Judicial Discipline through the Prism of Public Law Values: A Contextual Analysis of Bill C-9, An Act to Reform the Judges Act

Richard Devlin
*Dalhousie University, Schulich School of Law, richard.devlin@dal.ca*

Sheila Wildeman
*Dalhousie University, Schulich School of Law, sheila.wildeman@dal.ca*

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**Recommended Citation**

Richard Devlin & Sheila Wildeman, "Judicial Discipline through the Prism of Public Law Values: A Contextual Analysis of Bill C-9, An Act to Reform the Judges Act" (2024) 54:3 Advoc Q 253 [forthcoming].

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Judicial Discipline through the Prism of Public Law Values: A Contextual Analysis of Bill C-9, An Act to Reform the Judges Act

Richard Devlin and Sheila Wildeman
Dalhousie University
Schulich School of Law

November 6, 2023
Abstract

Bill C-9 is the first significant legislative reform to the Judges Act in five decades. The goal of the legislation is to enhance public confidence in the administration of justice by modernizing the complaints and discipline regime for federally appointed judges. This essay is a contextual analysis of Bill C-9. The authors begin by outlining a conceptual framework which identifies eight public law goods that can guide an assessment of a complaints and discipline system. They then locate Bill C-9 in a historical context by identifying a crisis of legitimacy that had overtaken the Canadian Judicial Council by the early 2020’s. Having established this context the authors outline seven key strengths of the reform legislation. In a follow up essay entitled, “A Critical Analysis of Bill C-9,” the authors revisit the eight public goods identified in this essay and argue that the legislative reforms are vitiated by five significant weaknesses. The authors conclude that Bill C-9, despite some improvements, reveals a failure of nerve on the part of its proponents and therefore it is unlikely to generate the improved public confidence that is central to the legitimacy of the Canadian judiciary as a democratic institution.
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I Introduction

The federal government has recently passed Bill C-9, An Act to Amend the Judges Act. The purpose of this legislation is to improve the complaint and discipline regime that governs federally appointed judges. There was consensus from all interested parties – politicians, judges, legal organizations, and academics – that changes to the regime are essential. The goal of this article and a forthcoming sequel also to be published in the Advocates Quarterly, is to provide a contextualized and critical assessment of the strengths and weaknesses of this reform legislation. The argument is that while Bill C-9 undoubtedly makes some important improvements, it also fails to adequately address several significant problems that were manifest in the previous system. This is unfortunate, because the last time there was legislative reform of the process was more than 50 years ago, almost two generations. Bill C-9 was thus a once in a lifetime opportunity for Canada, in the words of the Minister of Justice, to establish “a world leading judicial conduct review process.” However, Canada has failed to seize that opportunity because by excessively focusing on the two public goods of independence and efficiency, it has paid insufficient attention to a variety of other public goods, most significantly impartiality, transparency, accountability, public representation, fair participation and responsive justification. In this first article our analysis proceeds in several stages. First, drawing on previous research, we outline a conceptual framework that can help evaluate any proposed complaint and discipline regime for judges. Second, we provide a brief overview of the structure of the former regime and identify some of the major problems that had emerged by the late 2010s. Having set the normative and historical context we then highlight seven significant improvements introduced by Bill C-9. At that point we tentatively conclude that Bill C-9 does fulfill many of eight norms essential for a legitimate complaints and discipline process. But we also assert that these reforms do not go far enough. We develop that argument in a sequel article entitled “A Critical Analysis of Bill C-9.”

II A Conceptual Framework

Contrary to the lamentations of at least one Member of Parliament that consideration of the complaint and discipline system for judges is “pretty dry stuff,” this section argues that it is fundamental to the legitimacy not only of the Canadian justice system, but also Canada’s constitutional democracy. In a previous project, Disciplining Judges: Contemporary Challenges and Controversies, the authors brought together scholars from more than a dozen countries to provide constructively critical assessments of diverse complaint and discipline systems for judges drawn from a variety of jurisdictions.

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2 House of Commons, Standing Committee on Justice and Human Rights, Evidence, 44-1, No 37 (17 November 2022) at 37:2 (Hon David Lametti); See also House of Commons Debates, 41-1, No 90 (16 June 2022) at 6782 (Hon Gary Anandasangaree) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-90/hansard> [https://perma.cc/2XY8-SHBR]; Others have been more nuanced, stating that the Canadian system is “one of the best in the world” (See also Debates of the Senate, 43-2, Vol 152 Iss 49 (15 June 2021) at 1849 (Hon Pierre Dalphond) online: <https://sencanada.ca/en/content/sen/chamber/432/debates/049db_2021-06-15-e> [https://perma.cc/F3VH-DPPH]), or “among the best in the world” House of Commons Debates (16 June 2022) at 6788 (Hon Rhéal Fortin), supra note 2 at 6788 (Hon Rhéal Fortin).

3 Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 37:16 (Hon Tako van Popta).

4 See also Debates of the Senate (15 June 2021), supra note 2 at 1848 (Senator Dalphond); House of Commons Debates (16 June 2022), supra note 2 at 6780 (Hon Gary Anandasangaree).

For the purposes of assessing the Canadian system - past, present, and future - two themes stand out from that project.

First, judicial complaint and discipline processes engage fundamental questions about the relationships among the executive, legislature, and judiciary, and the relationship between government and those governed. As such, the design of such processes is not a merely technocratic or manageralist project; it is a significant act of statecraft. Second, and connectedly, it is a project of institutional design that generates two key questions: “Who guards the guardians?” and “How to guard the guardians?” In response to the “who” question it is important to consider the roles and responsibilities of at least four constituencies – the executive, the legislature, the judiciary and the Canadian public. Yet the “how” question is even more complicated. It requires the identification of core values, or public goods, that we as a society hope to attain through the design of a judicial complaint and discipline system and through the constitutional order more broadly. Immediately, complex questions arise, including “Who or what is ‘Canadian society’?” and “How do we acknowledge and navigate differences at the level of values and interests, domination and subordination, when proposing to address key aspects of constitutional ordering through institutional design?”

At the most general level, the goal of a judicial complaints and discipline system is to “promote public confidence in the administration of justice.”6 As we shall see in Part III, there is good reason to believe that public confidence in the justice system has been waning in Canada for well over a decade – a phenomenon that has many complex social and political roots, including growing recognition that the ongoing fact of the justice system’s participation in disproportionate burdening and exclusion of marginalized groups on gendered, racist, and other discriminatory lines can no longer be factored out when asking the “confidence question.” Bill C-9 aspires to help remedy the public confidence problem. But the public confidence “test” inquires into an outcome; it does not provide any specific guidance on how we get there. In our previous project we identified several particular values, or public goods, that can help those charged with the design and implementation of a complaint and discipline regime for judges to achieve their objective of promoting public confidence.

We identified eight key values as central to this institutional design project, values that include and exceed the fraught couple, independence and accountability, that have tended to capture the spotlight7:

**Independence**  There are several dimensions to be considered: the independence of individual judges, the independence of the judiciary as an institution and the independence of administrative decision-making bodies responsible for safeguarding this value (e.g., a judicial council).

**Impartiality**  The requirement that those involved in legal processes (including the judicial complaints and discipline process) are as free as possible from (conscious/unconscious) individual and institutional bias, to ensure that the interests of all affected parties are fairly considered.

