July 18, 2022

VIA EMAIL: mcu@justice.gc.ca; JUST@parl.gc.ca

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, Ontario K1A 0A6

Mr. Randeep Sarai, M.P., Chair
Standing Committee on Justice and Human Rights
c/o Jean-François Pagé, Clerk of the Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, Ontario K1A 0A6

Dear Minister, Mr. Sarai:

RE: Bill C-9, *An Act to amend the Judges Act*

The Advocates' Society writes to comment on Bill C-9's proposed amendments to the *Judges Act*.

Established in 1963, The Advocates' Society is a not-for-profit organization representing more than 5,500 diverse lawyers and students across the country who are unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society is dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, and inclusion in the justice system and legal profession.

I. Overview

The Advocates' Society supports the government's initiative to reform the Canadian Judicial Council's process for reviewing allegations of misconduct against federally appointed judges. The current process is susceptible to delay and inflated costs. This inefficiency has the potential to diminish public confidence in Canada's judiciary and the administration of justice. The Advocates' Society believes that several of the amendments proposed by Bill C-9 will streamline the CJC's process and improve its efficiency.

One significant cause of delay is that parties can apply for several levels of judicial review of the CJC's decisions, at multiple points in the CJC's process. The Advocates' Society agrees that this should be addressed. However, in our view, Bill C-9 overcorrects this issue by effectively eliminating external judicial oversight of the CJC's actions and decisions. The lack of external judicial oversight in Bill C-9's proposed legislative scheme risks substantial unfairness to parties.

To remedy the lack of external judicial oversight, The Advocates' Society recommends that Bill C-9 grant the judge and the presenting counsel a right to appeal the CJC's ultimate decision to the Federal Court of

Appeal. We believe this small change to Bill C-9 strikes the right balance between efficiency, public confidence, and fairness to the parties in the CJC's process.

We expand upon The Advocates' Society's recommendation and the reasons for it in our submissions below. We also provide draft legislative language for eventual consideration by the Standing Committee on Justice and Human Rights once Bill C-9 is referred to the Committee for study.

II. Bill C-9 Removes Effective Judicial Oversight of the CJC's Actions and Decisions

i) Current Judicial Oversight of the CJC

Currently, the CJC's decisions are reviewable under s. 18 of the *Federal Courts Act*,[1] which grants the Federal Court jurisdiction to review the actions and decisions of any federal board, commission, or other tribunal.[2] Parties may then appeal a decision of the Federal Court to the Federal Court of Appeal under s. 27 of the *Federal Courts Act*. Parties may further apply for leave to appeal a decision of the Federal Court of Appeal to the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*.[3]

As noted above, The Advocates' Society agrees that this multi-layered mechanism for judicial oversight risks creating undue delay and increasing the costs involved in reviewing allegations of judicial misconduct against federally appointed judges. The parties may apply for judicial review of the CJC's decisions at multiple junctures, and then further appeal the decisions on judicial review through two additional levels of the federal court system. The CJC's process and, if warranted, any resulting recommendation to the Minister of Justice that a judge be removed from office, are necessarily delayed to await the outcome of an interim application for judicial review and any appeals from the decision. This delay risks undermining public confidence in Canada's judiciary and in the administration of justice.

ii) Bill C-9's Proposed Judicial Oversight of the CJC

In contrast to the robust judicial review currently available, Bill C-9 proposes to remove all rights to judicial review of or appeal from the CJC's decisions to the Federal Court. Instead, Bill C-9 provides for internal review mechanisms within the CJC. A decision of a CJC Review Panel can be reviewed by a CJC Reduced Hearing Panel;[4] a decision of a CJC Reduced Hearing Panel can be appealed to a CJC Appeal Panel;[5] and a decision of a CJC Full Hearing Panel can also be appealed to a CJC Appeal Panel.[6] The parties may apply to the Supreme Court of Canada for leave to appeal a decision of a CJC Appeal Panel.[7]

Bill C-9 creates a scheme in which the CJC is the investigator, the decision-maker, and the appellate authority with respect to allegations of judicial misconduct. Bill C-9 does not provide for any right of judicial review or appeal to any external body or court at any stage in the CJC's process: an appeal is only available if the Supreme Court of Canada grants leave. As a result, the CJC's administrative process and decisions are rendered practically immune from external review.

