April 3, 2023

Senator Brent Cotter, Chair, Senator Pierre-Hugues Boisvenu, Vice-Chair, Members,
Legal and Constitutional Affairs Committee, Senate of Canada

Dear Senators Cotter and Boisvenu, and members of the Committee,

I am writing to express my concerns about Bill C-9, an Act to amend the Judges Act. My understanding is that the Bill has passed third reading in the House of Commons and is now in consideration in committee at the Senate. I hope that it is not too late to communicate my reservations about this Bill to Senate for its deliberations.

In my view, the amendments to the Judges Act proposed by Bill C-9 do little to improve public confidence in the way the Canadian Judicial Council handles complaints about judges. Under a semblance of openness, they maintain the Council's absolute control over the complaint process, enabling one screening officer, appointed by the Council and whose decision is without appeal, to dismiss complaints without investigation. Other measures serve essentially to protect judges under complaint and their salaries. The changes in process with respect to the removal of a judge could make the removal of a judge more difficult, even in cases where public confidence is direly reduced.

I would recommend that the Senate reject the Bill in its present form, propose the amendments I suggest below and return the Bill to the House.

The purpose of Bill C-9 as presented by the minister of Justice is to improve transparency and accountability and ensure greater confidence in the justice system. These are laudable goals, to which I subscribe. However, my reading of the Bill suggests that the proposed changes will not have the intended effect. I understand the need to maintain judicial independence, particularly in the wake of recent attempts in several countries to undermine this independence, but as I indicated in an opinion column for *Law360 Canada* (1), this worthy principle should not become a way to batten down the hatches and avoid engaging with legitimate public concerns.

Deficit in public confidence in the Canadian Judicial Council's complaint process

When reviewing Bill C-9 in view of its purpose, it is essential to keep in mind the disturbing decline in public confidence in our courts and the role played in this decline by the deeply entrenched resistance of the Canadian Judicial Council to constructive criticism of judges' conduct and better judicial training. Angus Reid surveys show that Canadians' confidence in the Supreme Court of Canada has declined from 71% in 2011 to 48% in 2022 and confidence in provincial courts is even lower, at 36% (2). The Parliament of Canada cannot count on the Judicial Council of Canada to implement the changes proposed in Bill C-9 in an open and meaningful way. It must provide more concrete guidance.

Canadians have long expressed concerns about how judges continue to apply myths and stereotypes in sexual violence cases, cases involving Canadians from equity-seeking groups including francophone litigants in minority language settings, and cases involving self-

represented litigants, to name just a few contexts that have given rise to major public criticism of the judiciary. They have rightly been critical of the Canadian Judicial Council's complaint system and what appears to be its mere window-dressing function. If the minute number of complaints that lead to any action and the insignificance of such action are any indication, the Council's primary goal is to protect judges rather than ensure public confidence. As a result, entrenched prejudices remain untreated, and many Canadians feel betrayed by a system which, adding insult to injury, their own tax dollars pay for.

An overwhelming proportion of complaints are dismissed by the Council, without any consideration or investigation. There is no appeal, and no guarantee for the public that their legitimate concerns have been heard. The language used to dismiss complaints, as published on the Council's website, is often condescending and disdainful. Cases appear to move to an investigation stage only when there is sufficient public outcry, witness the complaint against former Alberta judge Robin Camp, who asked an alleged victim of sexual assault why she didn't just keep her "knees together" (3).

A complaint against three judges attending cocktails sponsored by the KPMG accounting firm, when the firm was before the court concerning its role in a controversial Isle of Man tax scheme, was only investigated after it was publicized by CBC's Fifth Estate (4). One of the judges, Justice Randall Bocock, was even the case management judge in the action. The complaint against Justice Terry Clackson for his discrediting dismissal of the testimony of a qualified forensic expert trained in Nigeria and the United States, on the basis largely of his accent and race, was only considered after numerous members of the medical and legal community protested (5).

Except for a few rare cases, the Camp case is one, even when some form of inadequate conduct is acknowledged by the Council, the consequences for the judge in question are insignificant. Despite the public outcry about judges attending events sponsored by KPMG, the Council found that the complaints were unfounded and required no action (6). With respect to Justice Clackson's perceived racist comments, the reviewing justice was "satisfied that Justice Clackson has learned from this event and has therefore directed that the matter be closed" (7).

Judges have merely to express some form of contrition. There is no follow-up. Repeat complaints for similar conduct are not compiled. Investigations are superficial. As a result, judges are free to continue to make sexist or discriminatory remarks about litigants or witnesses, undermine French-language rights, treat self-representing litigants disrespectfully, or mix socially with powerful litigants, all conduct which can impact on their judgments, and the confidence Canadians have in the integrity of the judiciary.

In the Clackson case, the Council does not appear to have questioned how a judge presiding in 2021 could not be aware of the possible perception of his comments about a person of African origin as being racist or seek to determine to what extent that insensitivity was related to entrenched unconscious prejudices, and what impact such possible bias could have on his judgments in cases involving racialized persons. The Alberta Court of Appeal over-turned Justice Clackson's decision, concluding that his conduct could be viewed as giving rise to a reasonable apprehension of bias (*R v Stephan*, 2021 ABCA 82). However, many decisions are

never appealed, often for lack of funds, leaving racialized persons before unfavourable decisions potentially tainted by prejudice. The failure of the Council to investigate meaningfully such cases undermines public confidence in our justice system.

