Disciplining the Judiciary: Some Preliminary Observations

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About a year and a half ago I was asked by the Canadian Judicial Council to study and prepare a report on judicial independence and accountability. I hope to complete my work in the late spring. The study will look at a range of issues for both federally and provincially appointed judges, including administering the courts, retirement and financial security, appointment and promotion, and of course, discipline. I had the pleasure of meeting with a number of persons in the audience in my travels across the country last spring and greatly benefitted from our discussions.

I accepted the invitation to participate in this panel on judicial discipline knowing that I would be about in the middle of my study. However, I thought it would be useful at this stage, both for me and perhaps for you, to express my tentative views to this audience. Your feedback will assist me in completing my work on this aspect of my report.

In my study, I will be examining a wide array of procedures for dealing with undesirable judicial conduct. Not only have I looked at procedures in Canada, such as the new Ontario and Manitoba legislation, but I have examined the English and American procedures as well. A major report on the U.S. federal discipline system was published about a year ago. Three impeachments of U.S. federal judges in the 1980s prompted their study.

One point that is worth stressing at the outset, is that there is an obvious connection between the selection process and the subsequent necessity for disciplining judges. As the recently published report by the U.S. National Commission on Judicial Discipline and Removal observed: "If the appointment process operated perfectly to select only the most highly qualified and honest judges, the need for disciplinary action would be significantly reduced if not eliminated". This perhaps overstates the connection, but that there is a connection is obvious.

There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. At the same time, accountability has an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court — to correct errors by trial judges or in the case of the

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Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding, sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not unnecessarily curtail judges' obligation to rule honestly and according to the law.

Let us go through some of the issues that I will be examining in my study. The first is the question of who may remove a judge. (We'll leave aside for the moment other forms of discipline.) In the federal system, this can only be done by the Governor General on a joint address by Parliament. I encountered no desire to change this requirement. To do so would, of course, require a constitutional amendment. The procedures that would be followed for a joint address, however, are not at all clear, as Canada has not ever actually completed the joint address procedure. Perhaps it would be wise for Parliament to consider the issue before a specific case arises, although it is conceded that there is no compelling necessity at present to do so. This could be something that the new Law Reform Commission could explore. Whatever procedures are devised, whether through legislation or otherwise, would not bind a future parliament. This could only be done by a constitutional amendment. Still, it would have some moral force when an actual case arose. The procedures could include dealing with what parliamentary body or committee would hear the evidence, whether the judge would be entitled to be heard and call witnesses, and what the standard and burden of proof should be.

At present, a simple majority in each House suffices. One constitutional amendment that should perhaps be considered at an appropriate time is to raise the requirement beyond a simple majority of those voting. It could, for example, be two thirds — or some such percentage — of those voting in each House, or a simple majority of those eligible to vote. The present system, in my opinion, gives Parliament — and therefore the government — too much power. One never knows what a future government that controls both the House of Commons and the Senate might wish to do.

Provincially appointed judges can in most provinces be removed by the Cabinet. In Ontario, however, removal is by the legislature, in Quebec it is by the Court of Appeal, and in British Columbia it can in effect be by the Judicial Council itself. Removal of a provincially appointed judge is sufficiently important, because of its effect on judicial independence, that one wants substantial protection of the judge. In my view, it would be desirable for each province and territory to consider requiring that a final decision on removal be made either by the legislature, as in Ontario, or perhaps, by the Court of Appeal, as in Quebec.

At present, discipline of federally appointed judges short of dismissal is handled by the Canadian Judicial Council and of provincially appointed judges by provincially created judicial councils. If one were designing a system of discipline from scratch, one might wish to create greater integration of the disciplinary standards, procedures, and even persons deciding disciplinary issues for both federally and provincially appointed judges. After all, unlike the separate legal systems in the U.S., Canada has an integrated hierarchial legal structure. It is almost accidental, as one can see in examining the

Confederation debates, that the appointing power is in different bodies. Provincially appointed judges apply the exact same law as federally appointed judges. We have one legal system. There should, to the extent possible, be one set of standards of judicial conduct.

