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REVIEW OF THE JUDICIAL CONDUCT PROCESS OF THE CANADIAN JUDICIAL COUNCIL

Background Paper

25 March 2014

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Canadian Judicial Council

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Canadian Judicial Council
Ottawa, Ontario
K1A 0W8
(613) 288-1566
(613) 288-1575 (facsimile)

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GLOSSARY OF TERMS USED IN THIS BACKGROUND PAPER

Canadian Judicial Council (“CJC”) = A body established by the *Judges Act*, empowered to investigate complaints made about judges who make up the federal judiciary and recommend to the Minister of Justice of Canada the removal of a judge from office. The CJC is composed of the Chief Justice of Canada, all chief justices and associate chief justices of superior courts in Canada, the senior judges of the Supreme Court of the Yukon, of the Northwest Territories and the Nunavut Court of Justice, and the Chief Justice of the Court Martial Appeal Court. The CJC is chaired by the Chief Justice of Canada.

Chairperson = The Chairperson or a Vice-chairperson of the Judicial Conduct Committee; distinct from the Chairperson of the Canadian Judicial Council, who is the Chief Justice of Canada.

Executive Director = Person responsible for all administrative aspects of the federal judicial conduct review process, who acts under the direction of the Chairperson of the Judicial Conduct Committee. The Executive Director is not a judge.

Federal judiciary = Judges of superior courts, the Federal Court, the Federal Court of Appeal, the Tax Court of Canada and the Supreme Court of Canada, who are appointed by the federal Government.

Independent Counsel = Counsel appointed by the Chairperson to present the case against the judge before the Inquiry Committee. Independent Counsel is a lawyer having at least ten years standing, who is recognized in the legal community for their ability and experience.

Inquiry Committee = Committee constituted under the *Judges Act* to inquire into the conduct of a federally-appointed judge. The Inquiry Committee consists of an uneven number of members, the majority of whom are members of the CJC designated by the Chairperson, and some of whom can be lawyers, having at least ten years standing, designated by the Minister of Justice.

Judicial Conduct Committee = Standing committee established by the CJC to administer the judicial conduct review process.

Review Panel = Panel of three or five judges that reviews a complaint against a judge referred to it by the Chairperson and is responsible for deciding whether or not an Inquiry Committee will be constituted under the *Judges Act*. The members of the Review Panel are designated by the Chairperson and the majority of them must be members of the CJC.

I. Introduction

A. *Reviewing the Conduct of the Federal Judiciary*

Judges in Canada are tasked with very important decision-making powers, which can have a dramatic impact on individuals' rights and interests. Because of their powers and responsibilities, we naturally expect that judges will conduct themselves in accordance with the highest ethical standards. The integrity and impartiality of the judiciary are key to the public's confidence in judges and in our political system more broadly.

At the same time, reviewing the conduct of judges raises questions that are not at issue when reviewing the conduct of other professionals. In order to carry out their functions, judges must be independent from external influence, including from the executive branch of government. Judicial independence is a constitutional principle in Canada and an integral part of our legal system. It is essential to the maintenance of the rule of law and is itself a guarantee of the public's confidence in the administration of justice.

Central to any process established for reviewing the conduct of judges is thus a tension between the accountability of judges and their independence. It is a tension that must be grappled with and should not dissuade constructive debate and reform around judicial conduct review processes. Ultimately, the restraint that is placed on judicial independence, through a review process that renders judges accountable for their conduct, serves to preserve the integrity of the judiciary and the confidence of the public.¹ Unsurprisingly, the tension between judicial accountability and judicial independence becomes evident in the present Background Paper.

This Background Paper is specifically concerned with the process for reviewing the conduct of the *federal* judiciary – that is, judges of superior courts, the Federal Court, the Federal Court of Appeal, the Tax Court of Canada and the Supreme Court of Canada, who are appointed by the federal government – though references will also be made at times to equivalent provincial processes.

The Canadian Judicial Council (“CJC”) is a body composed of chief justices of Canada's federal judiciary, whose objects are to promote efficiency and uniformity, and improve the quality of judicial service in the federal judiciary.² Under the *Judges Act*, the CJC is empowered to investigate complaints made about judges who make up the federal judiciary, to constitute Inquiry Committees for the purposes of such investigations, and to recommend to the Minister of Justice of Canada the removal of a judge from office following the completion of an investigation.³ The *Judges Act* also empowers the CJC to make by-laws respecting the conduct of its investigations.⁴ Thus, while the *Judges Act*, and the Canadian Constitution provide a broad framework for the review of judicial

¹ See *Moreau -Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 59, [2002] 1 S.C.R. 249.

² *Judges Act*, R.S.C. 1985, c. J-1, s. 60(1).

³ *Judges Act*, R.S.C. 1985, c. J-1, ss. 60(2)(c), 63(3), 65(1).

⁴ *Judges Act*, R.S.C. 1985, c. J-1, s. 61(3)(c).

conduct within the federal judiciary, it is the CJC itself, through the adoption of by-laws and procedures, that designs the specific process.

Like any administrative process, the procedures established by the CJC for reviewing the conduct of the federal judiciary are amenable to discussion and improvement. An important contribution to the debate about the process for reviewing the conduct of judges is the report entitled *A Place Apart: Judicial Independence and Accountability in Canada*, prepared by Martin Friedland, Professor of Law at the University of Toronto, which was published in 1995. Friedland was commissioned by the CJC to undertake a wide-ranging analysis of the many issues encompassed by the twin concepts of judicial independence and judicial accountability, including the issue of disciplining the judiciary.

In his chapter on judicial discipline, Friedland's overall conclusion was that the CJC had dealt with complaints against judges carefully and conscientiously.⁵ At the same time, drawing on the experience of Canadian provinces and other common law jurisdictions, he made a number of suggestions with respect to the CJC's procedures for reviewing judicial conduct, partly with a view to improving the visibility and transparency of the process.

The CJC's judicial conduct review process has evolved since the Friedland Report, and in many ways the CJC has learned through experience. As we will see in this Background Paper, several modifications to the CJC's procedures were made in 2002, and the latest changes were made in 2010. The process, however, has not undergone significant revisions. Ensuring the best and efficient way to resolve judicial conduct issues while promoting public confidence in the judiciary remains an ongoing and important concern of the CJC. In this context, the CJC wishes to consult Canadians about whether changes should be implemented to the judicial conduct review process.

The present Background Paper has four objectives: (1) to situate the current federal judicial conduct review process within its constitutional and legislative context, and as compared to other jurisdictions; (2) to identify aspects of the process that are apt for public discussion; (3) to situate those issues in light of the fundamental principles and values that animate the federal judicial conduct review process; and, (4) to formulate questions for possible reform of the current process.

B. Key Values at Play in the Federal Judicial Conduct Review Process

As noted, two key values that animate the federal judicial conduct review process are **judicial independence** and **judicial accountability**. As will be explained more fully in the following section, judicial independence is a constitutional principle in Canada and therefore enjoys a particular status in the federal judicial conduct review process.

At the same time, judicial independence is not an end in itself, but rather services important societal goals, one of which is **public confidence in the justice system**.

⁵ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 at page 94.

Judicial independence is an essential guarantee that judges will have the freedom to hear and decide cases without external influence or interference from the State or other sources, to uphold the Constitution and rights under the *Canadian Charter of Rights and Freedoms*, and generally to ensure the protection of the public and litigants before the courts. As we discuss different aspects of the judicial conduct review process, and any limits placed on either judicial accountability or judicial independence, we must always have in mind the public interests which these principles are intended to serve.

The **transparency** of the process for reviewing the conduct of the federal judiciary is an important factor in maintaining the public's confidence in the justice system and constitutes another guiding value.

The **fairness** of the procedures, both towards the judge whose conduct is being reviewed and towards a person bringing a complaint about a judge's conduct, is also a key consideration. As we will see, procedural fairness is a fundamental principle of Canadian administrative law, and one of its requirements is that decisions be made free from a reasonable apprehension of bias. Fairness also comprises ensuring that the reputation and privacy of the judge are not unduly compromised in the judicial conduct review process so as not to affect judicial independence.

A final guiding value in the federal judicial conduct review process is that of **efficiency**. A process for resolving conduct issues that is too complicated and takes too long to complete does not foster the public's confidence and cannot be said to promote real accountability.

These key values in the federal judicial conduct process need to be carefully balanced. Judicial independence could be compromised by a process that is too informal and does not provide essential fairness guarantees to judges. Judicial independence also means that judges should have considerable leeway in conducting judicial affairs and the freedom to render justice without external interference or influence. Wrong judicial decisions may be corrected on appeal, not through a misuse of the judicial conduct review process.

On the other hand, judges cannot hide behind the protection of judicial independence to avoid responsibility for serious misconduct which is destructive of public confidence. In this context, judicial accountability is key to ensuring public confidence in the justice system. Judicial accountability may involve not only the possibility of removal from office, which is the most extreme disciplinary measure, but also the possibility for alternative measures or sanctions, in keeping with judicial independence.

When complaints made against judges are treated in an efficient and transparent matter, the public confidence in the judicial system is enhanced. Any lack of efficiency or transparency may lead reasonable members of the public to misunderstand the nature and consequences of judicial independence and believe that the judicial conduct review process is designed to or has the effect of shielding judges from scrutiny.

Finally, the reputational and professional consequences of complaints against a judge may be considerable and judges should be expected to be treated with fairness in the process. While a complainant is not a party in the process, those making complaints against judges should also be treated fairly, which entails mechanisms to inform and engage complainants in the judicial conduct review process.

II. Constitutional Framework for the Discipline of Federally-Appointed Judges

A. Section 99 of the Constitution Act, 1867

Section 99 of the *Constitution Act, 1867*⁶ provides that “judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.” “Superior courts” under section 99 are courts of inherent jurisdiction created under the *Constitution Act, 1867*, and must be distinguished from the Federal Courts, the Tax Court of Canada and the Supreme Court of Canada, which are all creatures of statute. Section 99 constitutes an essential guarantee of judicial independence, protecting judges of superior courts from arbitrary or discretionary removal by the executive branch.

Section 99 of the *Constitution Act, 1867*, however, does not constitute the only guarantee of judicial independence in Canada. It is important to consider the full scope and content of the constitutional principle of judicial independence, as developed in the case law. Indeed, the principle of judicial independence informs both the context in which an address for the removal of a judge under section 99 may occur and the meaning of “good behaviour”, as well as the conduct expected of judges generally.

B. Judicial Independence and the Canadian Constitution

The principle of judicial independence applies to all judges, and not only to superior court judges under section 99 of the *Constitution Act, 1867*.

Judicial independence is a fundamental principle of Canadian constitutional law, which can be traced back to the English *Act of Settlement* of 1701.⁷ Today, it is widely accepted in Canadian law that judicial independence is an unwritten and organizing principle of our constitutional framework. The “source of our commitment” to this principle is found in the preamble to the *Constitution Act, 1867*, which refers to “a Constitution similar in Principle to that of the United Kingdom.”⁸ Express provisions of the Constitution, specifically sections 96 to 100 of the *Constitution Act, 1867*, and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*⁹ protect certain aspects of judicial independence.

⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁷ *Reference re Remuneration of Judges of The Provincial Court*, [1997] 3 S.C.R. 3 at para. 106.

⁸ *Reference re Remuneration of Judges of The Provincial Court*, [1997] 3 S.C.R. 3 at para. 109.

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11.

Section 96 of the *Constitution Act, 1867* states that the Governor General shall appoint the judges of superior, district, and county courts, while section 100 provides that Parliament shall fix and provide the salaries of such judges. Sections 96 and 100 have been interpreted by the Supreme Court of Canada as guaranteeing the core jurisdiction and the financial security, respectively, of superior, district, and county court judges. These guarantees are considered to be manifestations of judicial independence.¹⁰

As noted, section 99 protects the tenure of superior court judges against arbitrary or discretionary interference by the executive branch. It guarantees that judges of superior courts shall hold office during good behaviour and shall be removable only on joint address of the Senate and House of Commons.

Finally, paragraph 11(d) of the *Charter* provides that everyone charged with a criminal offence has the right to be tried by an “independent and impartial tribunal.” The provision guarantees the independence of judges exercising jurisdiction over criminal offences.

C. Content of the Principle of Judicial Independence

Central to the principle of judicial independence is the freedom of judges to hear and decide cases without external influence or interference, whatever the source.¹¹ The Supreme Court has articulated three objective guarantees of judicial independence: security of tenure, financial security, and the independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.¹²

Judicial independence has both individual and institutional dimensions. Even if an individual judge enjoys the essential conditions of judicial independence, if the court over which they preside is not independent of the other branches of government, the judge cannot be said to preside an independent tribunal.¹³

Of particular importance for the question of review of judicial conduct is the fact that judicial independence exists not for the benefit of judges, but for the benefit of the judged.¹⁴ A flawed process of review may undermine public confidence in the independence of the judiciary. Judicial independence is considered a safeguard for judicial impartiality, that is, the actual unbiased state of mind the judge has when hearing and deciding a case.¹⁵ It promotes public confidence in the administration of justice and guarantees a strong judiciary capable of upholding the rule of law and the Constitution. The Supreme Court has stressed that the principle of judicial independence must be

¹⁰ *Reference re Remuneration of Judges of The Provincial Court*, [1997] 3 S.C.R. 3 at para. 84.

¹¹ *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 21; *Valente v. The Queen*, [1985] 2 S.C.R. 673 at paras. 17, 18.

¹² *Valente v. The Queen*, [1985] 2 S.C.R. 673 at paras. 27 to 52.

¹³ *Valente v. The Queen*, [1985] 2 S.C.R. 673 at para. 20.

¹⁴ *Ell v. Alberta*, 2003 SCC 35 at para. 29, [2003] 1 S.C.R. 857.

¹⁵ *R v. Lippé*, [1991] 2 S.C.R. 114 at page 156.

interpreted in light of the public interests it is intended to serve, otherwise it may end up hurting rather than enhancing public confidence in the administration of justice.¹⁶

Canadian courts have referred to international instruments to flesh out the content of the constitutional principle of judicial independence.¹⁷ Particularly relevant in framing the principles at play in the context of reviewing judicial conduct are the following provisions of the *Draft Universal Declaration of the Independence of Justice*:¹⁸

2. Judges shall be free, and it shall be their duty to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
4. The Judiciary shall be independent of the Executive and Legislature.
8. Judges shall always conduct themselves in such a manner as to reserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

D. Judicial Independence and the Judicial Conduct Review Process

The CJC has asserted that “judicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal.”¹⁹

Judges must have the freedom to render decisions free from external influence but they also have the duty to act according to the highest standards of impartiality and integrity. Where they do not act in accordance with such standards, judges abuse the principle of judicial independence and may face discipline.

¹⁶ *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13 at para. 116, [2002] 1 S.C.R. 405.

¹⁷ *Slansky v Canada (Attorney General)*, 2013 FCA 199 at para. 151, 114 D.L.R. (3d) 393, Mainville J.A., concurring; *Reference re Remuneration of Judges of The Provincial Court*, [1997] 3 S.C.R. 3 at para. 194; *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at paras. 33, 34; *R. v. Lippé*, [1991] 2 S.C.R. 114 at pages 153 to 55.

