

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

**DEPARTMENT OF JUSTICE CONSULTATION REGARDING
POSSIBILITIES FOR FURTHER REFORM OF THE FEDERAL
JUDICIAL DISCIPLINE PROCESS**

Federation of Law Societies of Canada Submission

Ottawa, September 9, 2016

The Federation of Law Societies of Canada (“the Federation”), on behalf of its member law societies, appreciates the opportunity to contribute to the government’s June 2016 consultation, “Possibilities for Further Reform of the Federal Judicial Discipline Process (“the consultation”).

Submission Overview

Given the short time provided for the consultation, the Federation is limiting its submissions to certain fundamental principles that we believe should be maintained at all stages of the discipline process, and to the following specific issues: the involvement of lay persons; the role of independent counsel; and the payment of legal fees incurred by judges in the course of discipline proceedings.

The Federation makes the following recommendations for reforming the judicial discipline process:

1. Include lay persons in all stages of the judicial discipline process.
2. Enshrine the role of lay persons in the *Judges Act*.
3. Enshrine the role of independent legal counsel in legislation or regulations with the following key components:
 - a. Require independent legal counsel to be engaged in all inquiries, regardless of the inclusion of other counsel.
 - b. Clearly define the role and expectations of independent legal counsel.
4. Ensure that the role of any other counsel is clearly defined and distinct from that of independent counsel.
5. Outline the selection criteria and qualifications for independent counsel in Canadian Judicial Council (“CJC”) policies.
6. Maintain the government’s current practice of paying a judge’s legal fees throughout the discipline process, including judicial review unless the application for judicial review is ultimately found to be frivolous or vexatious.

The Federation of Law Societies of Canada

The Federation is the national coordinating body of Canada’s 14 law societies, which are mandated by provincial and territorial statutes to regulate the country’s 117,000 lawyers, Quebec’s 4,500 notaries and Ontario’s nearly 8,000 licensed paralegals in the public interest. Among other activities, the Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members. The Federation also speaks out on issues critical to safeguarding the public’s right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

An important role of the Federation is to communicate the views of the governing bodies of the legal profession on national issues. It is of great importance to the legal profession that administrative processes like judicial discipline are fair in practice and perception, effectively

balance judicial independence with accountability, and operate in the best interests of the public.

General Principles

The consultation paper outlines key principles that are foundational to the judicial discipline process, including judicial independence, fairness, judicial accountability, efficiency, transparency and accessibility. The Federation agrees that these principles must be respected. Public confidence in the legal system requires that the principle of judicial independence, while a cornerstone of our legal system, be balanced against the need for the judiciary to be accountable. A fair and transparent judicial complaints and discipline process is thus essential to that public confidence.

It is clear from the consultation paper that these principles have been taken into account. In the view of the Federation, there is, however, another principle that should inform the judicial discipline process. Like the judiciary itself, the judicial discipline process must be representative of the diversity found in Canadian society. Reflecting the diverse values, perspectives and communities of Canadian society in the CJC's discipline processes would support and further its goals and would increase public confidence.

Lay persons

Section 3.5 of the consultation paper explores whether the federal judicial discipline process could benefit from greater involvement by lay persons. In the view of the Federation it would. As the paper notes, the involvement of members of the public, i.e. persons who are neither lawyers nor judges, is commonplace in provincial judicial councils and discipline processes and in the discipline processes of many self-regulated professions. Increased participation of lay persons at all stages would enhance the CJC processes, contributing to public confidence and increasing opportunities to reflect the diversity of Canadian experiences and perspectives.

The National Discipline Standards¹ developed by the Federation and adopted by every law society in Canada, require the participation of at least one public representative at every stage of the discipline process (including charging committees and hearing panels) and also require that there be review processes for complaints that are disposed of without charges that includes public participation. In our view, these requirements enhance the transparency and accountability of law society discipline processes and increase the diversity of perspectives represented throughout. Increased public participation in federal judicial discipline processes would do the same.

The Federation submits that public participation at all stages of the discipline process should be enshrined in the *Judges Act*. An amendment of this nature would further the government's goal of transparency.

¹ The standards, first adopted in 2014, address such important elements as timeliness in the investigation and hearing stages, public participation, transparency, accessibility and training. A copy of the National Discipline Standards is available on the Federation's website at www.flsc.ca.

