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Judicial Conduct: A Reference Guide for Chief Justices

Prepared by the Judicial Conduct Committee

Revised xx

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I. INTRODUCTION

> The Council ... will have the continuing responsibility of ensuring the self-disciplining of the judiciary by holding inquiries and investigations under the *Judges Act*. It is intended that the Council will provide a forum where complaints or grievances in respect of the federally appointed judiciary can be considered and dealt with effectively and in accordance with our well established tradition of judicial independence.
>
> *Department of Justice, News Release, "Judges Act Bill" (28 April 1971)*

The Canadian Judicial Council came into being in 1971 under the auspices of the *Judges Act*. The Council's mandate is to foster greater efficiency and uniformity in the administration of justice and to improve the quality of superior courts by providing a national forum for chief justices and by formalizing the use of educational programs. However, as related by Professor Friedland in his book *A Place Apart: Judicial Independence and Accountability in Canada*, in the view of many who played a role in the creation of the Council, judicial conduct was the main reason.

Another important incentive in adopting the *Judges Act* may have been the awkwardness and uncertainty of the proceeding in the review of the allegations of misconduct concerning Justice Landreville, which was done pursuant to the *Inquiries Act*. Thus, while the creation of the Council was designed to improve the quality of judicial services, it was also created to play a fundamental role in the investigation of complaints made regarding the conduct of federally-appointed judges

The complaint process was changed on 29 July 2015 with the coming into force of new *By-Laws* (2015) and new *Review Procedures*. During the twenty-year period 1999-2000 to 2018-2019, the Council reviewed 4040 complaints, a yearly average of 202 . It is important to note however, that the number of new files created has almost doubled since the coming into force of the new *Review Procedures*. The table at Appendix A to this guide provides an overview of this caseload.

This guide is not intended to be definitive about all judicial conduct matters. However, it does provide an overall framework that should be useful to all Council members when addressing a complaint against a member of their Court.

Any requests for information about this guide, or suggestions for changes, should be directed to the Executive Director, for consideration by the Judicial Conduct Committee of Council.

II. COUNCIL'S JURISDICTION

1. Constitutional and Statutory Framework

The source of CJC jurisdiction with respect to its role as overseer of the conduct of judges and judicial discipline is not the *Judges Act* but rather section 99 of the *Constitution Act, 1867*. Section 99 establishes that "The 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."

Sections 60(2) and 63(2) of the *Judges Act* give Council the authority to "investigate any complaint or allegation made in respect of a judge of a superior court." Sections 63 to 66 of the *Act* provide a framework regarding the procedures Council must follow to conduct a formal inquiry and to report its conclusions and recommendations to the Minister of Justice. The *Act* specifies that this framework does not affect "any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge." The provisions of the *Act* regarding judicial conduct and possible removal are found at Appendix B to this guide.

Section 7 of the *Operating Procedures of the Canadian Judicial Council* establishes the Judicial Conduct Committee and determines how its members are appointed. The members of the Judicial Conduct Committee are responsible to oversee the consideration of complaints.