One could, for example, have one provincial or regional judicial council for both federally and provincially appointed judges. In the U.S., magistrates are disciplined by the same body that disciplines Circuit and District Court judges. In England, the Lord Chancellor's office handles disciplinary matters for all levels of the judiciary. Nevertheless, I am probably not going to seriously pursue the idea in my report. As a practical matter, it is not going to occur in the foreseeable future. There is at present sufficient mistrust between the two levels in most jurisdictions in Canada that the idea would be strongly resisted by federally appointed judges and perhaps by provincially appointed judges as well.

Nevertheless, it is desirable to have the federal and provincial systems operating more in tandem than at present. In another section of my report I will no doubt argue that judges should have codes of conduct and that the codes of conduct for federally and provincially appointed judges should for the most part be similar. The same standards of conduct should in general apply to all levels of the judiciary. I am not including a discussion of codes of conduct in the discipline section of the report or in this paper because I believe that it is desirable to separate, to the extent possible, codes of conduct from the discipline process. In my view, the purpose of a Code should be primarily to guide conduct and only secondarily to use for purposes of discipline. The U.S. federal system achieves this separation better than most of the state systems that I have examined.

Further, I believe that it is desirable to include some federally appointed judges on provincial judicial councils. In both Quebec and British Columbia there are no federally appointed judges and in the new Ontario legislation there is only one. Unlike British Columbia, which has a majority of non-judges on the Council, and Ontario, which has a majority (seven out of twelve) of non-provincially appointed judges on the Council, the Quebec Council has eleven provincially appointed judges on the Council out of fifteen members. Is it just a coincidence that the Quebec Council, whether or not it has deserved it, has turned out to be the most subject to criticism of all the Councils? Would a stronger component of federally appointed judges have given the Council greater credibility with the press and the public? Clearly, some Councils in the past, including Ontario, did not have sufficient input from provincial judges. I will not be suggesting precise numbers for provincial commissions. Suffice it to say that it is my present view that it would be desirable to have a substantial component of federally appointed judges — at least more than one — on provincial councils. Uniformity amongst provincial councils is, of course, not essential. There may be many local factors which will call for differences.

The question then arises whether provincial court judges should be involved in disciplining federally appointed judges. In theory, there is much to be said in favour of doing so. Provincial judges would become more familiar with the standards applied by federally appointed judges and they could add a knowledgeable and yet objective assessment to the issues. To the extent that non-federally appointed judges are involved in the process, it is worth considering making at least one of those persons a provincially

appointed judge — although I recognize that there might be quiet resistance, at least from federally appointed judges, to this suggestion.

One important issue is the separation of the investigation of the complaint from the adjudication of the complaint. As a matter of natural justice, the person who decides an issue should not have been involved in the earlier stage as an investigator. The Canadian Judicial Council changed its by-laws in 1992 to effect a separation, as have Ontario and Manitoba in their recent amendments. Also, the recent American Bar Association model discipline procedures require such a separation. It should be noted, however, that the U.S. federal procedures seem not to be concerned with this issue. The Chief Judge vets the complaints, chairs the circuit council that hears petitions from the chief judge's dismissals, and selects and chairs any special hearing committee that is set up. In my opinion, this gives the chief judge too much power over the proceedings, or at least the appearance of too much power. I prefer the separation adopted by the Canadian Judicial Council, the American Bar Association, and a few provinces and will no doubt recommend that other provincial judicial councils adopt such separation. Moreover, I think that having the investigators and the adjudicators being part of the same organization, but playing different roles at different times by rotation is better than having completely separate bodies. The knowledge of the general process of investigation and vetting is valuable to adjudicators and vice versa. Ontario and the American Bar Association have adopted this approach, as has the Canadian Judicial Council, in that the Chair of the Judicial Conduct Committee is not on panels and members of a panel are not on an Inquiry Committee if one is established for that case. Moreover, those who are on a panel do not participate in the Council decision to send a matter to a formal investigation by an Inquiry Committee and those who are to be on the Inquiry Committee are removed from the deliberations of the Council on the case. I also agree with the American Bar Association's recommendation that there be separate counsel for the investigative and the adjudicative stages.