¹⁸ “Shingvi Declaration”, adopted at the final plenary session of the First World Conference on the Independence of Justice held in Montréal in 1983, reprinted in “Universal Declaration on the Independence of Justice” in Shimon Shetreet & Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Boston: Martinus Nijhoff Publishers, 1985) 447 at page 450.

¹⁹ *Report to the Canadian Judicial Council of the Inquiry to Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, (1991) 40 U.N.B.L.J. 210 at page 218, cited in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 56, [2002] 1 S.C.R. 249.

The function of the CJC and of equivalent provincial bodies is to intervene when judges abuse the powers of their office, in order to preserve the integrity of the judiciary.²⁰ The test adopted by the CJC for recommending the removal of a judge (which will be discussed more fully below) recognizes that judicial conduct that is contrary to judicial independence and judicial impartiality undermines public confidence in the justice system:²¹

Is the conduct invoked so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?²²

The types of judicial conduct the CJC has been called upon to investigate include: in-court statements insensitive to the situation of the parties or allegedly demonstrating discriminatory views;²³ public engagement in political debates;²⁴ criminal offenses during or preceding the judge's appointment;²⁵ and delays in rendering written decisions.²⁶ Under the *Judges Act*, the CJC may also be called upon to investigate situations involving judicial disability.²⁷

Ultimately, the restraint that judicial councils place on judicial independence, through a disciplinary process that renders judges accountable for their conduct, serves to preserve the integrity of the judiciary and the confidence of the public²⁸. It is the balance between judicial independence and judicial integrity that animates the entire review process led by the CJC.²⁹

²⁰ *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 at para. 68; *Therrien (Re)*, 2001 SCC 35 at para. 58, [2001] 2 S.C.R. 3; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 46, [2002] 1 S.C.R. 249.

²¹ *Therrien (Re)*, 2001 SCC 35 at para. 147, [2001] 2 S.C.R. 3.

²² The test was first articulated in the CJC's inquiry into the conduct of the Honourable Donald Marshall Jr. and consistently applied since; see: *Report to the Canadian Judicial Council of the Inquiry to Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, (1991) 40 U.N.B.L.J. 210 at page 219; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at paras. 12, 51, 66, [2002] 1 S.C.R. 249.

²³ See Canadian Judicial Council, Press Release, "Judicial Conduct Committee Vice-Chairperson closes file involving Mr. Justice MacPherson of the Court of Appeal for Ontario" (28 October 2002) online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2002_en.asp>.

²⁴ See Canadian Judicial Council, Press Release, "Canadian Judicial Council concludes its inquiry into the conduct of Justice Matlow" (3 December 2008) online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2008_1203_en.asp>.

²⁵ See Canadian Judicial Council, Press Release, "Canadian Judicial Council completes its review of a complaint against Justice Yves Alain" (21 August 2007) online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2007_0821_en.asp>.

²⁶ See Canadian Judicial Council, *Annual Report 2005-2006* at page 12.

²⁷ *Judges Act*, R.S.C. 1985, c. J-1, s.65(2)(a).

²⁸ See *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 59, [2002] 1 S.C.R. 249.

²⁹ See *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 60, [2002] 1 S.C.R. 249; Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995, page 129.

III. Duty of Procedural Fairness in the Investigative Context

A. *Content of the Duty of Procedural Fairness*

The doctrine of procedural fairness is a fundamental component of Canadian administrative law. As a general principle, it requires that every decision affecting the rights, privileges or interests of an individual be made through fair procedures.³⁰ The duty of procedural fairness is a common law doctrine and is protected under subsection 2(e) of the *Canadian Bill of Rights*.³¹ Where more fundamental interests are engaged, specifically an individual's life, liberty or security, procedural fairness enjoys constitutional status under section 7 of the *Charter of Rights and Freedoms*.

While the duty of procedural fairness is triggered whenever an individual's rights, privileges or interests are affected by a decision of a public body, the specific content of the duty varies according to the context.³²

The first source of procedural guarantees will be found in the relevant statutory and regulatory framework,³³ and the procedural choices made by the administrative body itself, for example if a body has rules of procedures and practice.³⁴ The common law rules of procedural fairness will supplement the statutory, regulatory or policy requirements, or lack thereof.

The Supreme Court has articulated several factors that help determine how stringent the procedural protections must be in a given context, including: (1) the nature of the decision being made and the process followed in making it – the more the process resembles that of a court, the more likely it is that procedural protections closer to the trial model will be required;³⁵ (2) the nature of the statutory scheme in question – greater procedural protections will be required when no appeal is provided under statute;³⁶ (3) the importance of the decision for the affected individual, which is the most critical factor – the more important the decision is to the individual affected and the greater its impact on that person, the more stringent the procedural protections required.³⁷

³⁰ *Canada (AG) v. Mavi*, 2011 SCC 30 at para. 38, [2011] 2 S.C.R. 504.

³¹ *Canadian Bill of Rights*, S.C. 1960, c. 44. Because the duty of fairness is a common law doctrine, it may be limited or overridden by legislation, but courts will require specific legislative directive before concluding that this has occurred (see *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 39, [2011] 2 S.C.R. 504; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105).

³² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 20, 21.

³³ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, SCC 52 at para. 22, [2001] 2 SCR 781.

³⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 27.

³⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 23, citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 46; see also Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 11 December 2013), (Toronto: Carswell, 2009) at 7:3200.

³⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 24.

³⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 25.

Balancing these factors helps determine the contents of the duty of procedural fairness in a given context. Depending on the contents of the duty of fairness, different procedural protections may be required, for example, the right to an unbiased investigator or decision-maker, the right to receive notice or disclosure of allegations, the right to counsel, the right to call or present evidence, the right to cross-examine witnesses, the right to reasons.

Special considerations apply to investigations and inquiries when determining the existence and degree of procedural fairness. In general, to be considered fair, an investigation must be neutral, balanced and rigorous so that the investigator has an adequate and fair basis for his conclusions.³⁸ These considerations will apply to the target of an investigation and, depending on the circumstances, they may also apply to the person who made a complaint that led to the investigation.³⁹

How this is achieved in an essentially investigative context will vary depending on the stage of the investigation. When the investigative process is in “embryonic form [...] in the gathering of the raw material for further consideration”, procedural fairness guarantees will be more limited.⁴⁰ However, when an investigation reaches the recommendation or decision stage, or when the rights of a person may otherwise be directly affected, the investigator may be required to provide those concerned with a full opportunity to respond to unfavourable conclusions.⁴¹

Publicity surrounding an investigative process will also be a significant factor in determining the degree of procedural fairness. If the preliminary stages of an investigation remain confidential, a lesser degree of procedural fairness may be afforded.⁴² On the other hand, if the results of the investigations are made public or in the context of a public inquiry, significant procedural protections will be granted.

The Supreme Court has stressed that the rules of procedural fairness apply to the proceedings of public inquiry commissions, in light of their impact on individuals’ rights and interests.⁴³ Because of the potential for considerable reputational damage, particularly in light of the publicity surrounding such proceedings, the duty of fairness owed to persons who may be subject to adverse findings by commissions of inquiry will generally be considered high.⁴⁴

³⁸ *Slattery v. Canada (Canadian Human Rights Commission)*, 1994 2 FC 574, 73 F.T.R. 161, aff’d (1996), 205 N.R. 383; *Guay v. Canada (Attorney General)*, 2004 FC 979, 256 F.T.R. 274; *Murray v. Canada (Canadian Human Rights Commission)*, 2002 F.C.T. 699, 2002 C.F.P.I. 699, aff’d 2003 FCA 222); *El-Helou v. Canada (Courts Administration Service)*, 2012 FC 1111.

³⁹ See *El-Helou v. Canada (Courts Administration Service)*, 2012 FC 1111.

⁴⁰ *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at para. 87.

⁴¹ See *Murray v. Canada (Human Rights Commission)*, 2002 FCT 699 at para. 24 (appeal dismissed in *Murray v. Canada (Human Rights Commission)*, 2003 FCA 222).

⁴² *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at para. 77.

⁴³ *Canada (Attorney General) v. Canada (Commission of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 31.

⁴⁴ *Canada (Attorney General) v. Canada (Commission of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 55 ; *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the*

B. Procedural Fairness and the Judicial Conduct Review Process

The judicial conduct review process of the CJC can ultimately lead to a recommendation that a judge be removed from office. The Supreme Court has recognized that a greater level of procedural fairness is required where the right to continue one's profession is at stake, and that even a disciplinary suspension can have "grave and permanent consequences upon a professional career."⁴⁵ Even absent a recommendation for removal, the CJC's review of a judge's conduct, especially when it is made public, can significantly affect a judge's reputation.⁴⁶ The preservation of the judges' dignity and credibility throughout the process allows them to be able to continue sitting as judges in future cases and furthers judicial independence.⁴⁷

In light of the importance of the CJC's decision to the judge whose conduct is subject to review, and in order to preserve judicial independence, the judicial conduct review process must provide the judge with important procedural protections⁴⁸.

The current federal judicial conduct review process is investigative in its nature, which influences the procedural guarantees required at various stages of the process. Full procedural protection will not be warranted at the preliminary stages of the investigative process, particularly if the process remains confidential. However, the closer the review process approaches a possible recommendation for removal of the judge, the more stringent the procedural protections should be.⁴⁹

The question of procedural fairness in the judicial conduct review process also arises with respect to the person who makes a complaint about a judge. While individuals certainly have an interest in having judges who are fair, impartial and competent, and in having a judicial conduct review process that accurately identifies and responds to judicial misconduct, it is not necessarily the case that the CJC's process will affect the complainant's *personal* rights and interests.

In *Taylor v. Canada*, the Federal Court Appeal explained:

[...] the *Judges Act* confers no rights on individuals with respect to judicial misconduct, and the Council does not exist to enforce the rights of complainants or to provide them with redress. Nonetheless, in the context of this scheme, a

Sponsorship Program and Advertising Activities), 2008 FC 802 at para. 61, [2009] 2 F.C.R. 417; Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 134.

⁴⁵ *Kane v. Bd of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at page 1113.

⁴⁶ See *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para. 55.

⁴⁷ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 at page 140.

⁴⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 25; *Therrien (Re)*, 2001 SCC 35 at para. 96, [2001] 2 S.C.R. 3

⁴⁹ *Therrien (Re)*, 2001 SCC 35 at paras 82 to 91, [2001] 2 S.C.R. 3.

complainant to the Council may be regarded as raising a matter of public interest, namely, that alleged judicial misconduct is properly investigated.⁵⁰

The fact that a complainant may not necessarily have a personal interest in the outcome of the judicial conduct review process has not precluded the imposition of a duty of fairness to the complainant. To date, the Federal Court has recognized that, as a matter of procedural fairness, complainants have – at a minimum – the right to be informed of the disposition of their complaint by the CJC,⁵¹ and the right to have their complaint dealt with in an impartial manner.⁵²

C. Rule Against Reasonable Apprehension of Bias

Procedural fairness requires not only that administrative decisions be made impartially, but also that they appear to be impartial.⁵³ The oft-cited test for a reasonable apprehension of bias is:

[...] what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.⁵⁴

The duty of impartiality is an element of procedural fairness and is triggered by the simple fact that administrative action affects a person's rights, privileges or interests⁵⁵. However, like all elements of the duty of procedural fairness, the precise content of the duty of impartiality depends on the context.⁵⁶

The standard of impartiality exists on a spectrum, and will vary depending on the type of decision in question – from “executive” decisions, supervising or implementing specific governmental policies to more “judicial” decisions, adjudicating disputes through some form of hearing⁵⁷. At the judicial end of the spectrum, administrative decision-makers

⁵⁰ *Taylor v Canada (Attorney General)*, 2003 FCA 55 at para 82.

⁵¹ *Slansky v. Canada (Attorney General)*, 2013 FCA at para. 165, 114 D.L.R. (3d) 393, Mainville J.A., concurring.

⁵² *Taylor v. Canada (Attorney General)*, 2003 FCA 55 at para. 85, 238 F.T.R. 234.

⁵³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 45.

⁵⁴ *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 394, Grandpré J., dissenting, cited in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 46; see also *Imperial Oil Ltd. v. Québec (Minister of the Environment)*, 2003 SCC 55 at para. 28, [2003] 2 S.C.R. 624; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para. 17, [2003] 1 S.C.R. 884.

⁵⁵ *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 38, [2011] 2 S.C.R. 504; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 20, 45.

⁵⁶ *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, para. 21, [2003] 1 S.C.R. 884, citing *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at page 636.

⁵⁷ *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para. 21, [2003] 1 S.C.R. 884, citing *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at page 638 and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.).

may be subject to the same stringent requirements of impartiality as courts. Their conduct “should be such that there could be no reasonable apprehension of bias with regard to their decision”⁵⁸. At the executive end of the spectrum, an administrative decision-maker may only have to keep an “open mind,” such that it does not appear that he has pre-judged the matter to such an extent that “any representations to the contrary would be futile.”⁵⁹

Courts have also found that the applicable impartiality standard may vary depending on the stage of an administrative decision-making process – investigative, reporting or decision-making.⁶⁰ In the context of public inquiry commissions, courts have recognized and applied an intermediate standard of impartiality. Because inquiry commissions must investigate the facts in order to discover the truth, they may be required to take on a more active role than would be appropriate for a judge in a civil or criminal trial.⁶¹ This intermediate standard of impartiality requires the absence of a reasonable apprehension that the decision-maker would come to a conclusion on a basis other than the evidence.⁶²

D. Impartiality and the Judicial Conduct Review Process

The Federal Court has recognized that the actors involved in the judicial conduct review process of the CJC owe a duty of impartiality, not only to the judge whose conduct is being reviewed, but also to the complainant. It has stressed that, in applying the standard of impartiality, the specific context of the review process, including its investigative and ongoing nature, must be taken into account.⁶³

The standard of impartiality applicable in the CJC review process may be higher than in other commissions of inquiry, in light of its highly individualized nature. As in the professional discipline context, where the judicial standard of a reasonable apprehension of bias is generally applied,⁶⁴ the judicial conduct review process is oriented around the conduct of one individual, namely the judge, and can have a significant impact on that individual. The standard of the reasonable apprehension of bias therefore has been

⁵⁸ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at page 638.

⁵⁹ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at page 638.

⁶⁰ *Saskatchewan (Human Rights Commission) v. Reimer* (1992), 105 Sask. R. 100, 98 D.L.R. (4th) 51 (Sask. C.A.).

⁶¹ *Gagliano v. Gomery*, 2011 FCA 217 at paras. 21 to 24.

⁶² *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 FC 527 at para. 27, 146 DLR (4th) 708; *Gagliano v. Gomery*, 2011 FCA 217 at paras. 24-25.

⁶³ *Taylor v. Canada (Attorney General)*, 2003 FCA 55 at para. 93, 238 F.T.R. 234.

