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

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Abstract

Bill C-9 is the first 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 system for federally appointed judges. In a previous essay published in Volume ?? of the *Advocates' Quarterly* we offered a normative framework for assessment of a complaints and discipline system and identified seven key strengths of Bill C-9. In this sequel, we continue to apply this normative framework and argue that the legislation is marred by five significant weaknesses. We conclude that because the reforms were driven by crisis thinking they over-emphasized two values – independence and efficiency – at the expense of several other equally significant values, including impartiality, transparency, accountability, participation, representation and responsive justification. Consequently, Bill C-9 will likely fail as an attempt to enhance public confidence in the administration of justice.

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I Introduction

In order to achieve public confidence in the administration of justice every legal system requires an effective complaints and discipline process that can respond to concerns about potentially inappropriate conduct by members of the judiciary. The design and implementation of such a process is not just a technocratic or bureaucratic exercise, it is an act of statecraft that helps constitute and legitimize the judiciary as a fundamental institution of our society.¹ Recently Canada has attempted to revamp its complaints and discipline process for federally appointed judges by Bill C-9, *An Act to amend the Judges Act*.²

In a previous essay published in Volume 54(3) of this journal, we advanced a contextual (but not yet fully developed critical) analysis of Bill C-9.³ Our argument proceeded in three stages. First, we argued that in order to assess whether a complaints and discipline regime is likely to achieve its goal of promoting public confidence in the administration of justice it is necessary to identify the public values or norms that can ground such an assessment. In addition to the two public values that have historically framed the analysis of complaints and discipline regimes – Independence and Accountability – we argued that there are six additional norms that need to be considered and calibrated. They are Impartiality, Transparency, Participation, Representation, Responsive Justification and Efficiency.⁴

¹ Richard Devlin & Sheila Wildeman, “Introduction” in *Disciplining Judges: Contemporary Challenges and Controversies* (Northampton: Edward Elgar Publishing Inc, 2021).

² *An Act to amend the Judges Act*, SC 2023, c 18.

³ “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) *Advocates Quarterly* XXX

⁴ We offer the following definitions:

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.

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.

Responsive 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.

As we explain in the companion paper to this one, we have modified the 7th value identified in our previous work from “reasoned justification” to “responsive justification” to signal the importance of responsiveness to the those affected by state action in public law generally and in the judicial discipline process in particular. For more on our reasoning, see footnote 8 of our first paper.

Second, we applied this conceptual framework to the disciplinary regime in place from the 1970s to 2023 and argued that because it was established in reaction to a particularly “awful fiasco”⁵ from the 1960’s, it overemphasized one norm, independence, at the expense of many others. Consequently, fifty years later, the system had become dysfunctional, generating widespread consensus that significant reforms were required. The result was Bill C-9. Thus, in the third part of the paper we filtered Bill C-9 through the prism of the eight public goods we initially identified and argued that there were a number of improvements: a reinforcement of the rights of impugned judges; the creation of a spectrum of remedies for judicial misconduct; the introduction of some lay representation in the process; a clarification of the role of presenting counsel in the process; the placement of some limitations on judicial opportunism; and a few other changes of note. We mostly applauded these renovations to the regime.

However, in this follow up paper, we dig a little deeper into Bill C-9 to argue that it does not go far enough to deploy the eight public goods essential to a legitimate complaints and discipline regime. Our thesis is that because Bill C-9 was driven in large part as a reaction to two other “awful fiasco” cases, *Douglas* and *Girouard*, its proponents tended to give excessive emphasis to two values, independence and efficiency, thereby sacrificing the other equally vital values: impartiality, accountability, fair participation, representation, transparency, and responsive justification. As a result, Bill C-9 is marred by five flaws: 1) it offers an impoverished articulation of the rights of complainants; 2) there remains insufficient lay participation in the process; 3) it omits one very significant remedy for judicial misconduct; 4) it seeks over-zealously to oust judicial review (and judicial oversight generally); and 5) it is insufficiently prescriptive in dealing with the reporting mechanism of an annual report. The proponents of Bill C-9 had many of these concerns brought to their attention, most importantly by the Senate in a number of proposed amendments, but these were unequivocally rejected by the Minister of Justice. This leads us to conclude that ultimately, despite some virtues, Bill C-9 is a failure as an act of modern democratic statecraft and unfortunately will not likely fulfill Chief Justice Wagner’s expressed aspiration to “maintain confidence in the administration of justice.”⁶

II The Sound of One Hand Clapping

We acknowledged in our previous essay that Bill C-9’s reforms of the complaint and discipline process were, as Minister Lametti argued, “substantive and far reaching,”⁷ and should help to promote public confidence in the administration of justice. However, in this follow-up essay we identify five weaknesses in Bill C-9 and conclude that the government could have, and should have taken further steps to create a more carefully calibrated complaints and discipline system for Canadian judges.

1. An Impoverished Articulation of the Rights of Complainants

In Part IV 2 of our previous paper, we outlined certain key procedural rights and assurances accorded to judges in Bill C-9. There are at least 15 references to judges’ rights in the bill. Such solicitude is founded

⁵ Jaccett CJ, cited in Martin Friedland, *A Place Apart: Judicial Independence and accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 88.

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>].

⁷ *House of Commons Debates*, 44-1, No 145 (9 December 2022) at 10711 (Hon David Lametti) online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-145/hansard>> [<https://perma.cc/5PHL-78BJ>].

in the public goods of independence, impartiality, fair participation, transparency, and responsive justification. In sharp contrast there were only two sections in the legislation, as it was originally introduced,⁸ that explicitly addressed the rights of complainants. Section 86(3) recognizes that complaints can be made either by identified persons or anonymously. Section 87 provides that the CJC “shall establish policies respecting the notifying of complainants of any decisions made under this Division.” To be clear, the notification engaged in the latter section is not notice in the usual administrative law sense – i.e., of an upcoming decision as a means of enabling participation -- but rather *post hoc* notification a decision has been made.

It is difficult to reconcile these meagre provisions on complainants’ rights with the Minister of Justice’s expressed desire to “respect... the people filing the complaint.”⁹

First, why is it that judges’ rights would be enshrined in legislation while complainants’ rights are relegated to policies? There is a transparency and relative permanence, as well as legal force, to legislative provisions that does not exist for policies. As we identified in Part III of our previous paper, policies made by the CJC are reactive and *ad hoc*. They have in the past reflected, and may be expected in future to reflect, the concerns of the CJC, not necessarily the concerns of the public. If the goal is to promote public confidence in the complaint and discipline process, then surely the participatory and justificatory interests of members of the public should be just as important as those of judges. This deficiency – i.e., the fundamental failure of the statutory regime to grant complainants procedural entitlements beyond notice that a decision has been made - calls into question the independence and impartiality of the complaints process, and its adequacy to the public goods of accountability, fair participation, transparency, and responsive justification.

We suggest that the rationale guiding the decision to exclude complainants’ rights from the Bill was not fairness (to judges) but rather efficiency.

During the Standing Committee, one official from the Ministry of Justice recognized that a duty of procedural fairness to complainants is engaged by the CJC process, albeit anchored in post hoc notification, stating:

It’s important to appreciate that the Canadian Judicial Council has a duty of procedural fairness toward the complainant, and the heart of that duty is precisely to communicate the outcome of proceedings to the complainant.

The bill does not address that head on, because the duty of procedural fairness is variable. It will vary depending on the context, who the complainant is, and what the circumstances of the complaint are, so it will be for the council to set out how it will deal with complaints in policies

⁸ See below.

⁹ *House of Commons Debates* (9 December 2022), *supra* note 7 at 10712 (Hon David Lametti) online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-145/hansard>> [<https://perma.cc/5PHL-78BJ>].; *House of Commons Debates* (9 December 2022), *supra* note 7 at 10715 online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-145/hansard>> [<https://perma.cc/5PHL-78BJ>].; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 37 (17 November 2022) at 37:6 (Hon David Lametti).

and procedures. Its best to leave that for policies and procedures, because it may need to be amended from time to time.¹⁰

We offer three observations in response. First, given the above concession on the existence of a duty of fairness, surely the legislation could at least state that complainants are “owed a duty of procedural fairness,” thereby removing any attendant need for litigation on this point.¹¹ Second, while it is true that the duty of procedural fairness is context dependent, that does not mean that some basic rights cannot be outlined in the legislation and then developed in the CJC’s policies and procedures. It is not an either/or situation.¹² Third, section 87 merely requires the establishment of policies on “notifying...complainants of any decisions made.” Beyond our already stated concern about relegation of rights to policy, this offers a particularly emaciated conception of the rights of complainants. Effectively, once one has filed a complaint, one will be shut out of the process, until at some later point after everything has been decided, one receives a statement of the outcome. It is difficult to imagine how such a process could fulfill the Minister of Justice’s assertion that the Bill accords with “the Canadian public’s expectations.”¹³

In addition, during the Standing Committee Hearings when the issue of complainants’ rights was raised, a Department of Justice official and Senior Counsel for the CJC both suggested that it was unnecessary to include complainants’ rights in the legislation because such rights have been established by the courts.¹⁴

This position prompts at least two responses. First, it is unduly minimalistic, as it suggests that the goal of legislative reform is to create a floor rather than a ceiling for complainants’ rights. On this approach, the only rights proper to complainants are those that have been insisted on by the courts, constituting the bare minimum for procedural fairness. But again, if the goal is to promote public confidence, why adopt such a minimalistic and retrospective position – particularly when judicial reluctance to recognize robust complainants’ rights is itself rooted in part in a concern to show deference to legislative intent?

