



CANADIAN
JUDICIAL
COUNCIL



Annual Report

1998-99



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Preface

The publication of *Ethical Principles for Judges*, described in Chapter 4 of this report, marks an important step in enunciating the high standards expected of judges in today's society.

The document is also meant to assist the public in understanding the role of judges as well as the constraints imposed by the need to protect judicial independence and impartiality.

Many people today no longer accord automatic respect or deference to our public institutions, including the judiciary. While judges are encouraged by the fact that they fare well in surveys of public support, they also accept that public confidence cannot be taken for granted. And they recognize that they are now receiving unprecedented public and media attention as a result of the prominent roles assigned to them with the introduction of the *Canadian Charter of Rights and Freedoms*.

Accordingly, at both their annual and mid-year meetings in 1998-99, members of the Council noted that, in many respects, courts and the role of judges are poorly understood by the public and the media, and agreed that judges must take initiatives beyond the courtroom to do something about it.

As reported in Chapter 4, the Council pressed provincial governments to facilitate the appointment of court officers to assist the media. The Council also supported the view that judges should not "comment" on their own judgments, but said there is a place for responses from the judiciary in the event of unfair personal

attacks on judges or serious errors in reporting. The Council established a Special Committee on Public Information to make recommendations on the kinds of initiatives that federally appointed judges across Canada can appropriately take in schools, public forums and in their relationships with the media to explain their work and the operation of their courts.

This role is consistent with judges' ethical responsibilities. In discussing the independence of the judiciary, the *Ethical Principles for Judges* booklet observes that "neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve." The document adds:

The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.

As the late Mr. Justice John Sopinka once said: "No longer can we expect the public to respect decisions in a process that is shrouded in mystery and made by people who have withdrawn from society. The public is demanding to know more about the workings of the courts and about judges."

Judges are making other efforts to respond to change in our society. They have worked hard to improve their judicial skills and understanding through various training programs, including the social context education offered by the National Judicial Institute. They are also answering requests for assistance to support judicial reforms around the world by helping set up model courts and training centres, participating in seminars and providing institutional support. Further, federally appointed courts across the country are taking measures to reduce delays through case management, pre-trial conferencing, judicial mediation and other techniques.

In the same vein, Council's mid-year seminar, discussed in Chapter 1, examined how judges can do more to ensure that unrepresented litigants are treated fairly in court. The seminar also discussed the role played by the Council in addressing complaints about the conduct of federally appointed judges, concluding overwhelmingly that public confidence requires a responsible, credible process for dealing with complaints about judicial conduct when it "crosses the line." Finally, Chapter 4 describes some of the many initiatives being taken to improve judicial efficiency and open up courts through the Internet and related technologies.

In this, the last annual report of Council that I will sign, I would like to take the opportunity to thank all my fellow Council members for their support, assistance and advice over the past 10 years. Many of them devote significant amounts of time each year, particularly in the handling of complaints, to the service of Council and I am greatly indebted to them for that. Most especially, I must thank my able Vice-Chairs, Chief Justice MacEachern and Chief Justice Michaud. I would also like to extend my sincere thanks to the Executive Director of the Council, Ms. Jeannie Thomas, who has worked indefatigably on behalf of the Council for many years and, we all hope, for many more.

A handwritten signature in black ink, appearing to read 'A. Lamer', with a long horizontal flourish extending to the right.

The Right Honourable Antonio Lamer, P.C., C.J.C.
Chairman
Canadian Judicial Council
December 1999

1.

The Canadian Judicial Council



Members of the Canadian Judicial Council at the September 1998 Annual Meeting in Yellowknife, Northwest Territories

GENERAL OVERVIEW

This report covers the activities of the Canadian Judicial Council for the period April 1, 1998 to March 31, 1999. It is the 12th annual report published by the Council.

The Council includes the chief justices and associate chief justices, chief judge and associate chief judge of all courts whose members are appointed by the federal government. To the end of the year, the senior judges of the Supreme Court of the Yukon Territory and the

Supreme Court of the Northwest Territories shared a seat, serving alternate two-year terms. As of April 1, 1998, the Council had 36 members. Members serving during 1998-99 are listed in Appendix A.

The Council was established by act of Parliament in 1971. Its statutory mandate, set out in subsection 60(1) of the *Judges Act* (Appendix C), is “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'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.

Members of the Canadian judiciary are frequently called upon by colleagues in other countries for assistance in judicial training and institutional support. In this connection, the Council Secretariat responds to many requests for information and documentation from judges, governments and academics around the world. In 1998-99, Council staff met with judges and officials from Benin, the People's Republic of China, Northern Ireland and New Zealand.

Much of the Council's work is 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, 1999, is found in Appendix B.

While required by statute to meet once a year, the Council's practice for some years has been to meet twice — in Ottawa during the spring, and elsewhere in the fall. The Council's September 1998 meeting was held in Yellowknife, Northwest Territories.

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

The March 1999 seminar addressed two subjects — "Judicial Free Speech and Accountability: The Struggle

to Find the Balance in Dealing with Complaints," and "The Unrepresented Party in Court Proceedings: The Role and Obligations of the Judge."

Seminar Participants

Part I: Judicial Free Speech and Public Accountability: The Struggle to Find the Balance in Dealing with Complaints

Professor Ed Ratushny, Q.C., Faculty of Law, University of Ottawa

The Honourable Edward D. Bayda, Chief Justice of Saskatchewan

The Honourable John W. Morden, Associate Chief Justice of Ontario

Part II: The Unrepresented Party in Court Proceedings: The Role and Obligations of the Judge

Chair, Mr. James O'Reilly, Executive Legal Officer, Supreme Court of Canada

Mr. Frank Broccolina, Deputy State Court Administrator for Maryland

Mr. Andrejs Berzins, Senior Crown Attorney for the Regional Municipality of Ottawa-Carleton

Mr. Justice George Czutrin, Ontario Court of Justice, Family Court

Judicial Free Speech and Accountability

Introducing the first session, Professor Ratushny said the underlying question relating to judicial speech or any form of judicial conduct is public confidence in the judiciary. Public confidence is the basis for the principle of judicial independence and the reason why the principle exists.

Public confidence requires a responsible, credible process for dealing with judicial conduct when it "crosses the line," a procedure to deal with complaints raised by members of the public. A credible process will help educate the public as to what is, and what isn't, the proper subject matter of judicial conduct proceedings. It may also educate individual judges about the limits imposed on them. Finally, it proves to both

the public and judges that the judiciary takes judicial misconduct seriously and is prepared to address it.

Professor Ratushny challenged the idea that judicial conduct proceedings concluding with an expression of disapproval in response to public clamour somehow scapegoats judges, damages their credibility or makes them ineffective in their work. He said:

It seems to me that where a judge has done some-thing stupid, for example, and it is not just an error but amounts to conduct, and the Council draws that to the judge's attention, and the judge says 'Yes, I understand, I should have been more careful, it was inappropriate for me to do that, and I am going to be more careful by avoiding such misconduct in future', I think that reflects very well on the judge. Judges are human beings and people realize that judges are human beings. I don't see a judge in that situation being wounded. I see the stature of the judge being enhanced.

What's the alternative? The alternative is that you have misconduct out there and it's never addressed. The judge doesn't address it, Council doesn't address it, and it seems to me that state of affairs can leave the judge much more wounded in terms of public perception and public confidence than if the matter had been addressed.

Chief Justice Bayda, arguing what he called an "extreme position," said Canada's system of justice rests on two pillars. The first pillar is an independent judiciary. The second is that every judge, when acting in a judicial proceeding, enjoys absolute freedom of thought, freedom of communication and freedom from fear of being punished for thinking his or her thoughts, and for putting those thoughts into spoken words.

These freedoms are there not for the benefit of the judge or the other participants in the proceedings, but for the higher interest of advancing public justice. Public policy dictates that these freedoms should not be interfered with in any way — directly or indirectly.

Occasionally a judge or other participant will abuse one or more of these freedoms and on occasion very seriously, but on balance the public advantage lies in respecting these freedoms as absolute — without exception. The common law has endeavoured to build a circle around these freedoms by giving civil immunity to all who participate in court proceedings in respect of anything they say.

Chief Justice Bayda said the conclusion must be that no one — including the Canadian Judicial Council — has the power to censor or censure a judge, directly or indirectly, for his or her thoughts during the course of a judicial proceeding, and this holds true for thoughts expressed and unexpressed. This does not mean that a judge can say anything he or she pleases with impunity. A judge's language, while not of itself censurable, may be evidence that the judge is "losing it" — tending to show the judge as unfit to continue as a judge. The Council should not be able to censure a judge because a complainant is offended by some language, but if there is an allegation that the language is one item of evidence of unfitness, then it should be received and admitted for the purpose of showing unfitness.

