

DANCING WITH MYSELF: A Critique of the Canadian Judicial Council

Richard Devlin
&
Sheila Wildeman

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“Masters in Our House:
Adjudicative Sovereignty versus Judicial Oversight”
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Good morning, Montreal . . .!

- Link: <https://www.youtube.com/watch?v=FG1NrQYXjLU>



Dancing with myself . . .

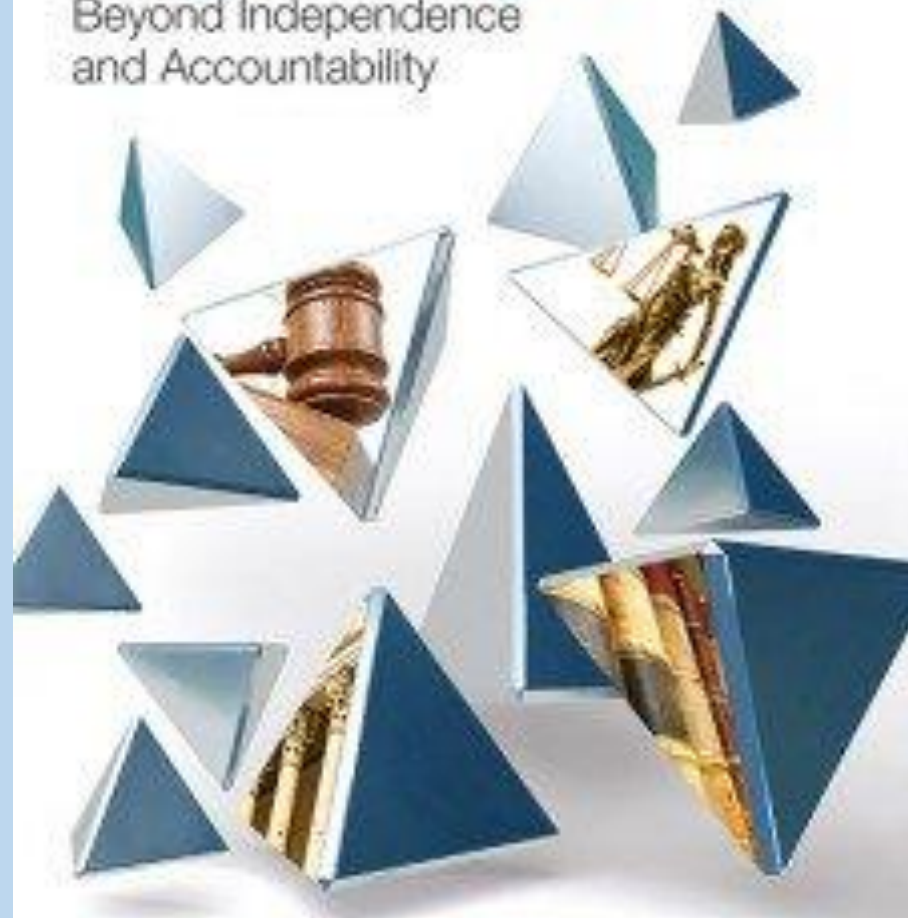
- Background
 - Matrix of regulatory values (beyond independence)
 - Origins and mandate of the CJC
- Immunity from judicial review #1: Deeming provision
- Immunity from judicial review #2: Constitutional architecture?
- Lessons learned?
 - Situating independence amidst a matrix of public values
 - Competing accounts of *the rule of law*

Edited by
Richard Devlin
Adam Dodek



Regulating Judges

Beyond Independence
and Accountability



Foreword by
Justice Richard Goldstone

Regulatory Values

- Impartiality
- Independence
- Accountability
- Representativeness
- Transparency
- Efficiency
- Justification
- Participation

Rule of law

Separation of powers

- Independent judiciary as guardians of the rule of law
- Adjudicative independence through objective guarantees
 - Security of tenure, financial security, administrative independence
- **“Independence = Legitimacy”**

Ethos of justification

- Each branch must publicly justify the exercise of its powers
- Each branch must engage with the reasoning of other branches & of legal subjects
- Independence is subordinate to participation & public justification
- **“Co-constituting fundamental values”**

The Critique Unpacked

- CJC's insistence that it is immune from review by the Federal Court
- Underdevelopment of mechanisms responsive to the interests of complainants (participation, justification)
- Ad hoc conceptualization of essential character & function of disciplinary proceedings (inquisitional or adversarial)
- Relative lack of public participation



CJC v. Federal Court (and Canadian Superior Court Judges Association)

The Question:

Are the processes,
recommendations and
decisions of the CJC, and its
Inquiry Committees, subject
to review by the Federal
Court?