¹⁰ Standing Committee on Justice and Human Rights, “No 37”, *supra* note 9 at 37:7 (Patrick Xavier).

¹¹ See, e.g., *Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses’ Association*, 2023 SKCA 11 (at para 24): “despite [. . .] divergence in the jurisprudence on the issue of judicial review on the *merits* of an administrative decision at the behest of a complainant [in professional discipline matters], there appears to be no dispute that there is at least a limited duty of procedural fairness owed to a complainant at the investigation stage, which is properly the subject of judicial review.” The Court of Appeal in *Toutsaint* indicates that failure to address the key arguments raised by a complainant in a screening decision may be a breach of procedural fairness – while nonetheless querying whether the issue is better posed post-Vavilov as an invalidating form of unreasonableness (an argument it suggests may not be available to complainants on review -- para 47). For a robust example of application of expectations of responsive reasons to a ‘screening’ decision see the dissent of Justice Jackson in *Toutsaint* (paras 57-105). See also *Tran v College of Physicians and Surgeons of Alberta*, 2018 ABCA 95, [2018] 5 WWR 446.

¹² See, e.g., the BC Health Professions Act [RSBC 1996] CHAPTER 183, ss. 34, 36(1.1) & 50.6 (if matters are screened out or disposed of through other designated processes, including in cases of consensual education or other action to be taken by the health professional complained of, the committee must provide the complainant with “a written summary of the disposition” and advise the complainant of their right to apply for a review by the designated review board (under section 50.6).

¹³ *House of Commons Debates* (9 December 2022), *supra* note 7 at 10711 (Hon David Lametti).

¹⁴ Standing Committee on Justice and Human Rights, “No 37”, *supra* note 9 at 37:15 (Patrick Xavier); House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 38 (21 November 2022) at 14 (Jacqueline Corado).

Why not aspire to something more reflective, and respectful, of the aspirations of the public to participate in the processes through which judicial accountability is effected?

By way of an analogy, if the architects of Canadian human rights legislation had taken as their benchmark judicial conceptions of discrimination we would still be in a situation where, for example, bartenders could refuse service to African-Canadians.¹⁵ Indeed when the reforms to the *Judges Act* in 1971 were introduced, there was no attempt to base them on a legalistic benchmark; the goal was prospective, to build a system for the future, and to avoid the mistakes of the Ancien regime. To the extent that Bill C-9 is, as we have argued previously, an act of statecraft, it should be more forward looking and attentive to the public goods of accountability, fair participation, transparency, and responsive justification, norms that have become increasingly salient over the last few decades.

Second, there is in fact relatively little case law on the rights of the complainants in the context of the CJC's discipline process. The only significant cases are *Taylor*, *Slansky*, *Best* and *National Council of Canadian Muslims*.¹⁶ Each of these cases, like all judicial decisions, were based on particular fact situations, and therefore do not offer a coherent conception of complainants' rights. Bill C-9 was an opportunity to offer some clarity and coherence, but it was wasted.

Indeed, arguments about the rights of complainants did receive some traction during the legislative process, first at the House of Commons Standing Committee, then at the Senate. In response to a submission from Professor Craig Scott (a former member of Parliament) that the process was Kafkaesque in so far as there were no obligations on the CJC to give reasons for its decisions to complainants in either the screening or review stages of the process, the House of Commons Justice and Human Rights Committee endorsed two amendments to the Bill.¹⁷

As a consequence, s 94(2) now reads:

If the reviewing member dismisses the complaint, they shall inform the complainant in writing of their decision *and the reasons for it* [emphasis added]

And s 103(2) reads:

¹⁵ *Christie v York*, 1939 CarswellQue 46, [1940] SCR 139.

¹⁶ *Taylor v Canada (Attorney General)*, 2003 FCA 55 [Taylor].; *Slansky v Canada (Attorney General)*, 2013 FCA 199.; *Best v Canada (Attorney General)*, 2011 FCA 351 [Best].; *National Council of Canadian Muslims v Canada (Attorney General)*, 2022 FC 324.

¹⁷ House of Commons, Standing Committee on Justice and Human Rights, *Sixth Report*, 44-1 at 1.

Clause 12

That Bill C-9, in Clause 12, be amended by adding after line 31 on page 6 the following:

“(2) If the reviewing member dismisses the complaint, they shall inform the complainant in writing of their decision and the reasons for it.

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.”

That Bill C-9, in Clause 12, be amended by adding after line 27 on page 8 the following:

“(2) If the review panel dismisses the complaint, it shall inform the complainant in writing of its decision and the reasons for it.

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.”

If the review panel dismisses the complaint, it shall inform the complainant in writing of its decision *and the reasons for it* [emphasis added]

This incorporation of a duty to give reasons for dismissal on the part of both the reviewing member and the review panel is a significant improvement in that it recognizes the importance of the public goods of transparency and responsive justification -- even if it requires more time and effort on the part of decision-makers. However, in our opinion, and that of others,¹⁸ it does not go far enough. There should be four expansions to complainants' rights as follows.

- *Complainants should have not only a right to be "notified of any decisions," but also a right to be reasonably informed of the progress of the complaint.* As related in the companion essay to this one, in some situations the process can take many years and complainants deserve the courtesy of being kept in the loop. This would not be excessively burdensome. The vast majority of complaints are still likely to be screened out relatively early in the process so there would be no need to keep those complainants informed. The requirement would only apply to the relatively few cases that make it to the review panel or beyond.

- *Screening officers should be required to give reasons if they dismiss a complaint.* While the aforementioned amendments impose on the reviewing member and the review panel a duty to give reasons for dismissal of a complaint, they do not impose a similar obligation on the screening officer. The annual reports of the CJC indicate that historically the vast majority of complaints have been dismissed at the initial screening stage. It appears that many of these screened-out complaints are clearly beyond the CJC's jurisdiction -- for instance, they are about provincially rather than federally appointed judges, or relate to unsatisfactory outcomes in a case (which could be appealed) as opposed to concerns about judicial misconduct. Under the current regime, the screening officer will continue to have the authority to screen out complaints (with the exception of allegations of sexual misconduct or harassment or discrimination based upon a prohibited ground)¹⁹ -- a decision that for many complainants will be determinative; thus it is important that they be given reasons.

Again, if a screening officer decides to dismiss the complaint, that is the end of the road.²⁰ It is a termination of the process, just as consequential as a dismissal by the reviewing member or the review panel, and therefore just as deserving of reasons. There is, of course, the efficiency concern that with more than 600 complaints per year, giving reasons to a large number of unmeritorious or even vexatious complainants would be burdensome. The response is twofold: if so many of the complaints are about provincial courts judges or are driven by disappointed litigants, neither should be difficult to explain; and the reasons need not be as detailed as those given by the reviewing member, the review panel, or the hearing panel.²¹ This is a small price to pay to maintain the integrity of the process.²²

¹⁸ See also Senate of Canada, The Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44-1, No 50 (29 March 2023) at 50:31 (Hussein Panju, Chair (Canadian Muslims Lawyers Association)), online: <<https://sencanada.ca/content/sen/committee/441/lcjc/50ev-56100.pdf>>; The Standing Senate Committee on Legal and Constitutional Affairs, 44-1, No 51 (30 March 2023) at 51:23,35 (Juliet Chang Knapton, Chair, Roundtable of Legal Diversity Associations).

¹⁹ *An Act to amend the Judges Act*, *supra* note 2 at 90(3).

²⁰ See *Taylor*, *supra* note 16 at para 81.

²¹ For an example of what a brief set of reasons might look like, see *Best*, *supra* note 16 at para 9.

²² There is in fact some relevant case law on the obligations of screening officers in other contexts. For example some cases draw a distinction between screening in and screening out a complaint in the human rights context,

Indeed, one of the key amendments proposed by the Senate to improve Bill C-9 directly addressed this concern. It suggested a new section 90(4):

90 (4) If the screening officer dismisses the complaint, they shall

- (a) give notice of their decision and the reasons for it to the Council; and
- (b) inform the complainant in writing of their decision and the reasons for it.

This however was one of the reforms rejected by the House of Commons and the Minister of Justice on the grounds that it was “contrary to the intent of the legislation.”²³ It seems that the public goods of accountability, transparency and responsive justification were sacrificed on the altar of efficiency.

