with sections 63 and 64 of the Act, these by-laws and any fair procedures that it may adopt.

Report of Inquiry Committee 65. The Inquiry Committee shall report its findings and conclusions to the Council and may express its opinion on whether a recommendation should be made for the removal of the judge from office.

Copies of report 66. As soon as possible after the Inquiry Committee has completed its report, the Executive Director shall:

(a) provide a copy of the report to the judge concerned, the independent counsel and any other persons who were given standing in the proceedings by the Inquiry Committee; and

(b) when the hearing has been conducted in public under section 63, make the report public.

Review of the Inquiry Committee Report by Council

Judge's submission to or appearance before Council

67. A judge who is the subject of an investigation pursuant to subsection 63(2) of the Act may make written submissions to the Council regarding the report of the Inquiry Committee or may appear in person before the Council for the purpose of making a statement to the Council.

Appearance of Independent counsel

68. If the judge advises that he or she intends to appear before the Council, with or without counsel, the Council shall invite the independent counsel to appear.

Public hearing

69. The hearing of the Council shall be held in public unless the investigation under subsection 63(2) of the Act was held in private.

Referral back to Inquiry Committee

70. The Council may refer the matter or any part of it back to the Inquiry Committee with directions.

Council's report to the Minister

71. In reporting its conclusions to the Minister under section 65 of the Act, the Council shall also provide the Minister with a copy of the report of the Inquiry Committee.

Inquiry Requested under Subsection 63(1) or 69(1) of the Act

Request from Minister or an Attorney General with respect to a judge

72. (1) If the Council receives a request from the Minister, or from the Attorney General of a province, under subsection 63(1) of the Act to conduct an inquiry as to whether a judge should be removed from office, the Chairperson of the Committee shall

appoint up to five members of the Council to serve on the Inquiry Committee, excluding members of the court of which the judge concerned is a member.

Chairperson of the Inquiry Committee

(2) The Chairperson of the Committee shall designate a member of the Inquiry Committee as Chairperson of the Inquiry Committee.

Request from Minister about other persons

73. (1) If the Council receives a request from the Minister under subsection 69(1) of the Act to conduct an inquiry as to whether a person appointed under an enactment of Parliament should be removed from office, the Chairperson of the Committee shall appoint up to five members of the Council to serve on the Inquiry Committee.

Chairperson of the Inquiry Committee

(2) The Chairperson of the Committee shall designate a member of the Inquiry Committee as Chairperson on the Inquiry Committee.

Rules for inquiry directed by Minister or an Attorney General

74. An inquiry referred to in section 72 and 73 shall be conducted in accordance with sections 60 to 71, with any modifications that are necessary, as though it were an investigation under subsection 63(2) of the Act.

Appendix E

HUMAN AND FINANCIAL RESOURCES, 1997-98

The Council is served by an executive director, a legal officer and two support staff located at the Council office in Ottawa.

1997-98 Expenditures of the Canadian Judicial Council

Salaries and Benefits	\$244,678
Transportation and Communications	59,052
Professional and Special Services	409,227
Rentals	20,354
Purchase, Repair and Upkeep	1,076
Utilities, Materials and Supplies	14,130
Construction and Acquisition of Machinery and Equipment	4,725
Other	128
Internal Government Expenditures	24,968
TOTAL	\$778,338

Appendix F

POSITION OF THE CANADIAN JUDICIAL COUNCIL ON THE APPOINTMENT OF FEDERALLY APPOINTED JUDGES TO COMMISSIONS OF INQUIRY

1. Every request that a judge perform a task referred to in section 56¹ of the *Judges Act* should in the first instance be made to the chief justice, chief judge, senior judge or other judge having administrative responsibility for the court (hereinafter referred to as the “chief justice”) to which the judge belongs.
2. Such request should be accompanied by a reference to the authority for such an appointment.
3. The request should be accompanied by the proposed terms of reference for the inquiry and an indication as to the time limit, if any, to be imposed on the work of the commission. It is expected that a government, in estimating a time limit, will not overlook the period necessary for organization of the work of the commission including arrangements for premises, staff, identification of those with standing, etc., all of which are required before the hearings or other business of the commission can begin.
4. A sufficient time should be allowed for the chief justice to discuss fully the request with the judge whose services are requested.
5. The chief justice, in consultation with the judge in question, should consider whether the absence of the judge for these purposes would significantly impair the work of the court. In this respect they should consider, in respect of the duration of the proposed commission of inquiry:
 - (a) If no reporting date is fixed for the inquiry, is the probable duration unreasonable having regard to the needs of the court?
 - (b) If a reporting date is proposed, is the date reasonable in relation to the terms of reference? An assessment should be made to the best of the ability of the chief justice and the judge as to whether such period is realistic. If it is not realistic the proposed appointment should not be accepted.

¹ Section 56 of the *Judges Act* states:

56. (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament, expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

(2) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under any public Act, whether of general or local application, of Canada or of a province, whereby a judge is required or authorized without authority from the Governor in Council or lieutenant governor in council to assess or ascertain compensation or damages.

If the appointment is accepted and a prolonged absence of the appointed judge is contemplated, the chief justice may consider requesting the creation of an additional position for the court.

6. Apart from the consideration referred to in 5, the chief justice and judge will wish to consider whether the acceptance of the appointment to the commission of inquiry could impair the future work of the judge as a member of the court. In this respect they may consider:

- (a) Does the subject-matter of the inquiry either essentially require advice on public policy or involve issues of an essentially partisan nature?
- (b) Does it essentially involve an investigation into the conduct of agencies of the appointing government?
- (c) Is the inquiry essentially an investigation of whether particular individuals have committed a crime or a civil wrong?
- (d) Who is to select commission counsel and staff?
- (e) Is the proposed judge through particular knowledge or experience specially required for this inquiry? Or would a retired judge or a supernumerary judge be as suitable?
- (f) If the inquiry requires a legally trained commissioner, should the court feel obliged to provide a judge or could a senior lawyer perform this function equally well?

7. In the absence of extraordinary circumstances, it is the position of the Canadian Judicial Council that no federally appointed judge should accept appointments as referred to in section 56 of the *Judges Act* until the chief justice and the judge in question have had sufficient opportunity to consider all these matters and are satisfied that such acceptance will not significantly impair either the work of the court or the future judicial work of the judge.