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# The Way Forward

FINAL REPORT OF  
THE SPECIAL COMMITTEE  
ON FUTURE DIRECTIONS  
TO THE  
CANADIAN JUDICIAL COUNCIL

ADOPTED BY THE  
CANADIAN JUDICIAL COUNCIL  
SEPTEMBER 2002



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# Chapter I

## INTRODUCTION

### A. Background and Context

In 1971, Parliament created a statutory body, the Canadian Judicial Council, with a broad legislative mandate in the area of judicial governance, “to promote efficiency and uniformity and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.” Creation of the Council can be seen as part of a wider context in which the law and legal institutions were undergoing major reforms and improvements.

At the time, cases dealing with the guarantees set out in the *Canadian Bill of Rights* were causing a good deal of public debate and controversy. Major reforms to the *Criminal Code* had recently been undertaken, most dramatically in the areas of abortion, sexual offences and criminal procedure. Both the Law Reform Commission of Canada and the Federal Court of Canada were created at the same time as the Council came into existence. Clearly, the law, legal policy and legal institutions were at the forefront of the social issues of the day. This is reflected in the expansive language used in the statutory declaration of the Council’s mandate. There was an obvious expectation that the judiciary and the administration of the courts had to keep pace with the concomitant developments in law reform and the activities of other legal institutions.

As it turned out, the rate at which the law evolved and the need for the judiciary to adapt to those changes only accelerated from that point forward. As the Chief Justice of Canada recently stated about the Council:

The litigation explosion that began in the 1980s has challenged us...to devise new ways of delivering justice in a timely way. Settlement conferences, judicial dispute resolution, unified courts, and judicial

insistence on expeditious criminal proceedings and adequate legal representation: these are but some of the responses that have emerged. Overarching all other concerns, however, is the need for judges to be equipped both in terms of education and infrastructure, to deal with the complex issues of our times knowledgeably and wisely. The Canadian Judicial Council provides an important forum for judges to discuss new challenges and develop new policies and practices.<sup>1</sup>

The question is whether the Council is actually fulfilling the role that appears to have been contemplated for it when it was established 30 years ago. This was the question posed by the Chief Justice when she established the Special Committee on Future Directions and the question the Committee hopes it has answered in this report. In a word, the Committee’s answer is “yes,” but it is a qualified “yes.”

In the Committee’s view, the Council must become a more dynamic and productive body if it is to continue to fulfil its mandate. The Committee suggests a number of ways in which this should happen. In short, they include: more active and efficient committees of Council; greater leadership and oversight by the Council’s Executive Committee; greater involvement of *puisne* judges and non-judges in the Council’s work through its various committees and sub-committees; and increased staff and financial resources for the Council as a whole.

These measures, the Committee concludes, are essential to ensure that the Council continues to be capable of discharging its statutory function and provide needed leadership in the area of judicial governance. Only then can it protect and further the public interest, which is the overarching purpose it was designed to serve.

<sup>1</sup> Chief Justice Beverley McLachlin, P.C., Address to the Canadian Bar Association, August 11, 2002.

When the Special Committee on Future Directions was established, the Canadian Judicial Council was not a body that was in any sense in crisis. On the contrary, in recent years, it had been found<sup>2</sup> to be performing well its most important function — the processing and disposition of complaints in relation to federally appointed judges. Moreover, it was becoming increasingly active and doing important work on a number of new fronts relating to the administration of justice in Canada. For those most closely involved in Council work, including the members of this Committee, the Council's main problems seemed to relate to a lack of adequate staffing and resources, and resulting inefficiencies in the way in which it did its work. While those problems are, of course, addressed here, the Committee certainly did not confine itself to the most obvious issues facing the Council — by necessity, it also considered the overall mandate and direction of the Council so that its governance structure and resource requirements could be considered in their proper context.

Further, the Committee took the view that every organization must from time to time engage in a close and careful examination of itself — its mandate, its governance structure, its procedures, its relationships with other related organizations, and so on — to ensure that it is not falling short of its potential. That is especially true of organizations that, like the Council, have been established to serve the public interest.