**Transparency**  The requirement that there be openness and candour concerning the purposes, processes, and outcomes of public decision-making.

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6 “Debates of the Senate, 44-1, Vol 153 Iss 8 (7 December 2021) at 190 (Hon Pierre Dalphond) online: <https://sencanada.ca/en/content/sen/chamber/441/debates/008db_2021-12-07-e> [https://perma.cc/V3DX-JX95].

**Accountability** The principle that public powers are exercised in a manner that is responsive to and answerable to the public that is to be served, and in a manner that advances the public interest, without favour reflective of entrenched patterns of domination and subordination.

**Participation** The expectation that all who are affected by the exercise of power are granted a meaningful opportunity to make representations and be heard in the course of public decision-making.

**Representation** The inclusion of a diverse range of perspectives, identities, and voices in the exercise of public power.

**Reasoned Justification** The commitment that those who exercise public power will do so in a manner that is publicly and rationally grounded in factual and legal (including constitutional) foundations responsive to affected public constituencies.

**Efficiency** The expectation that the costs (both financial and temporal) of institutional processes will be proportional to the other values previously identified, and transparent and accountable, specifically regarding the expenditure of public funds.

Undoubtedly, no regime will ever be able to fully realize all of these public goods. Inevitably there will be tensions between and among them. But the benefit of explicitly identifying them is that they can serve as guiding principles, or normative aspirations, to be deliberately and contextually calibrated in the design and implementation of a complaint and discipline system for judges. They can be tools for institutional design purposes, in the hands of state actors committed to promoting public confidence in the administration of justice.

The remainder of the paper will argue that the past system, the current system, and the Bill C-9 system have all failed to adequately calibrate these eight public goods and that as a country, we and our political representatives need to try harder if we want something that is “worthy of Canadians’ confidence and trust.”

**III The Former Regime**

Bill C-9, in both its aspirations and content, can only be fully understood and evaluated if it is located in a larger historical, political, and jurisprudential context. Painting with broad brush strokes, the prior judicial complaints and discipline process can be broken into two periods: the Ancien Regime (pre-confederation to 1971) and the Modern Regime (1971 – 2023). The defining characteristics of the Ancien Regime were its obscurity and informality. Prior to the late 1970s there was very little literature on how the system worked, although we do know that four county court judges were removed between 1915 and 1933. One former provincial Chief Justice indicated that normally complaints would be

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8 *Debates of the Senate* (15 June 2021), supra note 2 at 1848 (Hon Pierre Dalphond). For the purposes of this paper, we have modified 7th value identified in our previous work from “reasoned justification” to “responsive justification” -- this to signal the importance of responsiveness to the situation and arguments of those affected by state action in public law generally and in the judicial discipline process in particular. The centrality of responsive justification as an element of reasonableness was emphasized in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (see paras 73 and 75), and has been brought to further prominence by *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (see, eg, paras 29, 67, 127 & 133).

9 This section draws on Devlin & Wildeman “The Canadian Judicial Council’s [Elusive] Quest for Legitimacy” in Devlin & Wildeman, *supra* note 5 at 4-6.

received and investigated by the Minister of Justice, who would discuss the matter with the relevant chief justice and with other parties having knowledge of the incident.11

The vicissitudes of this system were laid bare by what Chief Justice Jackett of the Federal Court called the “awful fiasco”12 of the Landreville case.13 In this case Justice Léo Landreville, after his appointment to the Supreme Court of Ontario, was accused of corruption during his prior career as a mayor. Three distinct ad hoc processes were established (including a covert committee of the Law Society of Upper Canada, a Royal Commission chaired by Ivan Rand - a retired SCC justice - and a special joint committee of the Senate and House of Commons which made a recommendation for his removal). Justice Landreville chose to resign prior to the execution of the joint committee’s recommendation, but subsequently conducted a lengthy litigation battle concerning the various processes convened. Ultimately the Federal Court concluded Justice Landreville had been denied procedural fairness and, more than a decade later, the federal government compensated Landreville for the loss of his pension benefits.14 The case revealed that few of the public goods we have noted -- independence, impartiality, fair participation, accountability, representation, transparency, reasoned (and so responsive) justification, or even efficiency -- were engaged. The response to this fiasco was reform of the Judges Act15 to create a new, more deliberate and defensible system.

Part II of the Judges Act 1971 provided that the complaint and discipline system would fall under the auspices of the newly established Canadian Judicial Council, whose mandate is to “promote the efficiency and uniformity, and improve the quality of judicial service.”16 The goal was to create a system of self-regulation in which the CJC was given the power to “make inquiries and the investigations of complaints or allegations”17 and to “make by-laws... respecting the conduct of inquiries and investigations.”18 The legislation is conspicuously spartan. Its centrepiece was (and remains, at least prior to passage of Bill C-9) section 63 which gives the CJC the authority to create an Inquiry Committee to investigate a complaint against a judge. Importantly, and likely a response to the Landreville case, s 64 provides the impugned judge with several rights of procedural fairness (e.g., notice, adducing evidence, hearing, and cross-examination). This Inquiry Committee then makes a recommendation to the CJC as to whether a judge should be removed.

The legislation only acknowledges one remedial power, a recommendation for removal, which can only be made if the judge:

has become incapacitated or disabled from the due execution of the office of judge by reasons of a) age or infirmity, b) having been guilty of misconduct, c) having failed in due execution of

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12 Jackett CJ, citied in Martin Friedland, A Place Apart: Judicial Independence and accountability in Canada (Ottawa: Canadian Judicial Council, 1995) at 88.
13 The most comprehensive review of the case is William Kaplan, Bad Judgment: The Case of Mr. Justice Leo A. Landerville (Toronto: University of Toronto Press, 1996).
14 Friedland, supra note 7 at 87.
16 Judges Act, s 60(1).
17 Ibid at s 60 (2)(c).
18 Ibid at s 61 (3)(c).
that office, or d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.19

According to Part II of the 1971 Judges Act, after the CJC receives the report of the Inquiry Committee, s 65 (1) provides that it “shall report its conclusions and submit the record of inquiry or investigation to the Minister [of Justice].” This reflects the constitutional fact that the CJC does not itself have the authority to remove a judge. That power is vested in the Governor General on a joint address to Parliament in accordance with s 99(1) of the Constitution Act, 1867, which also states that superior court judges hold office “during good behaviour.”20

Three points can be emphasized about Part II of the Judges Act. First, in contrast to the Ancien Regime, it puts a high premium on the public goods of judicial independence and fair participation — at least for judges. Second, it contemplates that the vast majority of the process will be conducted by the CJC, and its Inquiry Committee, and that only the final stage, removal, will be the responsibility of the political branches of government. Third, it determines that primary responsibility for design of the complaint and discipline system is to fall on the CJC — a function of a statutory conferral of authority to the CJC under s61(3)(c) to “make by-laws... respecting the conduct of investigations and inquiries.”