In his presentation Associate Chief Justice Morden said the issue in question was "the possible inhibiting or chilling effect of official sanction for what are thought to be a judge's statements that 'go too far'." The value at stake is judicial independence, which requires that judges express themselves honestly and fearlessly in their adjudication of the relevant law, evidence and policy.

Judicial independence can be infringed if a judge is inhibited from honestly speaking his or her mind in a judicial proceeding for fear of Council disapproval. On the other hand, if a judge in his or her statements goes beyond what is necessary to carry out the judicial function, this can have a damaging effect on the public's perception of the independence and impartiality of the courts.

Associate Chief Justice Morden cited the legal framework governing the Council's processing of complaints set out in the Council's by-laws, and a number of

recent well-publicized examples, concluding that the Council has dealt fairly with judges who were truly exercising their judicial powers fearlessly and independently.

On the other hand, when complaints are made about judges' comments that are clearly inappropriate or improper, the Council has an obligation to "call a spade a spade." The public's estimation of the judiciary will erode if judges make outrageous statements and the Council responds by saying complaints are without substance, frivolous or vexatious.

Comments from the floor supported a role for the Council reviewing judicial conduct. Said one chief justice:

. . . the only power we have . . . since we have neither the power of the purse or the sword, is the support of the public, is public opinion. If the public is made aware and sees that that kind of behaviour goes un-sanctioned in any way, shape, or form by the judiciary, I think we have got a big problem. I think it is in the very interests of the independence of the judiciary that we so revere that that kind of behaviour, that kind of speech, even on the bench, must be dealt with through an enlightened discipline process.

The one goal of the independence of the judiciary is to ensure the impartiality of the judge, said another chief justice. It cannot seriously be suggested that the Council should be powerless if a judge shows racist or sexist bias or violates the rule of impartial treatment, in court or out of court.

The Unrepresented Party in Court Proceedings

Mr. Broccolina said self-represented litigants are having a profound impact on the U.S. judicial and legal systems. They now account for a large and growing share of the caseload in most U.S. trial courts, especially — but not only — in the area

of family and domestic law. It is routine to expect at least one person to be unrepresented in half of those cases, and not unusual that both parties are unrepresented in more than a third of those cases.

The unrepresented litigant in the courtroom poses a dilemma for a judge on how to preserve judicial impartiality while at the same time attempting to protect the litigant's access to justice. Judges are required to spend ever more time and personal energy to educate litigants in the trial process, which puts a strain on already limited judicial resources and threatens to create case backlogs and delays.

Together with the expansion of the Internet and the plethora of lawyers, the situation is creating a new legal niche in the practice of law. Lawyers are beginning to provide limited legal advice to litigants for reduced fees without creating a solicitor-client relationship.

The judiciary as an institution in the United States has experienced a significant loss of public trust and confidence. Survey after survey reveals strong negative perceptions of the courts as hard to access, costly to use and difficult to understand. Many courts have recognized that how they respond to the self-represented litigant will have a direct bearing on the critical issues of access to justice and public trust and confidence.

The challenge to chief justices is to extend the traditional roles of the courts by searching for novel and creative models and solutions beyond the confines of existing practice and policy. The strategy adopted by some courts is to create a case management system for self-represented litigants that seeks to avoid, at all costs, putting an unrepresented or unprepared litigant at a clerk's counter or in a courtroom in front of a judge. Courts are making it easier for lawyers to volunteer their time and services. Direct financial support is being provided for government legal services through an allocation of filing fees. Self-service centres are being set up to supply forms, advice and direction to community resources. Investments are being made in alternative means to resolve disputes. Legal services are being provided in courthouses through partnerships with

non-profit organizations and the bar, in some cases making staff counsel and staff attorneys available. Courts are creating telephone helplines and legal clinics.

Mr. Berzins said there was a huge increase in the number of unrepresented accused in Ontario with the change in legal aid policies in 1994, and incremental growth since then. Their profile has also changed. They are often ordinary people charged with relatively common types of offences — such as impaired driving and domestic violence — who simply cannot afford a lawyer. With the closure of hospital beds, more and more persons who are mentally ill are appearing before the courts unrepresented.

In response, courts are being managed better. Courts are recognizing their obligation to advise the accused of the right to make an application for disclosure, and they are facilitating disclosure. In Ottawa, the disclosure office is right beside the cafeteria, and does not require an appointment. The practice is to ensure that the same thing is given to the accused as to defence counsel.

Many of the issues arising with unrepresented accused pertain to pre-trial matters, since only nine percent of criminal charges end up going to trial. It is useful for legal aid duty counsel to participate in pre-trial discussions, even though they are not formally representing the accused. Judicial pre-trials are taking place in court on the record. The most effective strategy is to have a small contingent of paid legal aid duty counsel operating in a courthouse.

The challenges for judges at trial are enormous. It would be helpful to provide a checklist for trial judges about what areas to cover with unrepresented litigants and some form of procedural protocol.

Mr. Justice Czutrin spoke of his experience in a long-running Family Court pilot project. Unrepresented litigants appear in at least 50 percent of all cases. Some cannot afford lawyers, but the court also sees doctors, professors and others of means who choose to act for themselves. The vast majority raise simple issues and need help only to ensure their material is put before the court.

Mr. Justice Czutrin and two other justices had been asked to recommend how to assist judges in the courtroom in order to minimize judicial interaction with self-represented litigants caused by a lack of understanding of the legal process. Their report suggested training court staff to deal with issues of behaviour and decorum in order to ensure that self-represented litigants act appropriately in the courtroom. They suggested posting signs outside the courtroom outlining appropriate conduct and explaining how litigants may seek legal advice.

The report recommended information centres at courthouses, each with a family law information centre staffed by a mediator who could direct people, answer questions and conduct mediation sessions. Litigants would have access to informational videos explaining the court process. Counsellors would provide assistance under the provincial legal aid plan and duty counsel would give legal and procedural advice.

Because the role of the judge is not well understood, litigants would benefit from additional information on process, conduct, the law and judicial roles before they appear in court.

Mr. Justice Czutrin said the Family Division now does everything, including settlement conferences, on the record. He offered many detailed suggestions regarding procedure in these conferences and in the courtroom.

2.

Judicial Education

OVERVIEW OF RESPONSIBILITIES

From the Council's inception it was recognized that a judiciary in a dynamic and changing society must constantly renew its intellectual resources. Parliament provided that the Council could, pursuant to paragraph 60(2)(b) of the *Judges Act*, "establish seminars for the continuing education of judges."

The Council makes educational opportunities available for judges through its Judicial Education Committee, which recommends conferences and seminars to be designated for attendance and reimbursement of expenses under subsection 41(1) of the *Judges Act*.¹

Opportunities for continuing education and training are also provided through other auspices. As authorized or required through provincial judicature acts, individual courts can undertake educational programs, and under subsection 41(2) of the *Judges Act*, individual chief justices 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

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. While the demands of the bench exercise constant pressure on judges' time and energies, the Council supports their commitment to continuous learning in cooperation with the National Judicial Institute (NJI), a non-profit organization funded by both federal and provincial governments.

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."

The NJI designs and presents courses for both federally and provincially appointed judges to help them improve the administration of justice, achieve personal growth, maintain high standards of judicial conduct and social awareness, and perform judicial duties fairly, correctly and efficiently.

During 1998-99, the Council authorized the following NJI seminars under subsection 41(1) of the *Judges Act*. They were attended by 20-40 judges on average.

Social Context Education: Faculty Development, Halifax, April 5-8, 1998 and Ottawa, April 26-29, 1998

Appellate Courts Seminar, Montreal, April 19-22, 1998

Civil Law Seminar, Ottawa, May 19-21, 1998

Early Orientation for New Judges, Ottawa, May 25-29, 1998 and Nov. 23-27, 1998

Advanced Settlement Skills for Judges, Toronto, December 2-4, 1998

Pre-Trial Settlement Skills Seminar for Federal Court of Canada, Ottawa, February 5, 1999

Family Law Seminar, Quebec City, February 10-12, 1999

Criminal Law Seminar, Vancouver, March 17-19, 1999

In addition, computer courses were provided to judges of various courts throughout the country during the year.

Canadian Institute for the Administration of Justice (CIAJ) Programs

As in previous years, the Canadian Institute for the Administration of Justice (CIAJ) conducted two annual seminars for federally appointed judges, for which the Council authorized reimbursement of expenses for participating judges:

Judgment Writing Seminar, Montreal, July 7-11, 1998, with up to 55 judges authorized to attend;

New Judges Seminar, Mont Tremblant, Quebec, February 28-March 5, 1999.