There is one important feature of the U.S. federal system that I find very attractive. It is the involvement of the judge's own chief judge at the initial stages of the complaint. The chief judge of the Circuit can dismiss the complaint if it is not in conformity with the Act, it relates to the merits of a case, or is frivolous. In addition, and most importantly, the chief judge can attempt to resolve the complaint. This procedure gives the chief judge significant influence with the judge because the judge knows that the issue can be taken to the special committee stage. Indeed, a recent amendment permits the chief judge of the Circuit to act in the absence of a formal complaint. A number of the provinces also give the chief judge of the provincial court power to attempt to resolve the complaint at the very early stages. It seems to me that this makes good sense for both provincially and federally appointed judges. Except in extreme cases, the real purpose of the legislation is to change undesirable conduct, not to discipline the judge.

In other institutions in society, it is usually the supervisor of the person or the chair of a department, or an official in a government department, who first tries to resolve a complaint from the public. It would not automatically be sent to the head office of a commercial organization, to the central administration of a University or to the premier's office to be dealt with. Of course, I am not talking about criminal conduct or other very serious conduct.

The Canadian Judicial Council's procedures do not now officially provide for this approach. Complaints that are sent to the Canadian Judicial Council in Ottawa or to the Chief Justice of Canada are dealt with by the Judicial Conduct Committee (that is, the Chair, initially, and later, in some cases, panel members). It is true that the relevant chief justice is notified of the complaint at the same time as the judge subject to the complaint, but the decision on what to do about the complaint still remains in the hands of the judicial conduct committee. Even if the complaint first comes to a chief justice, it seems that under the by-laws there may be an obligation to pass it on to Ottawa.

Many chief justices do deal informally with complaints they receive. The by-law gives some discretion in that it states: "[I]n the opinion of such member, may require the attention of the Council". Judges know that the chief justice may send on a matter to the Canadian Judicial Council even in the absence of a complaint if the matter "may require the attention of the Council". This gives the chief justices significant leverage in discussing matters that have been brought to their attention. As in the U.S. federal system, this informal activity is potentially one of the most effective ways of controlling undesirable conduct. As one U.S. chief judge stated in describing their procedures: "You get the right result without unnecessarily humiliating or degrading anyone".

Many chief justices and administrative judges, however, now send on the complaint to Ottawa or, more likely, tell the complainant that the complainant may do so. In any event, many departments of justice, law societies and other bodies now quite appropriately tell complainants about their right to send a complaint to the Canadian Judicial Council. So it is often accidental whether the complaint first comes into the chief justice's hands to enable the chief justice to attempt to resolve it informally.

I am presently attracted to the idea that the Canadian Judicial Council's by-laws be changed to provide that a chief justice first have the opportunity to deal with a complaint sent to the Council, unless the matter is so serious that it should remain with the Canadian Judicial Council or where the chief justice is unwilling or unable to deal with it. A similar procedure should be considered for provincially appointed judges. The chief justice should be able to dismiss the complaint on any of the grounds now used by the Chair of the Judicial Conduct Committee, that is, that the complaint is "trivial, vexatious or without substance". In many cases the chief justice would say, as the Chair of the Judicial Conduct Committee now says, that the matter is one for appeal.