Complaint review process under revised Bill C-9

The Bill, as it now stands, appears to be a much watered-down version of the initial proposal. Under a previous version, the new complaints process would see all complaints potentially raising concerns about a judge's conduct considered by a three-person review panel. That panel would decide whether to investigate the complaint themselves (less serious allegations) or refer the complaint to a separate five-person hearing panel (serious allegations that could lead to removal from office) (8).

Under the latest, revised, version, the Council can continue to dismiss complaints after consideration by one screening agent, appointed by the Council, as at present. This leaves far too much power in the hands of one individual acting in an opaque manner. Although the Bill provides some requirements for dismissing complaints (para. 90), they are not sufficient to ensure that the public interest is protected.

The Council retains sole responsible for appointing the screening officer. There is no requirement with respect to the specific appointment criteria for the screening agent, or what training they must have, in unconscious bias, for example.

While the Council would have to make public the screening criteria it uses for dismissing complaints, no obligation for detail is stipulated. The Council would be free to provide the broad general, and essentially meaningless criteria it already professes to use.

The Bill does stipulate that "A screening officer shall not dismiss a complaint that alleges sexual harassment or that alleges discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*." This is a small advance over the present system, but I am concerned about the wording.

Would complaints about judges' conduct in sexual violence cases, based on myths and prejudices about sexual assault survivors, necessarily fall under "sexual harassment" or Charter-based discrimination? Would the egregious misconduct of former justice Camp fall under the category of sexual harassment or gender discrimination? Would complaints by francophone litigants about judges' inadequate linguistic skills or understanding of linguistic rights fall under discrimination? In my opinion, the screening agent could continue to dismiss such complaints if sexual harassment and Charter-based discrimination are interpreted narrowly, and if the complaints themselves are not formulated specifically in this manner.

In my view, the public would be better served by a return to the original three-person panel, one of whom should be a lay person, for the initial decision to proceed or dismiss, and clearer guidance should be provided with respect to criteria for making this decision. Any complaint that touches directly on public confidence should be investigated.

Role of lay persons

The addition of a lay person is provided for only at a later stage, namely a full-panel hearing (para. 117), although, as mentioned above, their presence at the initial intake stage would greatly add to the public's confidence in the complaint system. Furthermore, lay persons would be chosen from a roster established by the Council and in function of selection criteria set out by the Council (para. 82).

The public would be much better served by a roster established by a public selection process, independent of the Council. A public process would ensure that lay members in the roster are committed to the interests of the public, rather than those of the Council, and bring perspectives critical of the justice system to the complaint process.

Annual reporting

Under the revised Bill (para 160), the Council would be required to report annually on the "number of complaints received, complaints dismissed by a screening officer or by a reviewing member, complaints dismissed by a reviewing member, complaints reviewed by review panels, hearing panels and appeal panels, and complaints in respect of which any of the actions referred to in paragraphs 102(a) to (g) were taken and how they were resolved."

While this is a start, simply requiring numbers does not provide any information to the public about the kinds of conduct alleged in the complaints dismissed. The reporting proposed provides little more transparency than the previous complaint process, other than serving potentially to underscore the high rate of dismissal.

At present statistics are given by type of case, civil or criminal. It would help considerably if aggregate information was required concerning complaints in key areas such as sexual violence, discrimination, francophone linguistic rights, and disrespect of self-representing litigants, where public confidence in particularly low. Given the number of complaints to the Council, there would be no risk to anonymity.

It would also help public confidence in the judiciary, if statistics were given about the types of action taken by the Council (para. 102).

The Council should also be required to compile statistics on complaints about individual judges since their appointment to the Bench and provide aggregate statistics about the number of judges receiving multiple complaints and the nature of the alleged conduct. Again, this could be done without any loss of confidentiality but would provide the public with a much more accurate picture of Council action.

The urgent need to restore Canadians' confidence in the judiciary

Canadians before the court, for whatever reason, are in a situation of suffering. Being involved in a matter before the Court is a stressful experience. It is essential that courts treat all Canadians equitably and with respect. An enlightened approach to complaints on the part of the Council

could go a long way to providing judges with constructive criticism about possible perceptions of their courtroom conduct and lead to productive judicial training.

Canadians may not be able to express their concerns in language that falls directly under the Council's complaint criteria, but I firmly believe that there is a kernel of truth in almost all complaints that the Canadian judiciary would do well to hear. Dismissing complaints out of hand in curt terms or undertaking insignificant actions do not give these complainants the sense that their concerns have been heard and communicated to the relevant judge.

It is essential to remember that complaints to the Canadian Judicial Council do not concern judicial decisions in the courts, where judicial independence is critical and the appropriate course of complaint is the appeal process, but judicial conduct. It is unethical, in my view, for the Council to unduly extend the argument of judicial independence to bolster a failing complaint system that leaves judges free to display conduct in infringement of the very laws they are mandated to enforce.

While underscoring the need to respect judicial independence, Parliament must send a strong signal to the judiciary that, with power comes responsibility, and that judges' overwhelming duty must be to serve the law with integrity. Given the past comportment of the Council, it would be important to provide for a review mechanism of the changes introduced by a revised Bill C-9. If at the end of a specified period (two to five years), no improvements were observed and public confidence continues to decline, Parliament should move to adopt legislation that would remove the complaint process to an independent body.

At stake is no less than Canadians' confidence in the rule of law, a founding pillar of our democracy.

I thank you and the members of your committee, a few of whom I have copied here, for your consideration of my concerns and your attentive study of Bill C-9. I am a frequent commentator in *The Lawyer's Daily*, now *Canada 360*, on French language rights, failings in the judicial appointment process, and judicial responsibility in cases of sexual violence. If the Committee so wished, I would be honoured to be invited to address the members of the Committee in person.

Sincerely,

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