



Canadian Judicial Council
Conseil canadien de la magistrature



Annual Report 2012-2013

Year in review

The Canadian Judicial Council works to enhance the quality of judicial service and provide Canadians with a judiciary they can trust. Here is an overview of the Council's specific achievements in 2012-13.

Staying focussed on Council's core business

As first reported in the 2011-12 Annual Report, Council has been engaged in a fulsome review of all its myriad activities in an attempt to focus squarely on priorities. While this has been an important undertaking, it has also consumed much of Council's time. Council members are deeply committed to pursuing projects that are of broad interest to the judiciary. As such, it remains important that the views of all members are sought on how best to determine which projects are essential to delivering on Council's mandate. Tough decisions regarding which projects to pursue and which committees may no longer need to meet regularly given their light workload may need to be taken. Ultimately, Council's decisions must be guided by what is timely and pertinent to helping it achieve its mandate.

Above all, Council must remain focussed on continuing to ensure the wise and economic use of public funds in line with Canadians' expectations and the current climate of restraint.

Publishing Guidelines for Judges and Court staff

Council published several informational documents under the auspices of its Administration of Justice Committee. These publications reflect the ever increasing role that technology plays in our modern courtrooms.

- The *Guidelines on Benchmarking of Costs* provide lawyers and judges with information they can consider when pursuing the filing and sharing of documents electronically.
- The *Court Information Management Policy Framework to Accommodate the Digital Environment* is intended to provide court staff with helpful information they can reflect upon when considering developing their own information technology policies.
- A *Comparative Analysis of Key Characteristics of Court Administration Systems* allows for a comparison of legislation, memoranda of understanding and other written agreements between the Judicial and Executive Branches of governments of several common law countries.

Review of the Judicial Conduct Process

From time to time, Council comes to the view that the process by which complaints about federally-appointed judges are reviewed could benefit from a fulsome analysis.

Recent trends suggest that such a review may be opportune as public confidence in Council's ability to address judicial conduct matters in a timely and thorough manner remains at the core of its mandate.

In the coming months, Council will consider how best to engage stakeholders and other Canadians to explore all and any appropriate avenues of reform to the judicial conduct process.

Judicial conduct

Council takes its role in reviewing complaints about judicial conduct seriously, noting that maintaining public confidence is key.

Council recognizes the role that public education plays in conveying information about judicial conduct and the mandate of Council. As a result, added effort has been devoted to better communicate Council's mandate and to explain the difference between judicial conduct and judicial decision making. While this effort to better communicate through correspondence may take some additional time and effort in the front end, there are clear longer-term benefits to helping those who write to understand that not all complaints constitute matters of judicial conduct.

Complaint files

For fiscal year 2012-2013 (reporting as of 21 March 2013) a total of 138 new complaint files were opened. The total number of complaint files closed for the same period was 131. As of 21 March 2013, there were 44 complaint files under review at various stages of the complaint process. This included 1 matter with outside counsel for further inquiries, 1 matter with a Review Panel and 2 matters with and Inquiry Committee.

COMPLAINT 1

A complainant wrote to Council expressing concern about what she believed was an unreasonable delay in releasing the decision of the Court. In her response to the complaint, the judge expressed regret and apologized for the delay, saying “I am sincerely sorry for the delay in finalizing the Reasons for Judgment. I understand how very important this case is to the complainant.” The judge provided further comments about the delays in this case. While she initially thought the decision could be written shortly after the trial, the actual writing of the reasons proved to be more demanding in light of the complexity of the issues. In commenting, the judge’s Chief Justice noted that the decision was quite lengthy and contained 426 paragraphs. The judge also had to undertake some research to review key points of law. At the same time, she was required to preside over a second degree murder trial which took longer than expected. As the accused in that trial was in custody pending the decision in that case, she had a duty to give priority to that case. Additionally, the judge unexpectedly had surgery in April 2012 and her recovery took longer than anticipated. The judge regretted these delays and wrote “I apologize for the worry and concern which my delay caused to the complainant”.

The member of the Conduct Committee who reviewed the matter noted that the litigants had been proceeding in court for 15 years. He appreciated that this added delay in rendering a decision had caused the complainant additional stress. However, in light of all the circumstances, including the judge’s explanation and apology, he came to the view that the matter did not warrant further intervention by the Council.