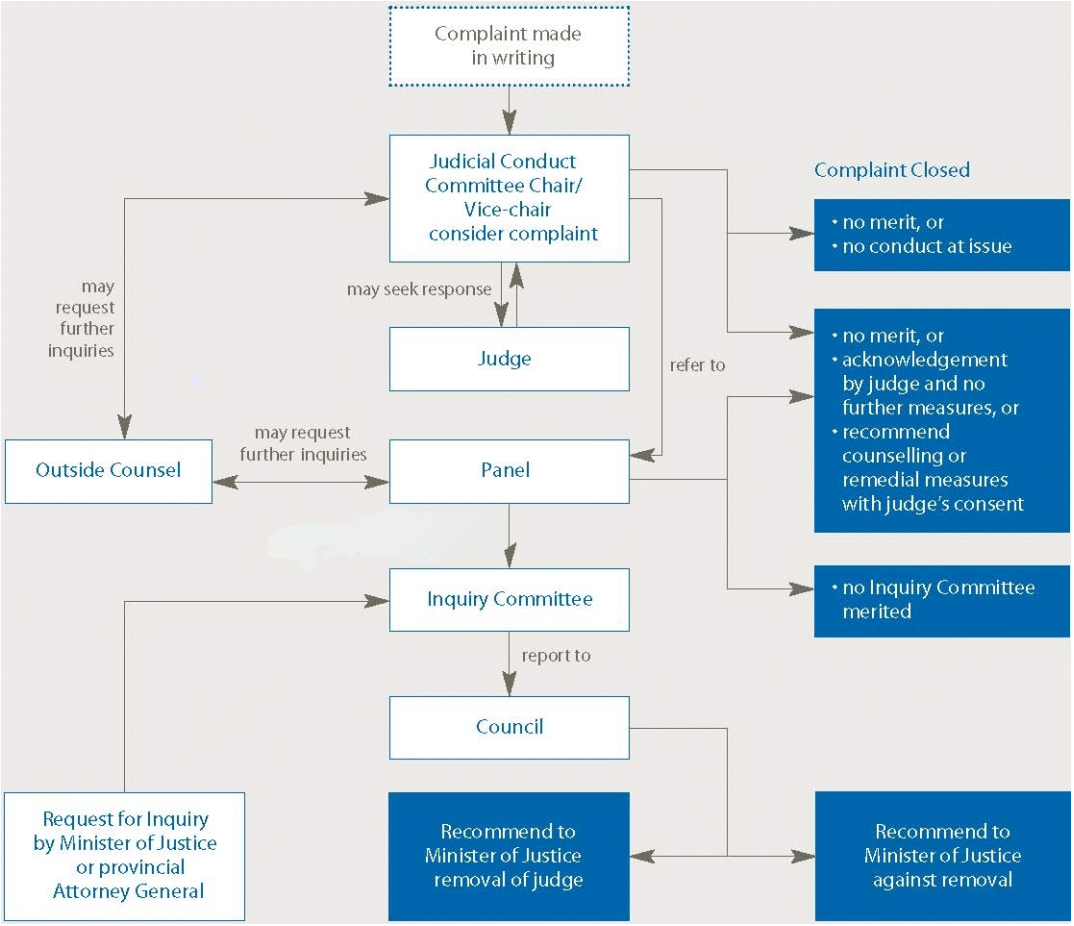
On 29 July 2015, Council has adopted the *Review Procedures* to allow the effective consideration and screening of complaints against judges, with a focus on informal, remedial resolution of complaints. They specify the responsibilities of the Chairperson and other members of the Judicial Conduct Committee, and those of the Executive Director. They set out the manner in which complaints are reviewed and the procedures for assessing complaints. This includes the possibility of formal remedial measures in appropriate cases and the referral of a matter to a Panel. The *Review Procedures* are found at Appendix C to this guide.

Section 61(3)(*c*) of the *Judges Act* authorizes the Council to make by-laws regarding the conduct of formal inquiries. Under this provision, Council has enacted, in 2015, the *Inquiries and Investigations By-Laws, 2015* that define the process relating to an Inquiry Committee. These *By-laws* are found at Appendix D.

2. ***Overview of the Judicial Conduct Process***

The following flow chart provides an overview of the Council's Complaints Process, from initial intake to a possible formal inquiry.

COMPLAINTS PROCESS FLOW CHART



Quite independently of the Council's fact-finding, conclusion and recommendation, Parliament is the only one who decides on the issue of possible removal. This point was made in the report of the Inquiry Committee in the matter of Justice Gratton.

The Supreme Court of Canada has commented on the function of Judicial Councils in the *Ruffo* and *Therrien* matters. These decisions recognized that the complaints process does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth. While a complaint may set the process in motion, its effect is not to initiate litigation between two parties. The Council's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry. The Council,

The complaints process does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.

through its own review, including obtaining comments from the judge who is the subject of the complaint when warranted, assesses the situation in order to determine the most appropriate resolution.

Ultimately, the outcome of a complaint may be to recommend to Parliament (through the Minister of Justice) that the judge be removed from office. However, as might be expected, this is a rare occurrence. Almost all complaints are resolved at a much earlier stage.

There are essentially four stages at which complaints will receive consideration by the Council prior to any recommendation to Parliament.

The review of complaints can be completed in any one of four stages. The first involves an early screening by the Executive Director as to determine whether the matter warrants consideration. The second relates to a resolution by the Judicial Conduct Committee, with or without the judge's comment. The third is consideration by a Panel and the fourth, a formal Inquiry Committee.

The Federal Court of Appeal, in the *Cosgrove* matter, commented that the informal screening procedure is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint, without resorting to a public Inquiry Committee. With the exception of matters initiated by request of the Minister of Justice or a provincial Attorney General pursuant to s. 63(1) of the *Judges Act*, a complaint may progress through each of the first three stages, and be resolved in accordance with its merits, at any one of those stages.