This last point is particularly important. For the last 50 years Parliament has left it up to the CJC to design and deploy the complaint and discipline system for judges. In response to the increasing number of complaints over the decades (from less than 10 per year in the early 1970s to more than 600 per year in the 2020s), including several high-profile cases (including Marshall,21 McClung,22 Bienvenue,23

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19 Ibid at s 65(2).
20 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 99, reprinted in RSC 1985, Appendix II, No S.
22 Canadian Judicial Council, “Panel expressed strong disapproval of McClung conduct” (21 May 1999) (on file with the authors).
Boilard, Matlow, Cosgrove, Douglas, and Girouard) bringing intensified public and media scrutiny, the CJC initiated a number of significant reforms to the system. The most significant developments were in 1989/1990, 1991, 1992, 1997-1998, 2002, 2010 and 2015. Consequently, by the 20-teens, the modern regime (established through CJC policies elaborating upon the skeletal structure of the 1971 Act) could be represented schematically, as follows:

Chart 1


29 For a fuller discussion see Devlin & Wildeman, supra note 5.

30 For a more detailed representation see Appendix A.
Despite multiple modifications to the process over time (leading to the process described in the above schematic), by the mid 20-teens to early 2020s it was becoming clear that the system was dysfunctional. Two cases in particular revealed the depth of the problems -- Douglas and Girouard -- but there were others that alerted the public to dysfunctionality at the CJC, including Déziel, Smith, Newbould, and Spiro.  

The Douglas case was initially triggered in 2010 as a result of a complaint by an African Canadian man that he had been sexually harassed by ACJ Douglas and her husband, before Douglas was appointed as a judge. The complaint later became focused primarily on the non-disclosure by Douglas, in the appointment process, of nude photos of her that had been posted by her husband on a website preoccupied with sado-masochistic interracial sex. The Girouard case arose from allegations in 2012 by a police informant that, while a practicing lawyer, Girouard bought $100 000 worth of cocaine and had exchanged legal services for cocaine. Here, the inquiry focused in significant part on the existence of a video allegedly showing Girouard purchasing cocaine 13 days prior to his appointment to the bench.

Some of the most significant questions that arose from these cases included:

- What types of judicial conduct can, or should, the CJC focus on?
- Can, or should, the CJC inquire into the personal or private lives of judges?
- How can the CJC process ensure (and assure the public) that it is not reproducing gender bias, race bias, or other forms of prejudice?

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• Should there be greater lay participation in the process? If so, at what stages and in what forms?
• Is the CJC process, or aspects of it, best conceived/designered as adversarial or inquisitorial?
• What are the rights and roles of complainants?
• What are the roles of Independent Counsel and Inquiry Counsel?
• What evidence is admissible and on what grounds should admissibility be limited?
• When should investigation and inquiry processes and reasons be public, and when and on what basis should confidentiality be maintained?
• How long should the process take? Should there be internal time limitations for moving from one stage to another?
• Are the CJC’s processes subject to judicial review (the seemingly obvious ‘yes’ having been called into question by the CJC in Douglas and again in Girouard)?
• What are the roles and responsibilities of the Attorney General in a judicial review?
• What are the financial costs generated by the system and how should those costs be managed?
• Should judges continue to sit while subject to the process?
• Should judges continue to be paid if they are not sitting as a result of the process?
• Should there be remedies for judicial misconduct beyond a recommendation for removal?
• If ultimately there is a recommendation for removal, from what date is the judge’s pension to be calculated: the date of the filing of the complaint, or only on the date of removal, or some other date?

As these cases unfolded the CJC began to acknowledge that the system that it alone had designed and constructed (in the vast interstices of the Judges Act) was in dire need of reform and that it was beyond its capacity to make the required changes. In March 2014, in the middle of the Douglas proceedings, it issued a “consultative background paper” in order to “identify what works well, what might need to be improved and what might be out of date.”36 In October 2016, after the Douglas case had been resolved (the judge agreed to resign on a full pension and the CJC agreed to discontinue its investigation), but still in the midst of the Girouard proceedings, the CJC published a set of additional proposed reforms “in order to improve efficiency and take into account evolving public expectations.”37 The CJC also explicitly acknowledged that its proposed changes were of such magnitude that they would require “constructive dialogue with the Minister of Justice” and “require some amendments to the Act.”38 Parallel to these developments, in June 2016, the Department of Justice issued a document entitled “Possibilities for Further Reform of the Federal Judicial Discipline Process.”39 In 2018, when Richard Wagner gave his welcome speech as the new Chief Justice of Canada (and therefore as Chair of the CJC), he acknowledged the need to move ahead with reforms of some kind, stating:

38 Ibid at 1.3, 1.4.
[it] has become increasingly evident that our procedures for dealing with serious judicial conduct complaints are outmoded, slow, and opaque. Furthermore, while Canadians expect transparency and accountability, we continue to operate under 1970’s modes of judicial administration. 40

In short, by the late 20-teens and early 2020s there was a sense of déjà vu. The reforms of 1971 were driven in large part by the Landreville crisis. Now 50 years later, once again there was a sense of crisis, a crisis that could no longer be managed by the CJC as maîtres chez nous. Bill C-9 was a legislative response to the CJC’s plea for help. However, in the following sections we will argue that despite some significant improvements, Bill C-9 falls short because it is primarily a reaction to the wishes of the judiciary and does not pay sufficient attention to the needs and “evolving expectations”41 of the Canadian public. Along the way, we will attend to an essential companion bill to Bill C-9: Bill C-3, which received Royal Assent on May 6, 2021. This bill introduced changes to the Judges Act and the Criminal Code aimed at increasing public confidence in the criminal justice system by enhancing judicial continuing education requirements – specifically in relation to sexual assault law and social context education focused on systemic discrimination. Bill C-3 thus serves as an important precedent to and context for the kind of statecraft now required if Canada is to realize its goal of fashioning “a world leading judicial conduct review process.”42

IV The New Regime: Reasons to Be Cheerful43

1. Overview

In March 2019, Prime Minister Trudeau, in his mandate letter to the newly appointed Minister of Justice and Attorney General, David Lametti, indicated that a “top priority” was the development of “proposals for reform of Canada’s system of judicial governance and discipline.”44 By January 2020 “government sources” revealed that “talks are going well between the federal judicial branch and Ottawa over exactly

41 Canadian Judicial Council, “Proposals for Reforms”, supra note 37 at 1.3.
42 Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 37:2 (Hon David Lametti); See also House of Commons Debates (16 June 2022), supra note 2 at 6782 (Hon Gary Anandasangaree); Others have been more nuanced, stating that the Canadian system is “one of the best in the world” (See also Debates of the Senate (15 June 2021), supra note 2 at 1849 (Hon Pierre Dalphond).) or “among the best in the world” (See also House of Commons Debates (16 June 2022), supra note 2 at 6788 (Hon Rhéal Fortin).
43 David Byrne, “Reasons to be cheerful” (2023), online: Reasons to be cheerful <https://reasonstobecheerful.world> [https://perma.cc/4L43-GMFR].
44 Mandate letter from The Right Honourable Justin Trudeau, Prime Minister of Canada to the Minister of Justice and Attorney General of Canada, The Honourable David Lametti (13 December 2019), online (pdf): Government of Canada <https://pm.gc.ca/en/mandate-letters/2019/12/13/archived-minister-justice-and-attorney-general-canada-mandate-letter>; In the mandate letter of December 2021, the Prime minister instructed Minister Lametti to “secure support for the swift passage of reforms to the Judicial conduct process ... to ensure the process is fair, effective and efficient so as to foster greater confidence in the judicial system” (See Mandate letter from The Right Honourable Justin Trudeau, Prime Minister of Canada to the Minister of Justice and Attorney General of Canada, The Honourable David Lametti (16 December 2021) at 1, online (pdf): Government of Canada <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-justice-and-attorney-general-canada-mandate-letter>.
what the planned amendments to the Federal Judges Act would look like.” In response, Chief Justice Wagner commented that “the judicial conduct process would be shortened... less costly... more transparent.” On one level this was good news: reforms seemed imminent. But there were warning signs in these pronouncements: the consultations seemed to be exclusively between members of the judiciary and the Minister’s staff, and seemingly only two values were being emphasized: efficiency and transparency.