Origins of the CJC

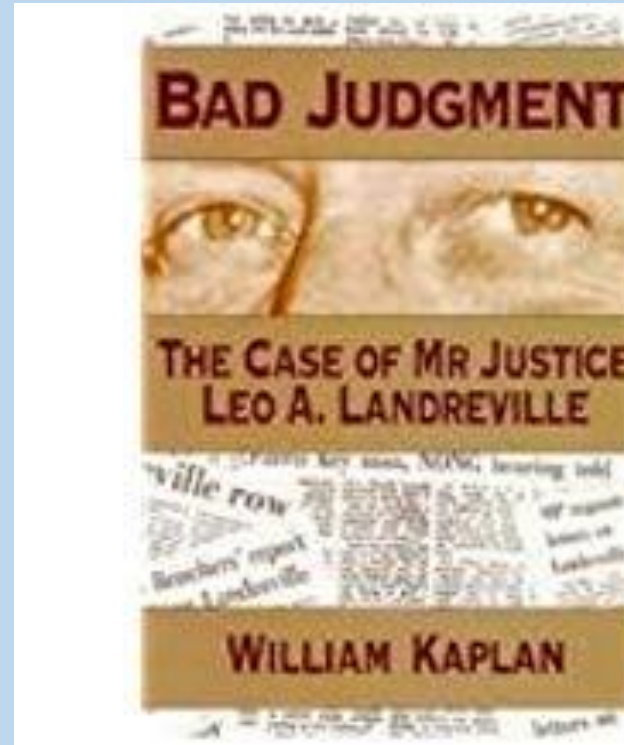


“Judicial capital punishment”

ss.99(1) Constitution Act, 1867

“...[T]he judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Jurisdictional instability at the foundations of the CJC



Letter from Landreville to federal Justice Minister on the Prospect of a Public Inquiry (1965)

- “[I]t has been pointed out to me by a number of my colleagues that for a Superior Court Judge to submit or consent to a public inquiry would establish a very dangerous precedent, particularly when such acts antedate his appointment and do not relate to the performance of his official duties. Further, your file contains a letter from my solicitor [which] expresses our view that a Superior Court Judge does not come under the Civil Service Act, the Public Officers Act, the Inquiries Act — nor any other applicable statute. Under the law the Superior Court Judge is answerable only before both Houses on proceedings of impeachment. . .”

Letter from Landreville to federal Justice Minister on the Prospect of a Public Inquiry (1965)

- “. . . You do realize no one is more interested than I to vindicate fully my name. **The dilemma raises, therefore, a question of jurisdiction.**”



CJC instituted - *Judges Act, 1971*

- “[T]he purpose of the Canadian judicial commission is to ensure that the separation of powers as between the executive and the judiciary is properly maintained”
 - (House of Commons Debates, 28th Parl, 3rd Sess, vol 5 (3 May 1971) at p 5433 (John Turner))