III. RECEIPT AND ANALYSIS OF COMPLAINTS

1. Early Screening of Complaints

All complaints received at the Council Office are reviewed by an analyst to ascertain whether it warrants consideration as per of the *Review Procedures*. Matters that do not warrant consideration are, as per the *Review Procedures* , complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process, complaints that do not involve conduct and, any other complaints that are not in the public interest and the due administration of justice allegations. These complainants are informed that their complaint will not be entertained (in many of those instances, repeated complaints have been previously made).

All other matters will be considered by a member of the Judicial Conduct Committee. This may include matters which pre-date the judge's appointment to the Bench. As observed in *Therrien*, past conduct can inform a person's present fitness to carry out judicial functions and can be examined in order to preserve the integrity of the judiciary as a whole.

Once a file is opened, every effort is made to proceed expeditiously. For that reason, the internal administration process and the initial legal analysis for most complaints is completed within 90 days. Where comments are sought from the judge, a request is made that a response be provided within 30 days.

The great majority of complaints are concluded within 3 months, with 95% of all files completed within 6 months. In order to achieve these targets, a judge and their Chief Justice are invited to submit comments **within 30 days** of being notified of a complaint.

2. Analysis of Complaints

Once a complaint file is opened, it is analysed by an analyst. The analysis is intended to provide a comprehensive overview of the matter, and to present recommendations to the Executive Director first as to whether the matter should be referred to a member of the Judicial Conduct Committee who reviews the complaint. The analysis takes into account a

number of factors, but is primarily informed by the provisions of the *Judges Act* and the grounds which could lead to removal. These are specified in s. 65 (2) of the *Judges Act*. They are:

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

In December 2017, the Federal Court recognized, in *Best v. A.G. of Canada*, 2017 FC 1145, that because of the "highly permissive and discretionary language in the Judges Act, it was (and is) clearly open to the CJC to delegate the administrative responsibility for the early screening of complaints to its Executive Director. As in Gill, the CJC's authority under section 62 of the *Judges Act* to engage the services of such persons as it deems necessary for carrying out its objects and duties should be given the widest possible interpretation."

The vast majority of complaints concern conduct while in the execution of judicial functions. A small number of complaints is about conduct while off the Bench or prior to the appointment to a judicial function. Less frequently the circumstances of age or infirmity may lead to complaints.

When reviewing conduct, the test generally accepted for removal, as originally articulated in the *Marshall* inquiry and accepted by the Supreme Court in *Moreau-Bérubé*, is:

> Whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

In this context, a judge's conduct can become the subject of scrutiny for any number of reasons. While the conduct in question must relate to the stated grounds for removal, all conduct which appears to fall short of the high standard expected of our judiciary will be considered. This exacting standard is captured in part in this commentary from *The Canadian Legal System* by Professor G. Gall:

> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society, which must fulfill this standard of public expectation, and at the same time, accept constraints.

In the *Cosgrove* matter, Council began its report to the Minister with the following words:

> Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal

> and collective duty to maintain this confidence by upholding the highest standards of conduct.

In its Report to the Minister in the *Matlow* matter, the Council addressed the relevancy of *Ethical Principles for Judges* in assessing a judge's conduct:

> [99] In summary, conduct by a judge which jeopardizes the impartiality or integrity of a judge in the minds of right-thinking members of the public may properly be the subject of judicial conduct proceedings. As the *Ethical Principles* state at page 14, judges have an obligation due to their unique constitutional role in society to "conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment." While the *Ethical Principles* are not absolutes and while a breach will not automatically lead to an expression of concern by the CJC, much less a recommendation for removal from the Bench, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judge. Therefore, the fact that challenged conduct is inconsistent with or in breach of the *Ethical Principles* constitutes a weighty factor in determining whether a judge has met the objective standard of impartiality and integrity required of a judge and in determining whether the challenged conduct meets the objective standard for removal from the Bench. (page 33)

3. Publicity

As a general rule, Council only releases generic and aggregate information about complaints. Details about the identity of the complainant or the judge are usually not made public. The Council has published, in its annual reports and on its website, information about the number of complaints received, illustrations about the nature of complaints and the manner in which the files were finalized, while omitting any personal information. There are, however, exceptions to this general rule.

Some complaints draw media attention and public reaction; indeed, some complainants make their complaint public. Depending on circumstances, the Council may issue a press release about such cases. Whether or not information is made public is governed by the public interest. At all times, Council acts in a manner that seeks to maintain public confidence in the judiciary and in the complaints process.