The Council also authorized a total of 85 judges to attend as participants or speakers at a CIAJ conference in Saskatoon on "Adjusting to Changing Demands: Coordination Issues in the Justice System in Canada" from October 14 to 17, 1998.

Other Seminars Authorized under the Judges Act

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

- One hundred and twenty-six judges were authorized to attend the *International Association of Women Judges Conference* "A New Vision for a Non-Violent World: Justice for Each Child," Ottawa, May 21 to 24, 1998.
- Up to 64 judges were authorized to participate in the Federation of Law Societies of Canada *National Family Law Program*, June 29 to July 2, 1998, in Whistler, B.C.
- Up to 64 judges were authorized to participate in the Federation of Law Societies of Canada *National Criminal Law Program*, July 13-17, 1998, at the University of Victoria.
- 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 1998.

STUDY LEAVE PROGRAM

Enhanced educational programs are essential to equip judges for their work in an evolving society. The desirability of leaves of absence for reflection and study is well-established within and outside the judiciary.

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 Study Leave Program is operated under the joint auspices of the Canadian Judicial Council and the Council of Canadian Law Deans (CCLD).

J U D I C I A L E D U C A T I O N

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 1998-99 are found 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.

Six judges participated in the Study Leave Program in the period September 1, 1998, to March 31, 1999, as follows:

- At the University of Montreal, Mr. Justice Marc Beauregard of the Quebec Court of Appeal followed courses in trade marks and copyright law, estate and tax planning and in electronic technologies. He also presided at three mock trials, and participated in a number of administrative activities. He taught judgment writing to two groups of newly appointed judges, took computer courses, and pursued research on the new Quebec Civil Code and on the latest judgments of the Supreme Court of Canada.

- Mr. Justice Tellex W. Gallant of the Court of Queen's Bench of Alberta worked actively with students and professors at the Law Faculty of the University of Victoria in spite of illness in the latter half of the period. He managed the UVic team in a moot competition with the University of British Columbia, including case research, intensive training and subsequent revision of written rules for the competitions. He also prepared major classroom lectures on the independence of the judiciary in Canada and professionalism in the practice of law, including a discussion of ethics for legal practitioners.
- While at the University of Ottawa, Mr. Justice Frank Maczko of the Supreme Court of British Columbia wrote a manual for judges on the conduct of class actions; lectured in litigation, public law and dispute resolution; and coached a moot team.
- Madam Justice Elizabeth A. McFadyen of the Alberta Court of Appeal divided her study leave between the International Centre for Criminal Law Reform and Criminal Justice Policy at the Law Faculty of the University of British Columbia, and the Law Faculty of the University of Calgary. At UBC she continued her research on judicial independence and chief justices' powers and the effect of the media on judicial independence. She lectured on the latter subject, worked with the Centre on a project related to the elimination of violence against women, and attended the Edmonton conference celebrating the 50th anniversary of the Universal Declaration of Human Rights. Her report on the conference was published in the Centre's conference newsletter. At the University of Calgary, Madam Justice McFadyen assisted in moot court programs, continued her research and presented several lectures to students.

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."

- Mr. Justice Pierre Viau of the Superior Court of Quebec carried out an intensive study of issues related to the evolution of justice and law in the western world during his leave at the Université du Québec à Montréal. He followed a course in administrative law; participated in several conferences on human rights, philosophy and the law; and delivered a number of lectures to students.
- Court demands obliged Mr. Justice Raymond J. Guerette of the Court of Queen's Bench of New Brunswick to shorten his study leave at the University of Moncton to three and a half months. He carried out a study of Australia's family court system, regarded as one of the most advanced of its kind in the common law world, and prepared a report on the Australian court's structure and operations as a contribution to modernization of New Brunswick's own family court.

3.

*Complaints***OVERVIEW OF RESPONSIBILITIES**

The *Constitution Act, 1867*, supports judicial independence and impartial justice by ensuring that judges can be removed from the bench only by Parliament and only for breach of the standard of good behaviour.

At the same time, the Constitution provides a check on the judiciary, ensuring that while the principle of judicial independence is respected, judges continue to be held accountable for their conduct. Whether judges are correct or incorrect, right or wrong in their decisions, they are not free to breach the bounds of “good behaviour.”

The distinction between judicial *decisions* and judicial *conduct* is fundamental.

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 *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.”

This formulation has been effective both in preserving judicial independence and in deterring judicial misbehaviour. Since 1701 only one judge has been removed from office by the U.K. Parliament. Canada’s Parliament had reviewed the conduct of superior court judges on five occasions prior to the creation of the Council in 1971. Four of these cases occurred prior to 1882. In every case the judge was absolved, resigned or died prior to the completion of the proceedings. In addition, a number of judges whose conduct has been under question have chosen to retire or resign rather than face parliamentary scrutiny.

From its creation in 1971, an important responsibility assigned to the Canadian Judicial Council has been to deal with complaints against federally appointed judges. The duty to inquire is engaged 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 makes an independent assessment of the judicial conduct in question — not whether a judge has made an erroneous decision. Its assessment can lead to an expression of disapproval of inappropriate

conduct. At most, it may, after a formal investigation or inquiry, recommend 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*. In practice, most complaints come from members of the public, typically by 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 judges whom complainants have not named or do not want to name. It cannot change decisions, compensate individuals, grant appeals or address demands for new trials. Nor can 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 without substance, 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. Those who feel aggrieved by a judge's conduct must be assured of an opportunity to have their concerns reviewed. A judge whose conduct is in question must be assured that the matter will be resolved as promptly and fairly as possible. The Council strives to make the complaints process demonstrably open and equitable, 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.

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

If a complainant has made his or her complaint public the Council, in closing the file, will generally issue a news release or have a statement available in

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

the event of media inquiries. The Council will not make the fact of a complaint or its disposition public on 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 a Vice-Chairperson⁴ reviews each complaint and decides on its disposition. The judge and the judge's chief justice may be asked for their comments, but with or without such comments, the Chairperson 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 judges — usually members of the Council but a Panel could include a puisne judge. The Chairperson, or a Panel, may ask an independent lawyer to 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 of 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 from the bench or to warrant a recommendation to the Council for a formal investigation by an Inquiry Committee.

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 usually consists of members of the Council and members of the bar appointed at the discretion of the Minister of Justice.

A complaint rarely results 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 undertake the inquiry.

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

THE 1998-99 COMPLAINTS

In 1998-99, the Canadian Judicial Council closed 162 files dealing with complaints against federally appointed judges.

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

Table 1
Complaint Files

	New Files Opened	Carried over from previous year	Total Caseload	Closed	Carried into the new year
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
1998-99	145	53	198	162	36

During the year 145 new files were opened, a total which was down considerably from recent years.

These totals remain very small in comparison with the hundreds of thousands of decisions made each year by about one thousand federally appointed judges.

Within the totals, however, proportionately more complaints are being received from individuals not represented in court by a lawyer, and significantly more from parties to family law disputes. In 1998-99, 77 of the 162 files closed, or 48 percent, arose from marital or family matters, perhaps reflecting the intense involvement of the parties in these disputes and the complex issues posed for judges.

It is 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.

Files Closed by the Committee Chairperson

Each complaint file naming a federally appointed judge is considered in the first instance by the Chairperson of the Judicial Conduct Committee, who 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 162 complaint files closed during the year 1998-99, 154, or 95 percent, were closed by the Chairperson. In 92 of these, or 60 percent, comments were sought from the judge in question and his or her chief justice before the file was closed. The remaining 62 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 directly or indirectly, is asking for reversal or alteration of the judge's decision,

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**Table 2
Complaint Files Closed in 1998-99 (162)**

	Closed by the Chairperson ¹ of the Committee	Closed by Panels
After response from the judge	92	5
Without requesting response from the judge	62	–
Files “Withdrawn” or “Discontinued”	1 ²	2 ³
Total	155	7

1 or Vice-Chairperson

2 File was closed as discontinued because the subject matter of the complaint was overtaken by a direction from the Minister of Justice for an inquiry under ss. 63(1) of the *Judges Act*.

3 Files were closed when the judges resigned from office.

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 can be considered only 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 letter of 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 independent lawyer before the file is closed.

Examples of complaints and how they were dealt with follow.

Alleged discrimination

In 21 cases, complainants alleged that judges demonstrated bias or discrimination, whether in relation to gender, race or in some other way. Three examples follow.