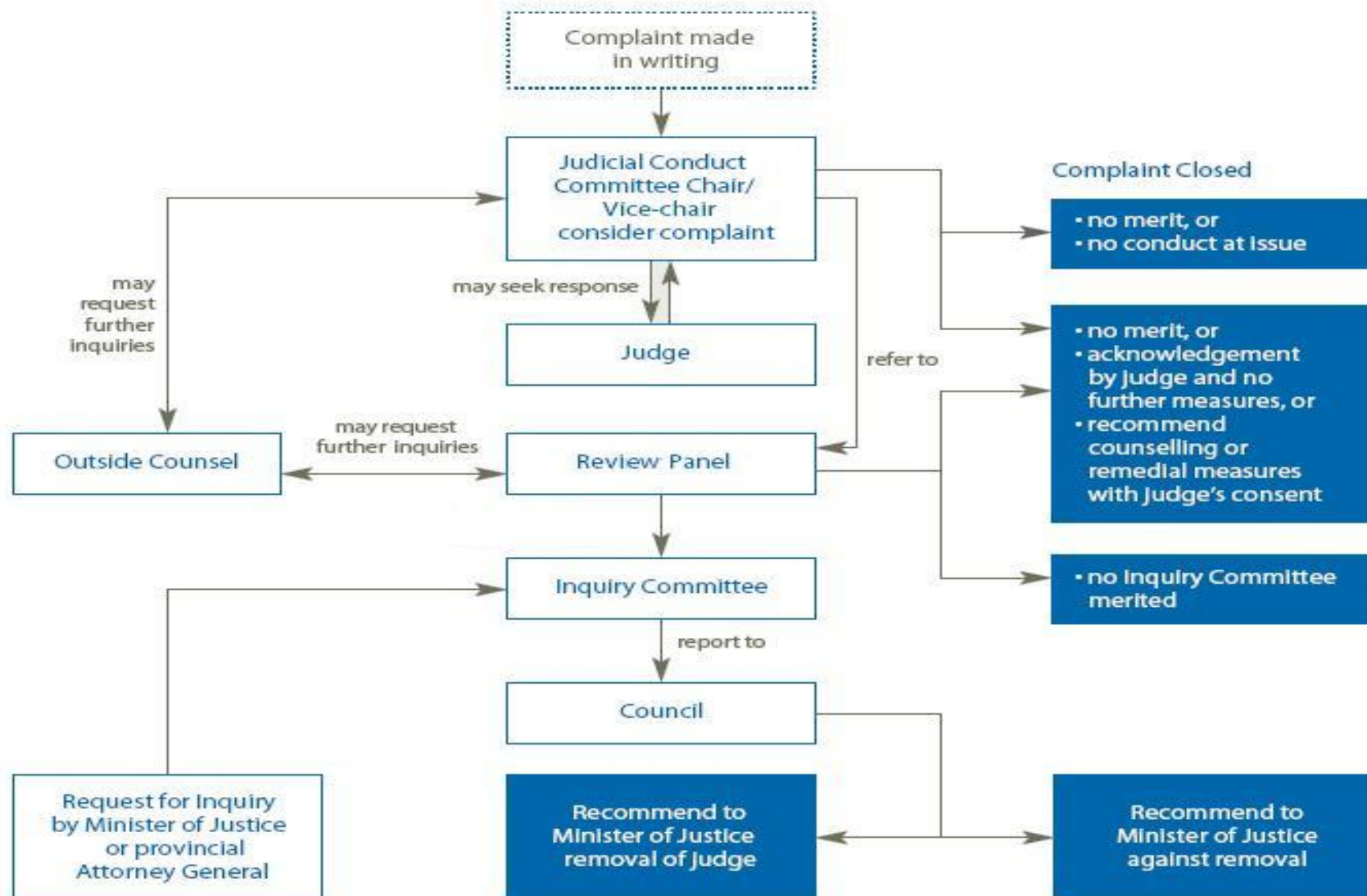
Mandate of the CJC

60(2) *Judges Act*

... the Council may

c) make the inquiries and investigation of complaints or allegations [made in respect of a superior court judge] in s. 63 ...

COMPLAINT PROCESS



First cut at the question: Deeming Provision (*Judges Act*)

63. (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

- (a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
- (b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted. [Emphasis Added]

Statutory interpretation



What does it mean for the CJC or its Inquiry Committee to be “deemed a Superior Court” per s.63(4)?

“Deemed to be ...”

1. Has the **status** of a superior court?
2. Has (some of?) the **powers of** superior court . . . but still “a federal board, commission, or tribunal” per s.2(1) *Federal Courts Act* ?

Gratton (1994) / Flahiff (1999)

- **s.63(4) constitutionally invalid as legislature seeks to constitute a superior court without the requisite safeguards?**
- CJC response: s.63(4) merely gives Inquiry Committee powers proper to its mandate, not superior court status
 - “Decision of the Inquiry Committee . . . In Relation to Mr Justice F.L. Gratton of the Ontario Court of Justice (General Division)” CJC (Feb 1994)
 - “Decision of Inquiry Committee Established by the Canadian Judicial Council to Conduct a Public Inquiry Concerning Mr. Justice Robert Flahiff”, *Canadian Judicial Council* (9 April 1999)

Patrick Healy, “The Unique Jurisdiction of the [CJC]” (2009) 13 Can. Crim. L.R. 103

- The Judges Act, in constituting the CJC, “creates a unique forum that is subject to review, if at all, only by itself and Parliament.”
 - *Constitutional, purposive, textual arguments*

Nothing less than an express grant of such jurisdiction [to the federal court] would suffice because it is **unthinkable** that in a matter dealing with the possible removal of a judge jurisdiction to review a committee of inquiry or the Council as a whole should lie, in the first instance, with a single judge of the Federal Court who is not a member of the Council and has **no experience or expertise** in matters under Part II of the *Judges Act*.
[emphasis added]

Healy, at 124-125.