> In some cases, a complaint and its disposition may draw media attention and public reaction, even in its early stages. In such circumstances, the Council may publicly release information and details regarding the review and eventual disposition of the complaint.

The following is an example of publicity surrounding a complaint:

The case concerned comments by a judge to a victim during a hearing in a sexual assault case, while he was sitting as a provincial judge. A news article in the Globe and Mail released some of the comments made by the judge. A press release was issued by the Council advising that it was reviewing the conduct of the judge.

In some instances where the matter is public, questions may be raised about whether or not a judge should continue to hear cases while subject to a complaint. This was the case in the first matter referred to above concerning comments by a judge during the sentencing in a sexual assault case. In that case, it was determined by the Chief Justice in question that the judge would not hear cases involving sexual charges, pending the determination of the complaint. This issue is discussed further under Part VII below.

An inquiry or investigation under section 63 of the *Judges Act* may be held in public or in private, unless the Minister requires that it be held in public. In the past, inquiries have been held in public. Hearings are therefore open to the media and the public. In recent years, information regarding an Inquiry Committee, including - transcripts of hearings - have been made available on the Council website.

IV. SCREENING OF COMPLAINTS

Allegations made against judges vary greatly in their nature and seriousness. Council responds to these allegations with an appropriate degree of flexibility. Many complaints do not address judicial conduct but seek to challenge the decisions taken. In many cases, Council's role is one of public education about the duties and responsibilities of judges, including for example, the difference between the exercise of judicial discretion as part of the judge's determination of a matter and judicial conduct.

1. Complaints Not Requiring Comments by the Judge

Because of the inquisitorial nature of the process, the complainant is not a party to the process, as such, although the Chairperson may sometimes decide to go back to the complainant for further information. Generally, after filing the initial complaint, the complainant takes no further part in the process, although they are informed of the eventual disposition of the complaint.

All complaints referred by the Executive Director in accordance with s. 6 of the *Review Procedures* are considered by the Chairperson or one of the Vice-Chairpersons of the Judicial Conduct Committee (referred to as the Chairperson). Complaints are considered by a Chairperson from a different province than that of the judge who is subject of the complaint.

In considering a complaint, the Chairperson first examines the complaint, the analysis and related material and decides whether there is enough information to consider it on its own. It often is the case that a file can be closed at this stage. If not, comments from the judge may be requested. If the file is closed at this stage, a response is sent to the complainant, explaining the Council's mandate and addressing any specific concerns raised in the complaint.

About 60% of all complaints are closed at the initial stage of review, without asking a judge to provide comments, usually because they are not about conduct.

About 60% of all complaints are closed at this stage. This is because analysis and review show that the allegations relate to judicial decisions rather than conduct, do not raise an issue of conduct or do not merit further consideration. When a file is closed at this stage, the judge and their Chief Justice are provided with a copy of the complaint and the response to the complainant.

Although judges are not routinely advised, at the time of receipt, that a complaint has been made against them (they are always advised at the time of disposition of the complaint pursuant to s.12.2 of the *Review Procedures*). As will be outlined below (see Part VII, Section 2), section 11 of the *Review Procedures* provides that, where it appears the judge

is still seized with the matter, any communication with the judge takes place through the judge's Chief Justice. This ensures there is no perception of involvement, by the Council, on issues that are pending before the Court.

2. Complaints Requiring Comments

Many complaints require comments from the judge because context is required to deal with the allegations. In such cases, the judge is provided with the complaint and asked to comment.

Asking a judge for comments does not mean that the Chairperson believes there is substance to the complaint, but rather that it is not possible, on the basis of the information available, to conduct a complete review. Transcripts or other recording of the proceedings, pertaining to the complaint, are often of particular importance, and if available, the judge is requested to provide them with the response.

Once comments have been received from the judge and their Chief Justice, a further analysis is done and the Chairperson again considers the complaint. Section 8.2 of the *Review Procedures* outlines that the Chairperson may dismiss the matter if the Chairperson concludes that no further measures need to be taken in relation to it. The matter may also become the subject of "further enquiries," it may be hold in abeyance pending the pursuit of remedial measures, or referred to a Panel as discussed below.

> Asking a judge for comment does not mean that the Chairperson believes there is substance to the complaint, but that it is not possible, upon the basis of the information available, to fully review the matter.