⁶⁴ Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 11 December 2013), (Toronto: Carswell, 2009) at page 11:3360: “the issues to be decided, and the seriousness of the consequences for the individual, make the administration of professional discipline closely analogous to a criminal proceeding, and hence more likely to be subject to a standard of impartiality akin to that applied to the courts.”

applied – both as regards to the judge and to the complainant, at the early stages of the judicial conduct review process, and to the judicial conduct review process generally.⁶⁵

At the same time, as indicated, the application of the standard of impartiality to the judicial conduct review process must take into account the fact that the process remains investigative in nature. Actors reviewing the conduct of a judge in the judicial conduct review process are investigators and may be allowed to participate more actively in the presentation of the evidence than would be permissible in judicial or quasi-judicial settings. As the Federal Court of Appeal wrote in *Gagliano v. Gomery*:

Good investigators, just like fine bloodhounds, are driven by suspicions which they seek to confirm so that the file can be closed, or to dispel so that the search can pursue other tracks. In so doing, investigators can and often will create an appearance of bias. Commissioners, therefore, through their questions and interventions and those of their counsel who closely examine witnesses, may one day give the impression of being prejudiced against a person who or group that is receiving particular attention from the commission at that time. However, the next day, when the commission has focused its attention on someone else, it is that person who will then be inclined to believe that the commissioner is prejudiced against him or her. Nevertheless, that is the nature of investigations.⁶⁶

IV. Current Process for Reviewing the Conduct of Federally-Appointed Judges

A. *Legislative Framework*

Until 1971, there was no legislation specifying the process that can lead to the removal of a federally-appointed judge, including a superior court judge under section 99 of the *Constitution Act, 1867*. In the late 1960s, Parliament appointed an ad-hoc commissioner under the *Inquiries Act*⁶⁷ to inquire into the conduct of Justice Léo Landreville. An unfavourable report was rendered against Justice Landreville, but the Federal Court found that the commissioner, former Supreme Court Justice Ivan C. Rand, had breached the mandatory procedural requirements of the *Inquiries Act*, failing to give Justice Landreville notice or an opportunity to be heard concerning allegations of misconduct.⁶⁸ The procedure followed in the *Landreville* case, notably regarding the fair treatment of the judge, was the subject of significant criticism and this was one of the factors motivating the adoption of what is now Part II of the *Judges Act*.⁶⁹

⁶⁵ *Taylor v. Canada (Attorney General)*, 2003 FCA 55 at para. 92, 238 F.T.R. 234; *Therrien (Re)*, 2001 SCC 35 at para. 104, [2001] 2 S.C.R. 3.

⁶⁶ *Gagliano v. Gomery*, 2011 FCA 217 at para. 22.

⁶⁷ R.S.C. 1952, c. 154 (now R.S.C., 1985, c. I-11).

⁶⁸ *Landreville v. Canada*, [1977] 2 F.C. 726.

⁶⁹ *Judges Act*, R.S.C. 1985, c. J-1. See: Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at pages 35 to 38; Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 at page 88; *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at paras. 45-48, [2007] 4 F.C.R. 714; *Moreau - Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 44, [2002] 1 S.C.R. 249.

Part II of the *Judges Act* establishes the CJC and provides a framework for investigations and inquiries into judicial misconduct, which can lead to a recommendation that a federally-appointed judge be removed from office. The term “superior court” under Part II of the *Judges Act* includes the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.⁷⁰

The CJC is composed of the Chief Justice of Canada, all chief justices and associate chief justices of superior courts in Canada, the senior judges of the Supreme Court of Yukon, the Northwest Territories and the Nunavut Court of Justice, and the Chief Justice of the Court Martial Appeal Court.⁷¹ It is chaired by the Chief Justice of Canada. Subsection 60(1) of the *Judges Act* states that the objects of the CJC are to “promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.”

The *Judges Act* provides two separate ways that the CJC can review the conduct of a federally-appointed judge. First, according to subsection 63(1), the CJC shall, at the request of the Minister of Justice of Canada or the Attorney General of a Province, commence an inquiry as to whether a federally-appointed judge should be removed from office. Second according to subsection 63(2), the CJC may investigate any complaint or allegation made in respect of a federally-appointed judge.

Where the Minister of Justice or the Attorney General of a province requests an inquiry under subsection 63(1) of the *Judges Act*, the CJC constitutes an Inquiry Committee composed of members of the CJC, as well as members of the bar having at least ten years standing designated by the Minister of Justice. The CJC may also constitute such an Inquiry Committee for the purpose of carrying out an investigation under subsection 63(2).⁷²

After the completion of an inquiry or an investigation under section 63, the CJC must report its conclusions to the Minister of Justice and may recommend that the judge be removed. Under subsection 65(2) of the *Judges Act*, the CJC may recommend that the judge be removed where in its opinion “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” for one of the following reasons: age or infirmity; having been guilty of misconduct; having failed in the due execution of that office; or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.”

The CJC has interpreted the application of subsection 65(2) of the *Judges Act* as requiring a two-stage process.⁷³ First, the CJC must determine whether the judge has become “incapacitated or disabled from the due execution of the office of judge” within the

⁷⁰ *Interpretation Act*, RSC, 1985, c I-21, s. 35.

⁷¹ *Judges Act*, R.S.C. 1985, c. J-1 s. 59(1).

⁷² *Judges Act*, R.S.C. 1985, c. J-1 s. 63(3).

⁷³ See: *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of an Inquiry into the Conduct of the Honourable Paul Cosgrove* (Ottawa: Canadian Judicial Council, 2009) at paras. 15 to 19.

meaning of subsection 65(2). If this question is answered in the affirmative, the CJC must then determine whether public confidence in the judge's ability to discharge the duties of his office has been undermined to such an extent that a recommendation for the judge's removal is warranted. The specific test the CJC applies at this second stage is:

Is the conduct invoked so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?⁷⁴

Moreover, according to the CJC, the *Ethical Principles for Judges*, published by the CJC in 1998, "set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judge."⁷⁵ The *Ethical Principles for Judges* provide guidance to judges on ethical and professional questions, organized around five central themes: judicial independence, integrity, diligence, equality and impartiality. The section of the *Ethical Principles* describing the purpose of the document includes the following statement:

The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.⁷⁶

B. Process Established by the CJC

While the broad framework for the CJC's review of judicial conduct is provided in the *Judges Act*, the detail of the procedure to be followed is established by the CJC itself – in the CJC's by-laws, procedures and policies. The *Judges Act* states that the CJC may make by-laws respecting the conduct of inquiries and investigations described in section 63⁷⁷. Since 2002, the CJC's *Canadian Judicial Council Inquiries and Investigations By-laws* ("By-laws") address the more formal aspects of the judicial conduct review process, while the CJC's *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges* ("Complaints Procedures") deal with the preliminary and remedial stages of reviewing complaints.⁷⁸

⁷⁴ The test was first articulated in the CJC's inquiry into the conduct of Donald Marshall Jr. and consistently applied since; see: *Report to the Canadian Judicial Council of the Inquiry to Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, (1991) 40 U.N.B.L.J. 210 at page 219; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at paras. 12, 51, 66, [2002] 1 S.C.R. 249.

⁷⁵ *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of an Inquiry into the Conduct of the Honourable Theodore Matlow* (Ottawa: Canadian Judicial Council, 2008) at para. 99.

⁷⁶ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at page 3, online: <www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

⁷⁷ *Judges Act*, R.S.C. 1985, c. J-1, s. 61(3)(c).

⁷⁸ See Canadian Judicial Council, Press Release, "Judicial Council foresees expanded role" (30 September 2002) online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2002_0930_j_en.asp>.

When the CJC reviews the conduct of a judge following a complaint under subsection 63(2) of the *Judges Act*, it follows a multi-step procedure. The process can be divided into five stages, each involving different actors within the CJC. At each stage, a screening takes place and the complaint must meet certain criteria in order to be considered at the following stage. In contrast, where the Minister of Justice or the Attorney General of a Province utilizes subsection 63(1) of the *Judges Act*, the CJC's review begins with the constitution of an Inquiry Committee, which corresponds to Stage 4 in the following outline.

- Stage 1: Opening of a complaint file by the Executive Director

The *Complaints Procedures* provide that a file will be opened by the Executive Director of the CJC for every complaint received in writing naming a federally-appointed judge, which is not clearly irrational or an obvious abuse of the complaints process.⁷⁹ The *Complaints Procedures* allow for anonymous complaints and state that they are to be treated “to the greatest extent possible in the same manner as any other complaint.”⁸⁰ The Executive Director is responsible for all administrative aspects of the judicial conduct process and acts under the direction of the Chairperson of the Judicial Conduct Committee.⁸¹ The Executive Director of the CJC is not a member of the CJC and is not a judge. The Judicial Conduct Committee is a specific working group established by the CJC, whose membership since 2003 is no longer identical to that of the Executive Committee of the CJC.⁸²

- Stage 2: Review of the judge's conduct by the Chairperson of the Judicial Conduct Committee

Complaints for which a file is opened are then referred to the Chairperson or Vice-Chairperson (hereinafter the “Chairperson”).⁸³ At a first stage, the Chairperson may close the file if he or she is of the view that the complaint is trivial, vexatious, made for an improper purpose, manifestly without substance, does not warrant further consideration, or outside of the jurisdiction of the CJC because it does not involve conduct of a federally-appointed judge, for example when the matter may be more appropriately dealt with through an appeal of a judgment. Alternatively, the Chairperson

⁷⁹ Canadian Judicial Council, *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges* (“*Complaints Procedures*”), 2010, s. 2.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸⁰ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 2.3, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸¹ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 2.1, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸² Canadian Judicial Council, *Annual Report 2003-2004* (Ottawa: Canadian Judicial Council, 2004) at 10.

⁸³ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 3.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

may seek additional information from the complainant or seek the judge's comments or those of the judge's chief justice.⁸⁴

At a second stage, after reviewing any response from the judge or the judge's chief justice, or any other materials received in response to a complaint, the Chairperson may close the file either where the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or if the judge acknowledges that their conduct was inappropriate and the Chairperson is of the view that no further measures are necessary⁸⁵. In the latter case, the Chairperson may, in writing to the judge, provide an assessment of and express his concerns about the judge's conduct.⁸⁶

Alternatively, the Chairperson may do one of three things: hold the file in abeyance pending the pursuit of remedial measures, ask Outside Counsel to make further inquiries and prepare a report, or refer the file to a Review Panel.⁸⁷ In the second case, the Chairperson reviews the report prepared by Outside Counsel and may either close the file (if the complaint is without substance or does not warrant further consideration, or if the judge acknowledges that his or her conduct was inappropriate), hold the file in abeyance pending the pursuit of remedial measures, or refer the file to a Review Panel. Since 2002, remedial measures, including counseling, may be recommended by the Chairperson in consultation with the judge's chief justice and with the consent of the judge in an effort to address problems raised by the complaint, and can lead to the closing of the file if the Chairperson is satisfied that the matter has appropriately been addressed.⁸⁸

- Stage 3: Review of the judge's conduct by the Review Panel

Until 2010, a Panel that reviewed the complaint following a referral by the Chairperson could recommend to the CJC that an Inquiry Committee be constituted under section 63(3) of the *Judges Act*, but the final decision to constitute an Inquiry Committee rested with the CJC.⁸⁹ With the latest reforms to the CJC's procedure, however, it is the Review Panel that exercises the authority to constitute an Inquiry Committee.⁹⁰

⁸⁴ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 3.5, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 5.1(a), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸⁶ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 5.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸⁷ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 5.1(b) to (d), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>); Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 1.1(1).

⁸⁸ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 5.3, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁸⁹ "Procedures for Dealing with Complaints Made to the Canadian Judicial Council about Federally-Appointed Judges" in Canadian Judicial Council, *Annual Report 2002-2003* (Ottawa: Canadian Judicial Council, 2003), Appendix E, s. 10.

⁹⁰ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 1.1; Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.6(d), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

The Review Panel consists of three or five judges, designated by the Chairperson, the majority of whom are members of the Council⁹¹ and some of whom can be puisne judges.⁹² The Review Panel can only decide to constitute an Inquiry Committee where the matter might be serious enough to warrant the removal of a judge.⁹³ The Review Panel does not formally have the statutory powers to summons witnesses and to require them to testify under oath and to produce documents, which are reserved to Inquiry Committees or to the full CJC.⁹⁴

Among its other powers, the Review Panel may: direct that further inquiries be made by Outside Counsel, close the file if it decides that the matter is not serious enough to warrant the removal of the judge, and hold the file in abeyance pending the pursuit of remedial measures, in the same manner as may be done by the Chairperson. When closing a file, the Review Panel may, in writing to the judge, provide an assessment of and express its concerns about the judge's conduct.⁹⁵

- Stage 4: Review of the Judge's Conduct by the Inquiry Committee

An Inquiry Committee constituted under subsection 63(3) of the *Judges Act* consists of an uneven number of members, the majority of whom are members of the CJC designated by the Chairperson. Neither the Chairperson, nor a member of the Review Panel, nor a member of the judge's court can be a member of the Inquiry Committee.⁹⁶ The Inquiry Committee has the authority to consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.⁹⁷

The CJC's *By-laws* provide for two different types of counsel at the stage of the Inquiry Committee (in addition to any counsel retained by the judge subject to the review process). First, the Inquiry Committee may engage legal counsel to provide advice and other assistance to it.⁹⁸

⁹¹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 1.1(2); Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.6(d), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁹² The *By-laws* were amended in 1998 to expressly allow, at the stage of the review panel, the participation of puisne judges, with the exception of judges who are members of the court of the judge subject to the review process; see Canadian Judicial Council, *Annual Report 1997-1998* (Ottawa: Canadian Judicial Council, 1998) at page 14; *Canadian Judicial Council By-laws*, effective April 1998, s. 54(2). The current formulation of the *By-laws*, according to which "the majority of the members of the Review Panel shall be members of the Council", maintains the option for the chairperson to designate puisne judges to the Review Panel.

⁹³ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 1(3)

⁹⁴ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(4).

⁹⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.7, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁹⁶ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 2(3); Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 9.2, 9.10, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

⁹⁷ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 5(1).

⁹⁸ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 4.

Second, since 1998, the *By-laws* provide for the appointment of Independent Counsel in proceedings before the Inquiry Committee.⁹⁹ Independent Counsel is a lawyer having at least ten years standing, who is recognized in the legal community for his or her ability and experience.¹⁰⁰ Independent Counsel's role is to present the case to the Inquiry Committee, acting impartially and in accordance with the public interest.¹⁰¹

The CJC currently has two policies which provide further specifics regarding the conduct of inquiries. The *Policy on Inquiry Committees* notably outlines the relationship between an Inquiry Committee, Independent Counsel and the Committee's own counsel, while the *Policy on Independent Counsel* expands upon the role and powers of Independent Counsel. Both Policies will be considered in more detail below in the section dealing with the process before an Inquiry Committee.¹⁰²

- Stage 5: Review of the Judge's Conduct by the CJC and Report to the Minister

Following its inquiry, the Inquiry Committee submits a report to the CJC setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.¹⁰³ A quorum of 17 members of the CJC then meets to deliberate the removal from office of the judge.¹⁰⁴ The CJC members of a Review Panel or an Inquiry Committee who have previously considered the matter shall not participate in the CJC's consideration of the report and any subsequent deliberations.¹⁰⁵ The quorum of the CJC must consider the report of the Inquiry Committee and any submissions made by the judge and the Independent Counsel.¹⁰⁶

Since 2010, submissions by the judge and the Independent Counsel to the CJC regarding the report of the Inquiry Committee are normally limited to written submissions.¹⁰⁷ If the CJC is of the opinion that the report of the Inquiry Committee is unclear or incomplete, or that further investigations are necessary, the CJC can refer the matter back to the Inquiry Committee with specific directions.¹⁰⁸

The CJC's *Policy on Council Review of Inquiry Committee Report* expands upon the final steps leading up to the CJC's report to the Minister pursuant to subsection 65(1) of the *Judges Act*, in which the CJC may or may not recommend the removal of the judge. In the Policy, the CJC explains that the judge is free to make "any submission deemed

⁹⁹ Canadian Judicial Council, *Annual Report 1997-1998* (Ottawa: Canadian Judicial Council, 1998) at page 15, Appendix D; *Canadian Judicial Council By-Laws*, effective April 1, 1998, s. 61.