... to suppose that the Council is merely a federal board, commission or tribunal is to diminish, if not trivialize, the subject-matter of its jurisdiction concerning complaints ... it is difficult to imagine a subject that would lie more naturally near the core of a superior court's jurisdiction than the tenure of a superior court judge. As a matter of general principle, it is almost ***inconceivable*** that Parliament would confer jurisdiction on this matter to an administrative body with the same juridical status as the Copyright Board or the Canadian Artists and Producers Professional Relations Tribunal. [emphasis added]

Healy, at 125

“daft”

“absurd”

“a farrago of proceedings”

“a fiasco of interminable litigation.”

Healy, at 125-132.



ACJ Lori Douglas

CJC's arguments in *Douglas*

- i) The inquiry committee is a superior court;
- ii) Constitutionally, the requirements of judicial independence and the separation of powers mean that the CJC has to be conceptualized as part of the judicial branch of government, not the executive, therefore it cannot be a “inquiry, commission or tribunal”;
- iii) The CJC's own processes provide sufficient substantive and procedural protections for the impugned judge;
- iv) The final decision rests with the Minister of Justice and Parliament, and the judge can seek a remedy at that stage;
- v) Given the expertise and status of the members of the CJC it would be anomalous if their decisions could be reviewable by a single judge of the federal court.

Justice Richard Mosley



Legislative intent / “deeming” provision

s. 63(4) of the Judges Act – in Douglas

- CJC argument from **legislative history**: deeming clause added by Standing Committee in response to concerns about separation of powers
 - Mosley J: purposive reading suggests the clause confers investigative powers plus protections / immunities of a superior court – that’s it.
- CJC **argument from absurdity**: *impossible* legislature would intend Chief Justice cluster to be reviewed by a single federal court judge
 - Mosley J: Rule of law. Get used to it.

Douglas (Mosley J): CJC IS A TRIBUNAL . . .

- The CJC and its inquiry committees are “creatures of a federal statute, the *Judges Act*, and the source of their authority is clearly that federal legislation .”
- Neither the CJC nor its inquiry committees have the inherent jurisdiction of a court, and the fact that most of their members are judges does not alter their status as **statutory entities** or the reality that the judges are acting as members of an administrative tribunal.
- Just because the CJC is an administrative tribunal does not necessarily imply that it is part of the Executive , thereby threatening the independence of the judiciary.

Douglas (Mosely J) . . . NOT A COURT

- The processes adopted by the Council and the Board of Inquiry are not that of an adversarial or adjudicative proceeding, rather they are **inquisitorial** in nature.
- The inclusion of **non-judges** on Inquiry Committees indicates that they were not perceived as performing a judicial function.

Douglas (Mosley J): RULE OF LAW

- If the Council or the Board of Inquiry were immune from judicial review this would offend the **rule of law principle that “all holders of public power should be accountable for their exercises of power”** so as to “ensure **the legality, the reasonableness and the fairness of the administrative process and its outcomes.**”
- Neither the Minister of Justice nor Parliament could provide effective review of the CJC’s processes and procedures because they “lack the capacity” and are “wholly ill-equipped” for such a task.

Second cut at the question

What lies beneath:

Canada's *constitutional architecture*?

Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21:

- “[88]. . . [T]he Supreme Court **was already essential under the Constitution’s architecture** as the final arbiter of division of powers disputes and as the final general court of appeal for Canada. The Constitution Act, 1982 enhanced the Court’s role under the Constitution and confirmed its status as a constitutionally protected institution . . .”

Constitutional architecture? Legitimacy crisis?

From “The Decline of Democracy and the Rule of Law: How to Preserve the Rule of Law and Judicial Independence?” (speech by McLachlin CJ (as she then was), Sept 28, 2017):

4. We must insist on review of judicial conduct by other judges.

This, I believe, is a constitutional imperative. While the actual removal of a judge in Canada remains a prerogative of the Parliament, the judiciary must play the primary role in the actual review of allegations of misconduct. **As the international experience demonstrates, when judges can be disciplined and undermined by politicians, judicial independence and public confidence in the judiciary are threatened.**

- “Canada’s top judge has called on the Trudeau government **to enact reforms to reduce the persistent lengthy delays and high costs of the federal judicial discipline process.**” (Lawyers’ Daily, June 22, 2018, citing Wagner CJ)

Constitutionalizing the CJC?

- A. Executive branch cannot interfere with matters at core of s.96 courts' authority and function without trenching on judicial independence (*Mackeigan*)**
- B. CJC powers are at core of s.96 courts' authority and function**
 - Administration of complaints and discipline is essential to independence and maintaining public confidence / rule of law
 - Just as aspects of Supreme Court are constitutionally protected, so is inquiry into judicial misconduct (as an aspect of s.96 courts' authority and function)
- C. As an essential function of the s.96 courts, CJC is not subject to judicial review**
 - S.96 courts / judges are not subject to judicial review, only statutory appeal
 - CJC has nonetheless established internal review mechanisms: sits "en banco" for final decision on recommendation
 - Final decision on removal remains Parliament's

Constitutional architecture



Are you convinced? Is there something to the claim that the CJC is constitutionally immunized from oversight by any other entity, including the Federal Court?