It was more than a year before the complaints and discipline reforms announced in January 2020 by the Chief Justice of Canada became public. They were first introduced into the Senate by Senator Marc Gold, who held the position of Government Representative in the Senate, as Bill S-5 on May 25, 2021. In the accompanying news release, the Department of Justice emphasized that “the current process is cumbersome, costly and can be prolonged for years...” and that it “needs to be updated in order to make the system less expensive and time consuming.” The news release stated that there must instead be an “accountable, transparent and fiscally responsible process.” It continued, “it is time to fully reform how complaints are dealt with... to streamline the process for more serious complaints,” adding that the reforms proposed “would also address the current process shortcomings by imposing mandatory sanctions on a judge when a complaint of misconduct is found to be justified, but not to be serious enough to warrant removal from office.” It noted that “[s]uch sanctions would include counselling, continuing education and reprimands.”

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46 Ibid at 1.

47 In particular, those seeking appointment to a provincial superior court must now undertake to participate in post-appointment training on “sexual assault law and social context, which includes systemic racism and systemic discrimination” (Bill C-3, An Act to amend the Judges Act and the Criminal Code, 2nd Sess, 43rd Parl, 2021, cl 1 (received royal assent on 6 May 2021) [Bill C-3]; Judges Act, supra note 15.). Relatedly, 60(2)(b) of the Judges Act has been amended to mandate the CJIC (using the normative language of “should” – perhaps a step shy of “must”) to develop seminars on sexual assault and systemic racism (Bill C-3, supra note 47 at cl 2(1); Judges Act, supra note 15 at 60(2)(b)). Section 60(3)(a) adds that the CJIC “should” ensure that the noted sexual assault seminars are developed in consultation with “sexual assault survivors and persons, groups and organizations that support them,” including Indigenous leaders and communities (Bill C-3, supra note 47 at cl 2.; Judges Act, supra note 15 at 60(3)(a).). Section 60(3)(b) further adds that the seminars should “include, where the Council finds appropriate, instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants” (Bill C-3, supra note 47 at cl 2.; Judges Act, supra note 15 at 60(3)(b.).) Finally, s.62.1(1) now states, per Bill C-3, that the CJIC “should” provide the Minister of Justice with an annual report, to be tabled in Parliament, detailing the seminars it has offered on sexual assault law and social context, and the number of judges who have attended these (Bill C-3, supra note 47 at cl 3.; Judges Act, supra note 15 at 62.1(1)(2).).


49 Ibid.

50 Ibid.
Meanwhile, Bill C-3, *An Act to amend the Judges Act and the Criminal Code* was introduced, receiving Royal Assent on May 6, 2021. A distinct yet related initiative, that bill was even more directly framed as an effort to enhance regulatory controls over the CJC in order to increase public confidence in the judiciary. Specifically, Bill C-3 expressed Parliament’s will to assert control over the educational inputs as well as (to a more limited extent) formal outputs of judicial labour -- the latter by mandating reason-giving in criminal trials relating to sexual assault. A similar bill had been advanced by Rona Ambrose in 2018 in response to public dissent over the Camp matter, a highly public judicial complaint (ending with the CJC’s recommendation of removal and the judge’s early retirement) based in the judge’s gratuitous humiliation of a sexual assault complainant in a manner expressive of rape myths.

Bill C-3 also introduced complementary regulatory mechanisms relating to systematic racial bias. The resulting 2021 changes to the *Judges Act*, beyond the noted requirement of reason-giving in matters relating to sexual assault, articulate expectations that judges attend and that the CJC design and implement, social context education relating to sexual assault law and systemic racial discrimination in the justice system.

The above reforms passed as Bill C-3 were not directly connected to Bill S-5. The latter was exclusively focused on the judicial discipline process, and a set of related values and concerns discussed further in what follows. However, there is a socio-political and normative link worth noting. That is, these two bills which follow decades of legislative inaction around the affairs of the CJC express in different ways Parliament’s effort to assure an increasingly restive public that there are democratic mechanisms to ensure that the judiciary is accountable to that very public: that not only judges as individuals, but judges as a class -- an elite cadre of constitutionally empowered actors shielded in important respects from Parliamentary oversight -- do not stray too far from public values both substantive (i.e., substantive equality) and procedural (the values we identify as central to the disciplinary process). Bill C-3 was the more incendiary move from the perspective of traditional judicial values privileging independence, in unmistakeably signalling Parliament’s will to shift the settled norms of a predominately older, white, male judiciary. However, Bill S-5 conveyed a simultaneous and complementary will to bring the judicial discipline process into line with public values, now inhering in the idea of fairness -- that is, a set of values inclusive of transparency and public participation which may be regarded as more procedural than substantive, yet which, along with public justification and the other values explored herein, may be understood as fundamentally *democratic* and so continuous with and supportive of the idea of equal moral worth expressed as substantive equality.

However, Bill S-5 did not pass its second reading as it died on Order Paper on June 29, 2021, when the Senate rose following the dissolution of Parliament.

After Parliament reconvened, on December 1st, 2021, Senator Gold introduced Bill S-3 which was identical to Bill S-5. The sponsor speech was delivered by Senator Pierre Dalphond, a former justice of the Quebec Court of Appeal, former president of the Canadian Superior Court Judges Association, and a


52 Bill C-3, *supra* note 47.; *Criminal Code*, RSC 1985, c C-46, s 278.98.

53 *Judges Act*, *supra* note 15 at 3(a)(b); Bill C-3, *supra* note 47.

54 Bill C-3, *supra* note 47 at 2,3.; *Judges Act*, *supra* note 15 at 60(2).
former member of several CJC committees. Yet on December 15, 2021, the bill was withdrawn, and its second reading discharged.

This was swiftly followed by the introduction of Bill C-9 in the House of Commons on December 16, 2021, by Minister Lametti. It was virtually identical to the two Senate bills. On June 16, 2022, a motion was made to move Bill C-9 for second reading and for committee referral. Bill C-9 was debated in the House of Commons on June 16, 2022. Minister Lametti added the following further commentary on the rationale and nature of the bill:

Protecting public trust in the administration of justice demands that a mechanism be in place and be ready to respond appropriately to complaints against members of the judiciary as they are made. This is a tangible guarantee of accountability. It helps preserve confidence that allegations are taken seriously, all while respecting principles of procedural fairness...

That is why the provisions of Bill C-9 propose a responsive approach seeking to ensure that allegations are addressed as fairly and effectively as possible. The proposed mechanism respects both the people filing the complaint and those who are the subject of the complaint. By providing a legitimate avenue for the careful review of allegations, we have the assurance that there is some oversight over the conduct of judges and that they will be held to account when necessary. At the same time, this promotes confidence in the administration of justice on a broader scale...