The chief justice would, under this scheme, also have the right to attempt to resolve the complaint. In consultation with the judge that is the subject of the complaint, the chief justice might, for example, offer the judge's apology for a comment made in the heat of a trial, or outline why a judgment has not yet been released and say when it is expected. Or, as sometimes occurs, the chief justice might arrange with the judge to attend a particular education program or undertake a medical or alcohol treatment program. These are not matters that need initially go to the Canadian Judicial Council. Many of these matters can be quickly resolved. There would therefore be far less anxiety amongst members of the judiciary with this procedure than exists today.

The complainant should in this scheme have the right to take the matter to the Canadian Judicial Council and the chief justice who dismissed or otherwise dealt with the

complaint should be obliged to tell the person about this further avenue. In such cases, the Council would continue to operate with its present procedures, which in my view are working reasonably well. The Chair of the Judicial Conduct Committee would assess the complaint in light of the comments and actions taken by the chief justice. The Chair could dismiss the complaint, do further fact-finding through a special investigator, or set up a panel of the committee to consider the complaint. I should add that having reviewed the files covering the past few years, I can state that the Executive Director and the Judicial Conduct Committee take their work in dealing with complaints very conscientiously.

The system tentatively suggested here would therefore combine the best features of the U.S. decentralized system with the Canadian centralized system. One additional advantage of the system is that it would cut down, by a considerable extent, the work required to deal with complaints at the level of the Canadian Judicial Council. There are now about 150 complaint files a year handled by the Canadian Judicial Council. The American federal experience is that only about one-quarter of the complaints received by a Circuit Chief Judge are appealed further. That percentage might be somewhat higher in Canada because of the apparent reluctance of U.S. Circuit Councils to review cases on a petition for review. I would estimate, although this is obviously a guess, that perhaps one third to one half of the 150 cases now dealt with would still have to be dealt with by the Chair of the Judicial Conduct Committee. This is a manageable number that could easily be handled with the existing procedures. Of course, the number under the existing procedures may go up if greater publicity is given to the existence of the complaint process, a subject that will be dealt with later.

Further, the Executive Director should have greater resources to deal with complaints, even if the above procedures are adopted. At present, the Executive Director not only initially receives all complaints and in many cases suggests what should be done, she also handles all the other functions of the Canadian Judicial Council, with its various working committees, annual and semi-annual meetings, an annual one-day seminar, and various research projects. Including herself, there are only three persons handling the work. In contrast, the New York Commission, which deals solely with complaints, has a full-time staff of 35 persons and a budget of two million dollars U.S. The annual budget for all of the activities of the Canadian Judicial Council, including salaries, and professional services is under $500,000 Canadian.

Visibility of the process is a matter which also requires careful consideration. At the early stages of the process, there has to be a measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing. (One cannot prevent a complainant from going public.) There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures take this approach and maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers. In the criminal process, generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken.

When the matter goes to a full hearing, the normal rule in most jurisdictions in North America has been, and I suggest should be, that the proceedings are open to the public. This is the new American Bar Association rule and has been the recent practice of the Canadian Judicial Council. Furthermore, when an inquiry is ordered by the Minister of Justice or an attorney general, it can be ordered to be open. Some provinces, however, now provide for closed hearings. It is not easy to justify a closed hearing — even though it may damage a judge's reputation if it is dismissed — when the judiciary itself favours open hearings in criminal cases, except in exceptional circumstances.

Because of the expectation that a full hearing will normally be a public one, there is an understandable trend to make sure that there is a strong case warranting subjecting the judge to the harmful effect of a public hearing. The Canadian Judicial Council recently interposed a non-public three-person review panel after a decision by the Chair of the Judicial Conduct Committee that the complaint should not be dismissed, but before a formal inquiry. Ontario adopted a similar technique of a non-public review by a four-person review panel and Manitoba has interposed a non-public Judicial Inquiry Board. The Canadian Judicial Council has adopted the technique of describing in its annual report in some detail, but without identifying the judge, all cases that have gone on to a panel. Ontario and Manitoba also provide for an annual report.