• *Complainants should have a right to request reconsideration of a decision to dismiss their complaint at the screening, review, or reduced hearing panel stages.* The state of the common law on the powers of administrative authorities to grant reconsideration is less settled and clear than would be optimal.²⁴ However, this right can be justified in the contexts noted primarily on the grounds of accountability, transparency and responsive justification.

There is nothing in the CJC’s bylaws or policies on the issue of reconsideration. But in at least one case reconsideration was granted to a complainant following dismissal of the case at the initial review stage.²⁵ Justice Newbould became involved in a property dispute with some members of a local

see *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 45, and *Attran v Canada (Attorney General)*, 2015 FCA 37 at paras 14, 49-50. Other courts have drawn a distinction between “adjudicative” and administrative” screening and processes, the former requiring reasons, the latter not (See *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax (Regional Municipality)*]). In response we would suggest that looking to other contexts such as human rights processes might not be helpful and emphasize, as we have done in the text, that from the perspective of a complainant the result is the same, their complaint has been rejected.

²³ David Fraser, “Senate changes to judicial oversight bill contrary to bill’s goal, Lametti’s office says”, *CTV News* (7 June 2023), online: <<https://www.ctvnews.ca/politics/senate-changes-to-judicial-oversight-bill-contrary-to-bill-s-goal-lametti-s-office-1.6431487>> [<https://perma.cc/ERB6-QWVY>]; *House of Commons Debates*, 44-1, No 214 (15 June 2023) online: <<https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-118/hansard>> [<https://perma.cc/S8NC-SP4S>].

²⁴ See e.g. *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 868; *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252 at paras 46, 50-54. On conflicting judicial approaches to *functus officio* and reconsideration across a range of administrative contexts, and the need for a flexible yet analytically structured, principled analysis, see Anna SP Wong, “Doctrine of *Functus Officio*: The Changing Face of Finality’s Old Guard,” 2020 98-3 *Canadian Bar Review* 543 esp at 574 ff.

²⁵ There are also references to the possibility of reconsideration in many of the annual reports of the CJC.; See e.g., Canadian Judicial Council, “Annual Report 1989-1990” (1990) (on file with author) at 10.; Canadian Judicial Council, “Annual Report 1995-1996” (1996) at 27-28, online (pdf): *Government of Canada* <https://publications.gc.ca/collections/Collection/JU10-1996E.pdf>.; Canadian Judicial Council, “Annual Report 1997-1998” (1998) at 27-28, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-1998E.pdf>> [.; Canadian Judicial Council, “Annual Report 1998-1999” (1999) at 19, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-1999E.pdf>>.; Canadian Judicial Council, “Annual Report 2000-2001” (2001) at 23-24, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-2001E.pdf>>.; Canadian Judicial Council, “Annual Report

Indigenous community over a property development which the judge and some neighbours feared would have a negative impact on the value of their cottages.²⁶ The complaint was accepted at the screening stage, and then dismissed by the Chairperson of the Judicial Conduct Committee. The Indigenous Bar Association sought a reconsideration of this decision and was successful.²⁷

The right to request reconsideration is important as a safeguard. As the *Newbould* case illustrates, decision-makers in the CJC process are not infallible. It is possible that they might give undue weight to the perspective of members of the judiciary and insufficient weight to the perspective of complainants, even if unintentionally. The duty to give reasons is one bulwark against this danger; the right to request a reconsideration would incentivize decision-makers to be even more rigorous in articulating their reasons to dismiss.

We argue that a statutory right to request reconsideration should be available against a decision of the screening officer and the reviewing member, and that such a right should also be available against a decision of a reduced hearing panel, which does not include lay representation (a point we will return to below). We suggest that a right of reconsideration is less urgent in the case of a review panel or full hearing panel because these bodies include lay representation – a contextual factor we take to be of relevance among the various counterposed considerations.²⁸

• *Complainants should have a right to request to participate as a witness or party in a Hearing Panel process on the basis that it would be in the public interest that such status be granted.* The early stages of the complaints and discipline process are designed to be inquisitorial rather than adversarial. Presumptively this means that complainants would not have party standing. However, in the *Douglas*

2001-2002” (2002) at 18, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-2002E.pdf>>; Canadian Judicial Council, “Annual Report 2002-2003” (2003) at 25, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-2003E.pdf>>; Canadian Judicial Council, “Annual Report 2005-2006” (2006) at 16-17, online (pdf): *Government of Canada* <<https://publications.gc.ca/collections/Collection/JU10-2006E.pdf>>; Canadian Judicial Council, “Annual Report 2006-2007” (2007) at 15, online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2011/ccm-cjc/JU10-2007-eng.pdf>; Canadian Judicial Council, “Annual Report 2007-2008” (2008) at 15, 25, online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2009/ccm-cjc/JU10-2008E.pdf>; Canadian Judicial Council, “Annual Report 2017-2018” (2018) at 2, online: *Canadian Judicial Council* <<https://cjc-ccm.ca/cmslib/ar17-18/en.html>>.

²⁶ Canadian Judicial Council, “Report of the Inquiry Committee to the Committee to the Canadian Judicial Council – Hon F.J.C. Newbould” (1 June 2017), online (pdf): *Canadian Judicial Council* <<https://cjc-ccm.ca/sites/default/files/documents/2019/2017-06-01%20Newbould%20Inquiry%20Concludes%20in%20light%20of%20Judge%E2%80%99s%20Retirement.pdf>> [<https://perma.cc/WC43-EYGH>].

²⁷ The process continued to the inquiry stage but was ultimately terminated when Justice Newbould reached retirement age. Other cases also indicate that reconsideration can be requested and granted. See e.g., *Taylor*, *supra* note 16 at paras 83, 94, 109.

²⁸ Most of the regulations of Law Societies allow complainants a right to request a reconsideration of a decision to dismiss a complaint. See e.g., *Legal Professions Act* 2004 SNS c 28, NS Reg 9.9.2/2021.

case, Mr. Chapman, who had alleged he had been the victim of the harassment, was granted limited standing at the Inquiry stage.²⁹

Under Bill C-9, at the hearing panel stage the presenting counsel takes on a prosecutorial role, and at the same time, the impugned judge is entitled to make both written and oral representations, essentially converting the process into an adversarial model.³⁰ It might well be that a complainant has something of value to share with the Hearing Panel that is not just about their individual concerns but serves the larger public interest. If this is a possibility, they should have a right to request an opportunity to participate as either a witness or a party. This would not mean an automatic right to participate; the complainant would have to present a *prima facie* case as to why it would be in the public interest for them to participate. This limited and exceptional right is grounded in the public goods of independence, impartiality, accountability, and fair participation.³¹

2. Insufficient Lay Representation in the Process

As we identified in Part IV 4 of our previous essay, proponents of Bill C-9 have been bullish in their celebration of lay representation in the process.³² The reforms mark an important step forward in that they reinforce the public goods of independence, impartiality, accountability, representativeness, and transparency, and go some distance to promoting public confidence in the administration of justice. But there is room for further improvements.

Lay participation under the reformed *Judges Act* is occasional and *ad hoc* rather than pervasive and structural. In fact, lay participation only exists at two stages of the process: as one of three members of the review panel³³ and as one of five members on the full hearing panel.³⁴ In other jurisdictions, for

²⁹Canadian Judicial Council, “Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to certain Preliminary Issues” (15 May 2012), online (pdf): *Canadian Judicial Council* < <https://cjc-ccm.ca/sites/default/files/documents/2019/CJC-Douglas-Ruling-2012-05-15.pdf> > [https://perma.cc/K827-Y9B5]. The possibility that this could happen again has been acknowledged by an official of the Ministry of Justice (See The Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44th Parl, 1st Sess, No 49 (23 March 2023) at 49:41 (Patrick Xavier). For competing cases on the rights of the complainants to seek standing in cases involving small claims court judges and justices of the peace, see *Kipiniak v Ontario Judicial Council*, 2012 ONSC 5866 and *Fairchild v Bligh*, 2015 NUCJ 17.

³⁰ *House of Commons Debates*, 44-1, No 214 (15 June 2023) at 1850 (Hon Pierre Dalphond) online: < <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-118/hansard> > [https://perma.cc/S8NC-SP4S].

³¹ We put aside a matter deserving of further inquiry, which is arguably too quickly dismissed in discussions of judicial disciplinary processes as self-evidently contrary to the public interest – namely, the merits of enacting discretionary powers to grant full party status to complainants at one or more stages of the process.

³² *House of Commons Debates* (9 December 2022), *supra* note 7 at 10713 (Hon David Lametti).; Standing Committee on Justice and Human Rights, “No 37”, *supra* note 9 at 37:2,5,9,10 (Hon David Lametti).; Standing Committee on Justice and Human Rights, “No 37”, *supra* note 9 at 37:12 (Patrick Xavier).; Standing Committee on Legal and Constitutional Affairs, “No 49”, *supra* note 29 at 49:4, 17 [Hon David Lametti].; Standing Committee on Legal and Constitutional Affairs, “No 49”, *supra* note 29 at 49:37,39.