¹⁰⁰ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 3(1).

¹⁰¹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, ss. 3(2)-(3).

¹⁰² See below: Theme D, Process Before Inquiry Committee and Role of Different Actors Before Inquiry Committee.

¹⁰³ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 8(1).

¹⁰⁴ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 10.1(3).

¹⁰⁵ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 11(2).

¹⁰⁶ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 11(1).

¹⁰⁷ Canadian Judicial Council, *Annual Report 2009-2010* (Ottawa: Canadian Judicial Council, 2010) at page 11; Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, ss. 9(1), 11(1); Canadian Judicial Council, *Annual Report 2002-2003* (Ottawa: Canadian Judicial Council, 2003), Appendix D.

¹⁰⁸ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 12.

advisable as to why the [CJC] should depart from the report of the Inquiry Committee.” The CJC stresses that it will give serious consideration to the recommendations made by the Inquiry Committee but that ultimately it must reach its own conclusions and report them to the Minister pursuant to section 65(1) of the *Judges Act*.

- Communications with and Disclosure of Information to the Judge and the Complainant Throughout the Complaints Process

The *Complaints Procedures* provide specific requirements with respect to the CJC’s communications with and disclosure of information to the judge and the complainant throughout the complaints process. At any stage of the process, where a complaint file is closed, the Executive Director must provide the judge and their chief justice a copy of the complaint and of the letter advising the complainant that the file has been closed.¹⁰⁹ Where the Chairperson decides to seek the judge’s comments on a complaint or those of their chief justice, the Executive Director must communicate with the judge and their chief justice in writing.¹¹⁰

If the Chairperson asks Outside Counsel to make further inquiries, the Executive Director must so inform the judge and their chief justice, and Outside Counsel must provide the judge with sufficient information about the allegations to allow the judge to make a full response.¹¹¹ Where a Review Panel is constituted, the Executive Director must write to the judge and their chief justice informing them of this.¹¹² Moreover, the judge must be provided with any information to be considered by the Review Panel that the judge may not have previously received and must be provided with a reasonable opportunity to make submissions to the Review Panel.¹¹³

When a Review Panel has decided that an Inquiry Committee shall be constituted, the Executive Director must provide the judge and their chief justice with a copy of the Panel’s decision.¹¹⁴

With respect to the notification of the complainant, the *Complaints Procedures* provide that the Executive Director must advise the complainant by letter whenever a file is closed, and the basis on which the file was closed.¹¹⁵ The Executive Director must also advise the complainant by letter when an Inquiry Committee is constituted and when it

¹⁰⁹ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 3.6, 5.4, 8.2, 9.8, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹⁰ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 4.1, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹¹ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 7.1, 7.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹² Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.3, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹³ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 9.4, 9.5, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹⁴ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.9, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 11.1, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

has made a report of its findings to the CJC, and must provide the complainant with a copy of the Inquiry Committee's report if its hearings were conducted in public.¹¹⁶ Pursuant to the *Judges Act*, an Inquiry Committee may conduct its proceedings in public or in private, unless the Minister of Justice of Canada requires that they be held in public.¹¹⁷ All other communications with the complainant about the stage of the judicial conduct review process are at the Executive Director's discretion.¹¹⁸

V. Issues that Arise When Examining the Current Judicial Conduct Review Process and Values They Engage

A. *Involvement of the Complainant*

1. Values Engaged and Legal Context

The complainant's involvement in the judicial conduct review process raises the question of the **fairness** of the procedures provided by the CJC. Fairness to the complainant may be required as a matter of natural justice, but is also essential to enhance **public confidence** in the judiciary. This also raises questions of **efficiency**, particularly in the context of possible review mechanisms that may be incorporated into the CJC's judicial conduct review process.

As discussed, the duty of procedural fairness is triggered whenever an individual's rights, privileges or interests are affected by an administrative decision.¹¹⁹ In the context of the judicial conduct review process, it is generally not the case that the complainant's personal rights and interests are engaged. Instead, the complainant is generally viewed as "the self-appointed representative of the public interest" in its interaction with the CJC.¹²⁰

That the judicial conduct review process is aimed at promoting the public interest rather than protecting the complainant's rights and interest is evidenced from the very structure of the process. There are no restrictions around who can bring a complaint, no requirement that the complainant have had any interaction with the judge whose conduct is being complained about, nor that they be engaged in any judicial proceeding. Furthermore, the *Complaints Procedures* expressly provide that the CJC can consider anonymous complaints and can proceed with the consideration of a complaint even where a complainant has asked for its withdrawal "on the basis that the public interest and the due administration of justice require it."¹²¹

¹¹⁶ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 11.6, 11.7, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹⁷ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(6).

¹¹⁸ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 11.2 to 11.5, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹¹⁹ *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 38, [2011] 2 S.C.R. 504.

¹²⁰ *Taylor v Canada (Attorney General)*, 2003 FCA 55 at para 79.

¹²¹ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 2.3, 3.4, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

However, the fact that a complainant may not necessarily have a personal interest in the outcome of the judicial conduct review process does not necessarily mean that there is no duty of fairness in respect of the complainant.

To date, the Federal Court of Appeal has recognized that, as a matter of procedural fairness, the complainant has – at a minimum – the right to be informed of the disposition of their complaint by the CJC,¹²² and the right to have their complaint dealt with in an impartial manner.¹²³

This means that the complainant can expect their complaint will be treated fairly by every decision-maker involved in the consideration of the complaint – which can encompass the Executive Director, the Chairperson, the members of a Review Panel, the members of an Inquiry Committee and a quorum of the CJC at the final stage. This also means that, regardless of the stage of the review process, the complainant must be informed of the disposition of their complaint.

Furthermore, there may be situations where, in light of the specific nature of the alleged misconduct, and the specific circumstances surrounding the complaint, it is appropriate to describe the complainant as having a personal interest in the outcome of the judicial conduct review process. Indeed, in certain cases, the complainant may be directly, personally and substantially affected by the impugned conduct of the judge.

Beyond the strict legal rights the complainant may have, procedures that are fair to the complainant and allow the complainant to be involved promote public confidence in the judicial conduct review process and in the judicial system more generally. This section will consider existing and available options with respect to the complainant's participation in the judicial conduct review process, not only through the lens of the duty of fairness, but also in light of the public confidence that this participation promotes.

2. Aspects of Current Process that provide for Disclosure to the Complainant

The *Complaints Procedures* currently specify different circumstances in which the CJC must inform a complainant of a decision it has made or of the fact that a certain stage in the review process has been reached, and those circumstances where the CJC may do so but is not obligated to.

Subsection 11.1 of the *Complaints Procedures* states that “the Executive Director shall inform the complainant by letter when a complaint file is closed by the Chairperson, a Panel or the Council, and the basis on which the file was closed.” The provision appears consistent with the participatory rights the complainant is entitled to in the judicial conduct review process. Regardless of the stage at which a complaint file is closed, this information is communicated to the complainant, and the complainant is provided with an explanation for why the complaint was closed.

¹²² *Slansky v. Canada (Attorney General)*, 2013 FCA at para. 165, 114 D.L.R. (3d) 393, Mainville J.A., concurring.

¹²³ *Taylor v. Canada (Attorney General)*, 2003 FCA 55 at para. 85.

The *Complaints Procedures* also state that the complainant must be advised by letter when a Panel decides that an Inquiry Committee shall be constituted and when an Inquiry Committee has made a report of its findings and conclusions to the CJC. They also state that the complainant must be provided with a copy of the Inquiry Committee's report if its hearings were conducted in public.¹²⁴

Finally, the *Complaints Procedures* provide that the complainant may be informed by letter when a complaint file is held in abeyance pending the pursuit of remedial measures, when the Chairperson or a Review Panel has referred a complaint file to Outside Counsel and when the Chairperson refers a file to a Review Panel.¹²⁵

Whether or not they may be required as a matter of procedural fairness, the CJC's practices, encapsulated in its *Procedures*, are intended to increase the complainant's satisfaction with the process and the general public's confidence in the process.

3. Complaints and "Other Conduct Correspondence"

Currently the *Complaints Procedures* provide that the Executive Director of the CJC must open a file whenever a complaint made in writing about a named, federally appointed judge is received by the CJC, except where such a complaint is "clearly irrational or an obvious abuse of the complaint process."¹²⁶ In its latest Annual Report, the CJC states that it has observed a marked increase in recent years in the amount of correspondence it receives from individuals either seeking clarity on the CJC's mandate, complaining about a judge's decision rather than the judge's conduct, or complaining about the conduct of an official not within the CJC's jurisdiction. All of those situations may not require the opening of a complaint file.¹²⁷

While some of this correspondence – namely correspondence seeking clarity on the CJC's mandate or complaining about the conduct of an official not within the CJC's jurisdiction – do not meet the threshold for the opening of a complaint under the *Complaints Procedures*, correspondence complaining about a judge's decision rather than the judge's conduct does. Under the current *Procedures*, a complaint pertaining to a judge's decision is automatically transferred to the Chairperson, even though it may, on its face, not be a complaint about conduct.

In all these cases, it appears that the CJC's time and resources could be more efficiently used by responding directly and quickly to the complainant's concerns rather than

¹²⁴ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 11.6, 11.7, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹²⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 11.2, 11.3, 11.4, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹²⁶ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 2.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹²⁷ Canadian Judicial Council, *Annual Report 2012-2013* (Ottawa: Canadian Judicial Council, 2013) at page 12.

treating the matter as a formal complaint and setting the judicial conduct review process into motion.

Furthermore, immediate and direct communication with the individual who sent the correspondence can increase the individual's satisfaction with how their correspondence was dealt with and foster the public's understanding and confidence in the process. Up to this point, the CJC's practice for dealing with correspondence that does not pertain to the conduct of a federally-appointed judge remains informal and is not defined in the *Complaints Procedures*.

In light of this, the following question arises:

- **Q1: Should the CJC clarify and make changes to the intake process of complaints, in particular with regard to the initial screening?**

4. Possibilities for Increasing the Complainant's Involvement in the Judicial Conduct Review Process

The following section considers different avenues that might be explored to increase the complainant's involvement in the judicial conduct review process.

(i) *Participation of the complainant in the resolution of the complaint*

To some extent, the complainant's involvement and participation in the CJC's judicial conduct review process is limited. The process does not expressly recognize that a complaint may be resolved at an early stage with the agreement of the judge and of the complainant.

Certain provincial judicial conduct review processes provide mechanisms whereby the complainant can agree to an early resolution of the complaint. In Manitoba, the Chief Justice can resolve the complaint with the agreement of the complainant and the judge, as can the Judicial Inquiry Board, after conducting an investigation into the complaint.¹²⁸ In Newfoundland and Labrador, the Complaints Review Committee, which receives complaints against judges, can attempt to resolve the complaint with the consent of the complainant and the judge.¹²⁹ Finally, in the Yukon, the statute provides that the Judicial Council may, with the consent of the judge, give the complainant and the judge the opportunity to speak to the complaint in each other's presence.¹³⁰

Beyond allowing for the early resolution of complaints in cases where dialogue and agreement between the judge and the complainant is possible, these mechanisms allow for a greater involvement of the complainant in the judicial conduct review process, and may increase their satisfaction with the treatment of the complaint. Even where an

¹²⁸ *The Provincial Court Act*, C.C.S.M. c. C275, s. 31(1)(a), s 35(1)(a).

¹²⁹ *Provincial Court Act, 1991*, S.N.L. 1991, c. 15, s. 23(1)(b).

¹³⁰ *Territorial Court Act*, R.S.Y. 2002, c 217, s. 41(1)(c)(i).

agreement between the complainant and the judge is not reached, the complainant may feel that their perspective is being considered, and that the process takes into account their particular needs. This in turn may foster public confidence in the judicial conduct review process. In any case, the consensual resolution of a complaint should always be made in furtherance of the public interest. This could be considered at the very early stages, prior to reaching the Chairperson or the Review Panel, perhaps with the involvement of the judge's chief justice.

In light of this, the following question arises:

- **Q2: Should the CJC's procedures provide that a complaint may be resolved at an early stage with the agreement of the complainant and the judge?**

(ii) *Internal review mechanisms and recourses available to the complainant following the disposition of the complaint*

When a complaint is dismissed, there is currently no formal process of review if a complainant is dissatisfied. The decision-maker can, in some cases, reconsider their decision. A complainant may also have the possibility to seek judicial review in the Federal Court. However, these possible options for review are not defined in any way. The *Complaints Procedures* do not provide the complainant with the option of requesting reconsideration of the disposition of the complaint.

In contrast, several provincial judicial conduct review processes incorporate internal review mechanisms. In some cases, the internal review mechanism operates automatically prior to the closing of a complaint, while in other cases, action by the complainant is necessary.

In Ontario, the initial decision of a subcommittee of the Ontario Judicial Council ("OJC") to not refer the complaint to the full OJC – which would effectively result in the dismissal of the complaint, is reviewed by a four-member panel of the OJC.¹³¹ In New Brunswick, a recommendation by a member of the Judicial Council that an inquiry into a complaint not be held is subject to review by the Judicial Council.¹³² Finally, in the Northwest Territories, the Judicial Council reviews and can overrule the Chairperson's decision to refer the complaint to the judge's chief justice rather than to a subcommittee of the Judicial Council.¹³³

Several provincial statutes also allow the complainant to request reconsideration of the disposition of their complaint against a judge. In Manitoba, where a complaint is first brought to the Chief Justice, a complainant who is dissatisfied with the Chief Justice's

¹³¹ *Courts of Justice Act*, R.S.O. 1990, c. C-43, ss. 51.4(16), (17); *Procedures Document* of the Ontario Judicial Council, available: <http://www.ontariocourts.ca/ocj/ojc/policies-and-Procedures/Procedures-document/>.

¹³² *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 6.7(4).

¹³³ *Territorial Court Act*, R.S..N.W.T. 1988, c. T-2, s. 31.3.1(4).

decision regarding the complaint can refer the complaint to a Judicial Inquiry Board.¹³⁴ Similarly, in the Yukon, a complainant who believes the Chief Justice has erred in their disposition of the complaint can ask the Judicial Council to review the complaint.¹³⁵ Internal appeal mechanisms are also common in the complaint processes of provincial law societies.¹³⁶

Such mechanisms increase the procedural options offered to the complainant. This may increase the complainant's overall satisfaction with the judicial conduct review process.

The absence of internal review mechanisms within the CJC's process may be of particular concern to complainants where their complaints are dismissed by a single person, namely the Chairperson, at the initial stage of the judicial conduct review process. On the one hand, review mechanisms may have the advantage of alleviating a complainant's concerns surrounding the closing of a file and ultimately increase accurate decision-making. On the other hand, additional review mechanisms may add an unnecessary level of bureaucracy to the process.