Recommendation 1:

Include lay persons in all stages of the judicial discipline process.

Recommendation 2:

Enshrine the role of lay persons in the *Judges Act*.

Role of Independent Counsel

The Federation submits that the role of independent counsel should be reintroduced into the judicial discipline process and should be enshrined in a legislative instrument.

The 2015 amendments to the CJC bylaws represented a stark and unwelcome departure from the previous requirement for two uniquely defined counsel in an inquiry: committee counsel and presenting (or independent) counsel. As the consultation paper explains, the former was responsible for providing legal advice and assisting the inquiry committee to fulfill its mandate, while the latter was appointed by the Chair of the Conduct Committee to present all relevant evidence for and against the judge. While the Federation understands that the amendment was prompted by a conflict between independent and committee counsel in the inquiry into the conduct of Justice Douglas, the change did not resolve the issues underlying that conflict. In our view, the issues would have been more effectively addressed by either doing away with the role of committee counsel or clearly defining the respective roles of independent and committee counsel. As it is, the amendment raises significant concerns in terms of both the inquiry process and broader legal principles.

Section 3.8 of the consultation paper aptly highlights the value of maintaining independent counsel at the inquiry stage. The Federation agrees that independent counsel play a vital role in the judicial discipline process and we recommend that the CJC restore the requirement for independent counsel in every inquiry committee. The Federation submits that by doing so the government will better reflect and uphold the fundamental principles it is committed to preserving.

1) Independent Counsel will Mitigate a Perception of Bias

As the paper acknowledges, the use of independent counsel was introduced to address concerns that rigorous questioning of witnesses by members of the inquiry committee might raise a reasonable apprehension of bias. The CBA noted in its 2014 submission that the use of independent counsel also mitigated the public's perception that judges reviewing "one of their own" might not be impartial and improved the transparency of the process. Despite the obvious merits of the role, the 2015 amendments not only removed any reference to it, but effectively created less certainty around what kind of counsel will be engaged in future inquiries and whether that counsel will operate at arm's length from the CJC and its committees. The Federation maintains that removing the requirement for independent counsel undermined the CJC's goal of enhancing public confidence in the judicial discipline process.

2) *A Lack of Independent Counsel Raises Procedural Fairness Concerns*

A fundamental principle of fairness is that the more severe the penalty, the greater an individual's right to procedural protection. As the consultation paper states, the stakes in the judicial discipline process are very high as the issue under consideration by an inquiry committee is whether the judge should be removed from office. Restoring the role of independent counsel would provide a necessary safeguard to ensure that a recommendation to remove a judge from the bench is reached in an objective and fair manner. This will better guarantee fairness to the judge (both in practice and perception), while holding him/her accountable to the public for substantiated allegations of misconduct.

Currently the CJC bylaws provide that legal counsel "may be engaged". This language is problematic in a number of ways; it permits the possibility that counsel *may not* be engaged, which brings into question who is responsible for raising and examining evidence, and how the inquiry committee will receive that evidence. In addition, it does not identify the type or number of counsel to be engaged, how their roles are defined (if more than one), or guarantee that evidence will be presented objectively or independently. The Federation recommends that independent legal counsel be required in all cases and that the inquiry committee's discretion be limited to deciding whether to engage committee counsel to assist with an inquiry.

3) *Existing Bylaw Lacks Clarity for Inquiry Committees and Counsel*

In their current form the bylaws of the CJC permit an inquiry committee to "engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry." Not only does the bylaw make the engagement of counsel optional, it fails to provide appropriate guidance to inquiry committees on the specific role or roles to be played by counsel when they are so engaged.

The current role of counsel to "advise" and "assist" in the conduct of the inquiry is vague and does not guarantee independence from the CJC and its processes. It leaves open the possibility of the engagement of a single counsel to perform a role that combines those of independent and committee counsel, or of more than one counsel without clear definition of the roles of each. Not only might this lead to confusion and possibly conflict, there is a risk of a perception of bias. The Federation recommends that the role of independent counsel be required and enshrined in a statutory instrument. It should also be clearly delineated to avoid any confusion on the part of counsel or the committee. The Ontario Judicial Council procedures set out on page 31 of the consultation paper provide one model for such delineation.