³³ *An Act to amend the Judges Act*, *supra* note 2 at s 98.

³⁴ *An Act to amend the Judges Act*, *supra* note 2 at s 117.

example Ontario, lay representatives participate at every stage of the process.³⁵ The following proposals would bring greater consistency and participatory legitimacy to the system.

- *Anonymous complaints.* Section 86 provides that if a complaint is anonymous, it can only go forward if it is supported by two members of the CJC. It is fair to assume that if a complainant wishes to remain anonymous then it is likely that they are feeling vulnerable and lack trust in the integrity of the system.³⁶ To offset these concerns about vulnerability and trust, it would be helpful, in addition to the two members of the CJC, if a layperson were also to participate in the decision as to whether the anonymous complaint should proceed to the next stage. The Senate recommended that s 86 be amended to include “one person from the roster of laypersons,”³⁷ but this was rejected by the Minister of Justice and the House of Commons.³⁸

- *Screening process.* Bill C-9 does not require lay representation at this stage; rather, an initial screening is performed by a “screening officer” followed by a second screening by a “reviewing member of the CJC.” The primary purposes of the screening process are to promote efficiency and safeguard the interests of impugned judges.³⁹ However, as we indicated earlier in Part II, 1 for most complainants screening is the determinative moment. To seek balance between efficiency and the interests of judges on the one hand, and impartiality, accountability, representation, and responsive justification on the other, we return to the earlier proposals that complainants have a right to be given reasons and a right to request a reconsideration of any dismissal of their complaints. If a complainant does make such a request, then a lay representative should participate in both a consideration of that request and, if granted, the reconsideration itself. Further, if there is no agreement between the layperson and the screening officer/reviewing member, the complaint should proceed to the review panel (where there is lay representation).

- *Lay participation on the reduced hearing panel.* As noted previously, a lay representative serves on the full hearing panel, but section 110 does not include lay representation on the reduced hearing panel, which only includes a member of the CJC, a judge, and a lawyer. This is especially worrisome. While the design of the reduced hearing panel reflects efficiency concerns, it is unclear why it is the lawyer who

³⁵ The Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44-1, No 53 at 53: 3,9 (27 April 2023) (Alison Warner, Registrar (Ontario Judicial Council)), online: <<https://sencanada.ca/content/sen/committee/441/lcjc/53ev-56159.pdf>>.

³⁶ 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.

³⁷ Senate of Canada, Journals, 44-1, Iss 126 (unrevised) (18 May 2023) online: <https://sencanada.ca/en/content/sen/chamber/441/journals/126jr_2023-05-18-e> [<https://perma.cc/CR3Z-FS97>].

³⁸ *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>].

³⁹ For more on this point see Canadian Judicial Council, “Judicial Conduct: A Reference Guide for Chief Justices” at 4, online (pdf): <<https://cjc-ccm.ca/sites/default/files/documents/2020/JCC%20Guide%20for%20Chiefs%20%282018%29%20v4%20final.pdf>> [<https://perma.cc/UB7Q-R6BE>].

“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.”

gets to sit, but not the lay representative, particularly in light of the fact that many of the proponents of the bill emphasized the importance of lay representation, but said almost nothing about the representative role of lawyers in the process.⁴⁰

The Senate appreciated this concern, and recommended that section 110 be amended to include a layperson rather than a lawyer,⁴¹ but once again this reform was rejected.⁴²

- *Lay representation on the appeal panel.* After a decision of a full hearing panel, which does include one lay representative,⁴³ the judge or presenting counsel has a right of appeal to an Appeal Panel.⁴⁴ This Appeal Panel is comprised exclusively of judges: three members of the CJC and two other superior court judges.⁴⁵ Both the lay representative and lawyer are excluded.

At first blush, one might think that because it is an appeal panel, it should only be composed of judges because in their nature appeals relate primarily to questions of law, and laypersons would not be competent to make such determinations.⁴⁶ However, the appeal panel has wide-ranging powers. The right of appeal included in the statute is not limited to questions of law,⁴⁷ and section 131 provides that the Appeal Panel “may, among other things, reverse, vary, or affirm any decision of the reduced or full

⁴⁰ *House of Commons Debates* (9 December 2022), *supra* note 7 at 10713 (Hon David Lametti). An official from the Ministry of Justice attempted to explain the exclusion of the lay person from the reduced hearing panel “because it is meant to address a very specific potential issue with the review panel’s process.”

“If the judges feels that their procedural rights have not been respected or they want a more fulsome process – they want a public hearing – that’s where they can exercise the option to go to a reduced hearing panel. The job of that hearing panel will be to ensure that the process provides the required level of procedural fairness.” (See Standing Committee on Legal and Constitutional Affairs, The Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44th Parl, 1st Sess, No 49 (23 March 2023) at 49:39-40 [[Patrick Xavier, Senior Counsel, Judicial Affairs Section, Department of Justice Canada] online: <<https://sencanada.ca/content/sen/committee/441/lcjc/49ev-56081.pdf>>

This reasoning is unpersuasive because there is nothing in Bill C-9 that states that the basis of a request for a hearing panel only relates to “procedural rights and fairness.” Moreover, Alison Warner the Registrar of the Ontario Judicial Council testified before the Senate Committee that the lay representatives in Ontario take their responsibilities “very seriously” and did not indicate any concerns about their competencies (See Standing Committee on Legal and Constitutional Affairs, “No 53”, *supra* note 35 at 53:3,16-17.; *Debates of the Senate*, 44-1, Vol 153, Iss 137 (21 June 2023) at 3847 (Hon Denise Batters)online: <https://sencanada.ca/en/content/sen/chamber/441/debates/137db_2023-06-21-e> [<https://perma.cc/A85U-QE8P>].

⁴¹ Senate of Canada, The Standing Senate Committee on Legal and Constitutional Affairs, *Thirteenth Report*, 44-1 (18 May 2023).

⁴² *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>]

⁴³ *An Act to amend the Judges Act*, *supra* note 2 at s 117.

⁴⁴ *Ibid* at s 123.

⁴⁵ *Ibid* at s 130.

⁴⁶ See for example *Debates of the Senate*, 44-1, Vol 153 Iss 129 (1 June 2023) at 3844 [Hon Pierre Dalphond] online: <https://sencanada.ca/en/content/sen/chamber/441/debates/129db_2023-06-01-e?language=e> [<https://perma.cc/VQR4-HMBM>]

⁴⁷ *An Act to amend the Judges Act*, *supra* note 2 at ss 116 & 123.

hearing panel...and make any decision the hearing panel could have made.” Moreover, section 134 provides:

The appeal is to be heard on the basis of the record of the hearing panel whose decision was appealed and on any submissions made by the judge who is the subject of the appeal and the presenting counsel. The appeal panel may, in exceptional circumstances, admit additional evidence or testimony if, in its opinion, it is essential in the interests of justice to do so.

The references to “submissions made by the judge...and...presenting counsel” and “additional evidence or testimony” have the potential to open up significant factual issues.

As a consequence, any voice that the lay representative might have had at the stage of the full hearing panel may become irrelevant at the stage of the Appeal Panel.

There are three options to fix this concern, none of which would generate major inefficiencies. The first would be to keep the Appeal Panel at five, reduce the CJC members from three to two, reduce the judicial members from two to one, and appoint a lay representative and a lawyer to the vacated positions. A second option would be to either reduce the CJC representation from three to two, or the judicial representatives from two to one, and add a lay representative. The third, and slightly more cumbersome, solution is to expand the composition of the Appeal Panel to seven to allow for both lay and lawyer representation. The Senate recommended that section 130 be amended to reflect the first of these options⁴⁸ but yet again this reform was rejected.⁴⁹

Here we pause to emphasize that while the Senate did not endorse all of the reforms we have suggested in this subsection, it did propose three relatively modest modifications of the Bill to ensure a more robust commitment to lay participation, all of which were rejected. It is difficult to square such intentional resistance to lay representation with the government’s expressly stated desire to enhance public confidence in the system.⁵⁰

3. The Remedies for Judicial Misconduct Should be Reconsidered and Expanded

As we noted in Part IV 3 of our previous essay, one of the great strengths of Bill C-9 is that it allows the CJC to impose at least seven actions on judges short of a recommendation for removal.⁵¹ These actions may be taken relatively early in the process, through a decision of a review panel, or later, through a decision of a reduced or full hearing panel, or an internal appeal panel. However, we have three concerns. First, while there is a statutory requirement to inform the complainant if the complaint is dismissed at the review member / panel stage, there is no comparable duty to notify the complainant or the public of whether any remedial action is taken in lieu of a decision to dismiss or refer the matter to a

⁴⁸ *Senate of Canada* (18 May 2023), *supra* note 41.

⁴⁹ *Debates of the Senate*, (21 June 2023), *supra* note 38.

