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CJC Policies regarding Inquiries

Canadian Judicial Council **Policy on Inquiry Committees**

An Inquiry Committee has complete responsibility for, and control over, the scope and depth of its inquiry into the conduct of a judge. At the outset and over the course of the hearings, it relies heavily upon Independent Counsel to ensure that all relevant evidence is gathered, marshalled, presented and tested at its hearings. But it does not “abandon” its own responsibility to such counsel since the Canadian Judicial Council relies upon the Committee for a complete report. One of the key functions of the Committee is to make findings of fact.

Prior to the hearings, Independent Counsel should advise the Committee and the Judge of the “case” Counsel intends to present, including the evidence and witnesses to be called. There may be additional allegations about the Judge’s conduct that were not contained in the initial complaint or a request under section 63(1) of the *Act*. For example, these could come to light as a result of publicity given to the forthcoming hearings or in the course of Counsel’s preparation for them. Subject to the Committee’s direction, and subject to fair and proper notice to the judge, such additional allegations could be included in the scope of the Inquiry. The Committee may also direct the Independent Counsel to explore additional issues and present additional evidence. The Committee may also act on its own to explore additional issues.

The Inquiry Committee may rely on its own counsel to act as a liaison with Independent Counsel and counsel for the Judge, both prior to and during the hearings. If any contentious issues are to be discussed, all three should meet together. The same should apply to substantive issues such as the scope of the inquiry. Such matters should be placed on the record once hearings have commenced, as well as any further guidance sought by Counsel and instructions given. Hearings do not necessarily need to be conducted with the same formality as a trial. Provided the principle of fairness has been respected throughout, strict rules of evidence are not necessarily binding. Agreed positions on facts may reduce the need to present *viva voce* evidence but the Committee must still consider whether such evidence should be adduced at the hearing, in the public interest.

Since counsel to the Inquiry Committee does not participate in the hearings, they may assist in drafting rulings and the final report. Past practices regarding the final report have included: reviewing the Committee's drafting for critical analysis; preparing a first draft of all contextual and factual reporting; preparing a first draft of the Committee's entire report after monitoring the Committee's deliberations and receiving specific instructions in relation to key issues. The role of counsel in this respect is entirely within the discretion of the Inquiry Committee and, indeed, a Committee may even decide not to engage its own counsel.

Subject to the provisions of the *Judges Act* and Council's by-laws, the Inquiry Committee remains master of its own procedure. In a case where the Inquiry Committee finds that the judge engaged in serious misconduct, the Committee may choose to reconvene, in its absolute discretion, prior to submitting its report to Council, to review issues related to whether or not the matter warrants the judge's removal.

Canadian Judicial Council
Policy on Independent Counsel

The central purpose for establishing the position of Independent Counsel is to permit such counsel to act at “arm’s length” from both the Canadian Judicial Council and the Inquiry Committee. This allows Independent Counsel to present and test the evidence forcefully, without reflecting any predetermined views of the Committee or the Council. The Inquiry Committee relies on Independent Counsel to present the evidence relevant to the allegations against the judge in a full and fair manner.

The role of Independent Counsel is unique. Once appointed, Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel’s best judgement of what is required in the public interest. This is an important public responsibility that requires the services of Counsel who is recognized in the legal community for their ability and experience.

Independent Counsel is, of course, subject to the rulings of the Inquiry Committee, but is expected to take the initiative in gathering, marshalling and presenting the evidence before the Committee. As a preliminary issue, consideration should be given to the relevance of any other complaints or allegations against the judge, beyond the scope of the instant complaint or request under section 63(1). Additional witnesses may have to be interviewed and documents obtained.

The public interest requires that all of the evidence adverse to the judge, as well as that which is favourable, be presented. This also may require that evidence, including that of the judge, be tested by cross-examination, contradictory evidence or both. This should be done in a fair, objective and complete manner.

Independent Counsel is impartial in the sense of not representing any client but must be rigorous, when necessary, in fully exploring all issues, including any points of contention that might arise. Where necessary, Independent Counsel may need to adopt a strong position in regard to the issues. At the same time, it must be kept in mind that the judge could continue to serve as a judge in future, so that expressions about the judge’s credibility or motives should be carefully considered.

Unlike other settings, such as civil litigation, Independent Counsel has no authority to negotiate a “resolution” of the issues before the Inquiry Committee. However, Independent Counsel’s submissions will be considered by the Inquiry Committee.

Canadian Judicial Council
Policy on Council Review of Inquiry Committee Report

At the Inquiry Committee stage, the judge has been given a full opportunity to participate in the proceedings, present evidence, make submissions. A full review of the issues has taken place. As a result, Council accords considerable deference to the report of the Inquiry Committee, particularly in relation to its findings of fact and especially in its assessment of credibility. The Council will give serious consideration to the recommendations of the Inquiry Committee but ultimately must report its own conclusions to the Minister pursuant to section 65(1) of the *Act*.

The review by the Council is based on the record and report of the Inquiry Committee and on written submissions by the judge and by Independent Counsel. These are limited to thirty pages each.

No grounds are specified for the Council's review of the report of the Inquiry Committee. The Judge is free to make any submissions deemed advisable as to why the Council should depart from the report of the Inquiry Committee. Such submissions may include reasons why the Council should not recommend removal, even on the facts as found by the Inquiry Committee.

Subject to the provisions of the *Judges Act* and Council's by-laws, Council remains master of its own procedure and may depart from this policy in the public interest, where it finds that such departure will assist it in discharging its duties. For example, Council may invite the judge to appear and make a brief personal statement regarding the effect of the judge's conduct on public confidence in the judiciary.