

Openness and Independence in Judicial Discipline Matters — The New Ontario Judicial Council

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It is a great honour for me to participate in this panel today, not only to be part of such a distinguished panel, but for another reason as well. "In 1974, a handful of dreamers assembled to establish an organization dedicated to the improvement of the administration of justice in Canada — the CIAJ". That is the beginning of an article which appears in the recent Newsletter of the CIAJ. The topic of the article is "After 20 Years, The Dream Lives On"!

The article concludes: "We dreamers of the CIAJ must, therefore, refocus and rededicate ourselves to the noble mission to which we committed ourselves 20 years ago. Our efforts and the support of other like-minded people are no less needed now than they were then. The dream of excellence in the legal system has not died; it beckons us today, more than ever". The author of that article is the Founding Executive Director of the CIAJ, from 1974 to 1978, Mr. Justice Allen M. Linden of the Federal Court of Appeal and my brother. I wish to acknowledge how useful some of the papers that have been published as books following public conferences of the CIAJ have been to me in my present job. For example, publications on the "Canadian Judiciary", the "Canadian Court System", "Expeditious Justice", the "Cost of Justice" and so on, have been invaluable resource tools for me and I know for many of my colleagues. The CIAJ has made an enormous contribution to the administration of justice and so I am proud to be a part of this conference. I am also proud of my brother Allen's contribution at the beginning.

At the outset, it is important for me to say that, insofar as provincially appointed judges are concerned, some of the issues under discussion here today have been resolved at least for the time being, on a policy level, in Ontario. For example, the notion of whether graduated sanctions in judicial discipline is practical or not has for the time being been resolved on the political level in Ontario. Similarly, the idea of including lay members on the Judicial Council, and some of the other issues regarding independence and openness, in judicial discipline have been dealt with in Ontario. It is not my desire to either defend or criticize the political decisions that have already been made. Provincially appointed judges in Ontario were consulted by government officials as the legislation establishing a new Judicial Council was being prepared. Our administrative judges, our Judges' Associations as well as myself have had many meetings with various government officials. We were asked for our views and we expressed them. There was an issues paper circulated and discussed. Sometimes our views were accepted by the government, and sometimes they weren't. The government made the decisions that it is their responsibility in a democratic society to make. Accordingly, our judges are happy with some parts of the Act and concerned about others. This legislation was developed in the context of a much larger package of amendments.

The new Ontario legislation received third reading in June, but it has not yet been proclaimed. The government has indicated that it is prepared to proclaim some parts of the legislation, as soon as the judiciary is ready, which is expected to be some time early in the new year.

When I was invited to participate on this panel, I thought my most useful contribution would be for me to focus upon and describe the situation in Ontario.

I. PRIOR TO 1990

There were nine members on the Ontario Judicial Council including three federally appointed judges (Chief Justice of Ontario, Chief Justice of the High Court, Chief Justice of the District Court) and three provincially appointed judges (Chief Judges of the Criminal, Family and Civil Divisions), the Treasurer and two lay persons. The meetings were informal and held at Osgoode Hall. The only support staff was provided by the Chief Justice's ELO and the occasional use of outside counsel. The Act provided for considerable "secrecy" regarding procedure and substance, for example, it was not appropriate to disclose that a complaint had been made. There was certainly no separate budget for the Council.

II. AS A RESULT OF COURT REFORM IN 1990

The composition of the Council was changed to increase the number of federally appointed Justices to four (Chief and Associate of Court of Appeal, Chief and Associate of General Division) and to reduce the number of provincially appointed judges to one, the Chief Judge. The Council continued to include the Treasurer and two lay members. The Council's function is to: a) consider new appointments and make recommendations to the Minister; b) receive and investigate complaints; and c) approve continuations in office of judges between the ages of 70 and 75. Council meets on an average of 8 to 10 times a year — approximately 75 new appointments were considered since 1990 and an average of 20 to 30 new complaints each year. Considering the very public nature of a judge's work — every word is on the record, every day — that may be considered an extremely low number of complaints. Very little use is made of outside counsel — still no real budget. No change regarding "secrecy" provisions. There is a possibility for public hearings at the Council stage, and obviously Public Inquiries are public. There are no written procedures, which is very frustrating for both complainants and judges. Whether it was true or not, both members of the public and provincially appointed judges felt that the system was closed and unfair. There was really only one option available to the Judicial Council and that was to recommend a public inquiry in appropriate cases — or to do nothing. Although "informal" dispositions were sometimes worked out, it was felt that the system was too limited, rigid and inflexible. A recent case in Ontario, which was very public, demonstrated some of the weaknesses of the current system. That matter is presently before the Court of Appeal and I do not intend to comment any further on it.