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[1] *Federal Courts Act*, R.S.C. 1985, c. F-7.
[2] See *Canada (Judicial Council) v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503.
[3] *Supreme Court Act*, R.S.C. 1985, c. S-26.
[4] Proposed s. 104.
[5] Proposed ss. 116 and 130.
[6] Proposed ss. 123 and 130.
[7] Proposed s. 137.

iii) The Importance of Judicial Oversight of Administrative Action

The courts have repeatedly emphasized the inherent nature of judicial oversight of administrative actions and decisions. As the Federal Court of Appeal held in *Slansky v. Canada (Attorney General)*, "[a]s a matter of constitutional law, courts must be able to review the decisions of administrative decision-makers for defensibility and acceptability on the facts and the law".[8] Courts ensure that administrative bodies stay within the scope of their statutory authority, and ensure "the legality, the reasonableness and the fairness of the administrative process and its outcomes."[9] In *Vavilov*, the Supreme Court of Canada reiterated the principle that "legislatures cannot shield administrative decision making from curial scrutiny entirely".[10]

Legislative attempts to oust a court's inherent (or plenary) powers to review administrative action, for instance by way of a privative clause, have been successfully challenged in numerous cases. Privative clauses are often "read down" to ensure an adequate degree of judicial oversight remains, albeit with appropriate deference.[11]

With respect to the importance of judicial review of the CJC's decisions specifically, the Federal Court held in *Douglas v. Canada (Attorney General)* that

> [i]mmunizing the Council's decisions from review offends the principle that all holders of public power should be accountable for their exercises of power. As mentioned above, where the issue arising from an impugned decision goes to a breach of procedural fairness, the decision-making body may be deprived of jurisdiction. Statutory tribunals cannot be immunized from review of such errors.[12]

In the same case, the Federal Court further stated as follows:

> Before a judge can be removed from office, he or she is entitled to a fair hearing. This fair hearing is essential not only as a matter of administrative law, but as a component of the constitutional requirement for judicial security of tenure. The supervisory jurisdiction of this Court over the Council and its Inquiry Committee serves an important function in the public interest of ensuring that the judicial conduct proceedings have been fair and in accordance with the law. […] [13]

While the goals of Bill C-9 are laudable, the bill goes too far in sheltering the CJC's decisions from external review. Adequate judicial oversight must be retained to ensure the parties to the CJC's process are treated fairly and the CJC's decisions are just. The CJC would also benefit from judicial guidance as it hones the new processes proposed by the amendments to the *Judges Act* in Bill C-9. Absent adequate oversight, the proposed legislative scheme may in any case be susceptible to the courts' intervention to ensure the CJC's decisions are not immune to review.

iv) Bill C-9 Would Make the CJC an Outlier among other Administrative Bodies

Bill C-9's proposed legislative scheme would grant the CJC an exceptional level of immunity from judicial review in comparison to other federal administrative tribunals and professional regulatory bodies.

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[8] *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81, at para. 314.
[9] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-31.
[10] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 24.
[11] *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81, at para. 314.
[12] *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911, at para. 119 (references omitted).
[13] *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911, at para. 121 (references omitted).

With respect to other federal administrative bodies, as noted above, the Federal Court has broad jurisdiction under s. 18 of the *Federal Courts Act* to hear applications for judicial review of the actions and decisions of any "federal board, commission or other tribunal", which is broadly defined. Under ss. 27-28 of the *Federal Courts Act*, the Federal Court of Appeal has broad appellate jurisdiction over decisions of the Federal Court, as well as jurisdiction to hear and determine direct applications for judicial review made in respect of the many listed federal boards, commissions, or other tribunals. By contrast, Bill C-9 would effectively immunize the CJC's decisions from these oversight mechanisms.

Bill C-9 would also make the CJC an outlier among professional regulators. For example, the decisions of the law societies of British Columbia, Alberta, and Ontario are all subject to review as of right by appellate courts.[14] Decisions by administrative bodies regarding health professionals and accounting professionals, among many other professions, are also subject to some form of judicial oversight.[15] It is not clear to The Advocates' Society why judges would receive a more limited right than other professions do to ensure decisions made with respect to their professional conduct are fair and justified.

v) The Right to Apply for Leave to Appeal to the Supreme Court of Canada Is an Inadequate Form of Judicial Oversight

Bill C-9 proposes that the judge who is the subject of the CJC's proceedings, or the presenting counsel, may apply to the Supreme Court of Canada for leave to appeal the CJC Appeal Panel's decision.[16] Under Bill C-9's proposed scheme, the Supreme Court of Canada is the only court with the power to review the CJC's decisions. This limited appeal avenue, in addition to being an outlier among legislative schemes regulating administrative decision-making, does not provide adequate judicial oversight of the CJC's process or ultimate decision.

The modern Supreme Court of Canada is not an error-correction court; rather, its role is to consider legal issues of public importance and to develop the law. As the Supreme Court of Canada itself stated in the *Reference re Supreme Court Act, ss. 5 and 6*:

> In 1975, Parliament amended the *Supreme Court Act* to end appeals as of right to the Court in civil cases. This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Court's "mandate became oriented less to error correction and more to development of the jurisprudence".[17]

Under s. 40(1) of today's *Supreme Court Act*,[18] a judgment of the Federal Court of Appeal or the highest court of final resort in a province can be appealed to the Supreme Court, with leave, if "the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".[19]

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[14] *Legal Profession Act*, S.B.C. 1998, c. 9, s. 48; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(1); *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.38.

[15] See e.g. *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 70; *Chartered Professional Accountants of Ontario Act, 2017*, S.O. 2017, c. 8, Sched. 3, s. 37.