In addition, the government would encourage consistency, transparency and efficiency in the inquiry process if it developed selection criteria or qualifications for independent counsel. The Federation understands that prior to the 2015 amendments, CJC policies and by-laws required that independent counsel have at least 10 years' experience and be recognized as a leader in the bar. We recommend either returning to this practice or creating new criteria to a) support the committee in its selection process, and b) ensure independent counsel have the requisite skillset and reputation to carry out their duties in the public interest.

The Federation does not take a position with respect to the engagement of other counsel. As the consultation paper notes, the CBA's 2014 submission questioned the necessity of retaining committee counsel given the inclusion of judges and lawyers on the inquiry committees. The CBA suggested that the role be carefully circumscribed and limited to administrative functions. To the extent committee counsel, or other counsel, is needed the Federation would agree that the role(s) should be clearly defined and limited to avoid any potential for conflict.

Recommendation 3:

Enshrine the role of independent legal counsel in legislation or regulations with the following key components:

- Require independent legal counsel to be engaged in all inquiries, regardless of the inclusion of other counsel.
- Clearly define the role and expectations of independent legal counsel.

Recommendation 4:

Ensure that the role of any other counsel is clearly defined and distinct from that of independent counsel.

Recommendation 5:

Outline the selection criteria and qualifications for independent counsel in CJC policies.

Payment of Legal Fees Incurred by Judges in the Discipline Process

While legal fees raise costs issues (described in the consultation paper as one element of the principle of “efficiency”), ultimately these costs are a relatively small part of maintaining the judicial discipline process. The Federation submits that the issue of costs must be considered in terms of their impact on the constitutionally protected principle of judicial independence.

As described at 3.13 of the consultation paper, the government’s current practice is to pay all legal fees incurred by a judge in the course of discipline proceedings, including those incurred at the investigation stage, during inquiry committee proceedings, and at the judicial review stage, if any.² As the focus of the consultation paper appears to be more on the payment of judge’s legal fees in the context of judicial review applications, the Federation assumes that the practice of paying fees during earlier discipline stages will remain unchanged. The Federation supports maintaining the current government practice at these stages.

The consultation paper outlines four options for reforming the payment of legal fees at the judicial review stage. The Federation’s submission assumes that these options refer strictly to applications commenced after a final determination from an inquiry committee, and not during those proceedings. The Federation is of the view that any reforms to the current practice of

² Consultation Paper at pages 40-41.

paying the legal fees incurred by a judge for judicial review *post-inquiry committee stage* must be carefully considered given the constitutional importance of judicial independence.

As the consultation paper notes, several courts, including the Federal Court of Appeal, have already found that “payment by the government of legal fees incurred by a judge in the course of discipline proceedings is not only beneficial for judicial independence, but is in fact mandated by it, and thus a constitutional requirement.”³

The Supreme Court of Canada has repeatedly held that the principle of judicial independence has three essential components: security of tenure, financial security and institutional independence with respect to administrative matters bearing directly on the exercise of its judicial functions.⁴ Any potential changes to the current practice of paying legal fees must be considered in terms of these principles, both in terms of potential impacts with respect to the individual independence of the judge and the institutional or collective independence of the court over which he or she presides.⁵

The Federation submits that, except in the most exceptional circumstances, the principle of judicial independence will require the government to assume all legal fees incurred by a judge in the course of discipline proceedings, including at judicial review stages. As the Consultation Paper notes, judicial review forms an “integral part of the discipline process”.⁶

*Option 1: A judge could be required to repay the costs of bringing a judicial review application where the reviewing court found the application to be frivolous or vexatious.*⁷

The Federation is unaware of any case where a judge has brought an application for judicial review that was frivolous, vexatious or an abuse of process as part of the judicial discipline process, and the consultation paper does not refer to any such cases. Although there is no evidence that this has been an issue to date, the costs associated with a frivolous or vexatious application for judicial review brought by a judge nevertheless could be one limited exception to the principle that the government must assume all legal fees incurred by a judge in the course of judicial discipline proceedings. Although the judge in judicial proceedings must have