Here and throughout government’s engagement with CJC procedural reforms, the values espoused in pursuit of public confidence are a potpourri of rule of law ingredients anchored in the foundational norm of fairness: here, transparency and accountability are principled high notes while efficiency and effectiveness serve as utility-conscious backstips. There was consensus among all the main political parties that the passing of the Bill was a priority. It subsequently passed its third reading on December 9, 2022, with two proposed

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57 House of Commons, Order Paper and Notice Paper, 44-1, No 90 (16 June 2022) at 51.; House of Commons Debates (16 June 2022), supra note 2 at 6780 (Hon Joyce Murray).
58 House of Commons Debates (16 June 2022), supra note 2 at 6780.
60 Ibid.
61 House of Commons Debates, 44-1, No 19 (16 December 2021) online:
amendments made by the House of Commons Standing Committee on Justice and Human Rights. Bill C-9 was debated in the Senate on December 13, 2023. A series of amendments were proposed by the Standing Senate Committee on Legal and Constitutional Affairs, which were accepted by the Senate. However, the House of Commons accepted only two of the amendments tabled by the Senate, rejecting the rest. Deliberations between the two chambers, resulted in the final decision, that Bill C-9 would be passed with the incorporation of the two amendments tabled by the Senate that the House agreed with and the other amendments, that the House did not agree with, would be discarded. Bill C-9 received royal assent on June 22, 2023.

The new “streamlined” model proposed by Bill C-9 has, broadly speaking, six stages:

1. An initial screening of complaints by a screening officer.
2. A second screening by a reviewing member of the CJC.
3. Consideration by a Review Panel with the power to dismiss the complaint or impose limited sanctions.
4. A decision by either a “Reduced” or “Full” Hearing Panel with the power to dismiss a complaint, impose limited sanctions, or recommend removal to the Minister of Justice (the last of these only by the full Hearing Panel).
5. A right of appeal to an Appeal Panel which has the power to reverse, vary, or affirm the decision of the Hearing Panel, or make any decision the Hearing Panel could have made.
6. A right to seek leave to appeal to the SCC by either the judge or presenting counsel.

There are key distinctions between this model and the previous one at each stage, as discussed below. Of these, the most notable arise at steps 3-6, including express authorization to impose limited sanctions at step 3, the alternative of a reduced or full hearing panel at step 4 (including public

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[63] Debates of the Senate, 44-1, Vol 153, Iss 91 (13 December 2023) online: <https://sencanada.ca/en/content/sen/chamber/441/debates/091db_2022-12-13-e> [https://perma.cc/7Q7W-ZSMM].


[65] Debates of the Senate, 44-1, Vol 153, Iss 137 (21 June 2023) online: <https://sencanada.ca/en/content/sen/chamber/441/debates/137db_2023-06-21-e> [https://perma.cc/A85U-QE8P]. Several of the rejected amendments are discussed in Part II below. The two that were accepted dealt with the removal of the phrase “as far as possible” from section 84 which dealt with the diversity of the roster of judges and laypersons, and the addition of “sexual misconduct” to 90(3) which required the screening of certain types of complaints to be by a judge and not a screening officer.


participation on “full” Hearing Panels), and the innovation of an internal appellate body as well as a final appeal with leave to the Supreme Court of Canada. As with the previous system, the CJC does not have the power to remove a judge: as a matter of constitutional law, its maximum authority remains to recommend removal to the Minister of Justice.

The new system can be represented as follows.\textsuperscript{68}

Chart 2

![Chart 2 Diagram](image)

There are several significant improvements in the Bill that correspond to the eight public goods identified in Part II, and that therefore would arguably contribute to enhancing public confidence in the new complaints and discipline process for judges. These are considered in the following subsections.

2. Reinforcing the Rights of Impugned Judges

In accordance with the principles of independence, fair participation, transparency, and responsive justification, the legislation A) curbs aspects of pre-existing CJC discretion on the grounds for recommending removal, and B) expressly secures previously absent procedural rights for judges.

\textsuperscript{68} For a more detailed representation see Appendix B.
A. The grounds for a recommendation for removal have been delimited with a modicum of increased specificity.

The original legislation provided:

65(2) Recommendation to Minister
(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
(a) age or infirmity,
(b) having been guilty of misconduct,
(c) having failed in the due execution of that office, or
(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

Bill C-9 now provides:

80 For the purposes of this Division, the removal from office of a judge is justified only if, for any of the following reasons, the judge’s continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office:
(a) infirmity;
(b) misconduct;
(c) failure in the due execution of judicial office;
(d) the judge is in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of judicial office.

Two points are noteworthy. First, “age” has been removed as a freestanding ground of removal, reflecting the rejection of age discrimination as a matter of Charter and constitutional values. Second, the broad discretion conferred by reference to “the opinion of the Council” concerning the respondent’s incapacitation or becoming disabled from execution of office has been replaced by reference to the touchstone standard established through case law, inhering in reasons to believe that “public confidence in the impartiality, integrity or independence of the judge” would be undermined “to such an extent that it would render the judge incapable” of holding office – for one of the noted reasons including the final catch-all reference to circumstances incompatible with holding office from the perspective of “a reasonable, fair-minded and informed observer.” The writing into legislation of the standard adopted by the CJC since Marshall 69 serves as an important reminder that the responsibilities of the CJC are to advance the public interest, not its own perception of how judges should behave.

At the same time, there is an important residual concern with the standard proposed in Bill C-9. It is not clear why “infirmity” remains listed among forms of misconduct. Mixing disability or illness with

egregious forms of misconduct corroding public confidence raises concerns about the messaging this sends judges and the public at large about incompatibility of the office with aspects of the human condition and human diversity that in other contexts warrant accommodation. Moreover, this approach suggests that a similar (inquisitorial and prosecutorial rather than supportive) process is appropriate where illness or disability rather than intentional or negligent misconduct is in issue. We return to this point in our companion paper.

B. A more comprehensive set of procedural rights for judges

The second notable development that protects individual judges is that they are provided with a more comprehensive set of procedural rights. The legislation until now featured few process rights, although some (not all) of the following list were addressed in CJC policy documents:

- Right to provide written submissions to reviewing member of CJC (93)
- Right to receive notice of decision of reviewing member (96)
- Right to provide written submissions to Review Panel (99)
- Right to receive notice of decisions/reasons of Review Panel (103)
- Right to request Reduced Hearing Panel (104)
- An assurance that the CJC member who designates presenting council cannot be part of the process (106(2))
- Right to receive notice of decisions/reasons by Reduced Hearing Panel (114)
- Right of appeal from decision of Reduced Hearing Panel to Full Hearing Panel (116)
- Right to be informed of the establishment of a full Hearing Panel (125)
- Rights to be heard, cross-examine, adduce evidence in person or by counsel at the Hearing Panel (124)
- Right to receive notice of Decision and Reasons from Hearing Panel (121)
- Appeal Panel – right to make oral and written submissions (133)
- Right to receive notice of decision and reasons from Appeal Panel (135)
- Right to receive notice of Report for Removal to Minister of Justice (139[3])
- An assurance that judges involved in one part of process cannot participate in other parts (141)

These rights illustrate a commitment to the public values of individual judicial independence, impartiality, fair participation, and responsive justification.

