



# Managing Change

THE 2008-2009 ANNUAL REPORT OF  
THE CANADIAN JUDICIAL COUNCIL

# Table of Contents

- 3 An important year in Council's evolution
- 4 An independent judiciary
- 5 Two public inquiries
- 6 Continuous improvement
- 8 Complaints and review
- 16 Statistics on complaints
- 16 Statement of expenditures

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## MESSAGE FROM THE CHAIR

### **An important year in Council's evolution**

Canadians deserve a judiciary that is responsive, efficient and up to date, and judges deserve a Council complaints process that is nimble and just. This year taught us which elements of the complaint and public inquiry processes work well and what aspects need to be streamlined. The goal moving forward is for Council to evolve a complaint system that ensures fairness and fosters public confidence in the efficiency of our judicial system.

Public inquiry committees initiated by complaints to the Canadian Judicial Council are few and far between; yet in 2008–09 Canada witnessed two come to a conclusion. The inquiries, in addition to other Council business, made for a busy and challenging year in which Council learned much about how to improve the complaints and inquiry processes to more effectively represent the interests of Canadians while protecting the integrity of Canadian judges.

Council business made many other substantial gains in 2008–09. We significantly reduced our processing time for complaints, which used to take three to five months to complete but now are routinely handled in less than 10 weeks. Significantly, a diverse group of stakeholders were gathered to discuss important issues of access to justice. Court delays are lengthening and legal costs are increasing, and Council, in partnership with other stakeholders, has a duty to Canadians to check this trend. The Action Committee on Access to Justice in Civil and Family Matters began this year to discuss ideas and concrete steps to improve access to justice for all Canadians.

Council also made significant headway evolving a set of best practices for exchanging productions in electronic form and for handling paperless trials. We worked to improve inter-jurisdictional communication in cases of parental child abduction and we collaborated with partners to improve the extent to which judges receive continuing education and professional development training.

I would like to thank and congratulate our committee members for their tireless work throughout an active year of progress. We look forward to an equally productive year ahead.

THE RIGHT HONOURABLE BEVERLEY MCLACHLIN  
CHAIRPERSON

## AN INDEPENDENT JUDICIARY

In the 1960s and until 1971, a group of judges called the Conference of Chief Justices met yearly on an informal basis to discuss common issues in the administration of justice in Canada. The Conference was a national forum to exchange ideas and bring about greater quality, efficiency and uniformity to judicial services.

In 1971, the federal government created the Canadian Judicial Council as an independent body to take over the Conference of Chief Justices' work. Recognizing Council by law was a pivotal act. It emphasized that judges are not civil servants; instead, they are autonomous members of a branch of government with special duties under our Constitution. Perhaps more importantly, it relieved the Minister of Justice from the responsibility to investigate the conduct of judges. Council became the self-governing body for federally appointed judges in Canada, with the principle of judicial discipline at its core.

In the early years, Council set out to establish some important and enduring operational practices that would affirm its role at the centre of judicial evolution in Canada. Its first members designed a process to respond to complaints concerning federally appointed judges, including a process for carrying out judicial inquiries into judges' conduct. They also worked to formalize the use of educational programs for judges.

### A responsive Council

Today, Council faces a modern cultural landscape that has significantly altered since 1971.

Access to justice has become a pressing issue, with litigants representing themselves in court in increasing numbers. Technological advancements since the early 1970s raise key questions for Council about how the rules of evidence should evolve in our legal system. Above all, Canadians live in a modern society that expects a higher-than-ever degree of accountability from its public institutions.

The duty to be accountable touches virtually every aspect of Council's activities—from providing educational programs that help judges respond fittingly in a rapidly evolving courtroom environment, to ensuring complaints against judges are dealt fairly and efficiently.

Council has learned many important lessons since its inception about how best to serve an increasingly educated and attentive Canadian public. The events of 2008–2009—in particular, the conclusion of two challenging public inquiry committees—have provided a compelling stimulus for change.



We are committed to fostering ongoing confidence in the judiciary

## TWO PUBLIC INQUIRIES

Public inquiries involving federally appointed judges are a rare occurrence in Canada. While Council processes an average of 168 complaints every year, only eight have resulted in inquiries since 1971. This is because where serious judicial misconduct is identified, a judge will often resign before a formal inquiry is triggered. As well, the complaints process moves through a series of formal stages, which enables Council to determine nearly all complaints without a public inquiry. A strength of the process is that it fully addresses each complaint while ensuring a public examination in cases where removal of a judge could be warranted. As such, the process protects the independence of the judiciary, an essential component of our democratic system of government.