- The complainant represented herself on a motion in family law proceedings. She alleged that the judge appeared to be totally unprepared for the hearing and as a result was unable to question the two parties. The judge “would not even look at [her]” and she was “totally disrespected, ignored and discriminated against.” The judge had treated her unfairly because she was a woman and single mother, and not a lawyer. The judge would not allow her to tender further evidence and refused to accept her suggestion that he meet with the children of the marriage in order to determine how they felt about custody issues. In his comments, the judge said that he believed the settlement proposed was a correct solution to the problem. Unrepresented litigants “often fail to understand that, in chambers, evidence is only received in the form of affidavits and not through further representations by themselves.” He

stated “perhaps I should have made a greater effort to instruct her on this point.” The judge apologized for any failure to accord the complainant the appropriate courtesies. The judge’s chief justice wrote that because of the increased numbers of applications in family law chambers, it was both difficult and frustrating for the judges, and for those lawyers and individual parties who have to wait so long to have their cases heard. Recent changes had been made in order to handle the volume and reduce the pressure on judges and inconvenience to parties. He advised that it “would be uncharacteristic of [the judge] to speak rudely to a litigant or witness appearing before him or to fail to give appropriate consideration to any matter that comes before him.” The Council’s letter to the complainant noted that it is unfortunate when a litigant feels he or she has been treated inappropriately by a judge. However, there was no basis for further action by the Council pursuant to its mandate under the *Judges Act*.

- A party in protracted family law proceedings complained that although he was given liberal access to his son by the judge, his wife had successfully moved to block his participation at his son’s extra-curricular school and sporting activities. The school had told him that acting as a classroom parent volunteer was not legally possible as it violated the court order regarding access, and the judge had confirmed this. In response, the judge stated that it was the school that had taken the position with respect to the complainant acting as a parent volunteer. The judge stated that there never was a problem with respect to the complainant attending extra-curricular school or sporting activities. The complainant was informed that as there was no evidence of judicial misconduct, there was no basis for further investigation by the Council.
- A litigant in child custody proceedings stated that she had had sole custody of her four children for a number of years. The judge’s interim order had denied her custody and all access to the children. She alleged that “from the time he realized I was an Aboriginal woman, every ruling went against me.”

The judge had given preferential treatment to her ex-husband throughout the hearing, would not let her cross-examine witnesses on relevant matters, and refused to allow evidence from the children to be heard. He had imposed “an order preventing any discussion of the case.” The complainant wrote subsequently to complain that the judge referred to the fact of her complaint in open court to the other lawyers. The judge had forced her to proceed at various hearings without legal representation. Once the trial concluded, the judge responded to the complaint. He stated that he had awarded permanent custody of two of the complainant’s four children to their father and that the complainant was denied access because he was concerned for their safety and welfare and felt that their interests were not being served by remaining in the complainant’s custody. For much of the trial, the complainant had been unrepresented, but he had assisted her to the extent he was able. He had given her every opportunity to present her case and cross-examine opposing witnesses. He and other judges involved at various times had given her every opportunity to retain counsel and he had made representations to Legal Aid for extra funding to assist her. The judge’s description of events was borne out by the transcript of the proceedings. The complainant was advised that there was no evidence of judicial misconduct.

Alleged conflict of interest

Two examples follow of a total of nine complaints that a judge or judges were in a conflict of interest when they dealt with the complainant’s case.

- A lawyer alleged “corruption” in the government ministry of which the judge had been a senior public servant before his appointment to the bench. He had sent the judge letters in relation to litigation in which he acted as counsel. The judge had initially responded to the letters with information he could recall from his term in government, but the complainant said the replies had been “non-responsive and did not have the ring of truth.” He also had “a great deal of unease about the integrity of the judicial system [in his province]” because the same

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judge had heard his matrimonial case a couple of years earlier and he alleged there was a conflict of interest in his doing so. On the basis of the judge's reply, to which he attached his reasons for judgment in the complainant's matrimonial case, the complainant was advised that there was no evidence of any misconduct. The complainant was informed that the Council had no jurisdiction to investigate allegations of corruption in government departments.

- A plaintiff in a personal injury action alleged that the judge had been influenced by another judge whose son appeared as counsel for one of the defendants, and had "tinkered" with his own judgment a year after it was pronounced. The judge commented that the only outstanding issues after the trial judgment had been delivered dealt with no-fault benefits, costs and interest, and he had dealt with them after representations from counsel, including the complainant's counsel. He was unaware that counsel for one of the defendants was the son of a retired judge, but in any event he had had no contact with the judge during the course of the trial and his only contacts with counsel were in the course of his representation in court. The complainant was informed that there was no basis for any action by the Council.

Alleged delay in rendering judgment

Nine files alleging delay in giving judgment were closed during the year, including the following two examples.

- The complainants were members of a church who had an interest in the outcome of an application for an accounting by the church. They stated that they had "four major points that lead us to believe justice was compromised." The first and second related to the fact that, in their view, the judge promised a trial of the matter during the hearing and then made a glaring "about face" in his judgment, and also that the judge did not let the counsel for the Public Trustee present his full case. The complainants said they "lost precious time" because the judge took five months to give a decision. They also alleged the judge was biased because he commented on an occurrence at his own church, and expressed the desire that the present proceedings "did not have such silliness." The judge's use of the term "dissidents" in respect of those supporting the application was alleged to be evidence of bias against the applicant. Finally, the complainants disagreed with the judge's decision dismissing the application. In response the judge provided a copy of his reasons and a detailed reply, explaining that because the applicant's allegations regarding the accounts had been acknowledged by the respondents as true, there was no need to go through an accounting process to establish those facts. He had not cut short the submissions of counsel for the Public Trustee, which had been made over two days. He acknowledged that he may have told counsel for the Public Trustee that if he was inclined to go to trial, he had enough admissions to proceed. The judge said he was not asked to order a trial. He denied bias against the applicant and failed to see how his comment regarding an occurrence at his own church supported such a conclusion. He could not imagine using the word "silliness" in that context. He had adopted the word "dissident," which had been used by the respondents in their documentation, but did not use the term in any pejorative sense. The length of time between the hearing of the application and the release of his reasons was four months and 10 days. He had found the issues in the application novel and difficult, and this was exacerbated by the fact that the respondents had been unrepresented. There had been an intervening eight-week trial and he had other urgent motions to deal with. The complainants were informed that there was no evidence of judicial misconduct.
- The appellant, who was serving a life sentence for sexual assault, alleged that an appeal court panel had not delivered a decision although the hearing was seven months prior to his complaint. He also complained about the time it took to have a hearing since he had started his appeal in 1992, and alleged that the court forced him to be represented by counsel contrary to his wishes. The file was held in

abeyance pending a decision by the judges. In the interim, the complainant sent two more letters. The decision was given 14 months after the hearing of the appeal. The judges commented that the delay was caused by the complexity of the appeal and the fact that one of the judges in particular had an unusually heavy workload during the period in question that clearly accounted for time involved in completing the judgment. The chief justice explained that only the time lapse between the hearing and the decision was attributable to the panel of judges. The complainant was the cause for the time lapse between 1992 and the date of the hearing because he had failed to take steps to perfect his appeal. The complainant was informed of a resolution of the Council that reserved judgments should be delivered within six months of hearings, except in special circumstances. He was advised that six months is not a hard and fast rule, particularly for appellate courts, and all circumstances must be taken into account. In this case, a delay of 14 months was understandable. He was informed there was no evidence supporting his other allegations.

Complaints against Council members

Council members themselves, of course, are not immune to complaints about their conduct. Because it may be perceived as improper for Council members to deal with complaints about their Council colleagues, it is policy for independent counsel to review all complaints involving Council members before the files are closed. Three files dealt with during the year involved Council members.

- A complainant alleged that he had been pressured into signing a settlement agreement following a meeting of the judge and both counsel in chambers. He said the judge had taken the trial in camera rather than continuing the hearing and issuing a judgment. The judge commented that he had hoped to involve the parties through their counsel in an appropriate disposition of the case. At no time did either counsel object to his involvement. The complainant's lawyer recalled that counsel invited the

judge to assist the parties in attempting to settle the case before the trial. The judge met with counsel after the close of evidence of the complainant and advised counsel of his views on the evidence. The complainant was advised of this, and subsequently instructed his lawyer to reach a settlement. The complainant was informed of these facts and that if a party believed there were grounds for the judge to withdraw from the case, the recourse was to present a motion for the judge's disqualification. In the circumstances, and particularly the fact that the judge's involvement began with a request from the parties' counsel, it was concluded that there was no evidence of misconduct on the part of the judge.