Thus the formal inquiry stage and, to a lesser extent, the panel stage are given a fair degree of visibility. It is the earlier investigative or screening stage which is not now visible. But this is the stage where 95% of the cases are disposed of. Society rightly wants to be assured that these decisions are fair ones and do not improperly cover-up judicial misconduct. How can visibility best be achieved? The techniques adopted will vary from jurisdiction to jurisdiction, depending on such factors as the mix of federally and provincially appointed judges on the provincial judicial council or the number of judges in the province (the greater the number, the less danger that disclosure of sanitized documents will identify a judge).

Let us examine a number of possible techniques to achieve visibility. The most common is to have lawyers or lay members on the council as a proxy for the public. The new Ontario legislation, for example, has an equal number of judges and non-judges on the Council, with the judicial chair having the deciding vote. The initial screening is done by a two-person subcommittee consisting of a provincial court judge and a lay member and the four person review panel consists of two judges, a lawyer and a lay person. Other provinces, such as British Columbia, give lawyers and lay persons a majority of places (four out of seven) on the Council. As discussed above, the number of lawyer and lay participants may well vary according to the number of federally appointed judges on the Council. Because British Columbia has no federally appointed judges on the Council, it may have been felt that public confidence in the judiciary required more lawyers and lay persons. The number may also vary according to the public's regard for the tribunal. In the U.S., many elected state courts, for example, are not as highly regarded by the public as federal courts and therefore may require a larger involvement of non-judges than the federal courts require in order to assure the public that everything is above board. Indeed, the U.S. federal courts do not have any non-judges involved in discipline and the recent National Commission on Judicial Discipline did not recommend that any be added.

Visibility is given in the U.S. to the federal chief judge's vetting decisions by another technique. All decisions of the chief judge dismissing or resolving a complaint are open to inspection by the public and the press in a sanitized form which does not identify the judge. The National Commission recommended that these should be available in all circuits and that the chief judge's dismissal order be accompanied by a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. One wonders whether such a technique would work in a small jurisdiction where it may not be difficult to identify the judge involved. In the U.S. federal system, each circuit covers a number of states and a population in some cases equal to that of all of Canada. Still, it is worth careful consideration for Canada.

The U.S. federal system, as does the Canadian Judicial Council, also provides a summary of the number of complaints brought. If the procedure outlined above, giving the chief justice the initial responsibility for dealing with the case is adopted, dispositions of written complaints, at least, should probably be reported to the Canadian Judicial Council and set out in the Council's annual report. Similar reports will now be provided in Ontario and Manitoba under their new legislation. Detailed annual reports should be available in each jurisdiction in Canada.

One further technique that has been suggested by Chief Justice McEachern, the Chair of the Judicial Conduct Committee, is to have a well respected person or persons review the complaint process at various intervals. This is the technique adopted for the Security Intelligence Review Committee (SIRC) to review the work of the Canadian Security Intelligence Service (CSIS). The members of SIRC are to be chosen from Privy Councillors, but the government can in fact select whomever it wishes by first appointing the persons Privy Councillors. In the case of the judiciary, if such a technique is used, it would probably be better to find an existing body which neither the government nor the judiciary have control over to make the selection from. So, for example, the President of the Royal Society of Canada could select, say, two lawyers from among its members (there are at present about 20 non-judicial legal members) along with another Royal Society member to review the complaint process at the end of each year or every second year. Another possible pool are officers or companions of the Order of Canada, perhaps selected by the Governor General.

What technique or combination of techniques would be best for the Canadian Judicial Council? The listener will have his or her own view of the proper mix. At the present time, mine is that there should be a modest amount of lay and lawyer participation in the panels as well as the formal inquiries, full disclosure in a sanitized form in an annual document (perhaps not the annual report) of the disposition of all complaints, plus a periodic external review of the decisions made in the complaint process. Each non-public pre-inquiry panel could include a lawyer or lay person selected from the same group proposed earlier. A panel might therefore consist of two judges and a lawyer or lay person.