Justice Michel Girouard



Justice Simon Noel



WHICH PART OF NO DON'T YOU UNDERSTAND?

Noel J, Girouard: Rule of law limits on legislation

[114] . . . Parliament cannot completely insulate a tribunal from the superintending power of the superior courts; this “would be to attempt to constitute a tribunal as a superior court”

- (Pasiachnyk v Saskatchewan (Workers’ Compensation Board), 1997 CanLII 316 (SCC), [1997] 2 SCR 890 at para 16; Crevier v Attorney General of Quebec, 1981 CanLII 30 (SCC), [1981] 2 SCR 220) – in Girouard pr Noel J at para 114

Constitutionalizing the CJC? Responses (Noel J in *Girouard* (like Mosley J in *Douglas*))

- **CJC is not a superior court**

- **Judges on the CJC do not sit in their individual capacities as judges.** As with judges appointed under the Inquiries Act, they sit as part of a body that gains its powers from legislation
- **The powers of the CJC are powers of inquiry & recommendation only, not adjudication.** CJC lacks the full authority and functions of s.96 courts
- **CJC is therefore not excluded from s.2 FCA “federal board, commission or other tribunal”.** It is subject to JR in the Federal Court.

Noel J in *Girouard*

Central theme: *Rule of law as **culture of justification***

“The CJC claims that it is **impossible** for a mere Federal Court judge to review the reports and recommendations of the CJC, which is composed of chief justices. **With respect for the honourable chief justices, this is what Parliament intended. Nobody is above the law or immune from error and, aside from the Supreme Court, there is no judicial or quasi-judicial institution that has the final word without the possibility of an appeal or some other remedy.”**

- *Girouard v. Canada (Attorney General)*, 2018 FC 865 at para 98 (emphasis added)

Noel J in *Girouard*

[5] I will begin by addressing the CJC's *rather peculiar* argument that it and its [Inquiry Committee], constituted to inquire into the judge's conduct, are deemed to be a superior court, thus placing them [TRANSLATION] "beyond judicial review". [Emphasis added].

Girouard (cont'd)

[6] I cannot agree with the CJC's position. It is undeniable that a report recommending the removal of a judge has a serious impact on that judge, professionally and personally, and on his or her family. *It is inconceivable that a single body, with no independent supervision and beyond the reach of all judicial review, may decide a person's fate on its own... [Emphasis added].*

Girouard (cont'd)

[6] Of course it is true that, in our society, the position of judge requires exemplary conduct, but is this a reason to render it subject to a single investigative body and to eliminate any possibility of recourse against the decision resulting from the inquiry? ...

Girouard (cont'd)

[6] In my opinion, it is not. *However prestigious and experienced a body may be*, it is not immune from human error and may commit a major violation of the principles of procedural fairness that only an external tribunal, such as the Federal Court in this case, can remedy. **As Justice Stratas of the Federal Court of Appeal recently recalled, *such absolute power has no place within our democracy:***

In our system of governance, all holders of public power, *even the most powerful of them*—the Governor-General, the Prime Minister, Ministers, the Cabinet, *Chief Justices* and puisne judges, Deputy Ministers, and so on—must obey the law From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed... [Emphasis added].

Girouard (cont'd)

[7] Therefore, as per the fundamental principles of our democracy, all those who exercise public power, *regardless of their status or the importance of their titles*, must be subject to independent review and held accountable as appropriate. *This also goes for the CJC and the chief justices who make up its membership.*
[Emphasis added].

Girouard (cont'd)

[160] In our judicial order, *in which the rule of law plays a fundamental role, a lack of judicial review or of a right of appeal constitutes a breach of procedural fairness.* As the AGC has observed in this case, without judicial review, a judge subject to an inquiry by the CJC would be deprived of his or her right to challenge the fairness and lawfulness of the proceedings. [...] [Emphasis added]

[163] [the CJC's] proposal would undermine the rule of law, “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, [1959] SCR 121 at p 142)

Doubling down on independence (CJC factum Girouard, FCA)