3. The Creation of a Spectrum of Remedies for Judicial Misconduct

As discussed previously, formerly and formally, because of the extremely high premium put on the principle of individual judicial independence, only one remedy was available if a judge was found to have engaged in misconduct: removal of a judge through a joint address in Parliament. However, while this might have ben the de jure position it was not the de facto position. Even under the Ancien regime it was likely that concerns about inappropriate conduct were dealt with by means of a “quiet word in the ear” either by a Chief Justice, or perhaps the Minister of Justice. Although the modern era ushered in by the 1971 reforms did not include any explicit lesser sanctions, the CJC did in fact exercise such powers. Over the years the CJC’s annual reports frequently acknowledged that judges had been given
“reprimands” and “warnings.” Moreover, in several cases including, Angers, Berger, Boilard, Taylor, Matlow, McClung, Smith, Camp and Spiro judges were variously reprimanded, disapproved, required to apologize, prohibited from engaging in certain activities, or required to engage in educational programmes.

During the third reading of Bill C-9, the Minister of Justice emphasized the importance of a more nuanced and proportionate response:

There is only one sanction expressly available under the current regime, and that is removal from office. It is therefore both potentially overbroad and underinclusive. Consider conduct that, while recognized as inappropriate, should warrant something less than overruling judges’ constitutionally protected security of tenure....

The CJC has told us it often struggles with the application of these stark either-or alternatives, that is, between recommending the most serious penalty or none at all. In either case the public may perceive injustice.

It is also important to highlight the idea of justice being done, as well as being seen to be done. Public trust in the judiciary relies not only on judges being held accountable, but also on judges being seen to be held accountable. By providing for options other than removal from office, such as participating in an education program or issuing a formal apology, Bill C-9 would provide a more balanced approach that reinforces accountability to Canadians at all levels. It would be an important step forward in continuing to foster the confidence of the public in our justice system.

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71 John J Robinette, “Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Council Case Report” (September 1982) 28:2 McGill LJ.


73 Taylor v Canada (Attorney General), 2003 FCA 55 [Taylor].


Consequently, in accordance with the principles of accountability, transparency, responsive justification, and efficiency, Bill C-9 empowers the CJC at various stages in the process (Review Panel, Reduced Hearing Panel, Full Hearing Panel, and Appeal Panel) to impose a series of penalties short of a recommendation for removal. The CJC is authorized to:

(a) issue a private or public expression of concern;
(b) issue a private or public warning;
(c) issue a private or public reprimand;
(d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;
(e) order the judge to take specific measures, including attending counselling or a continuing education course;
(f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);
(g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.\(^80\)

In the words of the Minister of Justice, the goal is “improved flexibility and responsiveness... a suite of potential sanctions that would allow for the imposition of a sanction that is more contextualized and appropriate for remedying the misconduct.”\(^81\)

4. Enhanced Lay Participation

The Minister of Justice and Ministry officials have emphasized on multiple occasions the significance of lay participation in the new process.\(^82\) While historically there has been no lay participation in the CJC process, it can be justified by a plurality of public goods. The first is the principle that the process itself must be seen to be independent of the excessive influence of any particular set of stakeholders (i.e., judges). Second, impartiality requires guarding against both conscious and unconscious bias and lay representation can help offset “judge think.”\(^83\) These goods are reinforced by the principles of representation (i.e., the inclusion of a diverse range of perspectives, identities, and voices in the exercise of public power), transparency and accountability.\(^84\)

Bill C-9 seeks to promote lay participation in two ways. First, it creates a roster of laypersons to be included in the decision-making process at two stages: the three-person Review Panel (the other panel

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\(^80\) See e.g., 102, 113, 120.
\(^81\) House of Commons Debates (9 December 2022), supra note 59 at 10713 (Hon David Lametti).
\(^82\) House of Commons Debates (9 December 2022), supra note 59 at 10713 (Hon David Lametti); Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 37:2,5,9,10 (Hon David Lametti); Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 37:12 (Patrick Xavier); The Standing Senate Committee on Legal and Constitutional Affairs, Evidence, 44th Parl, 1st Sess, No 49 (23 March 2023) at 49:4, 17 [Hon David Lametti], online: <https://sencanada.ca/content/sen/committee/441/lcjc/49evidence-56081.pdf>; Standing Committee on Legal and Constitutional Affairs, “No 49”, supra note 82 at 49:37,39.
\(^83\) Dmitry Bam, “Legal process theory and judicial discipline in the United States” in Devlin & Wildeman, supra note 5.
\(^84\) On the contribution of layperson adjudicators to the legitimacy and fairness of Ontario’s lawyer discipline regime (and the expectation that departure from the regulatory requirement that lay members be included on hearing panels must be justified through express engagement of permissible grounds) see Law Society of Ontario v. Schulz, 2023 ONSC 3943 at paras 27-29.
members are a CJC member and a judge)\textsuperscript{85} and the five-person Full Hearing Panel (also to include two members of the CJC, a superior court judge who is not a member of the CJC, and a lawyer designated either by the Minister of Justice or the CJC).\textsuperscript{86} Layperson members must not have been called as a lawyer nor worked as a paralegal, and must meet further criteria to be established (and made public) by the CJC.\textsuperscript{87} Bill C-9 acknowledges that hearings can be in “either or both official languages” \textsuperscript{88} and, importantly, further emphasizes that “the Council shall name persons who reflect the diversity of the Canadian population to the roster of judges and to the roster of laypersons.”\textsuperscript{89} The roster of laypersons is to be accessible by the public.\textsuperscript{90} Those selected may remain on the roster for four years, renewable.\textsuperscript{91}

The above innovations on lay representation are without doubt progress, but as we shall argue in our companion paper, these provisions do not go far enough.

5. Clarification of the Role and Responsibilities of Presenting Counsel

The Matlow\textsuperscript{92} and Douglas\textsuperscript{93} cases generated significant controversy as to the roles and responsibilities of legal counsel in the inquiry process. Fundamental questions were raised as to whether the process was to be inquisitorial or adversarial in nature and this would affect the position to be adopted by both Independent Counsel and the Inquiry Counsel. Indeed, confusion about these roles and the distinction between them -- and associated concerns that the hearing panel and its Inquiry Counsel had descended into the fray -- became so intense in Douglas that the Independent Counsel resigned (although they gave no public reasons).\textsuperscript{94}

The role and responsibilities of what Bill C-9 calls “presenting counsel” engage principles of impartiality, independence, accountability, fair participation, transparency and, as the Douglas case itself made apparent, also efficiency. To ensure independence and impartiality, Bill C-9 clarifies that the member of Council who designates presenting counsel shall not participate in the decision-making process.\textsuperscript{95} Moreover, that same member of Council gives instructions to the presenting counsel (i.e., not members of the hearing panel), thereby guarding against allegations of actual or perceived bias.\textsuperscript{96} Section 107 is explicit as to the responsibilities of presenting counsel:

\textbf{107} The role of the presenting counsel consists of preparing a statement of allegations against a judge who is the subject of a complaint before a reduced hearing panel or full hearing panel, as the case may be, and presenting evidence. The presenting counsel is also responsible for bringing an appeal and presenting arguments in an appeal.