The external review technique, as suggested above, might occur once a year — or perhaps every two years — covering the previous year or year's activities and could be set out in the annual report in much the same way as an auditor's report is set out in a company's annual report.

Should the review include dispositions made by chief justices under the procedure tentatively suggested earlier? It is perhaps not necessary to include these as a matter of course, assuming that the system gives the complainant a right to have the matter considered further by the Chair of the Judicial Conduct Committee. Perhaps only dispositions which had originated with a complaint to the Canadian Judicial Council or otherwise reached the Council should be included.

Finally, we come to lay participation in formal inquiries. The Act specifies that the inquiry can include one or more lawyers. Recent inquiries (Gratton and Marshall) have included two lawyers appointed by the Minister of Justice. It would be better to provide that non-judicial participation could be both a lawyer and a lay person. Again, it should not be the government that selects the individuals, but rather some objective method of selecting a pool that the council can draw from, perhaps in this case (for both lawyers and lay persons) by the President of the Federation of Law Societies or of the Canadian Bar Association or of the Canadian Institute for the Administration of Justice. The inquiry proceedings would be public and the purpose of the participation is more to have input into the decision and less to give visibility to the process. In my view, it is undesirable for the government to have control of the composition of an Inquiry Committee. It should not have any influence on the result. It is for this reason that the suggestion made by some that there be a government appointed ombudsman who investigates the judges is not desirable.

If the above tentative suggestions are adopted, there would be substantial assurance to the public that complaints are being treated conscientiously. There would be public disclosure of the complaint process, a periodic retrospective review of the screening or investigation stage of the complaint process, a lawyer or lay person on each panel, and a lawyer and lay person on each Inquiry Committee.

Another issue is how to make knowledge of the system more readily available. The U.S. National Commission found that there was widespread ignorance about their 1980 Act and recommended that both the bar and the federal judiciary increase awareness of and education about the Act. It suggested that the existence of the Act should, for example, be included in the Rules of Court. A similar approach could be taken in Canada. Whether one wants to go further, as Ontario has done, and legislate that signs should be posted in court houses and that a toll-free number be provided is another question. It can be argued that one wants to make the complaint process accessible but not actively encourage complaints. At the federal level, at least, this does not appear to be necessary or desirable.

One aspect of the composition of judicial councils found in most provincial councils and in the U.S. federal system, but not in the Canadian Judicial Council, is the involvement of puisne judges in the process. In my view, it would be desirable to involve puisne judges in discipline matters, even though they are not involved in regular meetings of the chief justices. To involve them in discipline would give them a greater stake in the process and would ensure that it is not solely the chief justices that are making the decisions. The discipline process devised in 1971, when the Council was established, was consistent with that found in other institutions, such as universities, at the time. It was then the deans of the faculties that disciplined students. In later years, however, a more representative composition was established. A similar approach should be taken with

respect to judges. There could, for example, be a puisne judge on each review panel and Inquiry Committee. How would the selection be made? It could perhaps be by the Chair of the Judicial Conduct Committee from a panel of judges chosen after consultation with the Canadian Judges Conference and, say, the Canadian Bar Association or the Canadian Institute for the Administration of Justice.

A further issue that requires consideration is whether the Minister of Justice and the provincial attorneys general should have the right to direct a formal inquiry. Because part of the reason for setting up the Council was to provide the Minister of Justice with Council's view of a disciplinary issue that might lead to a joint address, it appears desirable to give the Minister of Justice the power to demand an inquiry. But, should the provincial attorneys general have the same right? In fact, it has rarely been exercised. There has only been one instance in which a provincial attorney general has ordered an inquiry. That was in the case involving the appeal court judges in the Marshall case. Nevertheless, it seems to me that only the federal Minister of Justice should have the power to order an inquiry. A provincial attorney general can always ask the Council to examine a matter, but then it is up to the Council to determine whether the matter warrants a full formal inquiry. The danger in giving this power to the provincial attorneys general is that they may order an inquiry for political purposes, although it is conceded that it has not so far been abused. If a provincial attorney general wants a public inquiry, he or she, it can be argued, should have to persuade the federal Minister of Justice to order one.