- A number of judges of a court, including a Council member, were the subject of two letters of complaint making three allegations. The first complaint related to letters sent by lawyers to three judges. The complainant was advised that it was not unusual for lawyers to write to a judge about matters related to a pre-trial conference. The complainant could contest the facts set out in the letters or argue that some matters should be debated by way of motion, but those questions should be argued before the presiding judge. It was not for the Council to assess that situation. The second allegation referred to "displaced collegiality" in a meeting between two judges about his case. The complainant was informed that there was no indication their conduct was inappropriate. Meetings to discuss logistics of a file may be necessary. The complainant's first letter also said that while dictating to the clerk, one of the judges experienced difficulty in reading his name out loud and stated that "if he were the trial judge, he would use 'Ayatolla' to refer to me." He alleged the judge had also made a comment about custody of 24-month-old children belonging more properly to mothers. The complainant's wife — who was present at the pre-trial — signed an affidavit denying the judge had made such a statement. The judge also denied having made the statement as alleged. The alleged comment had apparently been reported to the

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complainant by his lawyer as the complainant was not present at the pre-trial. The third allegation was that during counsel's arguments, one of the judges had said that a complaint could be made to the Council. The complainant felt this comment disclosed that there was some form of "judicial reprisal" against him because he had previously complained to the Council about other judges. The complainant was informed that although this comment by the judge did not appear necessary to decide upon the issues before him, on the basis of the comment alone there was no indication that the judge was biased in his determination.

- A complainant alleged that four judges had conspired with the Crown or police against her in a "star chamber" manner. She also disagreed with a number of the decisions made by the judges. In a subsequent letter, she provided 29 pages of unidentified and largely illegible handwritten notes. The complainant was provided with a point-by-point response to her allegations. She was informed that her allegations were either without substance or concerned judicial decisions that were not reviewable by the Council.

Files reopened and reclosed

Occasionally, files previously dealt with are reopened and reclosed. This may occur, for example, if additional information is received that leads to further action, such as a request for comments from the judge or the judge's chief justice. This occurred with the following complaint.

- A defence counsel objected to a judge ordering spectators in the court to remove their hats and headgear or leave. In the complainant's opinion, many of them were wearing hats for religious purposes. Asked for comments, the judge explained that the trial was of a well-known activist and that it was "apparent [to him that] a concerted effort was under way to turn this into a political rather than legal trial." The complainant was informed

that the Chairperson of the Judicial Conduct Committee was of the view that the judge had taken the steps he thought necessary to maintain order in the courtroom. Only the Court of Appeal could review his decision. When the complainant wrote expressing dissatisfaction with the disposition of his complaint, he was informed that if the Court of Appeal commented adversely about the judge's comment, the Council could consider whether that conduct would engage the Council's jurisdiction. During 1998-99 the Court of Appeal delivered its decision and commented that the judge had demonstrated insensitivity toward minority religious groups. The complainant then asked for reconsideration of the complaint. The file was reopened and the judge was asked for further comments. The Chairperson expressed disapproval of the judge's comments on the basis that they appeared insensitive to minority rights and reclosed the file. The Council was subsequently informed that the complainants have commenced an application for judicial review in the Federal Court of Canada to compel the Council to carry out a formal investigation of the judge's conduct.

Files Closed by Panels

A total of seven files were considered by Panels. A Panel may be designated to deal with a particular file when the Chairperson managing the file concludes that it is a particularly sensitive file which might benefit from review by more than a single Council member, or 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 under subsection 63(2) of the *Judges Act*. Two files were closed as "discontinued" when the judges resigned, as shown in Table 2. The other five files were closed during the year by three-person Panels, on one of which a puisne judge acted as a Panel member with two Council members. In four of the five files the Panel Chairperson sent letters to the judges involved expressing disapproval of their conduct.

- Media reports quoted a judge as saying: “I’m concerned as a citizen that with immunity, a Minister of the Crown can get up in the House — on the basis of I don’t know what — and say ‘I’m going to fire this guy’ and everybody is up and cheering. I was thinking of those people around the guillotine. I don’t know whether I have a right to intervene. But it left a bad taste in my mouth.” On the basis of the media reports, the Chairman of the Judicial Conduct Committee asked for comments from the judge. While the reply was pending, a Member of Parliament sent a complaint to the Council saying that, in his opinion, the comments constituted contempt of Parliament. After receiving comments from the judge, the file was referred to a Panel. In a letter to the judge, the Panel said it had concluded that the judge’s comments fell outside of the sphere of proper judicial expression, were extraneous to the issues before him, and were gratuitous and insulting to Parliament. The judge had expressed a personal concern “as a citizen” but was acting in the role of judge not citizen, and improperly used the unique status of judicial office as a platform for engaging in controversial political debate. The Panel noted that the judge publicly acknowledged the inappropriateness of his remarks as reported. The Panel concluded that while the comments were an unfortunate crossing of the boundary of appropriate judicial speech, the conduct did not warrant a recommendation to the Council for a formal investigation pursuant to subsection 63(2) of the *Judges Act*.
- The complainants were the father and family of two alleged victims in criminal sexual assault proceedings against a lawyer. After comments were received from the judge, and a fact-finding investigation was conducted by outside counsel, the file was referred to a Panel which concluded that five of the complainants’ six concerns related to the correctness of various decisions that the judge had made in the course of the trial in acquitting the accused, and fell outside the Council’s jurisdiction. The sixth concern dealt with the fact that the judge attended a hockey game with a law partner of one of the witnesses for the defence. In his comments the judge pointed out that he had referred to this in open court, and explained that it was only at the game that he had become aware of the relationship between the defence witness and one of the persons with whom he attended the game. The judge noted that the Crown had stated that it was satisfied that the judge continue to hear the case. The judge said that he was satisfied that there was nothing improper about his conduct. The Panel concluded that there was nothing improper in the judge’s conduct and directed the file be closed as there was no basis for any further action.
- In a 145-page complaint, a lawyer for the accused in a criminal trial alleged that (1) the judge interjected a number of times with unnecessary comments which sought to undermine his role as a competent advocate, and sought to demean him in front of his client (2) the judge made comments in the presence of a Crown witness which would lead the alleged victim to believe that the judge was “on her side”; and (3) the judge made critical comments concerning the lawyer’s previous cases as defence counsel, and about his professional judgment. After comments were received from the judge and his chief justice, the file was referred to a Panel. The Panel concluded on the first allegation that the judge’s interjections and exchanges with defence counsel, although in some instances questionable, did not constitute misconduct. On the second aspect, the judge had responded that he found the witness to be fragile and he was exercising his duty to ensure that she was not improperly dealt with by defence counsel. The Panel concluded that this complaint would have been properly dealt with by way of an appeal, but for the acquittal of the accused. The Council was not the appropriate forum to deal with the concern. On the third allegation, the Panel concluded that the judge’s conduct in levelling gratuitous insults about defence counsel, and his persistence in doing so, were not only inappropriate, but constituted a departure from the accepted standards by

which judges should conduct themselves during the course of a trial, no matter what the circumstances. The comments were inappropriate and deserving of an expression of disapproval, but not sufficient to warrant a formal investigation.

- A lawyer complained on behalf of his clients that the judge had demonstrated hostility toward the lawyer and had spoken of his clients in an uncomplimentary manner. He alleged that the judge had stated to the lawyer in chambers that he had a reputation for inflating claims and that the judge had told the parties that they should accept less. Comments were sought from the judge and the matter was referred to a Panel. The Panel found no unacceptable behaviour or language on the part of the judge in the taped transcript of the proceedings, and accepted the judge's statement that he had not meant to offend the complainant or his clients. But it was inappropriate for the judge to make unfavourable comments about the lawyer in chambers. The meeting, apparently suggested by the judge in order to canvass whether there was a possibility of settlement between the parties, was contrary to rules of procedure in force in the province and the judge had erred in holding it. The Panel expressed disapproval of the judge's conduct in making the comments about the lawyer's reputation and in holding the meeting since he would be continuing the trial if no settlement was reached.
- The parents of a young woman victim of sexual assault alleged unfairness in the Court's decision and in a number of specific comments made by one of the judges. The complainants were advised that the Council had no jurisdiction with respect to judicial rulings and decisions. After receiving comments from the judge, the file was referred to a Panel, which found one of the comments unfortunate, but related to the fact that two of the convictions before the court involved unchaperoned camping trips. The Panel found another remark to be provocative and potentially hurtful not only to the parents of the victim in question, but others as well. The remark would be inappropriate but for

the fact that it arose during the course of the Crown's argument and in response to a particular submission. The Panel added that the widest possible latitude must be given to both counsel and the judge for a full and frank exchange during the course of argument. Two other comments related to the seriousness of the offence. The Panel said that this was very much at issue in the case due to provisions of the *Charter of Rights and Freedoms*. Such an assessment was not easy to make and could be perceived as minimizing the importance of some charges and the impact on the victims. The complainants were informed that it is always to be regretted when comments made by a judge in the course of a hearing, or the manner in which the comments are made, are considered offensive.