In 2008–2009, two public inquiries were concluded, providing Council with valuable insights into how it can refine the inquiry process to meet modern Canadians' expectations for efficiency and accountability. In one inquiry, Council recommended that Justice Paul Cosgrove be removed from judicial office. In another, Council strongly admonished Justice Theodore Matlow.

Following the inquiries, Council concluded that while the overall process worked well, several of its components could be improved. The Cosgrove inquiry took five years to complete—too long by any standard of efficiency or fairness for all concerned and detrimental to fostering

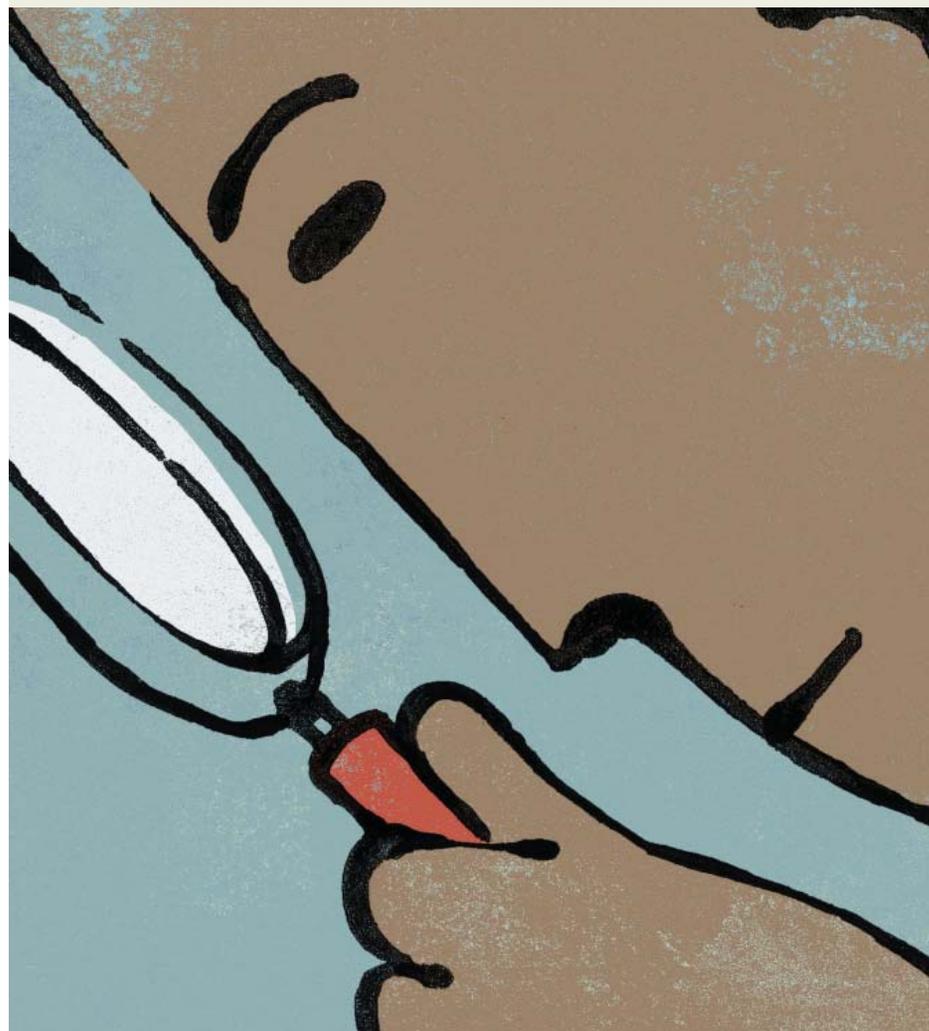
ongoing public confidence in the process. The Matlow inquiry was constituted after moving through the more usual process: a review by the Judicial Conduct Committee, a Panel of Judges, an Inquiry Committee and the Council.