⁵⁰ For a clear articulation of the connection between systemic lay participation and public confidence see the remarks of the Registrar of the Ontario Judicial Council (Standing Committee on Constitutional and Legal Affairs, “No 53”, *supra* note 35 at 53:11.). It is to be noted that the Senate Committee did invite Minister Lametti to appear a second time to answer questions, but he declined (See *Debates of the Senate*, 44-1, Vol 153, Iss 128 (31 May 2023) at 3830 (Hon Brent Cotter), online: < https://sencanada.ca/content/sen/chamber/441/debates/pdf/128db_2023-05-31-e.pdf>.) *Debates of the Senate* (1 June 2023), *supra* note 46 at 3846 (Hon Denise Batters)).

⁵¹ The remedies in question may be imposed at different stages in the process: 1) by a review panel (s.102), 2) by a reduced or full hearing panel (ss113 & 120), or 3) the internal appeal panel (s 131).

hearing panel. While this protects the interests of impugned judges, it fails to deliver on the public values of transparency and responsive justification.

Second, as to the sanctions available, something is conspicuously absent: the authority to temporarily suspend a judge. The seven actions identified in the legislation are all relatively light; they do not amount to much more than “a rap on the knuckles.” Moreover, beyond the lack of any duty to inform complainants of these sanctions, many of the remedial actions available at this and later stages may be “private” – for instance, issuing a “private or public” reprimand or requiring that the judge make a “private or public” apology. This raises significant concerns about transparency and accountability.

There have been several cases over the years where judges have engaged in egregious behaviour but the CJC determined that it was not sufficient to warrant a recommendation for removal. Consider, for example, the Nova Scotia Court of Appeal judges who blamed Donald Marshall Jr. for his wrongful conviction and suggested “that any miscarriage of justice was apparent than real.”⁵² The Inquiry panel applied no formal sanctions and made only the mildest statement of concern (“it was a bad mistake in choice of words, but that is all it was”).⁵³ In the late 1990s, an anti-feminist rant published by Alberta’s Justice McClung, attacking Supreme Court of Canada Justice L’Heureux-Dube, met with deference as a Review Panel labelled his actions as “inappropriate” but not meriting a formal hearing.⁵⁴ In the early 2000s, Justice Boilard, in an act of petulance following the CJC’s expression of disapproval of his actions in a prior case, walked away from a major trial, causing great harm to the administration of justice.⁵⁵ Again, there was no sanction; indeed, while the Inquiry Committee expressed disapproval of the judge’s actions (as “improper”), the Council of the Whole subsequently determined that even this modest statement of concern was too severe an incursion on judicial discretion.⁵⁶ More recent examples include the case of Justice Spiro, whose interventions in a university hiring process to express disapproval of a candidate’s work on the Israeli-Palestinian conflict gave rise to a complaint, leading his own Chief Justice to suspend him from hearing cases involving members of the Muslim community; the Review Panel found no basis to support concerns about bias or proceed to an Inquiry, simply describing his behaviour as a “serious error”.⁵⁷ Another recent case is that of Justice Clackson, whose demeaning remarks about the statements and body language of a Nigerian born expert witness, determined by the Alberta Court of Appeal to give rise to a reasonable apprehension of bias, attracted multiple complaints

⁵² *Royal Commission on the Donald Marshall, Jr. Prosecution, Digest of findings and recommendations* (Nova Scotia: Canadian Cataloguing in Publication Data, 1989) at 7.

⁵³ Canadian Judicial Council, Report of the Inquiry Committee (August 27, 1990) at 26.

⁵⁴ CBC News (May 21, 1999), “Judge who criticised Supreme Court justice won’t face inquiry” <https://www.cbc.ca/news/canada/judge-who-criticised-supreme-court-justice-won-t-face-inquiry-1.170222>

⁵⁵ Canadian Judicial Council, “Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec” (19 December 2003), online (pdf): *Canadian Judicial Council* < https://cjc-ccm.ca/sites/default/files/documents/2019/conduct_inq_boilard_ReportIC_200312_en.pdf > [<https://perma.cc/7RUJ-RP2X>].

⁵⁶ Canadian Judicial Council, “Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss.65(1) of the *Judges Act* concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec” (19 December 2003), online (pdf): Canadian Judicial Council <https://cjc-ccm.ca/sites/default/files/documents/2019/conduct_inq_boilard_ReportIC_200312_en.pdf>

⁵⁷ Canadian Judicial Council, “Report of the Review Panel Constituted by the Canadian Judicial Council Regarding the Honourable D.E. Spiro” (13 April 2021), online (pdf): *Canadian Judicial Council* <<https://cjc-ccm.ca/sites/default/files/documents/2021/Report%20of%20the%20Review%20Panel%20-%20Spiro.pdf>> [<https://perma.cc/HPV2-YYN2>].

to the CJC alleging discrimination including one signed by 42 doctors, lawyers and professors; the Chair of the Judicial Conduct Committee found no basis to refer to an Inquiry, in part in view of an expression of contrition by the judge.⁵⁸

It might well be that, given changing public expectations, some, perhaps all, of these cases might be considered sufficiently problematic to warrant a recommendation for removal if decided today. But if not, surely it would make sense for the CJC to have the power to suspend a judge temporarily. Such suspensions could be imposed while the complaints process is running its course, in order to protect the public from further actual or potential harm (e.g., the *Marshall*, *Spiro*, and *Clackson* cases where there were concerns about discriminatory attitudes), or as a remedy, to reinforce the public's confidence that the CJC is taking such misconduct seriously (e.g., the *Boilard* case, where there was a clear abdication of judicial duties) and to deter other judges from engaging in similar conduct.⁵⁹

This recommendation might not be as radical as some might fear. Some judges who have been subject to the complaints and discipline process have in fact been relieved of their adjudicative duties by their Chief Justices for the duration of the process -- for example, ACJ Douglas, Matlow J and Spiro J, as mentioned above. Moreover, suspensions are part of the disciplinary repertoire in many other jurisdictions,⁶⁰ and all provincial systems.⁶¹ According to the Registrar of the Ontario Judicial Council as part of their testimony before the Senate Legal and Constitutional Affairs Committee, the existence and implementation of a power to temporarily suspend provincially appointed judges has not proved particularly problematic.⁶²

The issue of a power to suspend came up in the deliberations of the Senate Committee on Legal and Constitutional Affairs and the Senate. Senator Batters proposed inclusion of a power to temporarily suspend a judge, both with and without pay.⁶³ Others, most notably Senator Dalphond, objected that suspension without pay would infringe the financial security dimension of the judicial independence principle.⁶⁴ Ultimately, the Senate did not recommend a power to suspend either with or without pay.⁶⁵ Our proposal is that any suspension would be with pay, because we agree that suspension without pay engages complex constitutional questions relating to judicial independence that would ultimately

⁵⁸ Canadian Judicial Council, "Canadian Judicial Council completes its review of a matter involving the Honourable Justice Terry Clackson" (18 January 2023), online (pdf): *Canadian Judicial Council* <<https://cjc-ccm.ca/en/news/cjc-completes-its-review-matter-involving-hon-justice-terry-clackson>> [<https://perma.cc/VZL3-KBEK>].

⁵⁹ Ontario allows for both types of suspension. See Standing Committee on Constitutional and Legal Affairs, "No 53", *supra* note 35 at 53:4 (Alison Warner, Registrar, Ontario Judicial Council).

⁶⁰ For examples see Devlin & Wildeman, *supra* note 1 at 19, 42 (Australia), 139 (England and Wales), 189-190 (Italy), 244 (Netherlands), 263 (Nigeria), 344-345 (the United States).

⁶¹ *Debates of the Senate* (1 June 2023), *supra* note 46 at 3849 (Hon Denise Batters). See eg. *Courts of Justice Act*, RSO 1990, c C43 at 51.4(12).

⁶² Standing Committee on Legal and Constitutional Affairs, "No 53", *supra* note 35. That said, here one may recall the public controversy around the Douglas case, where some argued that the CJC exhibited a special gendered animus toward the judge, expressed through an unduly aggressive prosecutorial style. Remedial discretion including discretion to suspend would necessarily bring with it a duty to exercise that discretion in accordance with fundamental legal values including equality and non-discrimination.

⁶³ The Ontario system permits suspension without pay. See *ibid* at 53:8 (Alison Warner, Registrar (Ontario Judicial Council)); *Debates of the Senate* (1 June 2023), *supra* note 46 (Hon Denise Batters); *Debates of the Senate* (1 June 2023), *supra* note 46 (Hon Denise Batters).

⁶⁴ *Debates of the Senate* (1 June 2023), *supra* note 46 at 3841 (Hon Pierre Dalphond).

⁶⁵ *Debates of the Senate* (21 June 2023), *supra* note 38.

require a determination by the Supreme Court of Canada, and an analysis that goes beyond this paper. Suspension with pay, in our opinion, does not generate the same constitutional concerns.