What sanctions should be available to a judicial council? The Canadian Judicial Council now exercises the right to criticize a judge for improper conduct and will make its criticism public in appropriate cases. It is usually referred to as an "expression of disapproval". Similar powers are exercised in the U.S. federal system. The use of such a public criticism or reprimand is never lightly taken in either the U.S. federal system or by the Canadian Judicial Council. In most cases, the matter will already have been public and the failure to publicly comment on the conduct would create even more undesirable adverse comment about the judiciary. Perhaps for this reason, the Canadian Judges Conference agrees — perhaps reluctantly — that public criticism should be available to the Council. I am not sure that I see much difference between the words disapprove, criticize, admonish or reprimand, although they seem to indicate an increasingly stronger degree of concern. Perhaps with the addition of the word "warn", included in the new Ontario legislation, all these words should be included in the Judges Act to indicate that Council can say what is appropriate in the circumstances without necessarily giving a particular label to their actions.

I am not persuaded — at least for the federally appointed judges — that any further sanctions are needed. The Council can, of course, express its view that the judge should change his or her conduct in some way. This was one of the purposes in establishing the Council, according to my reading of the available evidence. The Council, for example, can say that the judge should get judgments out more quickly or recommend that the judge should undertake alcohol treatment or take a particular educational course. These are the types of suggestions that a chief justice would make in appropriate cases and probably would already have done so in the particular case. There would be a strong incentive for the judge not to disregard the Council's view in that, repetition of the conduct would normally be treated more seriously by the Council in the future and, if persisted in, could lead to a recommendation that the judge be removed from office. The Council

should also be able to recommend to the judge's chief justice that the judge not be assigned cases during a period of education or treatment. In my view, no specific legislation would be needed for these recommendations. They are, in my view, part of the remedial, supervisory authority of a chief justice and the Council.

Some provincial councils provide for the possibility of suspension without pay. Ontario, for example, permits its Council to order up to a 30 day suspension without pay and Manitoba also provides for the possibility of suspension without pay during the period that the judge is receiving education or treatment. Again, I am not persuaded that such provisions are necessary or desirable for federally appointed judges, assuming that they would be constitutionally valid at the federal level. They would almost never be used and seem inconsistent with the dignity of the office of a judge who is to continue serving as a judge.

There is also the question of the procedures to be followed for a formal inquiry. There are many issues that could be examined, such as the burden of proof, whether the judge must give evidence, and who pays for the judge's counsel. The American Bar Association has worked out sensible model rules that could be applied throughout the United States. It would be useful to develop a set of model rules applicable to Canada. I will probably suggest that the Canadian Judicial Council consider inviting the Chief Judges of the provincial courts, the Canadian Bar Association and/or the Canadian Institute for the Administration of Justice and representatives of federally and provincially appointed judges associations to develop a set of model rules which individual judicial councils might wish to adopt.

I also raise here an issue which law societies and bar associations across the country raised with me. How does a lawyer communicate concern about a judge's conduct without paying the consequence of being a whistle blower? A number of provinces have set up Bench/Bar committees to address this issue. The reported experience has not, however, been very positive. Lawyers continue to be reluctant to complain. One solution is to have the communication take place through the secretary of the provincial law society directly to the Chief Justice. One would not expect that these verbal communications would be counted in any statistics on complaints received. There is still the danger with this proposed system that the real source of the complaint can be identified, and whatever system is chosen lawyers will continue to be reluctant to complain through these channels.

Finally, I have not said anything here about procedures to handle incapacity. In my view, this should not be viewed as a disciplinary issue and other techniques should be devised to handle the issue apart from labelling it misconduct or lack of good behaviour.