- Role of CJC (“Chief justices with senior administrative duties”) **is to ensure uniformity in the administration of justice throughout the country**
- This includes judicial ethics and professional discipline – ie **ensuring judicial removal by Parliament is based in constitutionally valid grounds: conduct vs legal judgment**
- Also engages **further core function of s.96 judges as “protectors of the rule of law”**

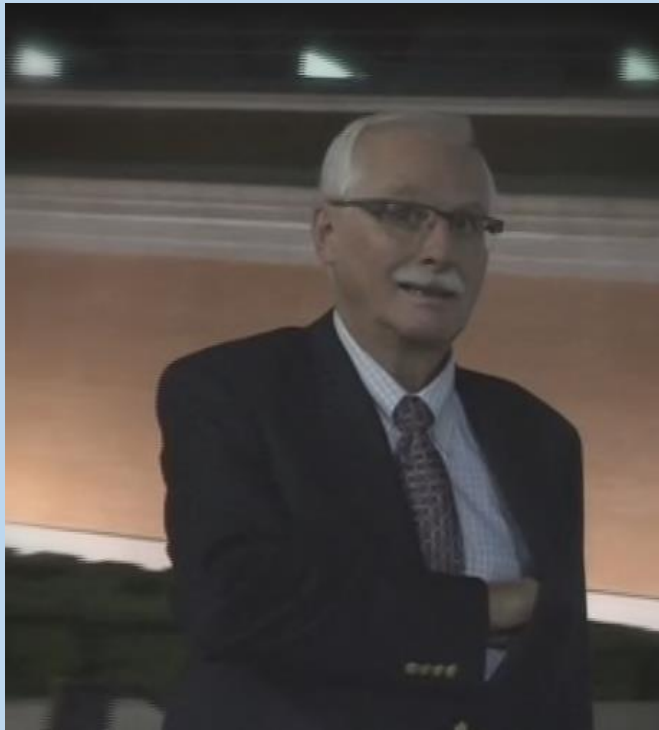
Inherent functions of s.96 judges, not statutorily-conferred powers of a “federal board, commission, tribunal”

Doubling down on independence (CJC factum Girouard, FCA)

83. Judicial review of the decisions and actions of the Council and its inquiry committees:

- a. overburdens the judicial disciplinary process **that Parliament intended to be efficient;**
- b. **does not provide any beneficial further guarantee of respect for the rule of law;**
- c. undermines **the individual independence of senior judges with administrative duties;**
- d. **does not reinforce public confidence in the judiciary in any meaningful way.**

Conseil canadien de la magistrature c. Girouard, 2019 CAF 148
(Pelletier, de Montigny & Gleason JJ.A)



FCA Girouard – Statutory powers (not s.96 courts' authority / function)

- [40] “. . . Without the adoption of the Act by the federal legislature, the Council simply would not exist. Note, moreover, that its existence goes back only to 1971; before that date, judicial discipline was entrusted to ad hoc inquiry commissions set up by the Governor in Council. **There is every reason to believe that if the roles and composition of the Council were to be changed, it would be up to Parliament, and not the Council itself, to legislate these changes.**”

FCA Girouard – Statutory powers (not constitutional)

- [46] “This means that, if the Act were to be repealed, the Council, and even more so, the Chief Justices would not be empowered to investigate, summon witnesses and compel them to adduce evidence at [. . .] these investigations. The only procedure under the Constitution to dismiss a Superior Court judge is that set out in subsection 99 (1) of [the Constitution Act, 1867] .”

FCA Girouard – Inquisitorial function (not judicial)

[56] “. . . [T]he role given to the Board by the Act does not resemble the role that the judge can play in a court of law. It follows that the appellant's argument that the powers of its members are "judicial in nature" and that, as such, their exercise would not be subject to judicial review must be dismissed.”

. . . Plus the CJC's inquiry powers are exercised collectively, not as individual s.96 judges. [para 74]

. . . Plus not all members of the CJC are s.96 judges [paras 78-79]

FCA Girouard: Independence and the rule of law

Para 101, citing Noel J at 162:

“ [N]atural justice and procedural fairness, principles stemming from the rule of law, ensure that judicial independence is maintained in the course of an inquiry. [. . .]. Judicial review of a recommendation by the CJC provides the Minister, and ultimately the two Houses of Parliament, that the process is consistent with the underlying constitutional principles. If the CJC were not subject to the superintending power of this Court, the Minister and Parliament would be forced to evaluate these legal issues, thereby overlapping with the judicial sector and threatening the separation of powers. It was precisely this situation that Parliament wished to avoid in establishing the CJC as it did.