Inquiry Directed by Minister of Justice

On February 3, 1999, the Council announced establishment of an Inquiry Committee to investigate the conduct of Mr. Justice Robert Flahiff of the Superior Court of Quebec, who had been convicted in the provincial court, the *Cour du Québec*, of criminal charges of money laundering prior to his appointment to the bench.

Acting on a request received from the Minister of Justice of Canada on January 25, 1999, under ss. 63(1) of the *Judges Act*, the Inquiry Committee's responsibility was to inquire into whether Mr. Justice Flahiff had become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in paragraphs 65 (2) (a) to (d) of the *Judges Act*, and in particular, by reason of (b) having been guilty of misconduct and (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office.

It was the first time in the history of the Council that a formal inquiry, or a formal investigation pursuant to ss. 63(2) of the *Act*, had been undertaken as a result of a criminal conviction of a judge. The Council's only recommendation for the removal of a judge from office occurred in the case of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in September 1996.

The Inquiry Committee was chaired by the Honourable Joseph Z. Daigle, Chief Justice of New Brunswick, and included the Honourable John D. Richard, Associate Chief Justice of the Federal Court of Canada, and Professor Patrick Healy of the Faculty of Law, McGill University. Jacques Bellemare of Montreal was appointed independent counsel to the Inquiry by the Chairperson of the Judicial Conduct Committee. The Inquiry Committee appointed François Aquin of Montreal to act as legal advisor to the Committee.

During hearings on March 29 and 31, 1999, the Committee heard a number of preliminary motions from counsel for Mr. Justice Flahiff, arguing among other points:

That the Council by-laws are invalid in authorizing the Chairperson of the Judicial Conduct Committee to appoint members and independent counsel to the Inquiry Committee and that ss. 63(3) of the *Judges Act* is constitutionally invalid in authorizing the Minister of Justice to appoint a lawyer to the Inquiry Committee;

That the inquiry be stayed because it threatened Mr. Justice Flahiff's right to an impartial hearing in the Court of Appeal and that it is the common law tradition for Parliament to refrain from acting in a case for removal of a judge while his case is before the courts.

At the end of the year covered by this report, the Inquiry Committee had taken the preliminary motions under advisement.⁵

5 On April 13, 1999, Mr. Justice Flahiff resigned from office, bringing to an end the proceedings of the Inquiry Committee. The Committee decision on the Motions was released on April 9, 1999.

4.

*Issues****ETHICAL PRINCIPLES FOR JUDGES***

On December 1, 1998, the Council released a landmark document entitled *Ethical Principles for Judges*, a comprehensive statement of principles designed to provide guidance for federally appointed judges in confronting the many difficult ethical issues they face as they work and live in their communities.

A product of almost three years of intensive consultation with the judicial, legal and academic communities across Canada, the *Principles* were formally endorsed by the Council at its annual meeting in September, and distributed upon publication to judges, lawyers, law schools, the media and the general public.

In a letter to the Council, Justice Minister Anne McLellan wrote that she believes the *Principles* “will contribute to a better public understanding of the complex challenges that judges face and thereby enhance public confidence in our judiciary.”

A Working Committee of the Council chaired by Chief Justice Richard J. Scott of Manitoba developed the *Principles* through a process involving more than 50 meetings and conference calls, and review at court meetings and judicial seminars across Canada. In releasing the *Principles*, Chief Justice Scott noted that they have no formal relationship with the process for dealing with complaints about the conduct of federally appointed judges. The objective is to provide guidance and assistance.

The *Principles* emphasize maintenance of a high level of judicial conduct. Statements of principle are accompanied by commentaries that provide information and explanations on day-to-day applications and implications of the standards. In many instances the document can only advise on matters that should be considered by a judge before reaching a decision, rather than provide definitive answers.

The *Principles* document makes five key statements, accompanying each with related principles and commentary enlarging upon their application. The statements:

Judicial independence

An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

Integrity

Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

Diligence

Judges should be diligent in the performance of their judicial duties.

Equality

Judges should conduct themselves and proceedings before them so as to assure equality according to law.

Impartiality

Judges must be and should appear to be impartial with respect to their decisions and decision making.

In approving the *Principles*, the Council also agreed to the establishment of an Advisory Committee to offer advice to judges seeking counsel on applying *the Principles* to specific problems.

A committee of 10 puisne judges was to be chosen from across Canada to work under the auspices of the Office of the Commissioner for Federal Judicial Affairs. It was to have no direct link with the Canadian Judicial Council or the Canadian Judges Conference, an association whose membership includes about 90 percent of federally appointed judges. From time to time the Advisory Committee would be expected to publish information about the views it had expressed on issues of general interest and to make recommendations to the Council for revisions to the *Principles*.

COURTS AND THE MEDIA/PUBLIC

Members of the Council have often expressed concern that the administration of justice and the role of judges are poorly understood by the public and the media.

At its 1998 annual meeting in Yellowknife, the Council agreed with Chief Justice Antonio Lamer that mechanisms are required to set the record straight when serious errors are made in public reports about court decisions and in response to unfair personal attacks on judges.

The Council concurred with the view, expressed by Chief Justice Lamer to the Canadian Bar Association in St. John's on August 23, 1998, that there are "enormous risks" in individual judges speaking out. The Council concluded that in exceptional circumstances, it may be necessary for judges to respond to personal

attack. In the case of court decisions, the Council took the position that judgments speak for themselves. The principle of judicial independence and the perception of judicial impartiality are usually best served when judges refrain from commenting on their judgments.

The Council proposed a number of alternatives to deal with inaccurate media coverage, including the appointment of an official in each province to assist media and a role for provincial chief justices in responding. Both practices already exist in at least five jurisdictions, and the Council suggested that Attorneys General in other jurisdictions be encouraged to facilitate appointment of communications officers for their courts. Chief Justice Lamer subsequently wrote to the Attorneys General urging support for this step.

At its mid-year meeting in March 1999, the Council returned to this subject, initially within the Administration of Justice Committee and later in plenary session. Members agreed with the Committee's conclusion that the existing reactive stance with the media taken by individual courts and the Council's national office does not adequately address the problem. They noted a widespread view that the legitimacy of the judicial function rests ultimately on public confidence, and that judges have a responsibility to do what they can to ensure that the public understands the operation of the courts and the judicial role.

The Council agreed that a national approach is required, and that consideration should be given to media initiatives, speaking engagements and educational activities. It was decided to appoint a Special Committee on Public Information to develop and recommend a national public information and education strategy.

EQUALITY WITHIN THE COURT

The Council's annual meeting approved a "Model Policy on Equality within the Court" (Appendix F) and recommended its adoption by all courts.

The policy calls for the equal quantitative and qualitative allocation of work to members of the court, subject to arrangements as necessary to recognize specific

needs and situations of individual judges. Such needs and situations may include a degree of specialization, seniority, family circumstances, temporary assignments and provisions for leave.

Equal allocation should be based on objective criteria, and the distribution of work should be made known to all members of the court.

The model policy was one of a number of initiatives of the Special Committee on Equality in the Courts, established in 1993 after the release of the Canadian Bar Association's *Report on Gender Equality in the Legal Profession*.

The Special Committee paid particular attention to the report's recommendation dealing with the need for social context education. In March 1994, the Council adopted the Committee's recommendation for "comprehensive, in-depth, credible" education programs on social context issues, which have since proceeded under the direction of the National Judicial Institute.

The Committee had previously developed a "Model Procedural Policy on Workplace Complaints" which was adopted by the Executive Committee on behalf of the Council in January 1997. It had also recommended that the Council sponsor a conference for women judges, which resulted in the successful November 1995 Equality Conference.

The Committee concluded in September 1998 that a separate committee focussing on equality issues was no longer required, and elected to dissolve. However, it urged all other Council committees to take equality principles into account in their ongoing work.

TECHNOLOGY AND THE COURTS

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 worked to exploit and share technology, and supported the leadership of the Commissioner for Federal Judicial Affairs in extending the electronic technologies available to judges.