In light of this, the following questions arise:

- **Q3: Should the CJC create a formal review mechanism of a decision to dismiss a complaint at an early stage?**
- **Q4: If a formal review process is established in the CJC's procedures, should the review be undertaken only at the complainant's request?**

(iii) *External mechanisms for reviewing the handling or disposal of a complaint*

In some jurisdictions, where a person is not satisfied with how their complaint is treated by the body established to review judicial conduct, they can turn to an external independent public officer. An external review body may have the authority to review the handling and disposal of complaints at various stages of a process. This usually does not include a review of the merits of complaints. The CJC is the only body legally authorized to review the conduct of federally appointed judges, and the principle of judicial independence indeed requires that the review of judicial conduct be carried out primarily by peers.¹³⁷

On the one hand, providing complainants access to an external body empowered to review the handling of complaints by the CJC may be a way of incorporating the complainant's interests and concerns into the process, and enhancing public confidence.

¹³⁴ *The Provincial Court Act*, C.C.S.M. c. C275, s. 31(4).

¹³⁵ *Territorial Court Act*, R.S.Y. 2002, c. 217, s. 43.

¹³⁶ See for example: *Professional Code*, R.S.Q. c. C-26, ss. 123.3, 123.4; *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.14; Law Society of British Columbia, *Law Society Rules*, November 2013, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=334>>, r. 3-9.

¹³⁷ *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paras. 39, 57; *Moreau-Bérubé* at para. 47.

On the other hand, adding layers of review mechanisms raises issues concerning the efficiency of the judicial conduct review process.

In the United Kingdom, a person can complain to the Judicial Appointments and Conduct Ombudsman about the handling of their complaint by the Judicial Conduct Investigations Office. The complaint must be about the process followed by the Judicial Conduct Investigations Office, rather than its decision. The Ombudsman can investigate the handling of the complaint and has the power to set aside a decision of the Judicial Conduct Investigations Office and direct that it look at the complaint again.¹³⁸ Similarly, in New Zealand, if a complainant is not satisfied with the handling of their complaint, they may write to the Judicial Complaints Lay Observer, who, after investigating, may request that the Head of Bench reconsider the complaint.¹³⁹

A similar external review body exists in British Columbia with respect to complaints against self-governing professional bodies, such as the Law Society of British Columbia. After having exhausted all internal review mechanisms, a complainant can ask the Ombudsperson to review the manner in which the complaint was handled.¹⁴⁰ The Ombudsperson has a recommendation power and may, among other things, recommend that the professional body review the complaint anew or provide a remedy to the complainant.¹⁴¹

In light of this, the following question arises:

- **Q5: Should a mechanism be created whereby an external body, such as an Ombudsman, could review the process of review of a complaint by the CJC?**

(iv) *Complainant's participation in proceedings before an Inquiry Committee*

A complaint against a judge may lead to the constitution of an Inquiry Committee under subsection 63(3) of the *Judges Act*. While the *Judges Act* grants the judge subject to a complaint a right to standing before an Inquiry Committee,¹⁴² neither the *Judges Act* nor the CJC's *By-laws* address the question of the complainant's standing before an Inquiry Committee.¹⁴³ Subsection 8(2) of the *By-laws* simply states that, after the Inquiry Committee submits its final report to the CJC, the Executive Director "shall provide a copy to the judge, to the independent counsel and to any other persons or bodies who had standing in the hearing."

¹³⁸ *Constitutional Reform Act 2005* (2005 ch 4), s. 111(5), s. 111(7)(b).

¹³⁹ *Complaints about Judicial Conduct*, Office of the Judicial Conduct Commissioner, Wellington, July 2005.

¹⁴⁰ *Ombudsperson Act*, R.S.B.C. 1996, c. 340, ss. 10(2)(a), (b).

¹⁴¹ *Ombudsperson Act*, R.S.B.C. 1996, c. 340, ss. 23(2).

¹⁴² *Judges Act*, R.S.C. 1985, c. J-1, s. 64.

¹⁴³ This is consistent with disciplinary proceedings where the complainant does not generally have a right to standing; see *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Friends of the Old Man River Society v. Assn. of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107 at paras 17, 19.

The *By-laws* grant an Inquiry Committee broad latitude in managing the conduct of the inquiry, which is consistent with the latitude generally afforded to inquiry commissions in case law.¹⁴⁴ Currently, under the *By-laws*, although not specifically provided, an Inquiry Committee has the discretion not only to grant a complainant standing in its proceedings, but also to determine the applicable test for granting a complainant standing, as well as the scope of such standing and the rights and obligations associated with it.

Standing could be granted to a complainant in a situation where their personal interests or reputation are clearly engaged. One possible test for granting standing is that the complainant must have a direct and substantial interest of an exceptional nature.¹⁴⁵ Beyond satisfying any right to procedural fairness the complainant may have, the grant of standing to the complainant where they have a clear personal interest in the subject matter of the complaint may enhance public confidence in the judicial conduct review process.

A high threshold for granting standing to a complainant may however be justified in light of the fact that an Inquiry Committee is fundamentally concerned with investigating the conduct of a judge in order to preserve the integrity of the judiciary and promote the public interest.

The possibility for a grant of standing should also take into account the role of Independent Counsel under the current federal judicial conduct review process. Independent Counsel is mandated to act in the public interest, which includes presenting all the relevant evidence, whether favourable or unfavorable to the position of the judge.¹⁴⁶ Before an Inquiry Committee, Independent Counsel is primarily responsible for presenting the evidence and examining and cross-examining witnesses.¹⁴⁷

A grant of standing to a complainant does not necessarily carry with it the right to actively participate in all aspects of the proceedings. The complainant could, for example, be given the right to make submissions but not to call evidence or, alternatively, the right to present evidence but not to cross-examine other witnesses. The amount and timing of the complainant's submissions could be carefully circumscribed.

The right to seek standing also raises the question of whether funding for legal counsel should be granted and who should pay for legal representation.¹⁴⁸ In the public inquiries context, the criteria for standing that have been applied include the importance of the

¹⁴⁴ Simon Ruel, *The Law of Public Inquiries in Canada*, Carswell, 2010 at page. 26.

¹⁴⁵ *Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to the application of Alex Chapman for standing and the funding of legal counsel*, Canadian Judicial Council, July 11, 2012 at para. 26.

¹⁴⁶ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 3(3); Simon Ruel, *The Law of Public Inquiries in Canada*, Carswell, 2010 at pages 51, 52.

¹⁴⁷ Canadian Judicial Policy on Inquiry Committees.

¹⁴⁸ *Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to the application of Alex Chapman for standing and the funding of legal counsel*, Canadian Judicial Council, July 11, 2012 at paras 42, 43.

interest at stake,¹⁴⁹ and whether the participant has sufficient financial resources to be adequately represented. The complexity of the matter before an Inquiry Committee may also be a consideration.¹⁵⁰ The CJC currently does not have provisions or criteria for grants of funding to those who have been granted standing.

As will be discussed more fully below,¹⁵¹ there are currently no standard rules of procedure and practice applicable to the proceedings of Inquiry Committees. In the public inquiries context, rules of procedures and practice adopted by commissions of inquiry typically contain provisions on the conditions and criteria for grants of standing and funding.

In light of this, the following question arises:

- **Q6: Should the CJC adopt criteria for granting standing and funding to a complainant in the context of the proceedings of an Inquiry Committee, as well as for determining the scope, rights and obligations associated with a grant of standing or funding?**

B. Public Awareness and Participation

1. Values Engaged and Legal Context

Public awareness and understanding of the judicial conduct review process is key to preserving **public confidence in the judiciary**. At the same time, the complaints process should not unduly undermine the privacy and reputation of the judge whose conduct is subject to review, which justify the requirements of procedural fairness. Reasonable limits on the disclosure of information to the public are necessary to guarantee the constitutional principle of **judicial independence** and the integrity of the judiciary.¹⁵²

The CJC is notably not subject to the *Access to Information Act*¹⁵³ and is empowered by the *Judges Act* to not disclose information connected with the investigation of a complaint where it is in the public interest.¹⁵⁴ While the CJC's Internet website is an effective tool for making the complaints process more transparent and more accessible, the CJC must also be mindful of the potential impact rapid dissemination of information can have on a judge's reputation.

¹⁴⁹ Simon Ruel, *The Law of Public Inquiries in Canada*, Carswell, 2010 at page 64.

¹⁵⁰ *Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to the application of Alex Chapman for standing and the funding of legal counsel*, Canadian Judicial Council, July 11, 2012 at paras 42.

¹⁵¹ See below: Theme D, Process Before Inquiry Committee and Role of Different Actors Before Inquiry Committee.

¹⁵² *Slansky v. Canada (Attorney General)*, 2013 FCA at paras. 131, 143, 144, 114 D.L.R. (3d) 393, Mainville J.A., concurring.

¹⁵³ *Access to Information Act*, RSC 1985, c A-1.

¹⁵⁴ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(5).

Public participation in the judicial conduct review process can serve three different objectives: (1) it can address concerns about opacity in the process; (2) it can allow for broader inclusion of public values in identifying judicial misconduct; (3) it can generally enhance public confidence in the process. Limits on the public's participation in the complaints process are informed by the constitutional principle of judicial independence. Indeed, the Supreme Court has held that judicial independence requires that investigations into the conduct of judges be dealt with primarily by other judges.¹⁵⁵

2. Ways of Increasing Public Participation in and Awareness of the Judicial Conduct Review Process

It is important to note that the possibilities for increasing public participation in, and awareness of, the CJC's complaints process outlined in the following section are not necessarily meant to be cumulative. The goal is to adequately address concerns surrounding transparency and public confidence.

(i) *Participation of lay persons in the review process as a proxy for the public*

Most provincial judicial conduct review processes provide for the participation of both lawyers and lay persons at the preliminary stages, the formal stage of an inquiry, or both. While in some cases, the provincial judicial council is itself composed of one or several lay members, in other cases the process is designed so that lay persons, without being members of the judicial council, participate in the review of judicial conduct.

In Manitoba, prior to a complaint reaching the Judicial Council of Manitoba, which itself has two lay members, the complaint is considered by a Judicial Inquiry Board, composed of one judge, one lawyer and one member of the public.¹⁵⁶ In Newfoundland and Labrador, the legislation expressly states that there must be one lay person "representing the public interest" in the committee that initially reviews complaints.¹⁵⁷

In Ontario, the review process is designed so that every complaint made to the Ontario Judicial Council is considered by at least two lay members of the OJC: a complaint received by the OJC is reviewed by a subcommittee of the OJC consisting of a judge and a lay member of the OJC, and the subcommittee's decision to not refer the complaint to the OJC is reviewed by a panel of the OJC including one lay person.¹⁵⁸

The presence of one or a few lay persons in the judicial conduct review process can enhance public confidence in the process. In the public's eyes, the presence of lay persons may alleviate concerns about the transparency of the process and be viewed as promoting greater accountability. The public may also find comfort in the fact that

¹⁵⁵ *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paras. 39 and 57; *Moreau-Bérubé* at para. 47.

¹⁵⁶ *The Provincial Court Act*, C.C.S.M. c. C275, s. 32(2).

¹⁵⁷ *Provincial Court Act, 1991*, S.N.L.1991, c. 15, s. 19(1)(c).

¹⁵⁸ *Courts of Justice Act*, R.S.O. 1990, c. C-43, ss. 49(14), (15), 51.4(1), (16), (17); *Procedures Document* of the Ontario Judicial Council, available: <http://www.ontariocourts.ca/ojc/ojc/policies-and-procedures/procedures-document/>.

persons who are not judges or lawyers will have a say in determining what constitutes acceptable and unacceptable judicial conduct, and have the opportunity to apply a “common sense” perspective to the matter.

At the same time, it is important to recognize that, in practice, some lay persons may be intimidated by the responsibility they are entrusted with and reluctant to question the views and arguments of judges, who have much more experience with judicial ethics and complaints about judicial misconduct. Any incorporation of lay persons into the judicial conduct review process should take this factor into account and provide an opportunity for meaningful participation.¹⁵⁹

The inclusion of lay persons in earlier stages judicial conduct review process could be done without changing the composition of the CJC or Inquiry Committees. However, the possibility of having a lay person (non judge and non lawyer) on an Inquiry Committee would require a legislative amendment, as the *Judges Act* currently provides that an Inquiry Committee is made up of members of the CJC as well as lawyers designated by the Minister of Justice, having at least ten years standing.¹⁶⁰

In the event that the CJC chooses to include lay persons in the judicial conduct review process, it may be advisable for the CJC not to select lay persons itself. Moreover, a rigorous selection of lay persons could eventually alleviate the risk that lay persons will be intimidated by their responsibilities and not fully contribute to the process. The eventual selection of lay persons could also take into account such factors as gender balance and Canada’s linguistic duality. Consideration should also be given to the terms of appointment.

In light of this, the following question arises:

- **Q7: Should lay persons be incorporated into the steps of the review process that precede the inquiry committee stage?**

(ii) *Outside audit of judicial conduct review process*

To further increase the transparency of the judicial conduct review process and satisfy the public that complaints about judges are being dealt with diligently, it could be envisioned that an external body or respected individual could audit the handling of complaints on a periodic basis. Possible issues that could be examined by such a body or individual include: time lines for treating complaints, whether complaint files are adequately documented and whether the CJC’s procedures are followed. This option has already been envisioned by the CJC, who in the past invited the Canadian Bar Association to

¹⁵⁹ See *Selecting Trial Court Judges: A Comparison of Contemporary Practices, Study Commissioned by the Commission of Inquiry into the Appointment Process for Judges in Quebec*, Peter McCormick, professor, Department of Political Science, University of Lethbridge, September 1st, 2010 at pages 96, 97.

¹⁶⁰ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(3).

examine complaint files in order to satisfy itself of the fairness of the process.¹⁶¹ As discussed previously, any review of the CJC’s handling of complaints would need to focus on process, rather than substance, the latter being under the sole authority of the CJC.

In light of this, the following question arises:

- **Q8: Should a process be established whereby an external body or respected individual could audit, on a periodic basis, the process of review of complaints by the CJC?**

(iii) *Information the CJC provides to the public about complaints*

Over the years, the CJC has taken steps to increase public awareness of both the complaints process and individualized complaints. In March 2000, the CJC decided to publish a pamphlet, “The Conduct of Judges and the Role of the Canadian Judicial Council”, explaining the complaints process, and distribute it widely to the public and judges.¹⁶²

In its annual reports, the CJC provides statistics regarding the number of complaint files opened and closed in a given year, as well as the number of complaints at each stage of the review process. The CJC also outlines how a handful of specific complaints were dealt with in a given year. For example, in its Annual Report for 2012-2013, the CJC stated that it closed 131 complaint files that year and it provided summaries of how it had dealt with nine specific complaints¹⁶³.

Since 2011, the CJC’s website has a sample of summaries of complaints going back to 1990, along with a search feature for key words (“concern”, “panel” “apology”, etc.).

The CJC’s practice with regards to publicizing complaints is sensitive to the privacy and reputation of judges, and ultimately aimed at preserving and enhancing public confidence in the judiciary. Confidentiality at the investigative stage of a complaint against a judge serves four important functions: (1) it avoids disclosure of unsubstantiated complaints that could risk undermining a judge’s authority in carrying out his or her judicial functions; (2) it improves the overall effectiveness of the investigation process and encourages full and frank disclosure by the judge at an early stage; (3) it protects legitimate privacy concerns of the judge; and, (4) it serves to protect judicial independence.¹⁶⁴

¹⁶¹ Canadian Judicial Council, *Annual Report 1996-1997* (Ottawa: Canadian Judicial Council, 1997) at page 34.