FCA Girouard: efficiency and the rule of law

[105] . . . That the concern for the efficiency of the disciplinary process should not prevail over legality and procedural fairness should be taken for granted, especially for the Chief Justices in the Council. This is all the more true in the context of a process that can result in "Capital punishment" for the judge concerned [. . .].



Canadian Judicial Council

**Proposals for Reform to the Judicial Discipline Process
for Federally-appointed Judges**

October 2016

October 2016 CJC Proposal: “Plan B”

- 7.4 There is a **constitutional imperative**, in our view, that the conduct of superior court judges can only be reviewed by superior court judges. **In so doing, judges are not acting as a federal board or tribunal, but as a collegium of senior justices of the superior courts, as that office is understood by the Preamble and section 99 of the Constitution Act, 1867.**
- 7.5 **Given this constitutional framework and the very nature of the judicial discipline process for superior court judges**, the CJC recommends that an appeal of a decision of a Judicial Discipline Committee be heard by a **“CJC Appeal Tribunal,”** constituted for that purpose by five CJC members (as defined below). None of these members would be from the same jurisdiction as the judge subject to the complaint, and none would have had prior involvement in the matter.
- 7.6 **Acting as an appeal body, the CJC Appeal Tribunal – deemed a superior court – would address any legal issue arising out of the proceedings, based on normal standards of appellate review** (which could be defined in the legislation for greater certainty). For certainty, a privative clause should be included in the legislation.
- 7.7 The CJC recommends that **a further right of appeal, with leave, rest with the Supreme Court of Canada.**
- 7.8 As a result, the CJC recommends that the current review by the “Council of the Whole” be abolished.

Institutional design



From your perspective (and perhaps drawing on other administrative contexts), does this strike you as a good design?

What if any problems does it solve? Does it introduce new problems?

September 2018

... the judicial council continues to **press the federal government** “to move forward” with “introducing necessary legislative reforms to the judicial discipline.”