### Advancing the inquiry process

At the heart of the public inquiry challenge is that the process has changed little since 1971. Despite key changes in the environment, public expectations for speedy resolutions have changed markedly. At the same time, there are more legal challenges to existing processes. Canadians expect and demand accountability—and they have a right to the assurance that all Council processes are efficient as well as transparent.

The challenges of 2008–2009 have raised fundamental questions for Council about whether the steps involved in the inquiry process are the best and most efficient way to resolve conduct issues. What improvements can be made that will streamline and bring greater efficiency to the inquiry process while protecting the public interest and being fair to the judge? Should Council reassess the scope of comments and evidence needed to ensure a full but efficient review? This is both an opportune and essential time to ask such questions.

# 2008–2009 has given us an opportunity to review our process



## CONTINUOUS IMPROVEMENT

### **Broadening access**

Access to justice is among the most important issues facing Canada's justice system. As delays become longer and costs increase, improving access to justice continues to be a priority for Council.

In 2008–2009, a sub-committee of the Council's Administration of Justice Committee released a report on reforms undertaken across Canada to improve Canadians' access to justice. The report identified five areas in which significant reforms have taken place and some 60 specific reforms, ranging from pilot projects to changes that have become permanent.

While the sub-committee's research identified many promising practices, there was insufficient evidence to promote any particular practice. However, the report recommended the adoption of measurable objectives and goals before judicial changes are undertaken. The sub-committee has also recognized a pressing need for all stakeholders to work collaboratively on this fundamentally important and exceedingly complex issue.

Council is now actively involved as a member of the Action Committee on Access to Justice in Civil and Family Matters, which is exploring new ways to improve access for all.

### **Process improvement**

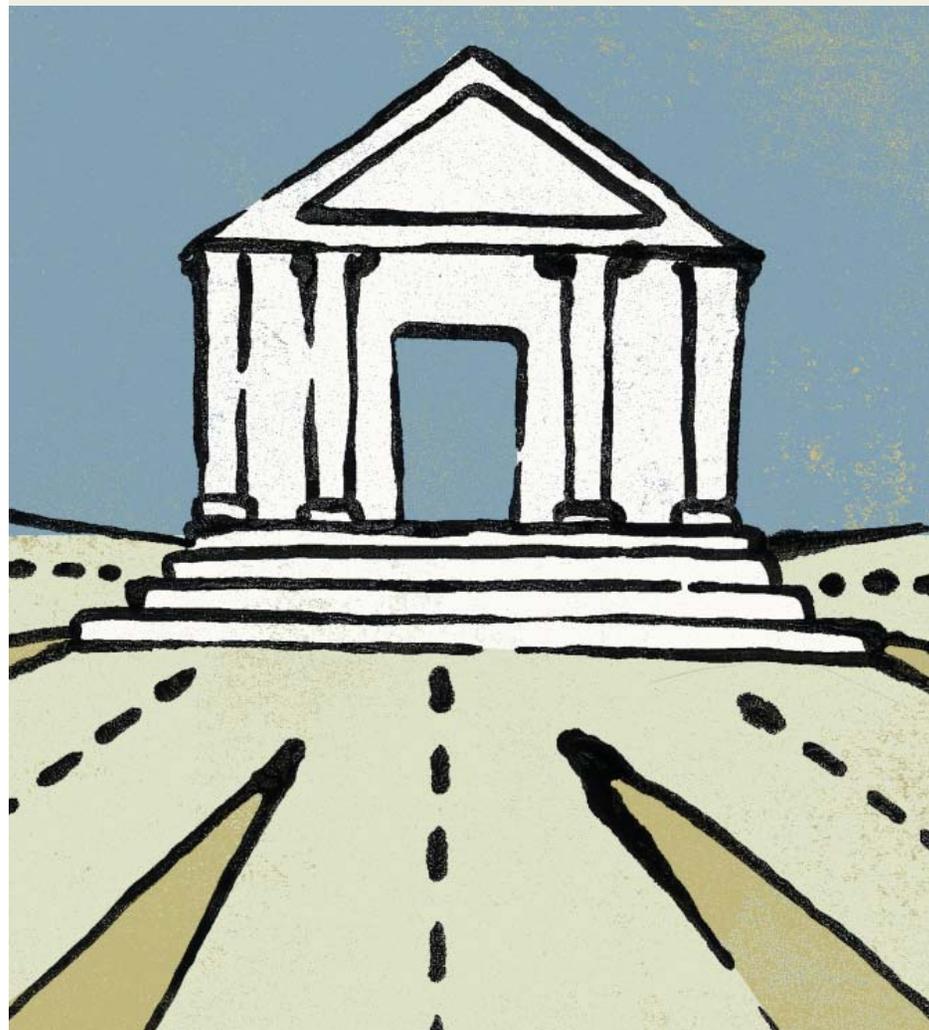
In 2008–2009, Council improved the processing time for regular complaints. Formerly, complaints took up to five or six months to process. This year, a more experienced staff at Council's office and greater efficiency measures resulted in 92 percent of complaints being completed within 10 weeks.