Section 8.4 of the *Review Procedures* specifies that, in consultation with the judge's Chief Justice and with the consent of the judge, the Chairperson may recommend counselling or other remedial measures (see section 4 below). Once the matter has been appropriately addressed, a final decision is made about the complaint.

> Whether a judge acknowledges that some of the issues that led to a complaint should be addressed, and that there is room for improvement, is a key consideration in deciding on next steps in a complaint.

Approximately half of all complaints received result in a request for comment, of which 95% are closed following the responses from the judge and Chief Justice. In instances where the judge's conduct has been less than ideal, an acknowledgment that conduct has been inappropriate, signifying that the judge appreciates and will address the issues that led to the complaint, is a key factor in the assessment of whether further measures may be required.

When requesting comments, the following sentence is sometimes included in the letter to the judge:

> Allow me to bring to your attention that, in some cases, the Council finds it very helpful to provide to the complainant, in whole or in part, the judge's response to the complaint.

The judge's response is sometimes the most helpful response that can be given to a complainant: it can provide the context and details that explain a specific situation. Sharing the judge's response also demonstrates the thoroughness of the review of the complaint, which enhances public confidence in the process.

The Chairperson decides whether or not the judge's response is shared with the complainant. Obviously, there are instances where sharing the judge's response is not appropriate. In particular, a judge may wish to give private or confidential information that should not be shared with the complainant. One example is where a judge provides medical information relevant to the review of the complaint. The response from the judge will normally not be shared with the complainant where the judge specifically requests confidentiality. However, should the matter proceed to the stage of an Inquiry Committee, it is possible (although unlikely) that information held in confidence could be revealed by order of the Inquiry Committee.

A judge may provide comments and ask that they be kept confidential (for example in relation to medical issues). In these cases, the comments would normally not be shared with the complainant.

3. Further Inquiries

The *Review Procedures*, at section 9.1, provide that the Chairperson may instruct the Executive Director to retain an investigator to gather further information about a matter and prepare a report. The investigator is to gather relevant information and may conduct confidential interviews if necessary and, may provide assurances of confidentiality to those who provide information. In all cases, the judge will be given an opportunity to participate in this process, as outlined in section 9.3 of the *Review Procedures*:

> Before finalizing the report, the investigator must provide the judge with an opportunity to comment on the information obtained by the investigator. The judge's comments must be included in the investigator's report.

The Executive Director must provide the investigator's report to the Chairperson and to the judge.

4. Remedial Measures

Some complaints bring to light a situation that suggests the judge would benefit from training, coaching, counselling, or some other intervention. In such cases, consultation with the Chief Justice takes place to explore what measures might be suggested to the judge. With the latter's consent, a file may be put in abeyance while such measures are pursued. For example, a judge who had developed an alcohol dependency affecting their work might undertake to enroll in an addiction treatment program. Or a judge subject to impatient outbursts in the courtroom might undertake to attend a seminar in communication skills.

Once these remedial measures are finalized, the file is re-examined by the Chairperson to determine if the complaint should be closed or if other steps are necessary.

5. Expression of Concern

In instances where the judge's conduct is less than ideal, a file can be closed where the judge acknowledges that their conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken. In such cases, the Chairperson may provide the judge with a written assessment of their conduct and express concern. This is, in essence, a constructive message to the judge about a shortcoming in their conduct.

An "expression of concern" is usually a formal indication to the judge about an aspect of their conduct that should not be.

An expression of concern by the Chairperson will not usually go beyond what the judge has acknowledged to be improper conduct. In all cases, the comments of the Chairperson can be considered helpful feedback to the judge and their Chief Justice.

In responding to the complainant, they may be informed that the Chairperson has expressed concern to the judge. Generally, however, an expression of concern is a private communication to the judge.

6. Referring a Matter to a Panel

The Chairperson may refer the matter to a Panel if the Chairperson determines that the

matter may be serious enough to warrant the removal of a judge.

The types of issues that have most often led to the constitution of a Panel are:

- racial, cultural or gender insensitivity
- inappropriate language
- discourteous or intemperate behaviour
- *ex parte* communications with lawyers or parties
- apparent conflict of interest or bias
- delay in rendering decisions
- physical or mental fitness

7. Request for reconsideration

In deciding whether to reconsider the dismissal of a complaint, the Chairperson considers all the relevant circumstances. These may include:

1. whether new information has become available since the decision to dismiss the complaint;
2. whether the decision-maker did not fully consider an issue;
3. whether reconsideration is necessary for the Council to complete its task of investigating the complaint or allegation(s);
4. whether reconsideration would prejudice the judge's ability to fairly respond to the complaint; and
5. whether the request for reconsideration is frivolous, vexatious, or would result in an abuse of process.