¹⁶² “The Conduct of Judges and the Role of the Canadian Judicial Council”, available online at <http://www.cjc-ccm.gc.ca>.

¹⁶³ Canadian Judicial Council, *Annual Report 2012-2013* (Ottawa: Canadian Judicial Council, 2013) at pages 3 to 10.

¹⁶⁴ *Slansky v. Canada (Attorney General)*, 2013 FCA at para. 152, 114 D.L.R. (3d) 393, Mainville J.A., concurring.

As a general policy, the CJC will not make a complaint or its disposition public on its own initiative. Of course, the complainant can always make their complaint public, for instance by disclosing it to the media. In publicizing summaries of complaints, the CJC will not include the name of the judge concerned, unless the fact of the complaint is in the public domain.¹⁶⁵

Where the complaint has received wide publicity in the media, the CJC will usually publish a press release to inform the public about the results of its review of a complaint.¹⁶⁶ In such cases, transparency is essential to allay public concern and preserve the public's confidence in the judiciary. In some cases, where the complaint has received wide public attention, the CJC may also publish on its website its letter to the complainant closing the file, as well as its letter to the judge expressing concern about the judge's conduct. In sum, the practice of the CJC is to only issue press releases about a complaint or publish information about a complaint at more advanced stages of the process, unless the complaint has received media attention.

The CJC's practice is consistent with the UN General Assembly's *Basic Principles on the Independence of the Judiciary*,¹⁶⁷ which call for the confidentiality of the disciplinary process, at least at the initial stage:¹⁶⁸

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at the initial stage shall be kept confidential, unless otherwise requested by the judge.

Our emphasis.

Providing summaries of the treatment of complaints serves important public education functions. It also promotes public awareness of the types of complaints that are brought to the CJC's attention, as well as of the CJC's decision-making process. However, because the CJC only provides summaries of the treatment of a handful of complaints in a given year, this practice may not necessarily reassure the public about the fairness of the process.

In light of this, the following questions arise:

- **Q9: Should the CJC take steps to increase public awareness of the federal judicial conduct review process, for example through the CJC website, general publicity, information in court buildings, or other mechanisms?**

¹⁶⁵ Canadian Judicial Council, *Annual Report 2002-2003* (Ottawa: Canadian Judicial Council, 2003) at page 14.

¹⁶⁶ Canadian Judicial Council, *Annual Report 2011-2012* (Ottawa: Canadian Judicial Council, 2012) at page 6.

¹⁶⁷ UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, referred to approvingly by Lamer C.J. in *Reference re Remuneration* at para. 194.

¹⁶⁸ *Slansky v. Canada (Attorney General)*, 2013 FCA at para. 151, 114 D.L.R. (3d) 393, Mainville J.A., concurring.

- **Q10: Should the CJC adopt a formal policy with respect to publicizing the treatment of all complaints?**

C. Disciplinary or Remedial Measures Available to CJC Short of Recommending Removal

1. Values Engaged and Legal Context

The tension in the judicial conduct review process between **judicial accountability** and **judicial independence** is particularly apparent when considering the question of disciplinary or remedial measures short of recommending removal. There may be a risk that the routine use of remedial measures by the CJC for conduct that does not warrant the removal of a judge could impact the scope of judicial free speech and the protection of judicial independence. On the other hand, despite the public’s expectation of judicial accountability, the actual removal of a judge as a disciplinary measure, which is the most extreme measure, is almost never used.

Provincial statutes grant judicial councils the power to take a range of remedial measures against a judge, in addition to recommendations for removal. For example, in Manitoba, after completing a hearing and finding that there has been misconduct by a judge, the Judicial Council may issue a warning or a reprimand, order specified measures as a condition for continuing to sit as a judge, such as apologizing to the complainant or accepting to receive education or treatment, or suspend the judge with or without pay for any period.¹⁶⁹ In Ontario, the Judicial Council has similar powers.¹⁷⁰ In Quebec, if the Judicial Council finds that a complaint is justified, the Council may reprimand the judge.¹⁷¹

However, the *Judges Act* does not expressly provide for any remedial measure except a recommendation by the CJC that the judge be removed from office, which is the most extreme measure possible. As considered more fully below, the CJC has incorporated remedial measures into its judicial conduct review process, but these are consensual (requiring the agreement of the judge) or declaratory in nature (such as an assessment of conduct or expression of concern).

While the *Judges Act* does not expressly grant remedial powers to the CJC, it states that the CJC’s object is generally to “improve the quality of judicial service” with respect to federally-appointed judges, which may comprise some forms of remedial measures.¹⁷² However, the use by the CJC of more invasive forms of remedial or disciplinary measures short of removal could require amendments to the *Judges Act*. Any such

¹⁶⁹ *The Provincial Court Act*, C.C.S.M. c. C.275, s. 39.1(1).

¹⁷⁰ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 51.6(11).

¹⁷¹ *Courts of Justice Act*, R.S.Q. c. T-16, ss. 279.

¹⁷² *Judges Act*, R.S.C. 1985, c. J-1, s. 60(1).

amendment would also have to respect, not only the general principle of judicial independence, but also section 99 of the *Constitution Act, 1867*.¹⁷³

2. What the CJC's Process Currently Provides in terms of Remedial Measures

Different remedial measures are currently incorporated into the early stages of the CJC's judicial conduct review process. The *Complaints Procedures* provide that, when closing a file and where the judge has acknowledged that their conduct was inappropriate, the Chairperson may provide the judge with an assessment of the judge's conduct and express concerns the Chairperson may have about such conduct.¹⁷⁴ A Review Panel also has the authority, when closing a file, to provide the judge with an assessment of the judge's conduct and express concerns about such conduct, but there is no similar requirement that the judge have acknowledged that their conduct was inappropriate.¹⁷⁵

The CJC has explained that an assessment of the judge's conduct and an expression of concern regarding such conduct can both help give complainants a reasonable understanding of the thinking that underlies the CJC's position on a complaint and can serve to inform the judge of how their comments or conduct appear in the eyes of fellow judges.¹⁷⁶ Expressions of concern may encourage the judge to improve their conduct and the use of such a measure may satisfy the complainant that judges can be held accountable even for relatively minor misconduct.

In cases where the complaint has received publicity in the media, the CJC may make public its letter to the judge assessing the judge's conduct and expressing concern, which can promote public confidence in the process. Finally, when a judge acknowledges that their conduct was inappropriate or otherwise apologizes for their conduct, they can be viewed as taking the complaint seriously. The judge's acknowledgment or apology carries with it an expectation that they will act more diligently in the future and may bring closure to the complainant.

The *Complaints Procedures* also provide that both the Chairperson and a Review Panel, with the judge's consent and in consultation with the judge's chief justice, may recommend counselling or other remedial measures to the judge, in an effort to address problems raised by the complaint. The pursuit of such measures can lead to the closing of a file.¹⁷⁷

¹⁷³ See Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995, page 140.

¹⁷⁴ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 5.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹⁷⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.7, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹⁷⁶ Canadian Judicial Council, *Annual Report 1990-1991* (Ottawa: Canadian Judicial Council, 1991) at page 15

¹⁷⁷ Canadian Judicial Council, *Complaints Procedures*, 2010, ss.5.3, 9.6(c), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

The CJC has effectively made use of such consensual measures. Judges whose conduct was the subject of complaints before the CJC have agreed to remedial measures such as attending a course on communication skills for judges;¹⁷⁸ undertaking gender sensitivity training;¹⁷⁹ meeting with an expert on gender equality;¹⁸⁰ pursuing seminars to improve their understanding of Aboriginal culture;¹⁸¹ receiving coaching from colleagues;¹⁸² and, instituting a system in conjunction with their chief justice¹⁸³ to improve the timely issuance of written decisions.

Remedial measures of this kind are an effective way to directly address the specific problem that sparked the complaint. They can be viewed as helping judges perform their functions with the highest ethical standards. Moreover, because of their consensual nature, they can accommodate specific concerns the judge may have, take into account the perspective of the judge's chief justice, and protect and foster judicial independence.

Generally, expressions of concern and the use of consensual remedial measures may also inform how the CJC will treat future complaints concerning the same judge. These mechanisms in effect constitute a strong recommendation by the CJC that the judge improve their conduct and, where this does not occur and further complaints about the judge are made, the CJC may conclude that the judge is incapable of fulfilling the judicial function.

3. Role of the Judge's Chief Justice

Currently, the CJC's *Complaints Procedures* provide that any consensual remedial measure must be reached "in consultation with the judge's chief justice."¹⁸⁴ The *Complaints Procedures* also state that, after reviewing the complaint file, the Chairperson may seek the comments of the judge's chief justice, in addition to those of the judge.¹⁸⁵ The *Complaints Procedures* therefore contemplate an involvement of the judge's chief justice in the early stages, particularly with respect to the pursuit of remedial measures.

¹⁷⁸ Canadian Judicial Council, *Annual Report 2006-2007* (Ottawa: Canadian Judicial Council, 2007) at page 13.

¹⁷⁹ Canadian Judicial Council, *Annual Report 2011-2012* (Ottawa: Canadian Judicial Council, 2012) at page 6.

¹⁸⁰ CJC Press Release of Nov 9, 2011, "Canadian Judicial Council completes its review of complaints made against justice Robert Dewar."

¹⁸¹ Canadian Judicial Council, *Annual Report 2002-2003* (Ottawa: Canadian Judicial Council, 2003) at page 22.

¹⁸² Canadian Judicial Council, *Annual Report 2005-2006* (Ottawa: Canadian Judicial Council, 2006) at page 12.

¹⁸³ Canadian Judicial Council, *Annual Report 1995-1996* (Ottawa: Canadian Judicial Council, 1996) at pages 28, 29.

¹⁸⁴ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 5.3., online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹⁸⁵ Canadian Judicial Council, *Complaints Procedures*, 2010, s. 3.5(c), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

Because of their role as judicial coordinators and their proximity with the judges under their stewardship, chief justices may be able to effectively devise remedial measures designed to address specific situations of misconduct.

In some other jurisdictions, judicial conduct review processes give the chief justice a more prominent role in the resolution of complaints. Complaints about the misconduct of judges of the Provincial Court of Manitoba must first be addressed by the chief justice of that court before they reach the Judicial Council of Manitoba.¹⁸⁶ The same process is applied in British Columbia and in Nova Scotia. In the United States, all complaints against federal judges are first considered by the chief justice of the judge's circuit, who may conduct a limited inquiry for the purpose of determining whether appropriate corrective action has been or can be taken without the necessity for a formal investigation.¹⁸⁷

Increased involvement of the judge's chief justice in the CJC's complaints process may encourage further use of effective, consensual measures and allow for an informal, early resolution of a complaint in cases where this is appropriate. A chief justice may be in a position to take immediate measures pending the disposition of a complaint, which could include a reassignment of cases.

In light of this, the following questions arise:

- **Q11: Should chief justices have a more robust role in the judicial conduct review process, for example in resolving complaints at earlier stages of the process?**
- **Q12: Should it be possible for the CJC, for example the Chairperson or the Review Panel, to refer a complaint to a judge's chief justice in specified circumstances?**

4. Remedial Measures and Structure of Preliminary Stages of the Review Process

Currently, both the Chairperson and the Review Panel have the authority, when closing a file, to provide the judge with an assessment of the judge's conduct and express concerns about such conduct.¹⁸⁸ The Chairperson, however, can only make such assessments and express such concerns where the judge has acknowledged that their conduct was inappropriate.

The concern that a single judge, namely the Chairperson, would have the power to issue remedial measures may have been one of the factors motivating the creation of the Review Panel. In fact, it may be seen as more appropriate that a panel of three judges be

¹⁸⁶ *The Provincial Court Act*, C.C.S.M. c. C.275, s. 28(1).

¹⁸⁷ *Judicial Conduct and Disability Act of 1980*, 28 U.S.C. § 352.

¹⁸⁸ Canadian Judicial Council, *Complaints Procedures*, 2010, ss. 5.2, 9.7, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

able to make an assessment of a judge's conduct and express concerns about such conduct. In all cases, however, remedial measures taken by either the Chairperson or the Review Panel remain declaratory in nature.

In light of this, the following questions arise:

- **Q13: Should the Chairperson be given the same powers to express concerns to a judge about their conduct, in the same way a Review Panel can do now?**
- **Q14: In any case, does the Review Panel remain a necessary step within the judicial conduct review process?**

5. Remedial Measures Short of Recommending Removal at Final Stages of the Judicial Conduct Review Process

The CJC's *By-laws* state that an Inquiry Committee constituted to inquire into the conduct of a judge must submit a report to the CJC "setting out its findings and conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office."¹⁸⁹ Under the *Judges Act*, the CJC must, in turn, report its conclusions and submit the record of the inquiry to the Minister.¹⁹⁰

Neither the *Judges Act* nor the *By-laws* expressly provides that the CJC at the final stage of the review process can take disciplinary or remedial measures other than recommending the removal of the judge from office. In practice, the CJC may wish to take some form of action even in cases where it does not recommend to the Minister of Justice that the judge be removed from office. In one case, the full CJC concluded that a recommendation for removal of a judge from the bench was not warranted but directed the judge to make written apologies to those affected by his conduct, to attend a seminar on judicial ethics, and to seek advice before participating in any public debate in the future.¹⁹¹

As indicated, however, the use by the CJC of some forms of remedial or disciplinary measures may require amendments to the *Judges Act*. Constitutional issues may also arise with respect to the adoption of more invasive forms of remedial or disciplinary measures against a federally appointed judge. The preservation of the dignity and credibility of a judge is an important safeguard of judicial independence.¹⁹² A judge subject to a severe disciplinary sanction may be "wounded" in the eyes of the public and perceived as being vulnerable to removal and less independent. Neither the judicial conduct review process nor its results should have the consequence of materially

¹⁸⁹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 8(1).

¹⁹⁰ *Judges Act*, R.S.C. 1985, c. J-1, s. 65(1).

¹⁹¹ *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of an Inquiry into the Conduct of the Honourable Theodore Matlow* (Ottawa: Canadian Judicial Council, 2008) at para. 186.

¹⁹² See Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995 at page 140.

impairing the independence and impartiality of judges more than is necessary in order to preserve the integrity of the judiciary.¹⁹³

In light of this, the following question arises:

- **Q15: Given the legal and constitutional framework, should the CJC have the ability to impose non-consensual remedial or disciplinary measures on a judge, short of a recommendation of removal?**

D. Process Before Inquiry Committee and Role of Different Actors Before Inquiry Committee

1. Values Engaged and Legal Context

In discussing the steps involved in the inquiry process in its annual report of 2008-2009, the CJC asked: “What improvements can be made that will streamline and bring greater efficiency to the inquiry process while protecting the public interest and being fair to the judge?”¹⁹⁴ The tension between **efficiency** and **fairness** informs any consideration of the process before an Inquiry Committee established under the *Judges Act*.

In the current process, the Inquiry Committee is charged with determining whether a recommendation should be made by the CJC for the judge to be removed from office.¹⁹⁵ Even where an Inquiry Committee determines that no such recommendation should be made, proceedings before an Inquiry Committee can have a significant impact on a judge’s reputation. In light of the importance of the interests at stake for the judge, an Inquiry Committee must grant the judge a high degree of procedural fairness.