### **Refining judicial education**

Canadians expect a judiciary that is fully competent not only in legal matters, but also with respect to social context issues. An important part of Council's mandate is to provide educational opportunities to the judiciary.

Council continued to work closely with the National Judicial Institute, [www.nji-inm.ca](http://www.nji-inm.ca), in 2008–2009 to provide targeted training seminars for new judges, ongoing training about emerging law and programs about how to manage self-litigants in the courtroom.

This year, Council reviewed the provision of ongoing training for judges. The Judicial Education Committee conducted a rigorous review of education programs for judges and other professionals across Canada and in other countries. The review led to the development of broad parameters for the ongoing professional development of judges.



We strive to provide  
Canadians with an  
accessible judiciary

## CONTINUOUS IMPROVEMENT

### Advancing technology

After consulting extensively with lawyers, judges and legal professionals, the Judges Technology Advisory Committee drafted and released a model practice direction to advise trial judges and lawyers on best practices for exchanging evidence in electronic form and for handling paperless trials. The aim of the National Model Practice Direction for the Use of Technology in Civil Litigation is to reduce the cost of litigation and improve access to justice.

In addition to the Practice Direction, the committee drafted a Generic Protocol that serves as a checklist and agreement between parties so that they can establish a meaningful and simplified exchange of evidence. Part of the Generic Protocol's purpose is to avoid misunderstandings and incompatibility among parties not using the same litigation-support software.

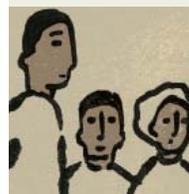
### Improving communication

In cases of parental child abduction, inter-jurisdictional communication and cooperation among judges and courts are essential to ensure speedy resolutions. The Special Committee on International Parental Child Abduction pursued a number of avenues this year to improve collaboration.

Discussions were held with the Canadian Council of Chief Judges to explore a possible role for courts in provinces where the jurisdiction is shared between the superior court and the provincial court in cases of inter-jurisdictional child custody. As a follow-up, in 2008, the Canadian Council of Chief Judges at their annual meeting unanimously approved the establishment of the Provincial Network of Contact Judges. Both Council's Special Committee and the Provincial Network are working in this area to protect the interests of children.

The Canadian Network of Contact Judges is also working on the development of a "Bench Book" that will assist Canadian judges in the handling of international child abduction cases.

# We refine our processes to better serve the public



# Complaints and review

# 189

## Two types of complaints

Almost all complaints to the Canadian Judicial Council are made by members of the public. However, complaints can also be made by the federal Minister of Justice or a provincial Attorney General.

Any member of the public may lodge a complaint if they believe that a judge's personal conduct (on or off the bench) is in question. They may do this without legal representation and at no cost to themselves. They may even complain anonymously.

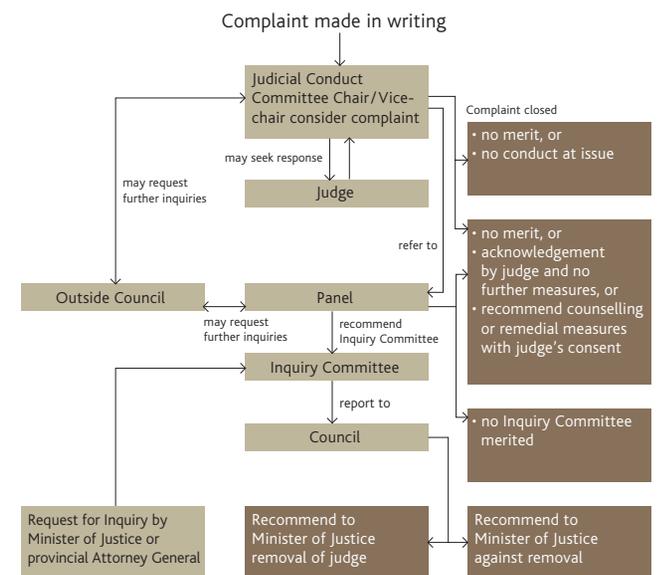
A complaint from a member of the general public is first reviewed by a member of the Judicial Conduct Committee. Roughly half of the complaints Council receives are studied in further detail and the judge in question is asked for comments. Most complaints are resolved swiftly, with a letter of explanation sent to the complainant. Some complaints are referred to a panel of judges for further review and, in rare cases, the panel deems the complaint serious enough to potentially warrant a judge's removal. If so, the complaint is investigated before a public inquiry committee.