Obviously, judicial conduct — in particular, the handling in a fair and proper manner of the complaints the Council receives — is one of the most important responsibilities of the Council. Accordingly, the Committee originally expected that it would be required to address a number of issues in relation to this aspect of the Council's mandate. However, the Council Chairperson instead established a

separate Working Group, also under the leadership of the Chair of this Committee (in his capacity as Chair of the Judicial Conduct Committee), to which she gave the task of undertaking a fundamental review of the complaints process. That Working Group submitted a separate set of recommendations to the Council at the same time as the recommendations in this report.

Because the complaints process has been reviewed by another body within the Council, this Committee has not considered it in any great detail. The only issues that it has addressed are the involvement of *puisne* judges and laypersons in that process, and the organization of the Council secretariat in relation to the handling of complaints.

Finally, it should be mentioned that the Committee was guided by a set of general principles which it now proposes be recognized as governing principles for the Council as a whole. They are set out in Chapter II. B. "Governing Principles."

## **B. This Committee's Terms of Reference and Membership**

The Special Committee on Future Directions was established in May 2000 by Chief Justice Beverley McLachlin, Chairperson of the Canadian Judicial Council, on the recommendation of the Executive Committee of the Council. In general terms, the Committee was asked to engage in "detailed consideration of the Council's mandate and operations."

The Council Members appointed to the Special Committee included the Honourable Richard Scott, Chief Justice of Manitoba (Chair); the Honourable Allan Lutfy, Associate Chief Justice of the Federal Court of Canada; the Honourable Michael

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<sup>2</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

MacDonald, Associate Chief Justice of the Supreme Court of Nova Scotia; and the Honourable Heather Smith, Associate Chief Justice of the Superior Court of Justice of Ontario. The Honourable Allan McEachern, Chief Justice of British Columbia, and the Honourable Pierre Michaud, Chief Justice of Quebec, both Council Vice-Chairpersons, were appointed *ex officio* members of the Committee.<sup>3</sup>

### **C. This Report**

This Report consists of a compilation of the topics addressed in various interim reports and the final recommendations of this Committee. The last of these reports, considered by the Council at its meeting on September 27, 2002, in Calgary, contained the bulk of the Committee's recommendations. The Council approved all of the recommendations contained in this Report.

For purposes of this Report, recommendations have been divided into two categories — Principal Recommendations and Supplementary Recommendations. The former include the Committee's main recommendations — those relating to the core of the Council's mandate and operations. The latter, while important, are of a more technical nature, of interest primarily to Council members. All the Principal Recommendations are set out and discussed in the body of this Report, while the Supplementary Recommendations are referred to primarily in footnotes. Many of the recommendations contained in the Committee's interim reports to Council have been superceded or amplified by the recommendations set out in this Report. However, some of them are still relevant and important and are referred to at various places throughout the Report.

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<sup>3</sup> It should be noted that both Chief Justice McEachern and Chief Justice Michaud ceased to be members of the Council, and hence *ex officio* members of the Committee, before the Committee finished its work. Both, however, made important contributions to the work of the Committee prior to their departure, and the Committee is most grateful to them for the time and effort they expended on its behalf.

## Chapter II

### THE FUNDAMENTALS — MANDATE, MEMBERSHIP AND MAIN FUNCTIONS

#### A. The Council's Mandate

The mandate of the Canadian Judicial Council is defined by s. 60(1) of the *Judges Act*, which reads as follows:

60(1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.

One of the most important issues the Committee addressed was whether this statutory mandate was appropriate. After lengthy consideration, the Committee has decided that it is. It provides the Council with a broad mandate to address a considerable range of issues affecting the administration of justice and to serve the public interest in ensuring that Canadians have the benefit of a professional, dedicated and independent judiciary.

#### RECOMMENDATION:

1. The Council's statutory mandate should remain in its current form; that is, "to promote efficiency and uniformity, and to improve the quality of judicial service" in the federally appointed courts.