Council Web Site

The Council launched its own Web site on October 1, 1998, as <http://www.cjc-ccm.gc.ca>, containing information about the history and mandate of the Council, a list of members, annual reports, frequently asked questions, and other information designed to assist the public in obtaining relevant information about the Council and its work. The site contains issues of *Computer News for Judges* back to No. 15, Winter 1993-94. Articles mentioning Web sites include active hot links. The site also includes information about Council publications, news releases, the texts of *Ethical Principles for Judges* and *Some Guidelines on the Use of Contempt Powers*, a 62-page reference for judges.

Judges Computer Advisory Committee

The Judges Computer Advisory Committee, which draws most of its members from the ranks of puisne judges, 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 nearly 600 federally appointed judges and sent to all Provincial and Territorial Court Chief Judges for distribution by their offices to interested provincially/territorially appointed judges.

JAIN Network and Technology

The Committee produced one issue of its newsletter during the year. It reported that 60 percent of federally appointed judges were now registered as members of JAIN — the Judicial Affairs Information Network — representing an increase of 43 percent in the past year. Those 600 judges accessed JAIN for more than 1,100 hours in October 1998, through 21,000 logins and more than 40,000 files.

Initiatives were being undertaken by the Office of the Commissioner for Federal Judicial Affairs to provide for further growth, organization and promotion of JAIN.

An agreement was signed by the Commissioner's Office in November 1998 allowing for direct unlimited access by Canadian judges to family.pro, insolvency.pro, securities.pro and law.pro services, to be integrated subsequently into a customized service called judge.pro. Arrangements were being made to supplement technical support and development, and to take JAIN to a new platform, allowing for easier access and increasing integration with related court and legal research sites. The Commissioner's Office was continuing to make on-site presentations to judges in their courts on the system's purposes, capabilities and functionality.

Neutral Citation Standard

The absence of a national system for the identification of court decisions has hampered the use of the Internet for ready access to decisions. Under the leadership of Professor Daniel Poulin, a technical advisor to the Judges Computer Advisory Committee, work began in 1997 to achieve a consensus among the judiciary, governments, academia and publishers on the content of a citation standard.

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 — a means of citing court judgments without reference to specific publishers, databases or report series. Work on the standard was advanced significantly in 1998-99 by a Canadian Citation Committee representing court administrators, law librarians, legal publishers, law

societies and others. The *Neutral Citation Standard for Case Law* would permit every court registry to assign a unique identifier to every judgment which, together with paragraph numbering, would provide an easy and accurate way of referring to all court judgments. Such a system is necessary for accurate citations in a computer environment, in which page numbers have been rendered meaningless.

5.

Judicial Salaries and Benefits

On November 18, 1998, the Governor General granted Royal Assent to Bill C-37, providing for the first increase in judicial salaries since a freeze imposed in 1992.

The legislation incorporated a recommendation from an independent commission, chaired by Ottawa lawyer David Scott, for a salary increase of 8.3 percent, providing for the increase to be phased in over two years, effective April 1, 1997.

A further provision permits retirement when a judge has served on the bench for a minimum of 15 years and the sum of age and years of service is at least 80. The previous 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 provided for a three-member Judicial Compensation and Benefits Commission to report every four years. The first Commission was to begin work on September 1, 1999, and report within nine months. The Minister of Justice, who may refer specific issues to a Commission at any time, will 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 nominates one member of the Commission, the Minister of Justice a second, and these two individuals nominate the third member, who chairs the Commission.

The bill also provided for increased resources for unified family courts across Canada.

In its consideration of Bill C-37, the Senate made two substantive amendments which were subsequently accepted by the government and passed by the House of Commons.

In its original form the bill had permitted survivor benefits to be extended to surviving common law spouses "where legally appropriate." The Senate amendment called for the new Judicial Compensation and Benefits Commission to consider the issue of dividing judges' pensions when there are two surviving spouses.

The second amendment included express statutory criteria to help define and clarify the criteria the Commission must consider in reaching its recommendations on judicial compensation. They are the state of Canada's economy, including the cost of living, as well as the government's overall economic and financial situation; the role played by the financial security of judges in maintaining judicial independence; the need to recruit the best candidates for the bench; and any other objective factor the Commission deems pertinent.

A P P E N D I X A

Members of the Canadian Judicial Council, 1998-99

The Right Honourable Antonio Lamer, P.C.
Chief Justice of Canada
Chairperson

The Honourable Allan McEachern
Chief Justice of British Columbia
First Vice-Chairperson

The Honourable Pierre A. Michaud
Chief Justice of Quebec
Second Vice-Chairperson

The Honourable Edward D. Bayda
Chief Justice of Saskatchewan

The Honourable Norman H. Carruthers
Chief Justice of Prince Edward Island

The Honourable Donald H. Christie
Associate Chief Judge of the Tax Court of Canada
(to December 1998)
Chief Judge of the Tax Court of Canada
(from January 1999)

The Honourable Lorne O. Clarke
Chief Justice of Nova Scotia
(to June 1998)

The Honourable J.-Claude Couture
Chief Judge of the Tax Court of Canada
(to December 1998)

The Honourable Joseph Z. Daigle
Chief Justice of New Brunswick

The Honourable André Deslongchamps
Associate Chief Justice of the Superior Court
of Quebec

The Honourable René W. Dionne
Senior Associate Chief Justice of the Superior Court
of Quebec

The Honourable Patrick D. Dohm
Associate Chief Justice of the Supreme Court
of British Columbia

The Honourable Catherine A. Fraser
Chief Justice of Alberta

The Honourable Alban Garon
Associate Chief Judge of the Tax Court of Canada
(from February 1999)

The Honourable Constance R. Glube
Chief Justice of the Supreme Court of Nova Scotia
(to June 1998)
Chief Justice of Nova Scotia
(from July 1998)

The Honourable James R. Gushue
Chief Justice of Newfoundland
(to November 1998)

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 alternated on the Council every two years until changes to the *Judges Act*, which took effect in April 1, 1999.

The Honourable Benjamin Hewak
Chief Justice of the Court of Queen's Bench
for Manitoba

The Honourable T. Alex Hickman
Chief Justice of the Trial Division of
the Supreme Court of Newfoundland

The Honourable Julius A. Isaac
Chief Justice of the Federal Court of Canada

The Honourable Joseph P. Kennedy
Associate Chief Justice of the Supreme
Court of Nova Scotia
(to June 1998)
Chief Justice of the Supreme Court of Nova Scotia
(from July 1998)

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 J. Michael MacDonald
Associate Chief Justice of the Supreme Court
of Nova Scotia
(from July 1998)

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

The Honourable John D. Richard
Associate Chief Justice of the Federal Court of Canada
(from June 1998)

The Honourable Richard J. Scott
Chief Justice of Manitoba

The Honourable David D. Smith
Chief Justice of the Court of Queen's Bench of
New Brunswick

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 Clyde K. Wells
Chief Justice of Newfoundland
(from January 1999)

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

A P P E N D I X B

Committee Members

EXECUTIVE COMMITTEE

Chief Justice Antonio Lamer (*Chairperson*)
Associate Chief Judge Donald H. Christie
Chief Justice Joseph Z. Daigle
Chief Justice Joseph P. Kennedy
Chief Justice Lyse Lemieux
Chief Justice Allan McEachern
Chief Justice Pierre A. Michaud
Associate Chief Justice Jeffrey J. Oliphant
Associate Chief Justice John D. Richard
Associate Chief Justice Heather J. Smith
Associate Chief Justice Allan H.J. Wachowich

STANDING COMMITTEES

Administration of Justice Committee

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

Finance Committee

Senior Associate Chief Justice René W. Dionne
(*Chairperson*)
Chief Justice Patrick J. LeSage
Chief Justice W. Kenneth Moore
Chief Justice David D. Smith

Judicial Salaries and Benefits Committee

Associate Chief Justice André Deslongchamps
(*Chairperson*)
Associate Chief Judge Donald H. Christie
Associate Chief Justice Patrick D. Dohm
Chief Justice Catherine A. Fraser
Chief Justice Benjamin Hewak
Mr. Justice Ralph E. Hudson (*ex officio*)
Chief Justice Kenneth R. MacDonald
Chief Justice R. Roy McMurtry

Judicial Conduct Committee

Chief Justice Allan McEachern (*Chairperson*)
Chief Justice Joseph Z. Daigle (*Vice-Chairperson*)
Associate Chief Justice Jeffrey J. Oliphant
(*Vice-Chairperson*)
Chief Justice Joseph P. Kennedy

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, 1999.