When a complaint is made by the Minister of Justice or a provincial Attorney General, an inquiry committee is formed in accordance with the *Judges Act*.

## An eventful year

In 2008–2009 Council received 161 new complaints and carried over 28 from the previous year for a total caseload of 189. Of those, 154 were closed during the year, leaving 35 to be carried over into 2009–2010.

This year also saw the conclusion of two matters that resulted in public inquiry committees—one of which was initiated by a complaint made by the Attorney General of Ontario in 2004, and the other by a complaint made by a lawyer in 2006.



# 154

### The complaint

Council received a complaint from a lawyer working for the City of Toronto about the conduct of Superior Court Justice Theodore Matlow. The complaint concerned Justice Matlow's participation with others to oppose a proposed development in their Toronto neighbourhood. The complaint was wide ranging and included objections to Justice Matlow's role in leading the group that opposed the project, his meeting and corresponding with politicians, using his title "Justice" in connection with his activities, promoting news media involvement in the controversy, using intemperate language and inappropriate comment, and sitting on an application concerning street use in which the City was a party (the SOS Application).

## Public inquiries can originate under the general complaint procedure

### The review

The inquiry committee concluded that Justice Matlow placed himself in a position incompatible with the due execution of the office of judge and that Justice Matlow was therefore guilty of misconduct. The committee cited the breadth and extent of Justice Matlow's failure to conform to generally accepted standards for judges and also noted that Justice Matlow's views about the propriety of his conduct indicated little or no prospect that he would conduct himself differently in the future. The committee found that Justice Matlow's conduct was so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that he would be incapable of performing the duties of his judicial office. His actions seriously undermined the confidence of individuals appearing before him and of the public in the justice system.

The committee concluded that a recommendation should be made to remove Justice Matlow from office.

While Council agreed with the Inquiry Committees findings that Justice Matlow made serious errors of judgment, which constituted judicial misconduct and also placed him in a position incompatible with the due execution of his office, it concluded that a recommendation for removal from the Bench was not warranted. Justice Matlow was directed: (1) to make written apologies to those affected by his conduct; (2) to attend a seminar on judicial ethics; and (3) to seek advice before participating in any public debate in the future.

The Council recommended to the Minister of Justice that he not be removed from office.

## COMPLAINTS AND REVIEW

### The complaint

The Attorney General of Ontario wrote to Council in 2004 requesting an inquiry into the conduct of Superior Court Justice Paul Cosgrove.

Justice Cosgrove had stayed the murder trial of Julia Yvonne Elliott as an abuse of process. The Ontario Court of Appeal later concluded that Justice Cosgrove made numerous legal errors and misunderstood the *Charter of Rights* during the trial, which prompted the Attorney General to request an inquiry.

A series of legal challenges by the judge delayed the conclusion of this matter until 2009.

A public inquiry can result in a recommendation that the judge be removed

### The review

The inquiry committee made several findings of facts with respect to Justice Cosgrove's misconduct. It found that many of the judge's rulings in the Elliott trial were made in the absence of any legal basis or made without any rationale. In certain instances, Justice Cosgrove came to premature conclusions about the case. The committee also found that the judge failed to control the proceedings, including the grossly unprofessional conduct of the defence counsel. Repeatedly, the judge appeared to side with the defence and to support positions of the defence that were unsupportable. An observer, the committee found, could only have concluded that Justice Cosgrove continually exhibited a bias against the Crown's position. Justice Cosgrove's actions, Council said, had the effect of launching his own inquiry into the RCMP investigation that led to the charges against the accused.