A copy of the Guidelines adopted in September 2018 is at Appendix D.

V. THE PANEL

The Panel is composed of five persons of which three are members of the Council, one is a

puisne judge and one is a person who is neither a judge nor a member of the bar of a province. They are appointed by the senior member of the Conduct Committee who reviewed the complaint. All members of the Council appointed are from a different Court than that of the judge who is the subject of the complaint.

Approximately three Panels a year may typically be constituted or about 2 per cent of all complaints.

A Panel does not hear evidence and consequently does not make findings of fact. It may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge from office.

In carrying out their role and determining whether to refer a matter to an Inquiry Committee, Panels have generally applied the standard originally set out in the *Report of the Inquiry Committee in relation to the Marshall Reference* referred to above:

> Is the conduct alleged 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.

In its consideration of a complaint, a Panel may hold a file in abeyance while remedial measures are pursued, and may also order further inquiries by an outside counsel, as described above. In this regard, the Panel has the same powers as the Chairperson of the Judicial Conduct Committee who reviews the complaint at an earlier stage.

The Panel, in addition to the authority vested in the Chairperson of the Conduct Committee, can formally express concern about a judge's conduct even where the judge does **not** make any acknowledgement of inappropriate behaviour.

Where a Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Chairperson or Vice-Chairperson of the Judicial Conduct Committee for them to make a decision on the most appropriate way to resolve it

In the vast majority of cases, Panels have not recommended that an Inquiry Committee be constituted but rather closed the file, either because the allegations were unfounded, or because the matter was not serious enough to warrant removal. In the latter case, Panels have sometimes expressed concern about the judge's conduct.

Panels, in the past, have expressed concern in relation to inappropriate judicial speech or comments, using the following descriptors: improper, unacceptable, patronizing, demeaning, disparaging, "crossing the boundary of appropriate judicial speech," insensitive, gratuitous, insulting, disrespectful and, in one case, "disgraceful." Panels have also characterized some judicial conduct in the following terms: "improper and unacceptable,"

"of some concern," "regrettable," inappropriate" and "departing from accepted standards."

Concern has also been expressed in some cases regarding cultural or gender insensitivity or the unnecessary disparagement of lawyers, witnesses and litigants.

Where a judge's conduct is found wanting, and a decision must be made on whether or not to recommend an Inquiry Committee, a key factor considered by Panels is of course the judge's response. There is less likelihood of further measures where the judge makes a prompt and unreserved acknowledgement of error and apology and where the judge undertakes to avoid similar conduct in the future.

Panels do not necessarily result in an expression of concern or in a referral to an Inquiry Committee. In many instances, the Panel is able to conclude the matter on the basis that the complaint does not warrant further consideration.

Panels have also considered absence of bad faith as a key factor. Other relevant factors have included: an expression of confidence on the part of the judge's Chief Justice; a long and distinguished career; the absence of any similar conduct in the past.

As will be outlined below, **the role of the Chief Justice in this process is of great importance** in providing the Panel with feedback about the judge's overall abilities and fitness.

In considering whether an Inquiry Committee is warranted, the Panel will take into account any submission the judge may wish to make on whether there should be an inquiry. If it decides that an Inquiry Committee is to be constituted, the Panel must prepare written reasons and a statement of issues.

The judge subject to the complaint is entitled to make written submissions to the Panel as to whether there should or should not be a public inquiry under subsection 63(2) of the *Act*.

VI. THE INQUIRY COMMITTEE

Section 63(3) of the *Judges Act* provides that the Inquiry Committee is composed of one or more members of Council, together with such other members as the Minister of Justice may designate. These must be members of the bar of a province of at least ten years standing. Typically, Inquiry Committees have been comprised of three members of Council and two members designated by the Minister. The *By-laws* require that the total number of members be an odd number, with the majority being Council members.

The Inquiry Committee constitutes the formal part of the complaint process.

1. Inquiry Following a Panel

A Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of a judge. Those members of Council involved in the previous consideration of the complaint, including the Chairperson who initially reviewed the matter and the Panel members, do not participate in further consideration of the complaint, as per s. 3(4) of the *By-Laws*.