³ Consultation Paper, Footnote 67, page 42. Footnote 67 further states that “The Quebec Superior Court and Quebec Court of Appeal have both arrived at this conclusion in respect of legal fees incurred by provincial court judges in the course of discipline proceedings: *Ruffo c. Québec (Ministère de la Justice)*, [1997] J.Q. 3658 (C.S.Q.) (Q.L.); *Fortin c. Procureur general du Québec*, [2002] J.Q. no. 6861 (C.S.Q.) (Q.L.); *Hamann c. Québec (Ministère de la justice)*, [2001] J.Q. no. 2046 (C.A.Q.) (Q.L.). In its 2006 decision in *Bourbonnais v. Canada (A.G.)*, 2006 FCA 62, the Federal Court of Appeal found in obiter that the same reasoning would apply to federally-appointed judges.”
⁴ *Valente v. The Queen* [1985] 2 SCR 673 [“*Valente*”]; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at para. 115 [“*P.E.I. Judges Reference*”].

⁵ *Valente*, at p. 687; *P.E.I. Judges Reference* at para 120.

⁶ Consultation Paper, p.41.

⁷ Consultation Paper, at page 42.

“reasonable resources to defend his position”,⁸ this might not need to extend to the costs of a clearly frivolous and vexatious application, as determined by a reviewing court.

A judicial review application that has been found by a reviewing court to have been frivolous, vexatious or an abuse of process is an application that, by definition, was a completely unnecessary and unreasonable step in the proceeding. It would be incongruous to have the government incur the full legal costs incurred by a judge to bring such a proceeding, and the Federation therefore generally supports Option 1.

Option 2: Reviewing court could also be empowered to impose costs payable by the judge where the court considers it appropriate in the circumstances even if the application was not found to be frivolous or vexatious.⁹

The Federation is not convinced that in cases where removal from office is a possibility, any further changes to the current government practice would be consistent with judicial independence, particularly its security of tenure and financial security components. In these instances, the judge should be entitled to the payment of the legal fees incurred; as the consultation paper acknowledges, the case law has found that such payment is “mandated” by the principle of judicial independence.¹⁰ The Federation is therefore opposed to Option 2.

Option 3: A judge could be initially required to pay his or her own legal fees on judicial review, with the reviewing court empowered to award the judge all or part of those costs should it deem it appropriate in the circumstances.¹¹

The Federation does not support this option for the same reasons as outlined in respect of Option 2.

Option 4: The policy of paying a judge’s legal fees on judicial review could exclude judicial review applications brought once it has been determined that a complaint does not warrant removal from office.¹²

Finally, the consultation paper raises the possibility of the range of sanctions for judicial misconduct being expanded such that in some cases dismissal may not be an option, but other non-consensual sanctions may be recommended. We respectfully disagree with the statement in the consultation paper that “Where the removal from office is not a possibility, a judge’s security of tenure is not in jeopardy, and the rationale for paying a judge’s legal fees is simply not applicable”.¹³ On the contrary, the Supreme Court of Canada has cautioned that “it has long been recognized that the scope of the constitutional guarantee of judicial independence, as it

⁸ Lemelin J. in *Fortin c. Procureur general du Québec*, [2002] J.Q. no. 6861 (C.S.Q.) (Q.L.), endorsed by the Federal Court of Appeal in *Bourbonnais v. Canada (A.G.)*, 2006 FCA 62 at para. 36.

⁹ *Ibid.*

¹⁰ *Supra* note 3.

¹¹ *Ibid* at pages 42-43.

¹² *Ibid.* at page 43.

¹³ *Ibid.*

relates to the independence of individual judges, extends beyond matters that might lead to the removal of the judge.”¹⁴

Even if the removal of the judge is not at issue, depending on the non-consensual sanctions being recommended, issues related to security of tenure, financial security and institutional independence may still apply.¹⁵ The applicability of these elements of judicial independence would need to be considered before concluding that the government could amend its practice of paying for judge’s legal fees incurred at the judicial review stage of the judicial discipline process.

The Federation submits that absent a full analysis of the range of potential sanctions and potential impacts to the elements of judicial independence, the government practice of paying a judge’s legal fees should be maintained without changes.

Recommendation 6

Maintain the government’s current practice of paying a judge’s legal fees throughout the discipline process, including judicial review unless the application for judicial review is ultimately found to be frivolous or vexatious.

¹⁴ *P.E.I. Judges Reference*, *supra* note 4 at para. 115.

¹⁵ For example, a suspension may impact on the judge’s security of tenure; a suspension without pay may impact on the judge’s security of tenure and the judge’s financial security.