Four members of the committee concluded that a recommendation should be made to remove Justice Cosgrove from office. One member dissented, saying that a public reprimand of Justice Cosgrove was enough.

Council agreed with the conclusions reached by the Inquiry Committee. It found that Justice Cosgrove failed in the execution of the duties of his judicial office and that public confidence in his ability to discharge those duties in the future had been irrevocably lost. It recommended to the Minister of Justice that Justice Cosgrove be removed from office. The judge resigned.

## COMPLAINTS AND REVIEW

### The complaint

The complainant alleged that a judge acted improperly as the complainant attempted to obtain a court order for his wife to pay him child-support reimbursement. He complained that his case was summarily dismissed because he is male and that the judge made a series of inappropriate comments, such as “stop wasting the court’s time” and “see a mediator and stop paying lawyers.” The complainant also alleged that the judge failed to execute his duties by refusing to hear from his lawyer about efforts he had made to obtain payment from his ex-wife and that costs were not awarded in his favour.

More than 50 percent of complaints originate from family law cases

### The review

The complainant was represented by an experienced lawyer during the lengthy and combative litigation between him and his ex-wife. Contrary to some of the claims of the complainant, the Court never made a decision on any issue. The judge’s role was to endorse the Minutes of Settlement already concluded between the parties. In other words, all issues had previously been settled. As to the issue of costs, a judge does not have the authority to make such an order at a case conference. A decision on costs falls within the discretion of the judge and is not a matter of conduct. The judge explained that the only reason the parties were before him was their chronic hostility and inability to communicate. The judge acknowledged that his comment to “stop wasting the court’s time” was inappropriate and apologized.

## COMPLAINTS AND REVIEW

### The complaint

This complaint was against the Chief Justice of Canada, the Right Honourable Beverley McLachlin. By law, she is the Chairperson of the Advisory Committee for the Order of Canada. When that committee decided to nominate Dr. Henry Morgentaler to the Order of Canada, many individuals protested. Some complained to the Canadian Judicial Council.

The allegations were that Chief Justice McLachlin influenced the discussions of the Advisory Council, that she showed bias and that she had a personal agenda.

In Canada, the conduct of all judges, including Chief Justices, can be the subject of scrutiny

### The review

On the face of the complaint, there was neither merit nor any facts to support the allegation. By the Constitution of the Order of Canada, the Chief Justice of Canada is appointed as Chairperson of the Advisory Council. The Advisory Council provides advice with respect to nominations for appointments to the Order of Canada and makes no decision. This is not a judicial role. The advice of the Advisory Council involves no claims or decisions about rights. Equally important, Chief Justice McLachlin did not participate in the vote by the Advisory Council with respect to Dr. Morgentaler. She only acted as Chairperson to facilitate the proceedings. In all these circumstances, the complaints contained in the letter are, on their face, without merit. After a review by Council, the complaint was then reviewed by a senior lawyer (a former president of the Canadian Bar Association). He agreed that there was no merit at all to the allegations against the Chief Justice.

### The complaint

In this case, the complainant went to court before a judge on a matter of family law. The complainant indicated that 31 months after the lawyers in the case submitted their final documents, the judge still had not issued his decision. The complainant also said that the judge and his ex-wife's lawyer had collaborated together on the file and said that he was informed by the judge that the judge was struggling with the file. The complainant said he had requested intervention by other judges, but that they would not become involved. The complainant requested that the judge be removed from the bench.

A series of rulings against one party, in of itself, is not evidence of bias by a judge

### The review

In his letter of comment, which was accompanied by copies of more than 35 rulings related to the dispute between the complainant and his former wife, the judge denied any inappropriate behaviour. He in particular denied that there was any improper collaboration or bias on his part. While acknowledging that many of the rulings he made were unfavourable to the complainant, the judge noted that dissatisfaction with the result of proceedings or with the assessment of evidence is a matter that a litigant may appeal.