A third concern encompasses not merely the remedies on offer in the revised *Judges Act*, but a deeper problem touched on in the first of our two-part contextualization and critique – namely, the elaboration in s.80 of the bases for recommending removal from office and so instituting disciplinary proceedings where continuation in office would so “undermine public confidence in the impartiality, integrity or independence of the judge or of their office” as to render the judge incapable of executing the judicial function. That list includes the following:

- (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.

We do not dispute that illness or disability (including disabilities relating to substance use) may in rare circumstances render a judge unfit for office. However, as we have also argued in the context of lawyer regulation,⁶⁶ the standards and processes for dealing with such concerns should be strictly distinguished from disciplinary processes triggered by misconduct. This is important for a few reasons, including:

- Resisting the stigmatization of illness and disability that results from blurring these with intentional or negligent professional misconduct;
- Relatedly, encouraging those affected by illness or disability to reach out in timely fashion for assistance, including workplace accommodations advancing both individual well-being and the public interest;
- Promoting elaboration of alternative regulatory pathways where problematic behaviour is rooted in illness or disability, i.e., responses grounded in an ethos of reasonable accommodation and respect for diversity.

There are already helpful precedents that legislators and the CJC might have consulted in crafting such reforms. For example, the Nova Scotia Barristers’ Society has developed a Fitness to Practice regime as an alternative to lawyer discipline where health or disability issues have contributed to conduct that is otherwise susceptible to discipline. That process focuses on identifying accommodations consistent with protection of the public interest while remaining responsive to individual lawyer’s condition and circumstances; other law societies are exploring similar initiatives.⁶⁷

⁶⁶ Richard Devlin, Jocelyn Downie and Sheila Wildeman, "Self-Regulation, Professional Responsibility and the Duty to Report" (2016) 35:2 Society Record 20. Available at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works/1954/.

⁶⁷ See ss 9.3 (“Fitness to Practice Committee”), Regulations Made Pursuant to the Legal Profession Act, S.N.S 2004, c.28. Proclaimed May 31, 2005; Amended to May 26, 2023: available at <https://nsbs.org/legal-profession/nsbs-regulations/>. See also Law Society of BC Mental Health Task Force, “Recommendation on the Development of an Alternative Discipline Process (“ADP”)” (September 24, 2021):

This was an opportunity for the CJC to take a leadership role in promoting equity, diversity and inclusion as well as public confidence in a judiciary that has attracted increasingly penetrating critique for its punitive approach to disability within its own ranks -- an attitude arguably connected to broader failures to promote disability justice and recognize interlocking barriers to substantive equality.⁶⁸

4. The Aspiration to Exclude Judicial Review

Proponents of Bill C-9, including the Chief Justice of Canada, the CJC, senators, MPs, and the Minister of Justice have all been explicit that one of the major goals of the reforms was to preclude judges who are subject to the process from having recourse to judicial review.⁶⁹ As the Minister of Justice has helpfully characterized it, the new process is vertical not horizontal.⁷⁰

While some judges in the latter part of the 20th century and early part of the 21st century had successfully sought judicial review of the CJC process⁷¹ it was the *Douglas* and *Girouard* cases in the 20-teens that generated a firestorm of controversy on this issue. In both these cases the impugned judges sought judicial review (sometimes on multiple occasions) of decisions of CJC Inquiry Committees in both the Federal Court and the Federal Court of Appeal. Invoking the constitutional principle of judicial independence, the CJC counter-argued that it was immune from judicial review. This led to protracted, expensive, and ultimately embarrassing litigation. The Federal Court of Appeal rejected the CJC's claims to immunity on several occasions, often in strongly worded decisions.⁷²

As new data confirms high rates of mental health and substance use issues within the profession, establishing alternative regulatory processes to address situations where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice.

Available online at <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-well-being-hub/mental-health-task-force/>

⁶⁸ See Joshua Sealy-Harrington, "Embodying Equality: Stigma, Safety and Clément Gascon's Disability Justice Legacy" (2021) 103 S.C.L.R. (2d) (advancing the key insight that "constructing disability as "less than", as something to be punished or avoided, is fundamentally incapable of promoting disability justice." (at 199)

⁶⁹ *House of Commons Debates* (9 December 2022), *supra* note 7 at 10713 (Hon David Lametti).; Standing Committee on Justice and Human Rights, "No 37", *supra* note 9 at 37:9 (Hon Pierre Dagher).; *Debates of the Senate*, 43-2, Vol 152 Iss 49 (15 June 2021) at 1850-51 online: <https://sencanada.ca/en/content/sen/chamber/432/debates/049db_2021-06-15-e> [<https://perma.cc/F3VH-DPPH>].; *House of Commons Debates*, 41-1, No 90 (16 June 2022) at 6781 (Hon Gary Anandasangaree) online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-90/hansard>> [<https://perma.cc/2XY8-SHBR>].; Standing Committee on Legal and Constitutional Affairs, "No 49", *supra* note 29 at 49:14 (Hon David Lametti).

⁷⁰ Standing Committee on Justice and Human Rights, "No 37", *supra* note 9 at 37:9.; Standing Committee on Legal and Constitutional Affairs, "No 49", *supra* note 29 at 49:14, 22 (Hon David Lametti).

⁷¹ See e.g., *Taylor*, *supra* note 16.; Canadian Judicial Council, "Report to the Canadian Judicial Council of the Inquiry Committee Appointed Pursuant to Subsection 63(1) of the Judges Act to Conduct an Inquiry Concerning Mr. Justice Bernard Flynn with Respect to Statements made by Him to a Journalist Whose Article Appeared in the Newspaper Le Devoir on February 23, 2002," (12 December 2002), online (pdf): Canadian Judicial Council <https://cjc-ccm.ca/sites/default/files/documents/2019/conduct_inq_flynn_ReportIC_200303_en.pdf> [<https://perma.cc/WW5D-2AYT>].

⁷² Canadian Judicial Council, "Hon Lori Douglas", *supra* note 29.; Canadian Judicial Council, "Report of the Canadian Judicial Council to the Minister of Justice – Girouard" (20 April 2016), online (pdf): *Canadian Judicial Council* <https://cjc-ccm.ca/cmslib/general/Girouard_Docs/2016-04-https://cjc-ccm.ca/cmslib/general/Girouard_Docs/2016-04-20%20Report%20of%20the%20Canadian%20Judicial%20Council%20to%20the%20Minister%20of%20Justice.pdf>

Bill C-9 seeks to fix this problem through three mechanisms: inclusion of a privative clause,⁷³ a right of appeal to an internal Appeal Panel composed of five judges,⁷⁴ and a right to seek leave to appeal of decisions of that panel to the Supreme Court of Canada.⁷⁵ The genesis of this idea is to be found as early as October 2016 when the CJC issued its “Proposals for Reform” document.⁷⁶ The theory is that if there is a right to appeal within the process, plus a right to seek leave to the SCC, that is a sufficient check on the power of the CJC and, therefore, there is no need to seek judicial review. The public good is efficiency – there will be a significant reduction in the costs of the proceedings and fewer delays.⁷⁷

While judicial review (in some cases, repeated reviews, paid for out of the public purse as a judge runs out the clock to retirement) has been positioned in discussions leading to Bill C-9 as a source of system inefficiencies, there are limits to the anticipated efficiencies of the reforms adopted.

First, as a matter of longstanding legal principle, the newly-minted privative clause is of far more limited in effect than it appears. The section reads:

158 A decision made by a member of the Council under any of Divisions 1 to 3 or by a member of a panel established under any of those Divisions is final and is not to be questioned or reviewed in any court other than provided for in this Part.

While this section is positioned under the heading “Decision Final,” it attracts the same rule of law principles that limit all privative clauses as a matter of Canadian administrative law.⁷⁸ That is, as multiple federal court rulings have established, there is nothing special about the CJC that makes its privative clauses more robust or more likely to impact the prospect or conduct of judicial review than similar clauses inserted in the governing legislation of other administrative agencies.⁷⁹

Still, the combined effect of the privative clause and the new internal review and appeal structure instituted through Bill C-9 strengthens the position that the federal court should decline to grant a judge’s request for review in deference to legislative design, i.e., on the basis of prematurity and/or failure to exhaust alternatives. Recent cases underline the importance of such deference, indicating that

[<https://perma.cc/V4B6-9C38>]; *Girouard v Canada (Attorney General)*, 2020 FCA 129 [*Girouard*]. Provincial Court judges in Ontario can seek judicial review in the Divisional Court. See Standing Committee on Legal and Constitutional Affairs, “No 53”, *supra* note 35 at 53:12 (Alison Warner, Registrar, Ontario Judicial Council).

⁷³ *An Act to amend the Judges Act*, *supra* note 2 at s 158.

⁷⁴ *Ibid* at s 116, 123, 130.

⁷⁵ *Ibid* at s 137.

⁷⁶ Canadian Judicial Council, “Proposals for Reforms to the Judicial Discipline Process for Federally-appointed Judges” (October 2016) at 1.3, online (pdf): *Canadian Judicial Council* <<https://cjc-ccm.ca/cmslib/general/CJC%20Position%20Paper%20on%20Discipline%20Process%202016-10.pdf>> [<https://perma.cc/JWL5-78JW>].