#### B. Governing Principles

Implementation of the Council's mandate is a function not only of the language in which that mandate is expressed and the activities in which the Council engages, but also the principles that guide its overall operations. This Committee was itself guided by a number of principles reflecting different aspects of the Council's mandate and the way in which that mandate should be fulfilled.

These principles can serve as a helpful source of guidance to the Council, just as they did for this Committee. They can provide useful reference points to the Council and its committees, and can also help to explain to those

interested in the Council's work the manner in which the Council interprets and carries out its mandate.

#### RECOMMENDATION:

2. The Council should adopt a set of principles to guide the manner in which it executes its statutory mandate, namely:
  - (a) The Council must be guided by the constitutional principles of federalism, judicial independence, judicial accountability, equality, the rule of law and due process;
  - (b) The Council must set its own policies and priorities; the role of the Council secretariat is advisory, administrative and executory in nature;
  - (c) The governance structure of the Council should be one that, through the effective use of active committees, promotes efficiency and flexibility in operation, while respecting the ultimate responsibility of the full Council for the carrying out of its statutory mandate;
  - (d) In fulfilling its responsibility to carry out its statutory mandate, the Council should operate on the principles of democratic decision-making, including the equality of all of its members;
  - (e) The Council should be mindful of both the representative role it plays in relation to the federally appointed judiciary as a whole and the experience and expertise that are available to the Council from within that judiciary; and
  - (f) The overarching duty of the Council is to ensure that in all that it does it is guided by a commitment to serving the public interest in the administration of justice.



### C. Statutory Powers

Section 60(2) of the *Judges Act* sets out the activities in which the Council may engage:

- 60(2) In furtherance of its objects, the Council may
- (a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;
  - (b) establish seminars for the continuing education of judges;
  - (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
  - (d) make the inquiries described in section 69.

Clearly, this provision does not reflect all of the activities in which the Council is currently engaged. Accordingly, the Committee considered whether s. 60(2) should be amended so that its language would better reflect current activities of the Council “in furtherance of its objects.” In the end, however, the Committee concluded that there was no real need for such a change given that the list in the existing s. 60(2) was never intended to be exhaustive, and all of the activities in which the Council is now engaged are authorized by the broad language of its statutory mandate.

#### RECOMMENDATION:

3. The statutory powers of the Council are adequate and should be maintained.

### D. Membership

The membership of the Council is governed by s. 59(1) of the *Judges Act*:

- 59(1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of
- (a) the Chief Justice of Canada, who shall be the Chairman of the Council;

- (b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;
- (c) the senior judges, as defined in s. 22(3), of the Supreme Court of the Yukon Territory, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice;
- (d) the Chief Justice of the Court Martial Appeal Court of Canada; and
- (e) the Chief Judge and Associate Chief Judge of the Tax Court of Canada.

The question whether the membership of the Council should be changed has two different dimensions. The first dimension relates to the size of the Council, and the second to its composition.

When the Council was created in 1971, it consisted of 22 members. It is now a body of 39 members. Whether the size of the Council should be reduced has been one of the more challenging questions this Committee has had to confront. The expert advice that the Council received on this issue was that a body the size of the current Council generally does not function well as a deliberative body; preferably, it should be somewhere in the range of 20-25 members. On the basis of this advice, with which the Committee is inclined to agree, an argument can certainly be made that the size of the Council should be significantly reduced.

However, after considerable reflection, the Committee decided against recommending a reduction in the size of the Council. The Committee’s view is that more would be lost than gained by a significant reduction in the current membership. Later in this report, the Committee recommends that the Council become even more active in the future than it is now. Therefore, the Committee is strongly of the view that the Council requires a relatively large membership. This will help ensure that the burden of its activities does not fall on the shoulders of only a few Council members

and will allow for more broadly based input into the Council's work. The concern about the ineffectiveness of the Council as a deliberative body can to a significant degree be addressed in other ways.

The second and more important question regarding membership is whether the Council should include in its membership federally appointed *puisne* judges and/or "non-judges." While aware of the fact that the provincial and territorial judicial councils generally have representatives of both of these groups in their membership, and while acknowledging that it is certainly possible that, if Parliament were creating the Council today, it might include *puisne* judges and non-judges in its membership, the Committee is of the view that changing the composition of the existing Council to add representatives from these two groups is not advisable.