The complainant offered no concrete support for the allegations. There was no evidence of any kind that the judge had collaborated with the lawyer for the complainant's ex-wife in the case. The materials forwarded by the judge with his comments established that the rulings made responded to the facts and evidence before the court. Moreover, the decisions taken and rulings made were within the discretion of the presiding judge. Under our system of justice, if a litigant does not agree with such decisions he or she must proceed before the appropriate Court of Appeal. The fact that there were over 35 rulings in the case illustrated the lack of cooperation of the parties and the complexity of the issues. With respect to the issue of delay, an examination of the orders issued and a consideration of the final decision indicated that the matter progressed in a normal way. The Judge indicated that the delay that did occur was in part due to his desire to allow the parties a cooling off period.

Council determined that there was no undue delay, the allegations of improper collaboration and bias were unsupported, and the rulings on evidence and other decisions and orders were matters for appeal.

## COMPLAINTS AND REVIEW

### The complaint

In this case, the judge presided over the trial of a police officer alleged to have sexually assaulted his stepdaughter. At the trial, it appeared that there were several inconsistencies in the evidence of the stepdaughter and that her recollections were at times imprecise. The stepdaughter's mother also testified, but the judge raised questions regarding her credibility. Because of the accumulated weaknesses in the Crown's evidence, the judge indicated that he had a reasonable doubt regarding the charged counts of sexual assault.

The complainant alleged that certain comments made by the judge in delivering his Reasons for Judgment in a case of alleged sexual assault were demeaning and vicious and re-victimized the family in question. The complainant alleged that the judge said the stepdaughter did not "act like a victim" or like a sexually assaulted child.

When the credibility  
of the parties is an issue,  
judges may have to  
ask difficult questions

### The review

Upon a careful reading of the transcript of proceedings and the Reasons for Judgment of the judge, Council concluded that the complainant had not characterized the decisions and conclusions of the Judge appropriately. In setting out his Reasons for Judgment, the judge had to resolve issues of credibility of the witnesses for the prosecution and for the defence. The matters raised by the complainant as being vicious and demeaning comments on the part of the Judge were not matters concluded by the judge to be proven facts. Instead, they were *illustrations* of matters that caused him to have doubts about certain evidence before him.

The matters that the Judge considered and decided were matters that he was required to address in carrying out his judicial functions. Council concluded that disagreements with judges' decisions are not matters for Council, but instead are matters for appeal.

### The complaint

A few people wrote to Council because they were upset about a Court judgment in which a judge overruled a father's disciplinary actions over his 12-year-old daughter. The parents of the girl were not living together and the mother had primary care of the child. The father had said the girl could not participate in a certain school activity because the girl had disobeyed him. The complaints were that the judge had wrongly intervened in a parent's right to discipline his own children.

A judge's duty is to consider all particular circumstances in cases before them

### The review

A review of the case showed that the issue was not as much about the father's decision to discipline the child, but about the fact that it was the mother who had the authority to do so. The judge explained her reasons for overruling the father's decision. She said that the child no longer lives with her father and it is the mother who has taken responsibility for the child's education. Also, the school activity was organized by the School Board for all the students in the class and there was no reason to exclude the child from the school activity. The child was doing well in school, her twin brother was participating in this school outing and her mother had consented to the trip. To refuse the child's request would only serve to isolate the child from her peers, the judge said.

Council determined that it was obvious that the judge, in coming to her decision, considered a number of factors in accordance with the applicable legislation and the particular circumstances of the case. This is part of the judge's duty and does not, in any way, raise issues of judicial conduct.

## STATISTICS ON COMPLAINTS

### 10 YEAR OVERVIEW

	New files created	Carried over previous year	Total caseload	Closed	Carried into new year
1999-00	169	36	205	171	34
2000-01	150	34	184	155	29
2001-02	180	29	209	174	35
2002-03	170	35	205	173	32
2003-04	138	32	170	122	45
2004-05	149	45	194	145	49
2005-06	176	49	225	155	70
2006-07	193	70	263	219	44
2007-08	189	44	233	205	28
2008-09	161	28	189	154	35

## STATEMENT OF EXPENDITURES

### FISCAL YEAR 2008-2009

Salaries and Benefits	\$ 745,165
Transportation and Communications	\$117,992
Information	\$17,335
Professional and Special Services	\$664,205
Rentals	\$22,882
Purchased Repair and Upkeep	\$10,472
Utilities, Materials and Supplies	\$27,586
Construction and Acquisition of Machinery and Equipment	\$42,652
<b>Total</b>	<b>\$ 1,648,289</b>