⁷⁷ Some witnesses suggested that the process would be reduced by between one and a half to two years (See: Standing Committee on Legal and Constitutional Affairs, “No 49”, *supra* note 29 at 49:29 (Patrick Xavier, Senior Counsel, Judicial Affairs Section (Department of Justice Canada); Standing Committee on Legal and Constitutional Affairs, “No 49”, *supra* note 29 at 49:35 (Hon Pierre Dalfond)).

⁷⁸ See e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31.

⁷⁹ See *Girouard v. Canada (Attorney General)*, 2018 FC 865 (CanLII), [2019] 1 FCR 404, *aff’d* 2019 FCA 148 (CanLII), [2019] 3 FCR 503.

interlocutory reviews will rarely be granted as a matter of general principle.⁸⁰ That said, a court may consider such factors as whether the illegality alleged could be cured by a subsequent internal appeal.⁸¹ And it remains to be seen how the Federal Court will evaluate the adequacy of the alternative introduced through Bill C-9 in the form of a right to seek leave to appeal to the Supreme Court of Canada. It is important to note, too, that the *Judges Act* does not recognize complainants as parties to any of the review or appeal mechanisms contemplated; thus a complainant's chance of challenging CJC decisions at any stage in the process continues to rest entirely on the (by no means assured) prospect of judicial review – meaning that the insulating effect of internal-alternatives-plus-privative-clause is weakened and the thinness of the insulation of the privative clause taken alone exposed.

Second, Bill C-9 itself appears to recognize that it will not be able to entirely preclude judicial review in the Federal Court. Section 146 addresses expenses to be paid out of the consolidated revenue fund, and this includes covering the fees of lawyers representing impugned judges. Section 142(6) states the following “restriction”:

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. [emphasis added]

This “for greater certainty” clause makes it clear that an impugned judge will not have their legal fees covered if they seek judicial review, therefore disincentivizing judges from going that route; but in so doing it implicitly acknowledges that, in fact, judicial review is still a possibility – or at least, spending money and time attempting to access judicial review remains a possibility.

Third, there are principled reasons beyond efficiency to be concerned about ousting the possibility of judicial review. These reasons are rooted in the values animating administrative law and more specifically the law of judicial complaints – values that include independence, impartiality, accountability, fairness, and responsive justification. No institution is perfect, and mistakes and misjudgements are always possible. As the Federal Court and the Federal Court of Appeal have made clear, just because the CJC is composed of senior, highly respected judges, that does not mean that it is infallible.⁸² In fact, there have been a number of cases where the federal court has made corrective

⁸⁰ See, eg, *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 35 (“an application for judicial review against an interlocutory administrative decision can be brought only in ‘exceptional circumstances.’ Such circumstances are very rare and require that the consequences of an interlocutory decision be so ‘immediate and radical’ that they call into question the rule of law”)

⁸¹ See *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 40-45.

⁸² *Girouard*, *supra* note 72 at para 26, citing *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at para 32.

interventions including *Taylor*,⁸³ *Flynn*,⁸⁴ *Douglas*,⁸⁵ and perhaps most importantly *Smith*,⁸⁶ clarifying the powers, and even questioning the judgment, of the CJC. And if we think back, it was the Federal Court that gave some succour to Justice Landreville following a judge-led inquiry. Proponents of Bill C-9 will counter that a safeguard is in place: the right to seek leave to appeal to the Supreme Court of Canada. However, as The Advocates' Society argued in its submissions on Bill C-9, section 137 does not guarantee a right of appeal to the Supreme Court of Canada – it only permits a right to seek leave.⁸⁷ The Supreme Court determines its own docket and the vast majority of applications for leave are rejected.⁸⁸ One might surmise that if a request for leave were sought, the Supreme Court would grant it, given the subject matter, but that is just speculation. And as we have noted, neither this statutory mechanism nor any of the other mechanisms introduced by Bill C-9 provides complainants with access to processes of internal review or appeal.

The Advocates' Society proposed a “simple remedy” to the access to justice problem it discerned in Bill C-9's statutory appeal – that the right to seek leave to appeal to the Supreme Court of Canada be replaced by a right of appeal directly to the Federal Court of Appeal.⁸⁹ This was strongly endorsed by the Canadian Bar Association.⁹⁰ Such a proposal removes the contingency of whether access to an external independent and impartial judicial body is available and therefore enhances the accountability of the CJC. But it does come at a price, in that a decision of the Federal Court of Appeal would of course be subject to a leave to appeal application to the Supreme Court of Canada -- meaning that there would be one more potential step in the process, which would both increase costs and generate delays, the very mischiefs that proponents of Bill C-9 sought to resolve. However, the process would still be relatively vertical as there would only be one “off ramp” to judicial review (after a decision of the Appeal Panel) and therefore it would still be more streamlined than the current regime. Thus, on balance, if the goal is to calibrate the variety of public goods as we have argued in both of these essays, then the addition of a right of appeal to the Federal Court of Appeal is justified.

⁸³ *Taylor*, *supra* note 16.

⁸⁴ Canadian Judicial Council, “Report to the Canadian Judicial Council of the Inquiry Committee Appointed Pursuant to Subsection 63(1) of the Judges Act to Conduct an Inquiry Concerning Mr. Justice Bernard Flynn with Respect to Statements made by Him to a Journalist Whose Article Appeared in the Newspaper *Le Devoir* on February 23, 2002,” (12 December 2002), online (pdf): Canadian Judicial Council <https://cjc-ccm.ca/sites/default/files/documents/2019/conduct_inq_flynn_ReportIC_200303_en.pdf> [<https://perma.cc/WW5D-2AYT>].

⁸⁵ Canadian Judicial Council, “Hon Lori Douglas”, *supra* note 29.

⁸⁶ Canadian Judicial Council, “Report of the Review Panel Constituted by the Canadian Judicial Council Regarding The Honourable Patrick Smith” (5 November 2018), online (pdf): *Canadian Judicial Council* <https://cjc-ccm.ca/sites/default/files/documents/2020/Smith%20Matter%20-%20Report%20of%20Review%20Panel%20WEB_0.pdf> [<https://perma.cc/S9CV-URZU>].

⁸⁷ Letter from the Advocates' Society to Minister Honourable Randeep Sarai, Chair of the Standing Committee on Justice and Human Rights (18 July 2022), “Bill C-9, *An Act to amend the Judges Act*.”

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ The Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44-1, No 50 (29 March 2023) at 50:22,39,41 (Steeves Bujold, President, Canadian Bar Association).

The Senate was persuaded by the wisdom of including an as of right appeal to the Federal Court of Appeal and proposed four amendments to achieve this outcome.⁹¹ But they also suffered the same fate as most of the other Senate reforms – rejection.⁹²

Finally, to return to a point already noted, Bill C-9 says nothing about a right to judicial review by complainants. As we discussed in Part II 1, complainants have in the past successfully sought judicial review of decisions by the CJC (although without much success); we assume that this common law right remains intact. But this takes us back to our previous argument in subsection 1, that Bill C-9 ought to have more fully acknowledged the rights of complainants. However, perhaps it would have been jarring to recognize complainants' right to judicial review, while extinguishing the same right for judges.

⁹¹ *An Act to amend the Judges Act*, *supra* note 2 at s 126(1), 137, 138 and 146.; Senate Committee on Legal and Constitutional Affairs (18 May 2023), *supra* note 37.; *Debates of the Senate* (21 June 2023), *supra* note 38.

126 (1) For the purposes of calculating an annuity under Part I, if a full hearing panel decides that the removal from office of a judge who is the subject of a complaint is justified, the day after the day on which the judge is given notice of the full hearing panel's decision is the day to be used to determine the number of years the judge has been in judicial office and the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement unless

- (a) the decision is set aside by a decision of the Supreme Court of Canada, by a decision of the Federal Court of Appeal if the Federal Court of Appeal's decision is final, or by the decision of an appeal panel if the appeal panel's decision is final;
- (b) the Minister's response under subsection 140(1) provides that no action is to be taken to remove the judge from office; or
- (c) the matter of removal of the judge from office is put to one or both Houses of Parliament and is rejected by either of them.

137 The judge who is the subject of a decision of an appeal panel and the presenting counsel may respectively, within 30 days after the day on which the appeal panel sends them a notice of its decision, appeal the decision to the Federal Court of Appeal.

138 If leave to appeal a decision of the Federal Court of Appeal made on an appeal under section 137 is granted by the Supreme Court, the Attorney General of Canada and the attorney general of a province may intervene in the appeal.

146 (2) 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 Federal Court of Appeal and 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.