[16] Proposed s. 137.

[17] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 86 (references omitted).

[18] *Supreme Court Act*, R.S.C. 1985, c. S-26.

[19] Emphasis added. See also *Supreme Court Act*, s. 43(1)(a).

Most matters do not meet this high bar for consideration, so that the Supreme Court denies the vast majority of applications for leave to appeal that it receives. In 2021, the Supreme Court decided 424 applications for leave to appeal. The Court granted 34, or approximately 8%.[20] Between 2015 and 2020, the Supreme Court granted an average of 8.3% of the applications for leave to appeal it received per year, meaning it denied an average of 91.7% of applications annually.[21] Furthermore, many of the appeals heard by the Supreme Court are criminal matters; for example, of the 58 appeals heard by the Supreme Court in 2021, 32 (or approximately 55%) were criminal law matters.[22] Few CJC decisions would ever be subject to review.

vi) Conclusion

The proposed legislative scheme would render the CJC an outlier among other federal administrative tribunals and professional regulatory bodies. The courts have been clear that there must be an adequate degree of judicial oversight of the CJC's administrative process and decisions. Bill C-9 effectively removes judicial oversight, which cannot be satisfied by the parties' right to apply for leave to appeal the CJC Appeal Panel's decision to the Supreme Court of Canada.

III. The Advocates' Society's Recommendation

The Advocates' Society submits that there is a simple remedy that balances the goals of Bill C-9 and fairness to the parties to the CJC's process. The Advocates' Society recommends that the judge and the presenting counsel be provided with a right to appeal a decision of the CJC Appeal Panel to the Federal Court of Appeal without leave.

An appeal as of right from a final decision of the CJC Appeal Panel to the Federal Court of Appeal would be more streamlined and efficient than the current process, in which judicial review is available at stages prior to the final decision. It would still allow, however, for an adequate degree of external judicial oversight of the CJC's administrative process and decisions. Moreover, as described above, many federal administrative bodies are subject to direct judicial review by the Federal Court of Appeal.[23]

To implement this recommendation, The Advocates' Society recommends the following minor amendments to Bill C-9's proposed s. 137 of the *Judges Act*:

> ~~Supreme Court of Canada~~ Federal Court of Appeal
>
> ~~**Notice of application for leave to appeal**~~ **Right of appeal**
>
> **137** The judge who is the subject of a decision of an appeal panel and the presenting counsel may respectively, within 30 days after the day on which the appeal panel sends them a notice of its decision, file ~~a notice of application for leave to appeal to the Supreme Court of Canada~~ with the Federal Court of Appeal a notice appealing the decision.

[20] Supreme Court of Canada, 2021 Year in Review.
[21] Supreme Court of Canada, Statistical Summary 2010 to 2020.
[22] Supreme Court of Canada, 2021 Year in Review.
[23] See *Federal Courts Act*, s. 28.

IV. The Advocates' Society's Recommendation Mitigates Bill C-9's Potential Impact on Judicial Independence

Judicial independence is a critical element of a democratic legal system. The CJC has stated that:

> An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. […] A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.[24]

The Supreme Court of Canada has enunciated three main and essential components of judicial independence: (1) security of tenure, (2) financial security, and (3) administrative independence. The first of these elements, security of tenure, means that a judge cannot be removed from the bench for making an unpopular decision or for making mistakes. While judges must be accountable for their conduct, the protection of judicial independence requires that the process with respect to the investigation and adjudication of complaints about judges be transparent, robust, and fair.[25]

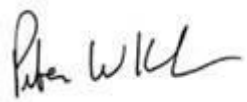
The Advocates' Society suggests that Bill C-9's total lack of oversight dilutes security of tenure and thus weakens judicial independence. The recommendation above, a right to appeal the CJC's ultimate decision to the Federal Court of Appeal, achieves the balance necessary to stringently protect independence while ensuring efficiency, public confidence, and fairness.

V. A Technical Amendment

We note in passing that a further technical amendment should be made to Bill C-9. Bill C-9 refers to "prothonotaries" of the Federal Court in clause 2, amending s. 2.1(1) of the *Judges Act*, and clause 12, in proposed s. 79 of the *Judges Act.* As Bill C-19 received royal assent on June 23, 2022, the term "Prothonotary" should now be replaced with "Associate Judge".

Thank you for the opportunity to provide you with this submission. We would be pleased to answer any questions you may have.

Yours sincerely,



Peter W. Kryworuk
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

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[24] Canadian Judicial Council, *Ethical Principles for Judges* (2021), at pp. 6-7. See also Chapter I, "Judicial Independence", at pp. 13-17.

[25] In April 2020, The Advocates' Society published a comprehensive statement on judicial independence, entitled *Judicial Independence: Defending an Honoured Principle in a New Age*, including a section on tenure, accountability, and removal of judges (see Part III.2, at pp. 9-10). The statement may assist the Standing Committee in any study of Bill C-9.

The Advocates' Society's Task Force on Bill C-9:

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