COMPLAINT 2

The complainant is an observant Jew. She was called for jury duty on dates that corresponded with the Jewish holiday of Sukkot (Monday 1 October and Tuesday 2 October 2012). She attended at the court house for jury selection on 28 September 2012. She intended to tell the judge that she would not be available on the October dates. About 300 people were called for jury duty. The judge separated the potential jurors into groups of 40 in order to facilitate the challenge for cause process. Before the complainant had a chance to speak to the judge, a Rabbi was called forward and he explained he would not be available due to the Sukkot holiday. The Rabbi was excused. The complainant then “spoke out” asking the judge if she could also be excused? The judge responded, “No, you are not a Rabbi” and told the complainant she would have to wait until it was her turn to be called forward. The complainant was not given the opportunity to further explain her situation on that day. She was instructed to return on 1 October when the challenge for cause process would continue.

The complainant returned to the court house on 1 October and brought with her a letter from her own Rabbi, which she presented to the judge. She explained that Sukkot required that Jews not work on this day. The judge excused her from jury duty.

The complainant alleged that on 28 September the judge used language that was inappropriate, rude and callous. She says she wrote to the CJC because she was “deeply upset” about the “insensitive attitude” of the judge. She also said she was complaining because the judge ordered her to act in a way that contravenes her religious beliefs.

Procedural issues, such as how to organize jury selection, are legal issues and a judge may use his discretion in respect of how he chooses to structure these proceedings. As such, this portion of the complainant did not warrant further consideration.

There appears to have been a misunderstanding by the judge that by attending court on 1 October, that would in itself be a contravention of the complainant’s religious beliefs. It was unfortunate that the complainant was not given a chance to explain the situation on the initial day of the proceedings, however this appears to have been as a result of scheduling, and no malice was intended. All judges have an obligation to treat everyone who appears in court with appropriate courtesy. In this particular case, the judge may not have conveyed the appropriate amount of consideration and sensitivity and the judge offered an apology and wrote that he did not intend to offend the complainant or her religious beliefs.

Based on the above, the complaint file was closed.

COMPLAINT 3

The complainant is a journalist who was reporting on a trial. The three accused were charged with murder. Due to the contentious nature of the trial and the volatility of the accused, the lawyers had been ordered to not approach witnesses during their testimony. There was also some evidence of witness intimidation by others in the courtroom, such as gesturing and making comments to witnesses while they were testifying. During a break, a witness was outside the courthouse smoking. The journalist approached the witness and asked if she could take her picture. The witness became upset and refused to have her picture taken. When the court reconvened, the witness was still upset and refused to take the stand to testify. The judge was made aware of the situation and asked to speak to the journalist before the court. She then ordered the journalist not to approach any witnesses during their testimony. The journalist complained that this order only applied to her and would put her at a disadvantage vis-a-vis other media outlets. Also, the journalist was concerned that this order - and the judge requesting to speak to her in court - showed a broader issue of the judge’s bias towards the media.

The judge explained that she was very concerned about the well-being of the witnesses and the potential for a mistrial if a witness could not testify. The judge spoke to the journalist firmly and

directly. The judge did not allow the journalist to explain her actions, as she felt this was not the time to engage in a debate with the journalist. While the judge did not allow the journalist to explain why she asked to take the witness' picture, considering all of the material, and the circumstances surrounding this case, it was found that the judge's conduct was appropriate, and regardless the order is a legal issue, and the journalist and her media outlet could have appealed the judge's order, which they did not. Further, there was no evidence of bias towards the media or the journalist. The order applied to all media outlets, not just the journalist, so there was no advantage to other media outlets as a result of the order.

It was found that this complaint did not warrant further consideration.

COMPLAINT 4

The complainant immigrated to Canada from Israel with his wife and two children. He also has a daughter from a previous relationship who is in the process of moving to Canada. The daughter is the subject of the litigation, as the complainant alleges she was "kidnapped" from his home by her biological mother and uncle in 2011. The complainant contacted a lawyer and began proceedings and mediation.