⁹² *Debates of the Senate* (21 June 2023), *supra* note 38. As we have suggested on several occasions in this paper Bill C-9 is very much the product of negotiations and perhaps compromises between the CJC and the Canadian Superior Court Judges Association. However, during the Senate proceedings, after the Advocates Society introduced its proposal for the as of right to appeal to the Federal Court of Canada, at the eleventh hour, on March 28th, the CSCJA sent a letter to the Senate Committee on Legal and Constitutional Affairs, supporting this reform, thereby revealing a lack of consensus on this particular matter [Letter on file with authors]; The Standing Senate Committee on Legal and Constitutional Affairs, 44-1, No 51 (30 March 2023) at 51:24 (Hon Pierre Dalphond), online: <<https://sencanada.ca/content/sen/committee/44/1/cjc/51ev-56107.pdf>>.

5. Requirements for CJC's Annual Reports

The CJC's Annual Reports need to be improved, to better accord with the public values of transparency and accountability. Section 160(1) is to be praised because it requires the CJC to provide an annual report to the Minister providing statistics on

- a) Complaints received
- b) Complaints dismissed by the screening officer
- c) Complaints dismissed by the reviewing member of the CJC
- d) Complaints reviewed by: Review panel, Hearing panel, Appeal panels
- e) Any actions imposed by any of the above

Also, section 160(2) requires that this Report be made public by the Minister.

But once again the reforms do not go far enough. Over the years, the annual reports of the CJC have varied enormously in content and tone.⁹³ In the 1990s and 2000s they tended to be quite detailed and qualitative in nature, giving examples of the types of complaints. They outlined the degree to which complaints were based on concerns about discrimination, especially on the basis of race and gender. They also frequently documented the challenges presented by self-represented litigants. In recent years the Reports have become much more quantitative and less qualitative. They provide statistics, but not much context.⁹⁴ We also know that in the last two decades there has been a very large increase in the number of complaints.

Thus, we would recommend that the annual reports be required to include additional information on

- i. The demographics of those who bring complaints (e.g., gender, race, disability etc.) This would of course be based upon voluntary disclosure by complainants at the intake stage;
- ii. The areas of law involved, e.g., criminal law, family law, tax law, etc.;
- iii. The types of complaints, e.g., a) discrimination on basis of race, gender, religion, etc., b) competence, c) judicial misconduct outside the courtroom, or d) judicial misconduct within the courtroom.

The Senate was also concerned that the Bill C-9 did not go far enough to collect and publish potentially relevant data. In introducing suggested reforms Senator Pate argued that better data collection and publication would allow the government to “understand who are the most displeased, who have the means to bring judicial complaints and who are disproportionately being impacted so that we can create better training for judges, lawyers and create a fair legal system.”⁹⁵ To achieve this outcome two amendments were advanced.⁹⁶ The goal was to collect and publish more specific data that would be

⁹³ See Devlin & Wildeman, “The Canadian Judicial Council’s (Elusive) quest for legitimacy” in Devlin & Wildeman, *supra* note 1.

⁹⁴ Ontario’s Annual Reports are more substantive. See Standing Committee on Legal and Constitutional Affairs, “No 53”, *supra* note 35 at 53:4, 13-15 (Alison Warner, Registrar (Ontario Judicial Council)).

⁹⁵ Fraser, *supra* note 23.

⁹⁶ 160 (1) The Council shall, within three months after the end of each calendar year, submit a report to the Minister setting out, in respect of the year, the number of

- (a) the number of complaints
 - (i) received,
 - (ii) withdrawn or abandoned,
 - (iii) dismissed by a screening officer for a reason set out in

part of a feedback loop aimed at improving the administration of justice in the federal courts and thereby enhancing public confidence in the judicial system. But disappointingly these amendments were also rejected as “contrary to the intention of the legislation.”⁹⁷

III Conclusion: “Canadians Deserve Better”⁹⁸

There is no doubt that Bill C-9 has introduced reforms that modernize and streamline the complaint and discipline process for federally appointed judges. These reforms that have recently become law demonstrate an awareness of, and an effort to implement, a plurality of public goods including independence, impartiality, accountability, fair participation, representation, transparency, responsive justification and efficiency.

However, Bill C-9 was flawed and the reforms made, glaringly partial. Reminiscent of the reforms introduced in 1971, Bill C-9 is a response to a crisis of legitimacy. In 1971, the crisis was the *Landreville* case, and the response was to hyperinflate one public good – independence – at the expense of a number of other public goods. For fifty years, the CJC struggled to establish and maintain legitimacy, but by the 20 teens, it was clear to everyone that it had failed to achieve the goal of promoting public confidence in the administration of justice.

In response to the current crisis, the Canadian Judicial Council, the Canadian Superior Court Judges Association, the Department of Justice, and parliamentarians have focused on two key public goods – independence and efficiency.⁹⁹ While it might go too far to claim that Bill C-9 was a product of agency

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- (A) paragraph 90(1)(a),
 - (B) paragraph 90(1)(b), and
 - (C) paragraph 90(1)(c),
 - (iv) dismissed by a reviewing member for a reason set out in
 - (A) paragraph 90(1)(a),
 - (B) paragraph 90(1)(b), and
 - (C) paragraph 90(1)(c),
 - (v) dismissed by a reviewing member for being wholly without merit,
 - (vi) reviewed by review panels, hearing panels and appeal panels, and
 - (vii) in respect of which any of the actions referred to in paragraphs 102(a) to (g) were taken;
 - (b) for each category listed in paragraph (a), the number of those complaints that allege
 - (i) sexual misconduct, or
 - (ii) discrimination on the basis of a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*;
 - (c) for each category listed in paragraph (a), in a manner that does not allow for the identification of any complainant, a summary of the information collected under section 86.1; and
 - (d) for any withdrawn or abandoned complaints, the reasons provided, if any.”, and

160(3) The Minister may recommend, on the basis of the information contained in the annual report, that the Council establish seminars under paragraph 60(2)(b).”

⁹⁷ Fraser, *supra* note 23.

⁹⁸ Minister of Justice Honourable David Lametti, cited in *Debates of the Senate* (15 June 2021), *supra* note 69 at 1850 (Hon Pierre Dalphond).

⁹⁹ For a clear example of the prioritization of efficiency see Standing Committee on Constitutional and Legal Affairs, “No 49,” *supra* note 29 at 49:3 (Hon David Lametti), Standing Committee on Constitutional and Legal Affairs, “No 50,” *supra* note 18 at 50:11 (Marc A. Giroux, Commissioner (*Office of the Commissioner for Federal Judicial Affairs*)).

capture,¹⁰⁰ it expressed a form of legislative tunnel vision that failed to adequately valorize a number of other key values essential to the legitimacy of the judicial complaint and discipline process. Bill C-9 should have been a project undertaken as more than a response to a crisis; it should have been understood as an opportunity, an exceedingly rare opportunity, to construct a judicial oversight regime worthy of an advanced constitutional democracy. The additional reform proposals offered in this second paper (and by the Senate) were not particularly radical. They sought to build upon and expand a set of public goods already inchoately embedded in Bill C-9 but marginalized by the fixation on independence and efficiency. Thus we do not share Minister Lametti's "confidence" that the "bill will put in place a judicial conduct process that will serve Canadians exceptionally well for decades to come."¹⁰¹ Bill C-9 was a good try, but it is not as ambitious as it might have been. The Canadian government should try again if it is truly committed to promoting public confidence in the complaint and discipline regime for federally appointed judges.

That, however, is highly unlikely. Perhaps then, as second best, the CJC might introduce the proposed reforms through the bylaws and policies it is authorized to implement under section 61(3)(c) of the *Judges Act*. While such bylaws and policies lack the legal pedigree and democratic legitimacy of statutory provisions, they would go a considerable way toward helping the CJC to achieve the legitimacy it wants and needs... and creating a governance regime for judges that Canadians deserve.

¹⁰⁰ For discussions of the vital roles played by both the CJC and the Canadian Superior Court Judges Association in the development of Bill C-9 see e.g., *Senate Debates* (15 June 2021), *supra* note 69 at 1850-51 (Hon Pierre Dalphond).; *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>].; *House of Commons Debates* (9 December 2022), *supra* note 7 at 10715 (Hon David Lametti).; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 38 (21 November 2022).; Standing Committee on Legal and Constitutional Affairs, "No 49", *supra* note 29 at 49:5 (Hon Pierre Dalphond).; Standing Committee on Legal and Constitutional Affairs, "No 49", *supra* note 29 at 49:6,7,20 (Hon David Lametti).; Standing Committee on Legal and Constitutional Affairs, "No 50", *supra* note 18 at 50: 2 (Marc A. Giroux, Commissioner (*Office of the Commissioner for Federal Judicial Affairs*)).; Standing Committee on Legal and Constitutional Affairs, "No 50", *supra* note 18 at 50: 4 (Jacqueline Corado).; *Debates of the Senate* (1 June 2023), *supra* note 46 at 3841 (Hon Pierre Dalphond).

¹⁰¹ Standing Committee on Legal and Constitutional Affairs, "No 49", *supra* note 29 at 49:3.