Submission on Behalf of Canada

and the Canadian Superior Courts Judges’ Association

QUESTIONNAIRE

# QUESTION 1

Please provide detailed information, including disaggregated data, on the number of judges that have been subject to disciplinary proceedings in the last ten years. How many of them were found guilty of a disciplinary misconduct? How many of them were removed from office?

* Subject to disciplinary proceedings: 6
* Found guilty of disciplinary misconduct: 3
* Removed from office: 0\*

\*Although there have been instances where federally appointed judges in Canada have been recommended to be removed from office, to date none actually has because they have voluntarily resigned or retired before being forcibly removed by an act of Parliament.

Proceedings in last ten years (from the Canadian Judicial Council’s Inquiries Listings online)

|  |  |  |
| --- | --- | --- |
|  | Guilty of misconduct? | Removal recommended?  |
| Justice Girouard (First Hearing) | No – allegations not proven/withdrawn | No |
| Justice Girouard (Second Hearing) | Yes | Yes |
| Justice Newbould | No – resigned after allegations and before hearing concluded | No |
| Justice Camp | Yes – conceded by judge | Yes |
| Justice Deziel | Yes | No |
| Justice Douglas | No – the lengthy judicial conduct review inquiry was eventually stayed on account of Justice Douglas agreeing to early retirement from the Bench | No |
| Justice Cosgrove (2009) | Yes – conceded by judge | Yes |

# QUESTION 2

Has any judge belonging to your association been subjected to any form of sanctions that were not previously established by law or that were imposed through a procedure that did not meet the procedural requirements established by the law? If yes, please provide information on the case(s).

No. Canada has strict mechanisms in place under the *Judges Act* for dealing with allegations of judicial misconduct and these procedures are followed. These mechanisms are described in further detail below.

An investigation into judicial misconduct ends with the Canadian Judicial Council (“CJC”) making a recommendation to the Minister of Justice as to whether a judge should be removed from office. There is currently some debate in Canada as to whether federally appointed judges can apply to have decisions of the CJC reviewed by the Federal Court through an application for judicial review as a means of ensuring procedural fairness and natural justice.

As a recent example, in *Girouard v. Canada (Attorney General)*, 2018 FC 865, the CJC brought a motion to strike the Justice’s applications for judicial review on the grounds that the Federal Court has no jurisdiction to grant a remedy against the Canadian Judicial Council or its Inquiry Committees. The Federal Court dismissed the motion to strike, finding that the Federal Court has jurisdiction to hear applications for judicial review of CJC decisions. The Federal Court is a statutory court whose jurisdiction is governed by the *Federal Courts Act*. In concluding that it had jurisdiction, the Federal Court held that the CJC fell within the definition of a “federal board, commission or other tribunal”, over which it had jurisdiction pursuant to ss. 2 and 18(1) of the *Federal Courts Act.* It also found that the CJC did not fall within any relevant exceptions that would exempt its decisions from judicial review.

The CJC unsuccessfully appealed the decision to the Federal Court of Appeal and then applied for leave to appeal the Federal Court of Appeal’s decision to the Supreme Court of Canada, which is Canada’s highest court. The Supreme Court of Canada dismissed the application for leave, meaning that the law currently permits judicial review of CJC decisions.

# QUESTION 3

Apart from disciplinary proceedings, are there any other measures that may be used to interfere with the capacity of a judge to adjudicate cases before him or her in full independence? Are you aware of any case in which a judge has been promoted, transferred to another court, forced to take a training course, a vacation or medical leave, or coerced or pressured in similar ways in order to abandon a case pending before him or her? If yes, please provide information on the case(s).

No, there are currently no other measures apart from disciplinary proceedings that may be used to interfere with the capacity of a judge to adjudicate cases independently.

However, there has been some recent debate over mandatory judicial training in Canada. Bill C-337, Judicial Accountability through Sexual Assault Law Training Act: An Act to amend the Judges Act and the Criminal Code (sexual assault), was introduced as a private member’s bill in the Canadian House of Commons in 2017 and has recently been revived by the current government through Bill C-5. If adopted, the bill would impose mandatory sexual assault training for federally appointed judges in Canada.

The bill was introduced in partial response to a few high-profile criminal cases in Canada where judges made inappropriate comments during sexual assault trials. In one such case, the CJC found that the judge’s comments amounted to misconduct and recommended that the judge be removed from office. The bill has sparked vigorous debate, with its proponents emphasizing the need to maintain public confidence in the administration of justice. Supporters of Bill C-5 argue that Canadians need to have confidence that judges have the training necessary to ensure that they decide sexual assault cases free from the influence of stereotypes about sexual assault survivors or “rape myths”.

By contrast, while not contesting the importance of ensuring that judges do not engage in stereotypical thinking about sexual assault survivors, others have emphasized the need for the judiciary to retain control over its own education. Proponents of this view argue that allowing Parliament to dictate judicial training encroaches on the powers of the judicial branch of government and would undermine judicial independence. A few weeks after Bill C-5 was introduced, the Chief Justice of Canada reportedly stated that the judiciary, rather than parliament, must decide what training judges receive.

# QUESTION 4

What measures have been put in place in your country to enable judges to decide matters before them impartially and without any pressure or interference?

## Constitutional Protection

The Supreme Court of Canada has confirmed that judicial independence is an “unwritten constitutional principle”. Our Constitution provides for the separation of powers between the judicial branch and the legislative and executive branches of government and contains other protections such as security of tenure for judges under s. 99 of the *Constitution Act*.