III. THE NEW JUDICIAL COUNCIL

When it comes into effect, it has been increased in size to 12 members including the Chief Justice of Ontario and five provincially appointed judges (the Chief Judge and four others), the Treasurer, a lawyer who is not a Bencher and four other persons who are neither lawyers nor judges.

The new Council will have at its disposal a range of disciplinary sanctions if it finds misconduct of a judge after a public hearing. For example, after completing the

hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge, may:

- a) warn the judge;
 - b) reprimand the judge;
 - c) order the judge to apologize to the complainant or to any other person;
 - d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
 - e) suspend the judge with pay, for any period;
 - f) suspend the judge without pay, but with benefits, for a period up to thirty days; or
 - g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.
- The Act creates a rather complex system for proceeding with a complaint.
- It attempts to strike a balance between openness and protection of privacy, both for subject judges and for witnesses, including the complainant.
- The new Council has a much broader mandate than the old, including developing standards of conduct, a system of evaluation and approving continuing education programs for judges. It also includes a public information and education mandate. Although these provisions are discretionary, they are contained in the legislation. These are all important topics on their own — perhaps subject for another panel or conference.

IV. SOME DETAILS OF THE NEW SYSTEM

Throughout the process, there is a balancing of judge and non judge review and adjudication. For example, all complaints are initially examined by a subcommittee of the Council consisting of a provincial judge other than the Chief Judge and a person who is neither a judge nor a lawyer.

The subcommittee may dismiss the complaint or refer it to the Chief Judge or to a mediator only if both members agree; otherwise, the complaint must be referred to the Judicial Council. The subcommittee will dismiss the complaint without further investigation if, in the subcommittee's opinion, it falls outside the Judicial Council's jurisdiction, is frivolous or an abuse of process.

If the complaint is not dismissed by the subcommittee, then the subcommittee shall conduct such investigation as it considers appropriate.

Mediation is an important part of the new system, and the circumstances, conditions and details of when and how mediation is to take place are specifically spelled out in the Act. For example, section 51 of the Act sets out that the Council may establish a mediation process for complainants and for judges who are the subject of complaints. Mediation may only be used if both the complainant and the judge consent.

If the Judicial Council establishes a mediation process, it must also establish criteria to exclude from the process complaints that are inappropriate for mediation.

The criteria must ensure that complaints are excluded from the mediation process in the following circumstances:

1. There is a significant power imbalance between the complainant and the judge, or there is such a significant disparity between the complainant's and the judge's accounts of the event with which the complaint is concerned that mediation would be unworkable.
2. The complaint involves an allegation of sexual misconduct or an allegation of discrimination or harassment because of a prohibited ground of discrimination or harassment referred to in any provision of the *Human Rights Code*.¹
3. The public interest requires a hearing of the complaint.

In some cases, the Council may decide to establish a Review Panel which, for the purpose of dealing with a complaint, has all the powers of the Judicial Council.

Once again, the Act specifically sets out the composition of the review panel and the balance between judges and non judges. It provides that the review panel shall consist of two provincial judges other than the Chief Judge, a lawyer and a person who is neither a judge nor a lawyer.

1. *Human Rights Code*, R.S.O. 1981, c. 53.

V. JUDICIAL COUNCIL HEARINGS

Section 51.6 sets out the ground rules for the conduct of a Judicial Council hearing either by a panel or by the full Council. Of course, the *Statutory Powers Procedure Act*² applies to the hearing and the Judicial Council's rules of procedure apply. (More about the Judicial Council's rules in a moment.)

The wider range of dispositions available to the Council, after a hearing, has already been mentioned. Council has the option of recommending to the Attorney General that a judge be removed from office. After a hearing, the Council may recommend to the Attorney General that the judge be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of — and I am paraphrasing the legislation slightly here:

1. an inability, because of a disability, to perform the essential duties of his or her office;
2. conduct that is incompatible with the due execution of his or her office; or
3. failure to perform the duties of his or her office.

The Attorney General then tables the recommendation of the Council in the Assembly if it is in session or, if not, within fifteen days after the commencement of the next session.

Then, an order removing a provincial judge from office can only be made by the Lieutenant Governor on the address of the Assembly.

There is a unique situation established regarding the Chair. The Chief Justice of Ontario acts as chairman for specific complaints against individual judges, whereas the Chief Judge of the Provincial Division acts as chairman for other matters, including the business meetings of the Council. There has been an attempt to keep the Chief Judge removed from the early stages of a complaint so that he or she will be able to participate in a subsequent hearing if there is one. The involvement of the Chief Justice of Ontario in respect to specific complaints and hearings of the Council provides a substantial degree of credibility to the process.