The complainant appeared before the judge at two case conferences. At the first case conference the complainant agreed, through his lawyer, to sign documents in order to have the daughter's Israeli passport renewed, as well as sign other documents necessary for her immigration to Canada. At the second case conference, the complainant had retained new counsel and claimed he did not agree to sign the documents and refused to do so. The court awarded \$500 costs against the complainant. The complainant's first language is not English and he says he has trouble understanding what occurred in court and that when he tried to explain this the judge "waved his hand" at the complainant, dismissing him, and thus denying the complainant his "right to understand" what was happening in court. He also alleges a court interpreter expressed his personal opinions to the judge and when the complainant explained to the judge that the interpreter was not relaying the correct interpretation, the judge replied saying, the next time the complainant can hire his own interpreter.

The complainant also alleges that the judge refused to listen to him, demonstrated aggression towards him, would not let his lawyer speak and the judge stated if the complainant continued to "apply" to the judge, he would be arrested.

The complainant wants the Case Conference recognized as invalid and he wanted the opportunity to negotiate a settlement with the other party.

The judge admitted he was exasperated and impatient, as the complainant refused to sign the passport application and documents, despite having given his agreement to do so. Given these admissions, it is possible that his comments regarding the interpreter may have also been presented in an impatient tone, as suggested by the complainant.

Judges must at all times preside with serenity. As noted in *Ethical Principles*, “Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone” (Chapter 5, *Equality*, Commentary 4). The judge apologized for his impatience and recognized that his manner and tone of us were inappropriate.

The complainant’s other allegation regarding his counsel not being able to speak were found to be without merit.

The Counsel does not have the jurisdiction to recognize a Case Conference was invalid or to order parties to negotiate a settlement.

Based on the above, and given the judge’s genuine apology, the complaint file was closed.

COMPLAINT 5

The Council received a complaint against four judges involved in a case regarding custody and access rights of the children of a separated couple. The complainant alleged that all the judges were biased, that their rulings were erroneous in law and that their appreciation of the evidence was faulty. She also asked that the proceedings continue before a different judge in a different jurisdiction, alleging that her complaint to the Council would disqualify the judges named in her complaint from hearing her case.

After a careful review of the allegations, it was determined that the complaint was in reality an expression of the complainant’s disagreement with the various decisions that were made in her case, which falls outside the mandate of the Council. As for the allegations of bias on the part of the judges, the complainant provided no details to substantiate them, other than her disagreement with the judges’ decisions.

With regard to the complainant’s view that the judges named in her complaint would disqualify them from hearing her case, the Court of Appeal of British Columbia, in the matter of *Holland v. Marshall*, clearly stated that a complaint to the Council constitutes no basis for interfering with a judicial hearing. The complaints process is not an appeal process. It is for the judge hearing the case to decide, on the presentation of a proper motion, whether he or she should be disqualified from a case because of a complaint.

The Council wrote to the complainant to explain that it has no authority to review a judicial decision for the purpose of determining its correctness, nor to change or rescind a judgment. The appropriate recourse lies with the courts. The Council also explained that the conclusions and findings of a judge made during a hearing fall under his or her judicial decision-making authority. These decisions do not constitute issues of judicial misconduct and do not fall within the mandate of the Council.

Consequently, the complainant was informed that her complaint did not warrant further consideration and that no other action would be taken.

COMPLAINT 6

The Council received a complaint from a woman alleging that the judge hearing her case was biased and not impartial. The complainant also alleged that the judge behaved improperly and was aggressive toward her and some of the witnesses. She complained that the judge violated international laws and conventions, as well as the *Ethical Principles for Judges*.

In reaching decisions on matters before them, judges exercise judicial decision-making authority. This includes assessing the evidence and arguments presented by the parties, as well as applying the law. One of the most important roles of a judge is to weigh the evidence and decide which party's position to accept. This necessarily includes assessing the credibility of the parties and witnesses. The fact that a judge finds the evidence of one party or a witness believable, and that of another not credible, does not mean that the judge was biased or partial. It is instead a core component of the judge's decision-making authority.

Even if a judge erred in his or her assessment of the evidence or application of the law, the Council has no authority to review such matters. The appropriate recourse is to appeal the decision to a higher court.

After a review of all the facts in this matter, it was found that the complainant did not raise any issue of judicial misconduct. As a result, the complainant's allegations were dismissed and she was informed that her complaint did not warrant further consideration.

COMPLAINT 7

The Council received a complaint from someone who made numerous allegations against the judge presiding at his trial, including that the judge allowed evidence submitted by the police and did not accept his own evidence. The complainant also alleged that the judge was biased and based his decision on the opinions of others. In addition, the complainant alleged that the judge did not allow for a French trial or proper representation in French.