2. Inquiry Requested by Minister or Provincial Attorney General

At the request of the Minister of Justice or of the Attorney General of a province, under section 63(1) of the *Judges Act*, an Inquiry Committee shall also be constituted to determine whether a judge of a superior court should be removed from office for any of the reasons set out in paragraph 63(2) of the *Judges Act*. This takes place without first undertaking the informal investigation process provided for in the *Review Procedures*.

3. Inquiries – Process and Outcomes

It is useful to briefly outline the Inquiry Committee process as established by the *Judges Act* and the Council *By-laws*.

The Inquiry Committee is vested with the powers of a superior court. It may hold its hearings in public or private unless the Minister of Justice requires that they be public. To date, Inquiry Committee hearings have been public. Notice to the judge subject to inquiry is required, and the judge is entitled to be heard and permitted to adduce evidence and cross-examine witnesses.

The *By-laws* provide that the Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry.

The Inquiry Committee submit a report to the Council setting out its findings and its

conclusions about whether to recommend the removal of the judge from office. The Inquiry Committee report is submitted to Council and then, to the judge, who may, within 30 days, make a written submission to Council regarding the Report. Council ultimately provides its conclusions to the Minister of Justice.

The respective roles of the Inquiry Committee and that of Council in its review of the Inquiry Committee's report are outlined in the *Handbook of Practive and Procedure of the CJC Inquiry Committees* and found at Appendix D-2.

There have been to date nine occasions upon which an Inquiry Committee has been constituted. The most recent one, for the first time, involves a Council member. Five have been at the request of the Minister or an Attorney General. The tests generally applied by those Inquiry Committees have been based upon that articulated originally by the *Marshall* Inquiry Committee, outlined above.

The outcome of past Inquiries have varied, with some judges resigning at various stages of the proceedings. Council has concluded that the matter was not serious enough to warrant removal in some cases, (including: *Girouard 2015, Matlow, Flynn* and *Boilard*) and that it warranted a recommendation of removal in others (including *Camp*, *Girouard 2017, Bienvenue and Cosgrove*).

In *Cosgrove*, the Council summed up its duties under s. 65(2) of the *Judges Act*, as follows:

> In discharging our duties pursuant to subsection 65(2) of the *Judges Act*, we must follow a two-stage process, as described in the *Majority Reasons of the Canadian Judicial Council In the matter of an Inquiry into the Conduct of the Honourable P. Theodore Matlow,* 3 December 2008 (see in particular, paragraph 166). First, we must decide whether or not the judge is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the *Judges Act*. If this question is answered in the affirmative, we must then proceed to the second stage and determine if a recommendation for removal is warranted.

VII. THE CHIEF JUSTICE

Beyond assigning cases, Chief Justices have a responsibility to generally oversee the judges in their Court. Legislation in some provinces specifically provides for the "oversight" of judges by the Chief. See, for example, section 22 of the *Courts of Justice Act* of Québec.

1. Comments from the Chief Justice

Chief Justices are in an excellent position to explain matters related to a complaint. They can provide context, outline principles or processes applicable in their Court, and give key information about any systemic or personal issues a judge may be facing.

Any extenuating circumstances, facts surrounding the case, or similar information that the complainant did not provide, are helpful so that the Chairperson will have a complete picture when evaluating the matter.

Chief Justices also benefit from seeing any possible pattern of behaviour with judges of their Court, which may in some cases lead a Chief to arrange for education or training programs in a given subject.

Chief Justices have a dual duty in providing comments: assisting the judge in the resolution of the matter, while ensuring, as a member of the Canadian Judicial Council, continued public confidence in the complaints process.

Certain specific situations may also require the Chief Justice's active involvement. For example, in situations such as Family law settlement conferences, transcripts when available are often intended for the sole benefit of the judge. While litigants (and complainants) may not be entitled to access such a transcript, a Chief Justice might encourage the judge to provide the information to the Chairperson, to allow a fulsome review of the matter.

Chief Justices are not, as such, participants in the decision-making of the complaint; however, they are an invaluable resource to both the judge and to the Chairperson reviewing the complaint. The Chief Justice can play an essential role of consultation when the remedial, problem-solving approaches are being considered.

2. Section 11 of the Review Procedures

When a judge appears to be seized with the matter giving rise to a complaint, any communication with the judge is deferred. A letter is sent to the judge's Chief Justice requesting that the complaint be brought to the judge's attention at the appropriate time. Obviously this approach relies upon the discretion of the Chief Justice to balance the

integrity of the court's proceedings with the progress of the complaint process.