While it is important to provide fair procedures, if the inquiry into a judge’s conduct is too lengthy and is viewed as inefficient, this will be detrimental to the public’s confidence in the judicial conduct review. Efficient and timely proceedings are essential to promote true accountability. As will be discussed further below, current concerns about the efficiency of the CJC’s process are also tied to the possibility of seeking judicial review of an Inquiry Committee’s decisions.

2. Current Procedural Fairness Guarantees in the Final Stages of the Review Process

The CJC’s *Complaints Procedures* and *By-laws* provide the judge several procedural fairness guarantees in any proceeding before an Inquiry Committee. As a general rule, there is a clear separation between persons involved in the consideration of the complaint at different stages of the process, so as to ensure that the formal investigation and

¹⁹³ *Slansky v. Canada (Attorney General)*, 2013 FCA 199, para. 143, 114 D.L.R. (3d) 393, Mainville J.A.; *Mackeigan c. Hickman*, [1989] 2 R.C.S. 796 at page 813, Laforest J.

¹⁹⁴ Canadian Judicial Council, *Annual Report 2008-2009* (Ottawa: Canadian Judicial Council, 2009) at page 5.

¹⁹⁵ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 8(1).

ultimate adjudication of the complaint are not tainted by what may have occurred earlier in the process. Thus, neither the assigned Chairperson nor members of the Review Panel can be members of an Inquiry Committee.¹⁹⁶ No person who was involved in the investigation of the complaint – which includes the assigned Chairperson, members of the Review Panel and members of the Inquiry Committee – can participate in the CJC’s final deliberations regarding the report of the Inquiry Committee.¹⁹⁷

While the separation in functions throughout the process is aimed at guaranteeing impartiality, other measures protect the judge’s participatory rights in the final stages of the process. Pursuant to section 64 of the *Judges Act*, a judge in respect of whom an inquiry is made should be given reasonable notice of the subject matter of the inquiry.¹⁹⁸ Under the *By-laws*, the judge must receive “sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.”¹⁹⁹ The judge has the right to counsel and must have the opportunity of being heard, of presenting evidence and of cross-examining witnesses.²⁰⁰ Furthermore, the judge can make written submissions to the CJC regarding the report produced by the Inquiry Committee.²⁰¹ The CJC’s *Policy on Council Review of Inquiry Committee Report* explains that the judge is free to make “any submission deemed advisable as to why the [CJC] should depart from the report of the Inquiry Committee.”

Beyond the specific provisions in the CJC’s *Complaints Procedures* and *By-laws*, the judge will have access to procedural fairness guarantees in proceedings before an Inquiry Committee under common law principles.²⁰²

The judge also has the right to be investigated by an impartial Inquiry Committee. As discussed, the proceedings of an Inquiry Committee constituted under the *Judges Act* are highly individualized in nature, oriented around the conduct of a single judge, and may need to satisfy a high standard of impartiality. At the same time, the application of the standard of impartiality should take into account the fact that members of an Inquiry Committee, as currently constituted, are essentially investigators rather than adjudicators, and may be allowed to participate more actively in the presentation of the evidence than would be permissible in judicial or quasi-judicial settings.²⁰³

¹⁹⁶ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s.2(3)(b); Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹⁹⁷ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s.11(2); Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.2, online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

¹⁹⁸ *Judges Act*, R.S.C. 1985, c. J-1, s. 64.

¹⁹⁹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 5(2).

²⁰⁰ *Judges Act*, R.S.C. 1985, c. J-1, s. 64.

²⁰¹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 9(1).

²⁰² Simon Ruel, *The Law of Public Inquiries in Canada*, Carswell, 2010 at page 135.

²⁰³ *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 FC 527 at para. 27, 146 DLR (4th) 708; *Gagliano v. Gomery*, 2011 FCA 217 at paras. 24, 25.

3. Whether Judicial Conduct Review Process is Inquisitorial or Adversarial

An important issue that arises when assessing the judicial conduct review process is whether the process should be inquisitorial, adversarial, or both. As discussed below, inquisitorial and adversarial models suggest different procedures.

(i) *Inquisitorial model of public inquiries*

The language of the *Judges Act* suggests that Parliament intended for the CJC's judicial conduct review process to be more in the nature of a public inquiry commission. Public inquiries are fundamentally inquisitorial in nature. An inquiry commission is charged with discovering the truth by actively investigating and testing the evidence relevant to the mandate of the commission.²⁰⁴ Most often, inquiry commissions will be called to investigate and report on traumatic events or public controversies involving a multiplicity of actors.²⁰⁵ However, some inquiry commissions have been appointed to review the conduct of a particular person or limited group of persons.²⁰⁶

In an inquiry commission, there is no burden, no case to meet and any evidence reasonably relevant to the subject matter of the inquiry will be relevant.²⁰⁷ The commission itself investigates. The gathering, marshaling and presentation of the evidence are carried out by the commission's counsel who takes instructions directly from the commissioners, acting as their *alter ego* and in the public interest.²⁰⁸ As Commissioner Bellamy wrote in her report of the Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry:

While it is not the role of commission counsel to advance any particular point of view, it does not follow that they should not be vigorous and thorough in their investigation, which includes the examination of witnesses. Commission counsel assist the commissioner in trying to discover the truth. They must be prepared to ask probing questions, especially when a witness's evidence is inconsistent and evasive. [...] They are not advocates for a party, but they are advocates for the truth.²⁰⁹

The rules of evidence before an inquiry commission are typically relaxed as compared to adversarial or trial settings.²¹⁰ Although inquiry commissions will be bound by a duty of procedural fairness, the content of that duty may be relaxed to take into account the investigative nature of the process.²¹¹ However, this distinction may more apparent than real in cases where very significant prejudice may be caused to a targeted individual in a

²⁰⁴ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at pages 5, 6.

²⁰⁵ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 7.

²⁰⁶ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 7.

²⁰⁷ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 74.

²⁰⁸ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 48.

²⁰⁹ Report of the Toronto Computer Leasing Inquiry/ Toronto External Contracts Inquiry, Volume 3, Inquiry Process, The Honourable Denise E. Bellamy, Commissioner (September 12 2005) at page 43.

²¹⁰ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 73.

²¹¹ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 139.

public inquiry setting. In such cases, inquiry commissions will be bound to apply a high degree of procedural fairness.²¹²

At the end of the process, the inquiry commission presents its factual findings and recommendations to the appointing government in its final report.²¹³ An inquiry commission has no power to issue binding decisions, and no power to make findings of civil, disciplinary or criminal liability.²¹⁴

(ii) *Adversarial model of professional discipline proceedings*

The judicial conduct review process shares some of the features of professional discipline proceedings, which are adversarial. Professional discipline procedures have evolved from an inquisitorial model, in the 1960s, to a decidedly adjudicative model, beginning in the late 1970s.²¹⁵ Given that Part II of the *Judges Act* was adopted in 1971, it may not be surprising that an inquisitorial model was initially adopted.

In modern professional discipline proceedings, the investigative and decision-making functions are formally separated, in a manner that is much closer to the criminal justice model.

Although particular professional discipline regimes vary, their processes are generally divided into the following broad phases:

- A preliminary screening phase where complaints are received and reviewed to determine whether an investigation is warranted;
- An investigative phase, where a rigorous investigation of the facts is conducted to determine whether there are grounds to hold a disciplinary hearing; the investigation may itself be broken into stages, for example an investigation by an officer of a professional body is reviewed by a conduct committee, which may carry out or direct further investigations, and which determines whether to refer the matter to a hearing committee;²¹⁶
- An adjudicative phase where a panel or hearing committee hears the evidence in an adversarial setting in which the professional is represented by counsel and the case against the professional is made by a “prosecuting” lawyer; the adjudicative panel or committee makes findings of fact and law, and may order sanctions against the professional.

²¹² *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 55; Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 135.

²¹³ Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at page 20.

²¹⁴ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 34.

²¹⁵ David Mullan, *The Role of Lawyers to Professional Disciplinary Bodies* (1994) 13 *Advocates’ Soc. J.* 10.

²¹⁶ See the process under the *Alberta Legal Profession Act*, RSA 2000, c L-8, ss. 53 to 78.

(iii) *Whether the federal judicial conduct review process is or should be inquisitorial or adversarial*

As indicated, the statutory framework suggests that the CJC's judicial conduct review process is inquisitorial. Under the *Judges Act*, an Inquiry Committee is constituted to inquire into whether a federally appointed judge has become incapacitated or disabled in the due execution of the office of a judge.²¹⁷ The Inquiry Committee has investigative powers under the *Judges Act*, including the power to summon witnesses and to require them to testify under oath and to produce documents, and the power to enforce the attendance of witnesses as is vested in a superior court.²¹⁸ Those powers are similar to those of a commissioner of inquiry under the *Inquiries Act*.²¹⁹ An Inquiry Committee has no explicit power to impose sanctions. The Inquiry Committee submits a report to the CJC setting out its findings and conclusions in respect of whether or not a recommendation should be made for the removal of a judge from office.²²⁰

The full CJC itself has investigative powers under the *Judges Act*.²²¹ The CJC has no explicit powers to impose sanctions. After considering the report of an Inquiry Committee and such further submissions of the judge and of Independent Counsel,²²² the full CJC must report its conclusions to the Minister of Justice and may recommend that a judge be removed from office.²²³ Under section 99 of the *Constitution Act, 1867*,²²⁴ the final decision to remove a superior court judge from office belongs to the Governor General, on address of the Senate and House of Commons.

Although the end-result of an Inquiry Committee or the full CJC may be no more than a recommendation for removal based on the finding that a judge has become incapacitated or disabled from the due execution of judicial office, such a finding is essentially "capital punishment" for the career of a judge. This may be why, as will be discussed below, progressive reforms to the CJC's judicial conduct review process, such as the creation of Independent Counsel, have shifted the process towards a more adversarial model. As a result, questions arise as to whether the judicial conduct review process is *de facto* adversarial, or should follow an adversarial model, with all the associated features.

Judicial conduct review processes for provincially-appointed judges vary between inquisitorial and adjudicative models, reflecting a lack of consensus around the ideal approach. For example, Quebec essentially has an inquisitorial model under which the Judicial Council may establish a committee to conduct an inquiry into a complaint, and presenting counsel acts under the direction of the inquiry committee.²²⁵ By contrast, in

²¹⁷ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(3).

²¹⁸ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(4).

²¹⁹ *Inquiries Act*, R.S.C., 1985, c. I-11, ss. 4, 5.

²²⁰ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 8(1).

²²¹ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(4).

²²² Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, ss. 9, 10, 11.

²²³ *Judges Act*, R.S.C. 1985, c. J-1, s. 65.

²²⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

²²⁵ *Courts of Justice Act*, R.S.Q. c. T-16, s. 269; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, paras 72 to 74.

Newfoundland and Labrador, for example, an “adjudication tribunal” may be appointed for dealing with a complaint against a judge referred by the Judicial Complaints Panel.²²⁶

However, one key consideration that militates in favour of an adversarial model at the provincial level is that, in a number of provinces, judicial councils are granted statutory powers to impose a range of sanctions or disciplinary measures against judges. As discussed, this is not the case federally, where the Inquiry Committee and the CJC only make findings and recommendations. The power to make final determinations and to impose sanctions generally goes hand in hand with an adversarial regime.

4. Independent Counsel and Inquiry Committee’s Counsel

(i) *Nature of the current judicial conduct review process and role of counsel*

The current process provides for two different types of counsel at the stage of the Inquiry Committee (in addition to any counsel the judge may retain): Independent Counsel and counsel to the Inquiry Committee.

Independent Counsel

The *By-laws* provide that, where an Inquiry Committee is constituted, the Chairperson of the CJC shall appoint an “Independent Counsel”, who will “present the case to the Inquiry Committee, which includes making submissions on questions of procedure or substance that are raised during the proceedings.”²²⁷ The *By-laws* also provide that the Inquiry Committee may engage its own legal counsel “to provide advice and other assistance to it.”²²⁸

The position of Independent Counsel was created following the CJC’s inquiry into Justice Fernand L. Gratton. Ed Ratushny, who acted as counsel to the Inquiry Committee in the Gratton case and recommended that Independent Counsel be appointed during the hearing, explains that the intention was to maintain an arm’s length relationship between such counsel and the Inquiry Committee “in the event that circumstances might arise that could affect the perception of fairness.”²²⁹

The recommendation to create a position of Independent Counsel was influenced by the CJC’s experience a few years before in the Marshall Inquiry. In that case, counsel to one of the judges whose conduct was the subject of the inquiry aggressively attacked the complainant. The Inquiry Committee’s counsel responded forcefully to the criticism of

²²⁶ *Provincial Court Act, 1991*, S.N.L. 1991, c. 15, s. 24(1).

²²⁷ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 3(1), (2).

²²⁸ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 4.

²²⁹ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at page 231.

the complainant, and the Inquiry Committee maintained an arm's length relationship with its counsel for the remainder of the process, so as to preclude an appearance of bias.²³⁰

The CJC's *Policy on Independent Counsel* expands upon the role and powers of Independent Counsel. The Policy provides that the central purpose for establishing the position of Independent Counsel is for such counsel to act "at arm's length" from the Inquiry Committee. The Inquiry Committee is not Independent Counsel's client. Independent Counsel is retained by the assigned Chairperson and acts in accordance with the CJC's *By-laws* and policies, in the public interest.

The CJC's *Policy on Inquiry Committees* provides that an Inquiry Committee does not "abandon" its own responsibilities to Independent Counsel. In fact, the *Policy on Inquiry Committees* provides that it may direct Independent Counsel to explore additional issues, and the Inquiry Committee may also act on its own to explore additional issues. The CJC's *Policy on Independent Counsel* provides that Independent Counsel is expected to take the initiative in gathering, marshalling and presenting the evidence before the Inquiry Committee, and is responsible for rigorously exploring the issues and taking a strong position where necessary, but remains bound by the rulings of the Inquiry Committee.

The model adopted by the CJC for the role of presenting counsel is essentially a hybrid. In a "pure" adversarial model, presenting counsel would take no instructions from the Inquiry Committee. In a pure inquisitorial model, presenting counsel would act under the direction of the Inquiry Committee.

Counsel to the Inquiry Committee

In contrast, counsel to the Inquiry Committee does not participate in the hearings and can assist the Inquiry Committee in providing legal or strategic advice, and drafting rulings and the final report. The *Policy on Inquiry Committees* explains that counsel to the Inquiry Committee can be entrusted with such responsibilities as preparing a first draft of all contextual and factual reporting, and preparing a first draft of the Committee's entire report after monitoring the Committee's deliberations and receiving specific instructions.

(ii) Alternative models

By creating distance between the Inquiry Committee and the marshaling and presentation of the evidence, the position of Independent Counsel is designed to ensure that the Inquiry Committee is and appears to be impartial. To some extent, through the creation of the position of Independent Counsel, the Inquiry Committee is removed from the actual investigation, and its main function is making determinations against the judge.

If one takes the position that the federal judicial conduct process is inquisitorial in nature, the fact that Independent Counsel acts at arm's length from the Inquiry Committee may

²³⁰ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at page 231.

be viewed as negatively impacting the efficiency of the process. Much of the conduct of the proceedings is placed into the hands of a counsel who does not take instructions from the Inquiry Committee. Furthermore, challenges may arise due to the fact that the investigative powers conferred by the *Judges Act*, including the power to issue summons, are conferred to the Inquiry Committee, not to Independent Counsel.²³¹ Finally, given the more passive role that the Inquiry Committee is expected to take on where there is an Independent Counsel, any intervention of the Inquiry Committee in the conduct of the proceedings may in fact raise concerns about the fairness of the process.