One of the most important duties of a judge is to assess credibility and make findings of fact about the evidence presented. In and of itself, this is not an indication that the judge is taking sides, or is biased in any way. After a careful review of the complainant's allegation of bias, it was determined that his perception of bias was in reality an expression of his disagreement with the judge's decision.

As for the complainant's allegation that the judge did not properly consider his evidence, this would be a matter to take up with the courts, possibly by way of appeal, since the Council has no mandate to examine the decisions of judges nor to assess the correctness of their decisions.

With regard to the complainant's allegation that the judge did not allow for a trial in French or proper French representation, it was determined, after a careful review of the facts, that an interpreter was present at all times during the proceedings and that the judge provided the complainant with access to the interpreter. Further, such procedural issues are matters to be raised with the courts, and are not considered issues of judicial conduct.

Since none of the allegations raised any issue of judicial misconduct, the complainant's allegations were dismissed and he was informed that his complaint did not warrant further consideration.

COMPLAINT 8

The Council received a complaint from someone who raised allegations of misconduct on the part of a judge when he was still a lawyer. The complaint related to the judge's involvement in a case prior to his appointment as a judge.

Although the Council has the authority to review a complaint in respect of a judge even if the alleged conduct that is the subject of the complaint occurred prior to the judge's appointment to the Bench, it is notably in circumstances where a judge's conduct could affect his or her capacity to continue to hold judicial office that the Council will act on a complaint.

After carefully reviewing the allegations, the Council found that the complaint did not raise any issue of judicial misconduct on the part of the judge. Rather, the complainant objected to the way his former lawyer had handled his case. As a result, it was deemed that this particular complaint did not warrant any further consideration. As a result, the complainant's allegations were dismissed and he was informed accordingly.

COMPLAINT 9

A complainant wrote to the Council alleging that the judge hearing her divorce case was biased against her and in conflict of interest because of an alleged relationship with a family member of the opposing party. She asked that the Council intervene to have a different judge assigned to her case.

After a careful review of the complaint, it was determined that the allegation of bias on the part of the judge was unsubstantiated, since the complainant provided no concrete information in support of her allegation. The complainant's personal opinion or disagreement with certain orders made by the judge are not evidence of bias. The Supreme Court of Canada, in the matter of *Wewaykum Indian Band v. Canada*, stated that impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. It is the key to our judicial process and must be presumed.

As for the complainant's allegation of a relationship and ongoing communication between the judge and a family member of the opposing party, the Council found that it did not warrant further consideration, since the allegation was vague and based on simple hearsay or personal belief.

With respect to the complainant's request that her case be assigned to another judge, the Council has no authority in administrative matters relating to courts, nor does it have any authority in the assignment of judges to cases or in matters of recusal. Only the judge hearing a case may decide, on a properly presented motion, whether he or she should recuse himself or herself.

Since none of the allegations raised any issue of judicial misconduct, the complainant's allegations were dismissed and she was informed that her complaint did not warrant further consideration.

Abuse of process

There has been an increase in the number of files deemed by the Executive Director to be an abuse of the complaints process or “clearly irrational,” pursuant to the *Complaints Procedures*. In this reporting period (to 21 March 2013), 34 such letters were sent as compared to 28 in 2011-12, 8 in 2010-11 and 9 in 2009-10.

EXAMPLE

In addition to placing numerous telephone calls to Council, an individual wrote to Council in 2003, 2004, 2005, 2010, 2011 and 2012 regarding his concerns about a disputed land ownership matter. Common to all of these letters was his vague allegations of fraud and conspiracy on the part of various lawyers and judges. In responding we reminded the writer of our numerous previous attempts to explain to him the mandate of Council noting that Council is not a court and cannot intervene in the judicial process or review court decisions and orders. Along with his letter, this individual also enclosed numerous bound documents consisting of Applications for Leave to Appeal and various other Notice of Motions, Factum and transcripts. It was unclear what he wanted Council to do with these documents. In light of our history of exchanges, Council’s numerous attempts to clarify our mandate and the writer’s continual submission of court documents without any credible or clear complaint, we advised the individual that his correspondence constituted an abuse of the complaints process and that we would be taken no action.