3. Assigning Cases to a Judge who is the Subject of a Complaint

One of the most difficult questions facing a Chief Justice in respect of a complaint against a judge is whether or not the judge should continue to hear cases while the complaint is outstanding. This involves a balancing of concerns. In the vast majority of cases, considering that only a very low percentage raise serious concerns, the judge will continue with judicial duties.

Should a judge continue hearing cases? Factors to consider include: notoriety of the complaint; gravity of the allegations; convening of an Inquiry Committee.

In some cases, however, a Chief Justice might consider that it would not be in the public interest to continue assigning cases to a judge who is the subject of a complaint. This could be in the event of a complaint which becomes notorious and the subject of intricate public discussion; where the gravity of the allegations are such that public confidence in the judiciary could be undermined while the review of the complaint is pending; or where an Inquiry Committee has been constituted to review a judge's conduct.

While there are no clear rules to follow in this regard, a Chief Justice will want to think carefully about the factors above. Generally, the more public and serious the allegations against a judge, the more reason for the judge to abstain from hearing cases while the complaint is under review. In considering the situation, a Chief Justice may want to discuss the matter with the judge in question, with experienced members of the Court and with colleagues on the Council. Consideration should of course be given to assigning different duties to a judge, such as case management, pre-trial conferences and administrative matters.

4. Particular Provision Relating to Chief Justices

Finally, Chief Justices should be aware that the processes specified in respect of complaints relating to them are generally the same as those for all judges. The principal exception to this rule, set out in section 10.2 of the *Review Procedures*, specifies that whenever it is proposed to close a file involving a member of Council, the matter must be referred to an outside counsel, who is asked to provide their views on the proposed disposition. When a file is closed, the complainant is notified that this additional step was taken.

5. Media Enquiries

The Executive Director is the Council's spokesperson in matters of judicial conduct. However, there are instances where a Chief Justice is required to address a matter involving a judge of their Court. In such cases, the Chief Justice may wish to consider the following:

- informing the judge in advance of any interview or media intervention;
- avoiding discussing the complaint itself and referring to the Council Office any questions about the Council's judicial conduct process;
- advising the media about the type of duties for which the judge will be responsible while the complaint is under review.

Appendix A

CASELOAD OF COMPLAINTS – (1999-2000 to 2018-2019)

	New files created	Carried over from previous year	Total caseload	Closed	Carried into new year
1999-00	169	36	205	171	34
2000-01	150	34	184	155	29
2001-02	180	29	209	174	35
2002-03	170	35	205	173	32
2003-04	138	32	170	122	45
2004-05	149	45	194	145	49
2005-06	176	49	225	155	70
2006-07	193	70	263	219	44
2007-08	189	44	233	205	28
2008-09	161	28	189	154	35
2009-10	161	35	196	167	29
2010-11	163	29	192	150	42
2011-12	185	42	227	190	37
2012-13	140	37	177	137	40
2013-14	155	40	195	128	67
2014-15	173	67	240	206	34

2015-16	270	34	304	284	20
2016-17	336	20	356	317	39
2017-18	382	39	421	390	31
2018-19	404	31	435	398	37

Appendix E

Case Law and Other References

***Slansky v. Canada (Attorney General)* 2011 FC 1467**
http://decisions.fct-cf.gc.ca/en/2011/2011fc1467/2011fc1467.html

***Cosgrove* v. *Canada (Judicial Council)* 2007 FCA 103**
http://decisions.fca-caf.gc.ca/en/2007/2007fca103/2007fca103.html

***Moreau-Bérubé* v. *New Brunswick (Judicial Council)* [2002] 1 S.C.R. 249**

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1948/index.do?q=Moreau-B%C3%89rub%C3%A9

***Ruffo* v. *Conseil de la magistrature* [1995] 4 S.C.R. 267**
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1321/index.do?q=Ruffo

***Therrien (Re)* [2001] 2 S.C.R. 3**
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1872/index.do?q=Therrien

Donald Best* v.*A.G. of Canada, 2017 FC 1145
https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/303719/index.do?q=%22Donald+Best%22

Other useful material is available on the Council's website: www.cjc.gc.ca, including:

- *Ethical Principles for Judges*
- Pamphlet: *The Conduct of Judges and the Role of the Canadian Judicial Council*
- Reports of the Inquiry Committees and Reports of Council, in the Matlow and Cosgrove matters
- Press releases on judicial conduct matters