Norman Sabourin

Le Loi, C'est Moi



Rule of law

Separation of powers

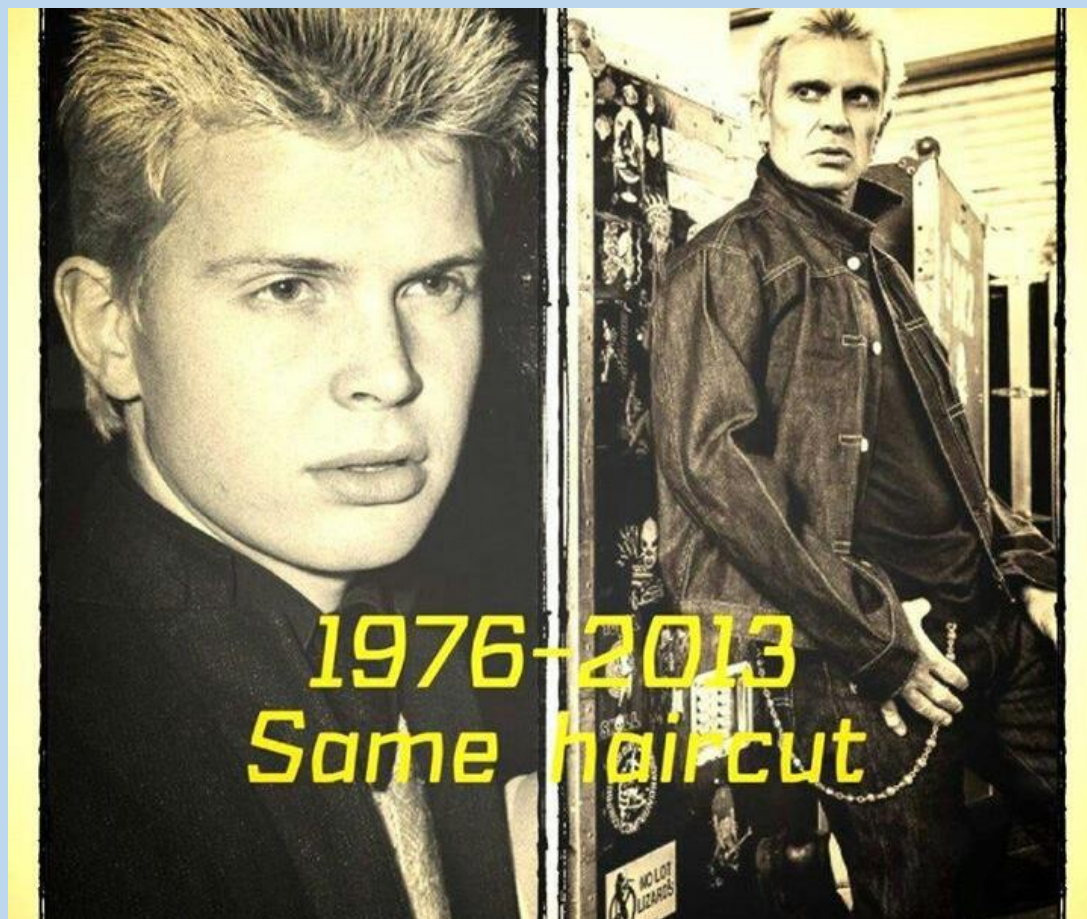
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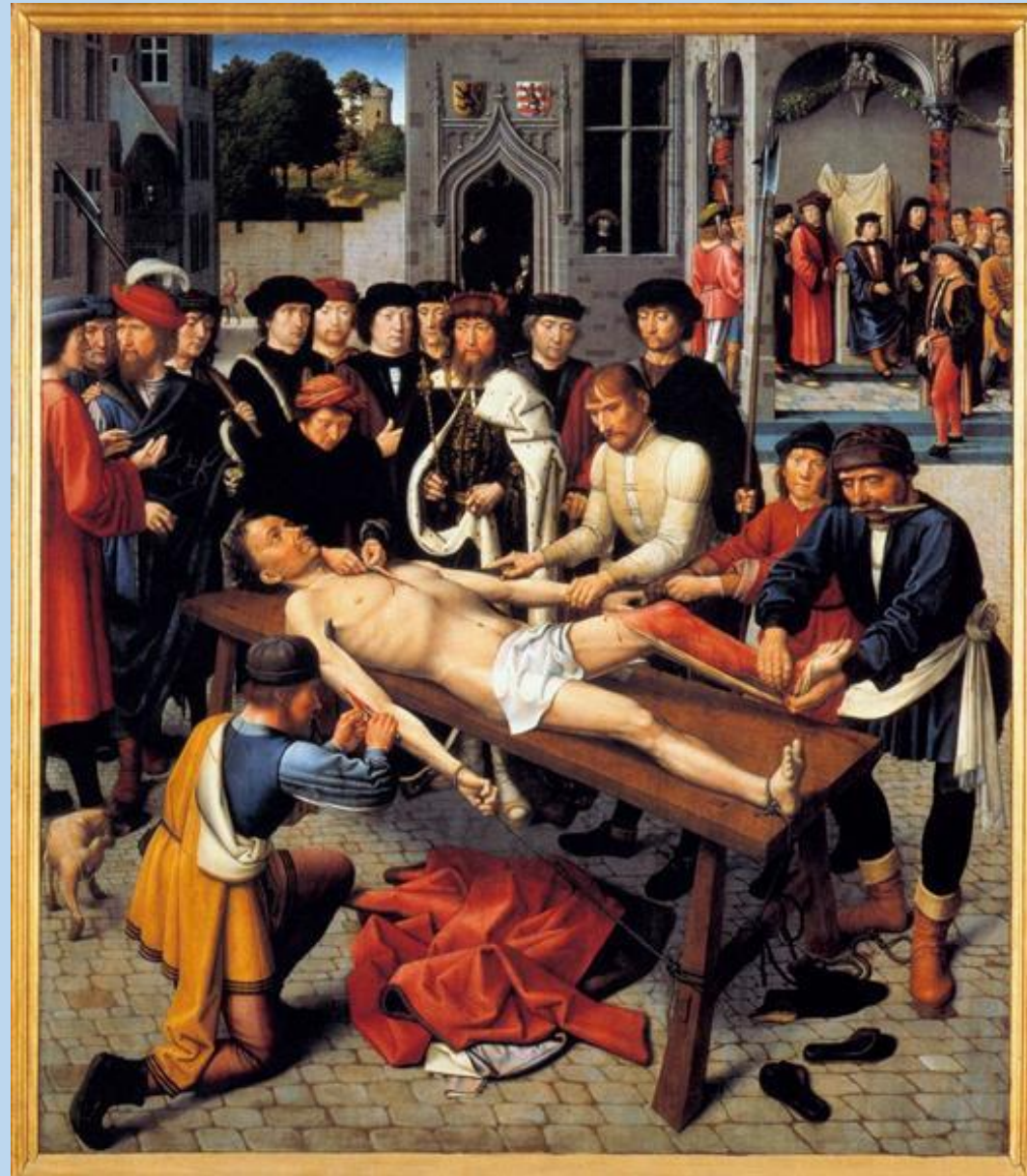
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DISCIPLINING JUDGES



CONTEMPORARY CHALLENGES AND CONTROVERSIES