\textsuperscript{85} An Act to amend the Judges Act, supra note 1 at s 98(1).
\textsuperscript{86} Ibid at s 117(1)(c).
\textsuperscript{87} Ibid at s 82(3)&(4).
\textsuperscript{88} Ibid at s 83.
\textsuperscript{89} Ibid at s 84.
\textsuperscript{90} Ibid at s 85.
\textsuperscript{91} An Act to amend the Judges Act, supra note 1.
\textsuperscript{93} Canadian Judicial Council, “Hon Lori Douglas”, supra note 27.
\textsuperscript{95} An Act to amend the Judges Act, supra note 1 at s 106.
\textsuperscript{96} Ibid at s 107.
As has been emphasized by Senator Dalphond, this is a significant move. This provision, read in conjunction with the rights of judges at the full hearing panel (ss.124-125), means that at this stage the process is no longer inquisitorial but unambiguously adversarial / prosecutorial. This is reinforced by section 109 which provides:

109 In fulfilling their responsibilities, the presenting counsel shall conduct themselves in accordance with the standards and principles that govern the conduct of Crown prosecutors, with any modifications that may be necessary.

6. Constraining Judicial Opportunism

In response to Girouard and other recent cases, the CJC, Senators Dalphond and Cotter, Minister Lametti and representatives from the Ministry of Justice and politicians all loudly expressed concerns about judges “gaming the system.” The objection was that some judges have dragged out the process either to get to retirement age or to maximize their pension benefits. Critics have also expressed the concern that because judges are entitled to be reimbursed for their legal fees when subjected to a complaint, judges have been incentivized to seek judicial review in the Federal Court, once again dragging out the process. There have also been objections to lawyers representing the judges making “millions of dollars” at the public’s expense. These concerns about the financial costs and inefficiency of the process obviously dovetail with principles of efficiency and accountability, and undermine public confidence in the administration of justice.

Bill C-9 responds to these concerns in three ways. First, s 126 provides that once a full hearing panel has notified the impugned judge that a complaint is sufficient to warrant a recommendation for removal from office, the judge’s salary and benefits are crystallized from that date, as calculated based upon the number of years a judge has held judicial office, in addition to their annexed salary at the time of their resignation, removal or attainment of retirement age (subject to some exceptions). Second, Bill C-9 seeks to curtail a judge’s right to seek judicial review in the Federal Court by establishing an alternative process which both the CJC and the Ministry of Justice believe will be more efficient: the entitlement of the impugned judge (or presenting counsel) to appeal to an internal Appeal Panel, followed by a right to

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97 See also Debates of the Senate (15 June 2021), supra note 2 at 1850 (Hon Pierre Dalphond).
98 See e.g. See also Debates of the Senate (15 June 2021), supra note 2 at 1849 (Hon Pierre Dalphond), citing Canadian Judicial Council, “Open Letter to Canadians from the Canadian Judicial Council” (31 July 2020), online (pdf): Canadian Judicial Council <https://cjc-ccm.ca/en/news/open-letter-canadians-canadian-judicial-council-0> [https://perma.cc/BGT6-BUSF]; See also Debates of the Senate (7 December 2021), supra note 6 at 190 (Hon Pierre Dalphond) as characterizing the extensive judicial review opportunities available to judges as a “recipe for adversarial zeal and abuse of process.”; House of Commons Debates (9 December 2022), supra note 59 at 10715.; Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 2.
99 Department of Justice Canada, supra note 39.; House of Commons Debates (16 June 2022), supra note 2 at 6789 (Hon Rhéal Fortin); House of Commons Debates (16 June 2022), supra note 2 at 6790 (Hon Christine Normandin); Debates of the Senate, 44-1, Vol 153, Iss 128 (31 May 2023) at 3818 (Hon Brent Cotter), online: <https://sencanada.ca/content/sen/chamber/441/debates/pdf/128db_2023-05-31-e.pdf>.
100 On the entitlement of federally-appointed judges to be compensated for legal fees when facing a complaint see Bourbonnais v. Canada (Attorney General) (F.C.A.), 2006 FCA 62 (CanLII), [2006] 4 FCR 170 (per Nadon JA); on incentivization see ibid., Debates of the Senate (1 June 2023), supra note 66 at 3842 (Hon Pierre Dalphond).
101 See Debates of the Senate (7 December 2021), supra note 6 at 190 (Hon Pierre Dalphond); House of Commons Debates (16 June 2022), supra note 2 at 6781 (Hon Gary Anandasangaree).
seek leave to appeal from the decision of the Appeal Panel to the Supreme Court of Canada.\(^{102}\) (We will return to these provisions in our forthcoming companion paper.)

The third point to emphasize is what Bill C-9 says about a judge’s entitlement to claim reimbursements for fees and legal expenses in matters relating to judicial complaints ("Division 1" of the Act) or referrals to the complaints system from provincial Ministers of Justice / Attorneys General ("Division 2"):

**Restriction**

142(6) Fees and expenses of lawyers representing judges may be paid only in respect of proceedings under this Division or Division 2 or in respect of appeals to the Supreme Court of Canada relating to those proceedings. For greater certainty, no payments to lawyers representing judges are to be made in respect of any judicial review of any decision made under this Division or Division 2.

The intent is clear – to dissuade a judge from seeking judicial review. If a judge were to do so, they would have to pay out of their own pocket. This strong disincentive reflects the critique that judicial review has, in the complaint’s context, served as a form of judicial opportunism. More positively stated, the restriction supports the thesis that the new internal appeals mechanism and further appeal (with leave) to the Supreme Court of Canada renders judicial review redundant or in any case less urgent as a mechanism of CJC accountability and public justification.

7. **Miscellaneous**

Finally, there are several other more specific provisions introduced by Bill C-9, now law, that are praiseworthy – or at least, reflect a clear effort to advance the public good and the values this implies. First, s 90 states three grounds on which a complaint may be dismissed by the screening officer, and requires that if any additional grounds are identified by the CJC they must be made public. As we outline in the next section, one of the major concerns over the last few decades has been that the vast majority of complaints are screened out at this very early stage with no reasoning in support. The clear articulation of the grounds upon which a complaint can be screened out reflects the public goods of independence, impartiality, accountability, and transparency.

Furthermore, there is a significant limit placed on the screening mechanism in s 90(3): “a screening officer shall not dismiss a complaint that alleges sexual misconduct or sexual harassment or that alleges discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.” The effect of this provision is to give responsibility for deciding whether a complaint based on these grounds should go forward to the reviewing member of the CJC under s 92. Although some have compellingly argued that this restriction does not go far enough,\(^{103}\) a contention we return to below specifically on the point of layperson participation, it is an attempt to emphasize the importance of dealing with discrimination and sexual misconduct complaints in a thorough and public manner. Third, s 86 allows for the possibility of an anonymous complaint, which is very helpful for those who might feel daunted by or are concerned about possible retaliation for making a complaint.\(^{104}\)

\(^{102}\) *An Act to amend the Judges Act, supra* note 1 at 116, 123 and 137.

\(^{103}\) Letter from Canadian Muslim Lawyers Association to Members of the Standing Committee on Justice and Human Rights (28 November 2022).

\(^{104}\) See also Letter from the Women’s Center for Social Justice to Members of the Standing Committee on Justice and Human Rights (26 November 2022) at 5.
Additionally, s 129(1) provides that “[a] hearing panel’s hearings are to be public, but it may hold all or any of its hearings in private if it considers doing so to be in the public interest.” This presumption reinforces the public goods of independence, impartiality, accountability, and transparency. It is particularly notable that the only reason for such a hearing to be private is that it is in the “public interest” rather than the judge’s interest, which has been an issue in previous complaints such as the Dugré case.105

Last, the revised Judges Act has addressed concerns about judicial independence raised by the multiple roles of the Minister of Justice under the old regime. As Kate Glover-Berger noted, the old Act not only empowered the Minister to request an inquiry into the conduct of a judge -- following which an Inquiry Committee was mandatorily constituted (a power that remains in place under the new regime with regard to striking a full hearing panel) -- it further empowered the Minister to participate in constituting the Inquiry Committee, as well as (again, a power that remains in place) participate in the final stages of the decision, i.e., whether to recommend initiation of a Joint Address upon the CJC’s recommendation of same.106 The concerns raised by these overlapping functions have been met by requiring that it is the CJC and not the Minister that selects the lawyer member of a hearing panel.