Other files

In addition to complaint files reviewed by a member of the Judicial Conduct Committee in accordance with the *Complaints Procedures*, there has also been a marked increase, in recent years, in the number of other conduct-related correspondence. As of 21 March 2013, 233 letters were sent to individuals who were seeking clarity on Council's mandate or who were expressing dissatisfaction with a judge's decisions or who were complaining about the conduct of an official not within Council's jurisdiction (ie. provincial judge, master, lawyer). This is an increase from 163 such letters in 2011-12; 114 such letters in 2010-11 and 83 such letters in 2009-10.

These "other files" sometimes become a complaint file; however, in the main, the resources expended in the Council Office to address the concerns of correspondents is more efficient than referring the matter to a member of the Judicial Conduct Committee as a formal complaint. This approach fosters better public education and generally shortens response time.

EXAMPLES

A woman wrote to Council to express her dissatisfaction with the judge's decision to not adjourn her court matter, as well as her frustration with the judge's ruling. She also asked to have the judge's decision cancelled. She was advised that Council is not a court and cannot intervene in court matters, attempt to change a judge's decision nor does it have the power to overturn a decision or request a new trial. The writer was informed that if she wished to challenge the correctness of a judge's decision, the proper recourse is for her to seek an appeal to a higher court.

Another writer indicated that she was "outraged and frustrated that judges have the authority to make life changing decisions." In responding, we indicated that one of the key responsibilities and duties of judges is to make decisions about the issues brought before the Court. In doing so, they consider all factors before coming to a conclusion. The writer also raised vague issues of bias. She was advised that a person alleges a judge is biased, that person must be in a position to demonstrate the real or apparent lack of impartiality of the judge. This requires credible evidence and cannot rest on a mere allegation. Further, bias is generally a legal issue, not one of conduct, and if a person suspects bias, they may raise these concerns with the court or by way of appeal.

Another writer expressed her concerns that the judge sided with her opposing party because of her own lawyer's negligence. In our response, we put forth that much of the writer's displeasure appeared to be with her former lawyer - not so much the judge. We responded that while we could not provide her with any advice in this regard, complaints about the conduct of lawyers are best directed to the appropriate Law Society in the province or territory in which that lawyer practices.

Litigation

Some matters become the subject of litigation or complaints to other bodies about the CJC. In 2012-13, Council has had to respond to certain matters before the Federal Court of Appeal; the Federal Court; some Superior courts; the Canadian Human Rights Tribunal (and other human rights bodies); the Barreau du Québec; and the Law Society of Upper Canada. Some matters are very complex and may require that the Council engage the assistance of skilled counsel to help explain the way Council undertakes its review of complaints. Other matters are more in the form of nuisance actions by vexatious litigants. In all such cases, Council takes the opportunity to clearly lay out its statutory obligations as set out in the *Judges Act*.

Media interest

A few complaints were the subject of media interest or reports. In these instances, Council attempts to communicate clearly the Complaints process and/or the result of the review into the judge's conduct and to issue press releases, where warranted or necessary.

EXAMPLE

Given the publicity surrounding two particular complaints, press releases were issued:

- *Decision made in a complaint against the Honourable David Near*
- *The Canadian Judicial Council to review the conduct of the Honourable Michel Girouard*

Financial statement

Expenditures by standard object 2012/13

Standard object	Original budget	Revised budget	Expenditures	Commitments	Free balance	Projected forecast	Projected free balance
Personnel	\$ 1,296,571	\$ 1,340,346	\$ 1,286,649	\$ -	\$ 53,697	\$ -	\$ 53,697
Transportation & Communication	50,000	111,000	94,816	-	16,184	-	16,184
Information	10,000	18,000	13,887	-	4,113	-	4,113
Prof. & Spec. Services	271,445	179,622	128,945	-	50,677	-	50,677
Rentals	10,000	10,000	7,263	-	2,737	-	2,737
Purchased Repair and Upkeep	5,000	18,500	19,006	-	-506	-	-506
Utility, Materials & Supplies	40,000	16,000	15,366	-	634	-	634
Const. Acquis. Mach. & Equip	20,000	90,500	91,668	-	-1,168	-	-1,168
Other Subsidies & Payments	-	-	-	-	-	-	-
Other Subsidies & Payments	-	-	-	-	-	-	-
Frozen	-	-	-	-	-	-	-
Total: Expenditures	\$ 1,703,016	\$ 1,783,968	\$ 1,657,597	\$ -	\$ 126,368	\$ -	\$ 126,368

Contact us

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