In addition, the *Canadian Charter of Rights and Freedoms* also guarantees anyone charged with an offence to the right to be tried by a fair and impartial tribunal.

## Appointment Process

Independent Judicial Advisory Committees are central to the judicial appointment process. These committees assess the qualifications of applicants for judicial office and provide a list of three recommendations to the Minister of Justice.

Each Judicial Action Committee consists of seven volunteer members representing the bench, the bar, and the general public, including the following:

* 1 nominee of the provincial or territorial law society;
* 1 nominee of the provincial or territorial branch of the Canadian Bar Association;
* 1 judge nominated by the Chief Justice of the province or by the senior judge of the territory;
* 1 nominee of the provincial Attorney General or territorial Minister of Justice; and
* 3 nominees of the Government representing the ‘general public’;
* 1 ex officio non-voting member: Commissioner for Federal Judicial Affairs or Executive Director, Judicial Appointments.

The Committee is selected with a view to achieving a gender-balanced Committee that also reflects the diversity of members of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members’ gender identity or sexual orientation differs from that of the majority. Committee members are appointed by the Government to serve two-year terms, with the possibility of renewal.

The primary qualifications for judicial appointment are professional competence and overall merit. The Committees are provided with assessment criteria for evaluating the applications. These guidelines explicitly state that Committees “must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members’ gender identity or sexual orientation differs from that of the majority.”

## Security of tenure

Once appointed, judges in Canada have security of tenure, on good behaviour, until they reach the age of mandatory retirement. As noted above, security of tenure is protected under the Constitution.

Judges can only be removed from office for specific reasons set out in law in the *Judges Act*, such as misconduct, infirmity, failing in the execution of their office, or engaging in conduct that is incompatible with their judicial office.

## Accountability

Judges are held accountable in several ways. First, they almost always exercise their authority in a public and transparent process in open courts. This invites scrutiny of the administration of justice and judicial decisions by the public, the media, and academics.

Second, in any individual case, judges are required to give meaningful reasons for their decision. Requiring detailed reasons aims to allows individuals before the court to understand how their case was decided and also allows for meaningful appellate review.

This leads to the third means of accountability: appeals. Canada has a robust appeal process that ensures judicial decisions are reviewed and, if erroneous, corrected.

Furthermore, changes in the law that originate with judges can be and sometimes are reversed by the legislature.

## Limits on Extra-Judicial Conduct and Employment

A judge must devote themselves exclusively to their judicial duties. Judges are prohibited from engaging, either directly or indirectly, in any occupation or business other than their judicial duties. A judge generally may not act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediation on any commission or inquiry or in any other proceeding unless expressly authorized by the government. There are strict limits on judges accepting extra remuneration.

Judges are also expected to ensure that their actions outside the courtroom and after they retire do not compromise the public’s confidence in the independence of the judiciary.

## Process for Addressing Complaints

Federal legislation sets out an independent complaints process that allows for investigations into alleged judicial misconduct. Complaints are dealt with by the Canadian Judicial Council, which is composed of the Chief Justice of Canada as well as chief justices of several other Canadian courts. The process is governed by the *Judges Act* and **the** *Canadian Judicial Council Inquiries and Investigations By-laws*, *2015*.

Investigations into alleged judicial misconduct may be prompted in two ways. First, the Minister of Justice may request an inquiry, in which case the investigation is mandatory. Second, the CJC may also investigate any other complaint or allegation, but it is not required to do so. The CJC may constitute an Inquiry Committee to conduct an investigation, comprising of one or more of its members along with such members of the bar as may be designated by the Minister. These inquiries may be public or private.

The CJC or an Inquiry Committee has the power to summon witnesses and require them to give evidence and produce documents. They also have the power to enforce a summons and to compel the person or witness to give evidence.

After completing an investigation, the CJC must report its conclusions and submit the record of the investigation to the Minister of Justice. The CJC may recommend that a judge be removed from office where it is of the opinion that the judge has become incapacitated or disabled from the due execution of the office of judge by reason of

1. age or infirmity;
2. having been guilty of misconduct;
3. having failed in the due execution of that office; or
4. having been placed, by their conduct or otherwise, in a position incompatible with the due execution of that office.

The CJC only has the power to recommend that a judge be removed from office. The final decision lies with Parliament.

## Financial Security

Salaries for federally appointed judges are fixed and paid by the federal government. Financial security of judges is protected by using an independent commission rather than allowing direct negotiations between Parliament and the judiciary. The Judicial Compensation and Benefits Commission reviews judicial salaries every four years and makes recommendations to Parliament.

In conducting its inquiry, the Commission examines the various submissions it receives keeping in mind the following factors:

1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
2. the role of financial security of the judiciary in ensuring judicial independence;
3. the need to attract outstanding candidates to the judiciary; and
4. any other objective criteria that the Commission considers relevant.

The use of an independent commission ensures that judges do not fear that certain decisions may result in their salaries and benefits being reduced by Parliament.

## Education

An independent organization (the National Judicial Institute) provides training for judges rather than the government mandating training. This helps avoid the perception or risk that the government can influence judicial decisions by promoting certain views or thoughts through training or education.

## Funding and Resources

The Chief Justice of the Supreme Court of Canada and the federal Minister of Justice have entered into a public accord that sets out the framework for their relationship, including the process for the Court’s funding requests to the government.

May 27, 2020

The Honourable Mr. Justice Clayton J. Conlan,

on behalf of Canada and the Canadian Superior Courts Judges’ Association