V. Conclusion

This essay has pursued three objectives. First it has provided readers with a normative framework by which to assess the legitimacy of a judicial complaints and discipline process in promoting public confidence in the administration of justice. Second it has argued that the regime in place from the 1970s to 2023, initially designed as a response to a crisis, has after five decades without significant renovations once again imploded, resulting in widespread disillusionment and another crisis of legitimacy. Thirdly, it has identified seven ways in which Bill C-9 has, with some significant success, improved the complaints and discipline system for federally appointed judges, and therefore, will go some way toward promoting public confidence in the administration of justice. However, in a follow up essay we will argue that Bill C-9 does not adequately respond to the eight normative principles outlined in the beginning of the essay and, as a consequence, will likely fail in its lofty goal of achieving what Canada’s Minister of Justice described as a “world leading judicial review process.”107

107 Standing Committee on Justice and Human Rights, “No 37”, supra note 2 at 2 (Hon David Lametti).
Appendix A

Chart 1

CJC Policies and Procedures 2015-2023

- Complaint made by the Attorney General or Federal Minister of Justice under s. 63(1)
- Complaint made by the public under s. 63(2)

CJC Receives a Complaint, held by the Executive Director. Executive Director reviews all correspondence to see if the complaint should be directed to the Council. Can also review other matter regarding the conduct of a judge. Does not open a file for complaints that are not about conduct, that are trivial, vexatious, abuse the complaints process, and are not in the public interest to consider. Anonymous complaints are treated the same.

The Judicial Conduct Committee Chairman or a Vice Chairman conduct a preliminary review of the complaint to see if a formal investigation should be conducted. Can a) close the file; b) seek additional information from the complainant or c) seek the judge's comments and those of the Chief Justice of that judge.

If file closed, The Executive Director will provide the judge and his/her Chief Justice with copy of the complaint and a copy of the reply to the complainant. Also will inform complainant.
If the Chairperson requests further comments from the judge, comments must be submitted in writing within 30 days, Chairperson must review response and can either a) close the file; b) hold the file in abeyance pending pursuit of remedial measures (may inform complainant); c) ask investigator for further inquiries and prepare a report (may inform complainant); or d) refer to a Panel (may inform complainant).

If consultation is taken for a matter in abeyance at any stage, the Chairperson with the judge’s Chief Justice can a) recommend counselling or remedial measures or b) close the file.

If the Chairperson requests investigator to look into a matter and make a report, investigator can gather relevant information, conduct confidential interviews, and before finalizing the report the investigator must allow the judge to comment on any information that the investigator found.

Executive Director must inform judge and Chief Justice if outside counsel is investigating and provide a copy of the report to them.

If the Chairperson requests investigator to look into a matter and make a report, Chairperson must review the report and either a) close the file; b) hold the file in abeyance (may inform complainant); or c) refer the file to a Panel (may inform complainant).

If the complainant withdraws their complaint, Chairperson can continue to investigate if complaint withdrawn. At this stage, the Chairperson can close the file or proceed with the complainant on the basis of public interest.

If the Chairman closes a file against own CJIC Member, must hire a lawyer to review. Lawyer can agree or request that the chairperson give the complaint further consideration.

When Chairperson refers a matter to a Panel, the must write the reasons for the referral and send it to the Panel. The Executive Director writes the judge and his/her Chief Justice informing them that the Panel is investigating, invite them to make comments within 30 days on if the Inquiry Committee should be created. These comments are given to the Panel.
Matter referred to a Panel of the Judicial Conduct Committee. Panel has 5 members, three are members of the Council, one is a puisne judge, one is a person who is neither a judge nor a member of a provincial bar. Panel gets copy of Chairman’s recommendations and reports of the further inquiry. At this stage, judge is given all information considered by the Panel and has opportunity to respond in writing. Panel can create the Inquiry Committee or decide that the inquiry Committee is not necessary and must send the matter back to the Chairperson/Vice Chairperson who will decide how to deal with the matter.

If Panel creates Inquiry Committee, the Executive Director will inform the complainant

The Panel must prepare written reasons and a statement of issues for the inquiry Committee, these documents must be sent to the judge and his/her Chief Justice, the Minister, and the Inquiry Committee.

Complaint goes to an Inquiry Committee who investigate. The senior member of the Judicial Conduct Committee appoint these members and the Chairman of the Committee. Can impose time limits regarding comments from the judge, must notify the judge of the time limit, and must consider any comments. Can consider other complaints related to the judge that are unearthed during their investigation — now conducted in public, also can recommend removal.

When sent to Inquiry Committee Executive Director informs complainant.

Bigger focus on keeping publication of documents private to meet its confidentiality principles.

At the Inquiry stage, the CJC can hire counsel to help them in their investigation

Report made to the full CJC Council by Inquiry Committee. Now published to allow public access. Anyone who had standing in the hearing gets a copy of the report.
Appendix B

New System

Chart 2

S86 Complaint made by:
   i) Identified member of public
   ii) Anonymous member of public
   iii) 2 members of CJC

S89 Screening Officer

S90 Dismiss x 3 grounds, but not sexual harassment or prohibited grounds of discrimination

S91 Reviewing Member of CJC

S93 Judge Right to make written submissions

S94 Dismiss

Mandatory 148 & 149

Council can refer any part of the matter back to the Inquiry Committee with directions

CJC makes a recommendation to the Minister of Justice re: judge's removal in a report, report includes the inquiry Committee's report and if they accept or reject the conclusion of the Inquiry Committee. Need a quorum of 17 members of the Council when deliberating if the judge should be removed. Meetings can be held by audio conference, video conference or in person. If there is a tie vote the Chairperson of this meeting may vote.

The Executive Director provides the judge with a copy of the report. If file closed, will inform complainant.

Judge in question can make a written to the report of the Inquiry Committee within 30 days. The judge can request an extension to do this past the 30 days. The Council can grant this request. The written submission is provided to the independent counsel.
S98 Review Panel (CJC Member, Judge, Lay Person)

S102 Dismiss

S102 7 Disciplinary Actions

S113 Dismiss

S113 7 inginary Actions

S104 Reduced Hearing Panel (CJC Member, Judge, 10-year Lawyer)

S106-109 Presenting Counsel

S112 Full Hearing Panel
Full Hearing Panel

S117: 2 Members of CJC, 1 judge, 1 lay person, 1 lawyer designated by MoJ

S106-109: Presenting Counsels

S129: Presumptively Public

S120: Dismiss

S120: 7 Disciplinary Actions

S119: Recommendation for Removal to MOJ

S139: Report to MOJ

S140: MOJ duty to respond

S126: Judge salary/pension frozen

Appeal Panel

S123

S130: 3 members of CJC + 2 judges

S132: Presumptively Public

Judge or Presenting Counsel: Request leave to appeal to SCC

S137

S131: Power to reverse, vary, affirm, or make every decision a hearing panel could have made