Chief Justice Antonio Lamer
Chief Justice Lyse Lemieux
Chief Justice Pierre A. Michaud
Associate Chief Justice John D. Richard
Associate Chief Justice Heather J. Smith
Associate Chief Justice Allan H.J. Wachowich

Judicial Education Committee

Chief Justice W. Kenneth Moore (*Chairperson*)
Senior Associate Chief Justice René W. Dionne
Chief Justice Constance R. Glube
Mr. Justice Ralph E. Hudson (*ex officio*)
Chief Justice Joseph P. Kennedy
Chief Justice Donald K. MacPherson
Chief Justice Richard J. Scott
Chief Justice David D. Smith
Associate Chief Justice Heather J. Smith

Judicial Independence Committee

Associate Chief Justice Gerald Mercier (*Chairperson*)
Chief Justice Norman H. Carruthers
Chief Justice T. Alex Hickman
Associate Chief Justice J. Michael MacDonald
Chief Justice Pierre A. Michaud
Chief Justice Barry L. Strayer
Associate Chief Justice Allan H.J. Wachowich
Chief Justice Bryan Williams

Appeal Courts Committee

Chief Justice Allan McEachern (*Chairperson*)
Chief Justice Edward D. Bayda
Chief Justice Norman H. Carruthers
Chief Justice Joseph Z. Daigle
Chief Justice Catherine A. Fraser

Chief Justice Constance R. Glube
Chief Justice Julius A. Isaac
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
Chief Justice Clyde K. Wells

Trial Courts Committee

Chief Justice Bryan Williams (*Chairperson*)
Associate Chief Judge Donald H. Christie
Associate Chief Justice André Deslongchamps
Senior Associate Chief Justice René W. Dionne
Associate Chief Justice Patrick D. Dohm
Associate Chief Judge Alban Garon
Chief Justice Benjamin Hewak
Chief Justice T. Alex Hickman
Mr. Justice Ralph E. Hudson (*ex officio*)
Chief Justice Joseph P. Kennedy
Chief Justice Lyse Lemieux
Chief Justice Patrick J. LeSage
Associate Chief Justice Michael J. MacDonald
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
Mr. Justice J. Edward Richard
Associate Chief Justice John D. Richard
Chief Justice David D. Smith
Associate Chief Justice Heather J. Smith
Associate Chief Justice Allan H.J. Wachowich
Chief Justice Bryan Williams

A P P E N D I C E S

Nominating Committee

Chief Justice Pierre A. Michaud (*Chairperson*)

Chief Justice Donald K. MacPherson

Associate Chief Justice Heather J. Smith

AD HOC COMMITTEES

Judges Computer Advisory Committee

Mr. Justice John McQuaid (*Chairperson*)

Madam Justice Marion Allan

Madam Justice Margaret Cameron

Mr. Justice N. Douglas Coe

Mr. Justice John Evans

Mr. Justice Morris Fish

Associate Chief Justice Jeffrey J. Oliphant

Madam Justice Lawrie Smith

Advisors:

Dr. Martin Felsky

Professor Denis Marshall

Professor Daniel Poulin

Study Leave Committee

Chief Justice Edward D. Bayda (*Chairperson*)

Chief Justice Benjamin Hewak

Associate Chief Justice John W. Morden

Dean Louis Perret

Dean Kent Roach

A P P E N D I X 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* and subsequent amendments.

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) the senior judges, as defined in subsection 22(3), of the Supreme Court of the Yukon Territory, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice; S.C. 1999, c. 3;
- (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.

(2) [Repealed, S.C., 1999, c. 3].

(3) [Repealed, S.C., 1999, c. 3].

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.

A P P E N D I X D

Canadian Judicial Council By-Laws

INTERPRETATION

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

Act
« Loi » “Act” means the *Judges Act*.

Chief Justice
« juge en chef » “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

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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.

- 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.
- 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.

Committees

Executive Committee

- 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.
- 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.
- Chairperson 19. (1) The Chairperson shall preside over all meetings of the Executive Committee.
- 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.

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.	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.
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.	Membership of Judicial Conduct Committee	28. (1) The members of the Executive Committee shall constitute the Judicial Conduct Committee.
Special meetings	(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.	Chairperson of 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.
Resolution	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.	Vice-chairperson of the Judicial Conduct Committee	(3) The Chairperson may, after consultation with the Chairperson of the Committee, designate one or more Vice-Chairpersons of the Committee.
Minutes	(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.	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.
Standing Committees	<p>Standing Committees</p> <p>26. There shall be a standing committee of the Council on each of the following subjects:</p> <ul style="list-style-type: none"> (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. 	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.
		Election of Nominating Committee	30. At every annual meeting the members of the Council shall elect a three- member Nominating Committee.
		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.

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Necessary
modifications

32. Section 23, subsection 24(1) and section 25 apply, with any modifications that are necessary, to any Committee of the Council.

Mandate of Standing Committees

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.

Representation

(2) The Nominating Committee shall consider and, if possible, nominate candidates who will furnish regional and jurisdictional representation.

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.

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.

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.

Report

38. (1) At each meeting of the Council, the Finance Committee shall present a current report on the financial affairs 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.

Ad Hoc 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.

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.

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

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- (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.

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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.

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A P P E N D I X E

Human and Financial Resources, 1998-99

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

1998-99 EXPENDITURES OF THE CANADIAN JUDICIAL COUNCIL

Salaries and Benefits	\$274,523
Transportation and Communications	61,714
Information	691
Professional and Special Services	292,709
Rentals	20,394
Purchase, Repair and Upkeep	2,949
Utilities, Materials and Supplies	22,026
Construction and Acquisition of Machinery and Equipment	26,744
Other	189
Internal Government Expenditures	20,209
TOTAL	\$722,148

A P P E N D I X F

Model Policy on Equality within the Court *Adopted by the Canadian Judicial Council, September 1998*

BACKGROUND

Equality is a fundamental concept which should be taken into account by a chief justice in carrying out his or her duties.

The chief justice/judge plays an essential leadership role in planning and coordinating the work of the court for which he/she is responsible and has full authority.

POLICY

1. **The work to be done by judges, whether judicial, extrajudicial (such as committees) or administrative, should be allocated in an equal manner.**

Equal workload allocation assumes objective criteria for assigning judges' work.

Assignments to a particular type of work should be allocated on an equal basis.

Although a certain degree of specialization may be desirable to ensure the court operates efficiently, there should be equality of assignments to the extent that is possible.

This does not mean that judges cannot specialize in certain areas if specialization is desirable or necessary. However, exclusive specialization should be

the exception and, generally, judges should not be assigned to just one type of work without his or her consent.

An equal workload allocation may conflict with considerations associated with seniority, however, seniority as desirable as it may be, cannot exclude or prevail over equality.

2. **Achieving an equal workload allocation may require accommodations adapted to individuals' specific needs and situations. These accommodations ensure that individuals with specific needs are not penalized by an across-the-board policy.**

In February 1995 a working group established by the Canadian Bar Association submitted a report¹ on the legal duty to accommodate, which can be described as a legal duty to adapt to individuals' needs in order to avoid discriminatory treatment.

As the report indicates, the "different" treatment required by the legal duty to accommodate should not be considered preferential treatment. It should be seen as a means of achieving equality in the workplace and as an illustration of the principle of equality rather than an exception to the rule.²

A commitment to accommodate could cover specific situations that affect an individual directly,

1 Canadian Bar Association, *The Legal Duty to Accommodate: A Report to Council on Recommendations 5.18 and 5.19 of the Gender Equality Task Force* (Working Group) (Ottawa: Canadian Bar Association, February 1995).

2 *Ibid.*, 16-17.

such as divorce, or indirectly, such as the illness of a spouse, child or parent. The accommodation should relate to both the workload itself and the organization of that workload.

Accommodation relating to workload may include temporary assignments to other than a full-time schedule, parental leave or sabbatical leave.

Implementing an accommodation policy requires a cooperative effort by all judges.

3. The distribution of the work and the workload assigned to each judge should be known to all judges. It should be clear to all judges that each judge is being treated in an equal manner.

This approach would publicize to some extent the criteria for an equal workload allocation. Each judge would be able to make a fully-informed comparison with the other judges and would have access to the criteria used for work distribution. In so far as there is a consensus about these criteria and their implementation, the result may be greater internal cohesiveness and efficiency within the court.

RECOMMENDATIONS

Subject to the responsibilities of the chief justice/ judge to administer the court and the duty of the other judges to comply with the directives in that regard, it is recommended that:

- as far as possible, the allocation and distribution of work to each member of the court should be equal in both quantitative and qualitative terms and should be known by all judges;
- where necessary, arrangements should be made to recognize the specific needs and situations of individual judges.