It should be noted that the Supreme Court has recognized that a model where presenting counsel acts under the direction of a judicial inquiry committee (such as the Quebec model) is appropriate in the judicial conduct review process and does not create a reasonable apprehension of bias:

[...] where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it. [...] Moreover, it is for this purpose and in order to conduct the inquiry for which it is responsible that the Conseil may retain the services of an advocate, as provided by s. 281 CJA. **Emphasis in the Supreme Court decision.**²³²

The existence of presenting counsel acting under the direction of the Inquiry Committee could allow the Inquiry Committee to actively control the proceedings and could enable a more efficient and expedited process.

It is also possible to ensure that the inquiry counsel, who presents all the facts relevant to the complaints or allegations that are being considered by the Inquiry Committee and who can test evidence and the credibility of witnesses throughout the proceedings, is not involved in the actual preparation of the report. The Inquiry Committee may engage a separate counsel to assist with the preparation of the report and with other internal matters,²³³ tasks that are currently carried out by the counsel to the Inquiry Committee. This would serve to preserve the fairness and appearance of fairness of the process.

If one takes the position that the federal judicial conduct process is more adversarial in nature, another option would be to make the counsel who presents the case before the Inquiry Committee completely independent from the Inquiry Committee. Under such a model, presenting counsel would take no instructions whatsoever from the Inquiry Committee, and would be primarily responsible for gathering and assembling the

²³¹ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(4).

²³² *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 at paras 72 to 74; see also *Therrien (Re)*, 2001 SCC 35 at para. 103, [2001] 2 SCR 3.

²³³ Simon Ruel, *The Law of Public Inquiries in Canada*, Carswell, 2010 at page 55.

evidence, possibly with the assistance of the Review Panel, and presenting it before the Inquiry Committee. The functions of presenting counsel would be similar to that of a public prosecutor in a criminal trial, or discipline counsel in the professional conduct setting. Under such a model, the Inquiry Committee would take on a passive role and essentially become an adjudicative committee.

Some provincial judicial conduct review processes have adopted a model where inquiry counsel is or appears to be independent from the judicial council, inquiry or adjudication panel. For example, in New Brunswick, where a hearing panel is constituted, counsel to the panel must act as a “prosecutor.”²³⁴ The Ontario Judicial Council must engage a “Presenting Counsel” for the purpose of preparing and presenting the case against the judge, and such Presenting Counsel must operate independently of the Ontario Judicial Council.²³⁵

5. Considerations in favour of inquisitorial and adversarial processes

The previous discussion reveals different normative considerations that apply when assessing whether the CJC’s judicial conduct review process should follow an inquisitorial or an adversarial process.

The following normative considerations favour an inquisitorial process:

- The judicial conduct review process under the *Judges Act* is essentially designed to be investigative. The process is fundamentally preliminary in nature – the Inquiry Committee is only authorized to make a recommendation to the CJC, and the CJC in turn is only authorized to make a recommendation to the Minister. In the case of superior court judges, there is theoretically scope for a parliamentary hearing prior to the removal of a judge by joint address;
- In theory, investigative processes should not be about finding guilt or misconduct, but about establishing the truth. Investigative processes are more flexible and judges carrying out an investigation are well positioned to understand the judicial role and functions and ask the “right questions”, directly, or through presenting counsel;
- An investigative process, as opposed to an adversarial process, should in principle be less confrontational, which may encourage the resolution of complaints at earlier stages of the process;
- The limited scope of available penalties may militate in favour of more informal procedures.

²³⁴ *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 6.10(4).

²³⁵ *Procedures Document*, revised February 17, 2012, ss. 1(d), 3.

There are also some normative considerations that favour an adjudicative process:

- Adjudicative processes are generally seen as providing a higher level of procedural fairness because they are closer to the court model;
- A higher level of procedural fairness may be warranted given the serious consequences of the review process on the judge's reputation and the fact that, in reality, a recommendation for removal may well result in the judge's resignation;
- A more court-like process may be appropriate given that the judicial conduct review process is individualized in nature, targeting a single judge, rather than a broad investigation into general matters of public policy. In this context, the professional discipline analogy seems apt;
- If the scope of available remedial or disciplinary measures that could be imposed by the CJC were to be increased, this could also militate in favour of an adjudicative model.

In light of this, the following questions arise:

- **Q16: Should the CJC follow a more adjudicative model at some stages of the process?**
- **Q17: Should the lawyer who presents a case to an Inquiry Committee take an active role in trying to prove misconduct on the part of a judge? In other words, should the process be adversarial at the stage of an Inquiry Committee?**

6. Determining the Scope of the Inquiry Before an Inquiry Committee

In the context of an Inquiry Committee constituted under the *Judges Act*, there are a number of ways the scope of the inquiry before an Inquiry Committee could be defined.

Since 2010, it is the Review Panel rather than a larger quorum of the CJC that has the authority to decide to constitute an Inquiry Committee. The test the Review Panel applies is whether “the matter may be serious enough to warrant removal.”²³⁶ At the same time, the *By-laws* provide that the Independent Counsel “shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry

²³⁶ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 1.1; Canadian Judicial Council, *Complaints Procedures*, 2010, s. 9.6(d), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/CJC-CCM-Procedures-2010.pdf>>.

Committee to enable the judge to respond fully to them.”²³⁷ Pursuant to the *Policy on Inquiry Committees*, Independent Counsel is responsible for presenting the allegations against the judge to the Inquiry Committee. Finally, the *By-laws* provide that the Inquiry Committee “may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.”²³⁸ There is thus arguably some uncertainty as to which body is responsible for defining the scope of the inquiry before an Inquiry Committee.

The question also arises as to whether the scope of the inquiry before the Inquiry Committee could evolve or be redefined should new allegations surface in the course of the Inquiry. The *By-laws* presently provide that the Inquiry Committee “may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.”²³⁹ The *Policy on Inquiry Committees* provides that the Inquiry Committee can direct the Independent Counsel to explore additional issues or act on its own to explore additional issues.

Outside the context of the judicial conduct review process, inquiry commissions and regulatory investigators are not normally involved in the definition of their terms of reference. The mandates of regulatory investigators are defined by statute.²⁴⁰ Where the government constitutes an inquiry commission, it outlines the commission’s terms of reference, which serve to define the scope of the inquiry²⁴¹. In the professional discipline context, the citation to be heard by a discipline committee may be established by a conduct committee,²⁴² or by prosecuting counsel.²⁴³

In any case, persons who appear before an inquiry commission must be provided with an understanding of the scope and the limits of the inquiry.²⁴⁴ This fosters predictability and fairness, as all persons involved in the inquiry know in advance what the subject matter of the inquiry is.

7. Rules of Procedure in the Proceedings Before an Inquiry Committee

While it is generally the case that an inquiry commission will establish its own rules and procedures to be followed for the proper conduct of its inquiry, this is because inquiry commissions vary greatly in their mandates. They are established on an *ad hoc* basis by governments to inquire into and report on a wide variety of events, scandals, catastrophes or other matters of public interest. Each inquiry commission essentially starts afresh.

²³⁷ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 5(1).

²³⁸ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 5(1).

²³⁹ Canadian Judicial Council, *Inquiries and Investigations By-laws*, 2010, s. 5(1).

²⁴⁰ See for example: *The Coroners Act*, 1999, SS 1999, c C-38.01, s. 3 for investigations carried out by coroners.

²⁴¹ Simon Ruel, *The Law of Public Inquiries in Canada*, (Toronto: Carswell, 2010) at pages 15, 16.

²⁴² See in Saskatchewan *The Legal Profession Act*, 1990 SS 1990-91, c L-10.1, s. 46(1).

²⁴³ See in Manitoba the *Rules of the Law Society of Manitoba*, Adopted by the Benchers of the Law Society of Manitoba on October 31, 2002, s. 5-96(3).

²⁴⁴ *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. at para. 28.

In contrast, Inquiry Committees constituted under the *Judges Act* are all tasked with inquiring into the conduct of an individual judge with the aim of determining whether or not a recommendation for removal of the judge should be made. There should thus be no reason for significant variation in the procedures followed by each Inquiry Committee. Moreover, all inquiries are constituted under the auspices of the same institution, the CJC, which has longstanding institutional knowledge about the judicial conduct review process. It is also noteworthy that relatively detailed procedures for disciplinary hearings for lawyers are set out in the rules and statutes of many law societies.²⁴⁵

A uniform process with a predetermined set of procedural rules may have several advantages, including: leading to more predictable inquiries; creating more consistency among inquiries held under the *Judges Act*; streamlining disputes about procedure; and, as will be discussed more fully below, circumventing the number of possible applications for judicial review. Such rules of practice and procedure could eventually cover issues such as: the timing and process for document collection, disclosure and production; the presentation of the evidence and documentation; the order and rules of examinations, cross-examinations, and re-examinations of witnesses; the procedure on motions; the criteria and process for seeking confidentiality orders; the criteria for grants of standing; and the specific procedural rights of those participating in the hearings of an Inquiry Committee.

In light of this, the following question arises:

- **Q18: Should the CJC consider establishing detailed rules of procedure and practice to be followed in the proceedings before an Inquiry Committee?**

8. Judicial Review

The reports and decisions of inquiry commissions can in principle be reviewed by courts, subject however to arguments on prematurity. A report or decision that is not founded on evidence or that breaches procedural fairness may be quashed on judicial review. However, courts will typically show considerable deference towards the conclusions of inquiry commissions and will not easily find a violation of procedural fairness.²⁴⁶

Specific rules apply to the issue of judicial review of interlocutory decisions – or decisions rendered while the proceedings are still ongoing. Generally, unless there are “exceptional circumstances”, courts will not interfere with ongoing administrative proceedings. As the Ontario Superior Court explained:

²⁴⁵ See for example: Law Society of British Columbia, *Law Society Rules*, November 2013, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=334>> at pages 4-25 to 4-34.

²⁴⁶ *Canada (Attorney General) v. Canada (Commission of Inquiry in the Blood System)*, [1997] 2 F.C. 36 at para. 23 (Fed. C.A.), affirmed *Canada (Attorney General) v. Canada (Commission of Inquiry in the Blood System)* [1997] 3 S.C.R. 440; *Stevens v. Canada (Commission of Inquiry)*, 2002 F.C.T. 2 at paras. 61, 62, 215 F.T.R. 228; Simon Ruel, *The Law of Public Inquiries in Canada*, Toronto: Carswell, 2010 at pages 165 to 170.

In the absence of exceptional circumstances, it is preferable to allow administrative proceedings to run their full course before the tribunal and to consider the legal issues arising from the proceeding including procedural matters against the backdrop of a full record and a reasoned decision of the tribunal.²⁴⁷

Another expression of this rule is that courts will ordinarily decline to exercise their jurisdiction with respect to a decision that does not finally determine the substantive rights of the individual in question, where an adequate alternate remedy is available later.²⁴⁸ The rationale for this rule is that a complaining party may be successful in the end result, rendering the application for judicial review of an interlocutory decision unnecessary, while costing resources and time.²⁴⁹

There are special considerations that apply to Inquiry Committees and the CJC under the *Judges Act*. Inquiry Committees and the full CJC for the purpose of inquiries under the *Judges Act* are “deemed to be a superior court.”²⁵⁰ Patrick Healy has argued that this deeming provision means that courts would not have the jurisdiction to review the decisions of the CJC or of an Inquiry Committee constituted under the *Judges Act*. According to Healy, Part II of the *Judges Act* “creates a unique forum that is subject to review, if at all, only by itself and Parliament.”²⁵¹ In practice, however, Federal Court judges have assumed they have jurisdiction to judicially review decisions of the CJC.²⁵² Both judges and complainants have sought judicial review of decisions made within the federal judicial conduct review process.

The reason why the question of judicial review has practical significance is because applications for judicial review of the Inquiry Committee’s decisions, particularly in the course of its inquiry, can significantly lengthen and complicate the proceedings. Justice delayed is justice denied, as goes the legal maxim. This consideration applies both to judges and complainants. Similarly, the judicial review of decisions made at earlier stages may have significant consequences on the efficiency of the judicial conduct review process. In some cases, complainants who are dissatisfied with the CJC’s decision to dismiss their complaint at the initial stages, prior to the constitution of an Inquiry Committee, have sought judicial review of the decision before the Federal Courts, whether to challenge the reasonableness of the CJC’s decision or its fairness.²⁵³

²⁴⁷ *Lala v College of Physiotherapists of Ontario*, [2003] OJ No 5062 (Div Ct) at para 2, recently reaffirmed in *Kleckner v Canada (Attorney General)*, 2014 ONSC 322.

²⁴⁸ *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174, [2005] 1 FCR 485 at para 29.

²⁴⁹ *Ziindel v Canada (Human Rights Commission)*, [2000] 4 FC 255 (FCA) at para 10.

²⁵⁰ *Judges Act*, R.S.C. 1985, c. J-1, s. 63(4).

²⁵¹ Patrick Healy, *The Unique Jurisdiction of the Canadian Judicial Council*, 13 Can. Crim. L. Rev. 103 at page 104.

²⁵² See : *Slansky v. Canada (Attorney General)*, 2013 FCA 199; *Akladyous v. Canadian Judicial Council*, 2008 FC 50; *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 FC 91, aff’d *Taylor v. Canada (Attorney General)*, 2003 FCA 55, [2003] 3 FC 3.

²⁵³ See : *Slansky v. Canada (Attorney General)*, 2013 FCA 199; *Akladyous v. Canadian Judicial Council*, 2008 FC 50; *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 FC 91, aff’d *Taylor v. Canada (Attorney General)*, 2003 FCA 55, [2003] 3 FC 3.

Aside from the legal question of whether judicial review of the CJC and Inquiry Committees' decisions is possible, measures may be envisioned that could provide judges and complainants the possibility for redress in appropriate cases, while limiting the amount of judicial review applications.

As indicated, the CJC's judicial conduct review process currently does not include any internal review mechanisms, whether by the same body or person who disposes of the complaint, or by another body within the CJC. Internal review mechanisms within the CJC's process could offer a more accessible and speedy remedy than judicial review. The existence of internal review mechanisms may also alter how applications for judicial review of the CJC's decisions are dealt with by courts. As the Supreme Court held in *British Columbia (Workers' Compensation Board) v. Figliola*, parties to administrative processes should not circumvent the appropriate review mechanisms by using other forums to challenge administrative decisions.²⁵⁴ Providing a detailed procedure to be followed by Inquiry Committees may also potentially streamline disputes about procedure and obviate the need for judicial review.

In light of this, the following question arises:

- **Q19: Should there be an internal mechanism to review procedural determinations made in the course of an inquiry committee?**

VI. Consultation

We invite comments on the issues raised in this Paper. The best way to respond to this invitation is by accessing the Discussion Paper available on the Canadian Judicial Council website at:

<http://discussion.cjc-ccm.ca>

Submissions can also be made by email to info@cjccm.ca

Or by mail to:

Canadian Judicial Council
Ottawa ON
K1A 0W8

²⁵⁴ *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 34.