There are many unique "people friendly" provisions of the new system, such as:

section **49(22)**: *The Judicial Council shall provide support services, including initial orientation and continuing education, to enable its members to participate effectively, devoting particular attention to the needs of the members who are neither judges nor lawyers and administering a part of its budget for support services separately for that purpose;*

2. *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484.

section **49(23)**: *The Judicial Council shall administer a part of its budget for support services separately for the purpose of accommodating the needs of any members who have disabilities;*

section **51(1)**: *The Judicial Council shall provide, in courthouses and elsewhere, information about itself and about the justice system, including information about how members of the public may obtain assistance in making complaints;*

section **51(2)**: *In providing information, the Judicial Council shall emphasize the elimination of cultural and linguistic barriers and the accommodation of the needs of persons with disabilities;*

section **51(3)**: *Where necessary, the Judicial Council shall arrange for the provision of assistance to members of the public in the preparation of documents for making complaints;*

section **51(4)**: *The Judicial Council shall provide province-wide free telephone access, including telephone access for the deaf, to information about itself and its role in the justice system;*

section **51(5)**: *To enable persons with disabilities to participate effectively in the complaints process, the Judicial Council shall ensure that their needs are accommodated at the Council's expense, unless it would impose undue hardship on the Council to do so, considering the cost, outside sources of funding, if any, and health and safety requirements, if any;*

section **51(6)**: *After the end of each year, the Judicial Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the judge or the complainant.*

There are, of course, provisions for complaints to be made in English or French.

There are several provisions that deal specifically with the issue of openness. The initial subcommittee and investigation stages are private, but there is a presumption that the Council's hearings will be public — unless there are special circumstances when they may be private. Section 51.6(7) provides that:

section **51.6(7)**: *In exceptional circumstances, if the Judicial Council determines, in accordance with the criteria established under subsection 51.1.(1), that the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality, it may hold all or part of the hearing in private.*

Consider section 51.6 subsections (8), (9) and (10) which also deal with this issue:

section **51.6(8)**: *If the hearing was held in private, the Judicial Council shall, unless it determines in accordance with the criteria established under subsection 51.1(1) that there are exceptional circumstances, order that the judge's name not be disclosed or made public;*

section **51.6(9)**: *If the complaint involves allegations of sexual misconduct or sexual harassment, the Judicial Council shall, at the request of a complainant or of another witness who testifies to having been the victim of similar conduct by the judge, prohibit the publication of information that might identify the complainant or witness, as the case may be; and*

section **51.6(10)**: *In exceptional circumstances and in accordance with the criteria established under subsection 51.1(1), the Judicial Council may make an order prohibiting, pending the disposition of a complaint, the publication of information that might identify the judge who is the subject of the complaint.*

The attempt to balance the interests of openness and privacy are evident throughout. The public's "right to know" is balanced with the need to retain and protect the judge's reputation and credibility in the eyes of the public if he or she returns to the bench. There is also a clear attempt to protect the identity of witnesses and complainants in appropriate situations.

I have referred to the Judicial Council's making its own rules and procedures.

The Judicial Council is required to establish guidelines and public rules to govern its own procedures covering, among other things, such matters as:

- conducting investigations, making recommendations, and making decisions during the subcommittee stage of complaint review (section 51.4(21));
- considering reports and complaints, and making decisions during the Council stage of complaint review (section 51.4(22));
- hearings (section 51.6(3));
- criteria for holding all or part of a hearing in private (section 51.6(7));
- criteria for determining that there are exceptional circumstances which warrant prohibiting the publication of information that might identify a judge who is the subject of a complaint, pending the disposition of a complaint (section 51.6(10)); and
- determining whether special needs of disabled judges can be accommodated (section 45).

Clearly, the development of these new rules and procedures is critical to the success of the new Council. Having regard to the principle of judicial independence, the

Ministry of the Attorney General in Ontario has recognized that it must be the judiciary itself that must develop the rules and procedures that are necessary to give effect to the new Council. Accordingly, the Chief Justice of Ontario and myself, as Chief Judge are presently in the process of developing these rules and procedures. We are preparing a submission that will soon be presented to the Ministry that will include not only these rules and procedures, but will also deal with a wide range of issues including appointments, staffing, office space, budget, transition, etc. Substantial consultation with our Provincial Judges' Associations is also necessary and anticipated.

The expectation is that the new Council will be properly organized, funded and operational some time early in the new year.