To add members to a body that is already too large to act effectively as a deliberative body seems unwise and counter-productive. Accordingly, some might regard such a change as an empty symbolic gesture. It would be better to draw upon the wisdom and expertise that lies outside the current membership of the Council by involving judges and non-judges in the activities of Council committees. It is there where the real work of the Council will take place and new members can truly make a difference. This will be discussed further in the next section dealing with the Chairperson's Advisory Group and in Chapter III "The Council in Action — The Committee Structure."

RECOMMENDATION:

4. The membership of the Council should continue as provided at present in the *Judges Act*.

## E. Chairperson's Advisory Group

As mentioned, the Committee believes that there can and should be a means of tapping into the wealth of wisdom and experience possessed by judges at large and members of the public about matters that are also of great concern to Council members. A special process is needed to achieve this objective. The Committee suggests the creation by the Chairperson of the Council of a small advisory group. Its role would be to serve as a sounding board in respect of issues that the Chairperson might choose to raise with it. It would consist of informed and experienced members of the public (legally trained, as well as laypersons) and *puisne* judges, chosen by the Chairperson in consultation with the Executive Committee. The goal would be to have a range of perspectives and philosophies represented on the group. The Chairperson may also wish her Vice-Chairpersons of Council to form part of the group. The total number of members might be nine or ten, but this need not be fixed in advance. The arrangements should be flexible and informal. The group would meet at the Chairperson's request. In turn, the Chairperson would share the comments and opinions she received from its members with the Executive Committee and/or the full Council.

Even though this advisory group would not in any way be a decision-making body, or even come to any definitive conclusions on the issues that might find their way onto its agenda, its role would still be valuable. In addition to providing the Chairperson and the Council with thoughtful ideas about important matters relating to judicial governance, the existence of such a group would enhance the Council's credibility as an open and outward-looking institution, and one in which Canadians can continue to have confidence.

RECOMMENDATION:

5. The Council should endorse the creation of an advisory group chaired by the Chairperson of the Council and the members of which would be selected by her in consultation with the Executive Committee. It would consist of knowledgeable and experienced members of the public (legally and non-legally trained) and *puisne* judges. Its role would be to act as a sounding board for the Chairperson in relation to issues that she may wish to raise with it, and to provide a means by which the opinions and comments of well-informed persons outside of the Council could be shared with the Executive Committee and/or the full Council.

## F. Council Activities

### (i) Generally

Given the broad mandate of the Council, an important question is: what activities can and should the Council be engaging in to implement that mandate? It is clear that, as the *Judges Act* now reads, the Council is under a statutory obligation to engage in a number of its current activities — for example, the handling of complaints about the alleged misconduct of federally appointed judges that come to the Council under s. 63. The Council's role in relation to judicial education, which similarly has a firm basis in the *Judges Act*, must remain intact (although, as will be explained shortly, the Committee believes that the nature and scope of that role should be expanded). The Council is also going to continue to play a role in the Judicial Compensation and Benefits Commission process. The real question is, what activities apart from these should the Council be engaged in?

In recent years the Council, sometimes responding to pressures from within and sometimes to pressures from without, has been active on a number of new fronts. It has commissioned a major study of the closely interrelated issues of judicial independence and accountability in Canada; it has drafted a set of ethical guidelines for Canadian judges; in conjunction with the Canadian Judges Conference (now the Canadian Superior Courts Judges Association), it has established the Advisory Committee on Judicial Ethics, consisting of *puisne* judges to whom judges can turn for assistance in resolving ethical questions; it has established a committee that provides advice to the Canadian judiciary on matters relating to the use of information technology in the administration of justice (i.e. the Judges Technology Advisory Committee); it has prepared guidelines for judges on the use of contempt powers; it has taken up the issue of television in the courtrooms; and it has established a special committee to provide advice and assistance to members of the Council in relation to the steps they might take to enhance public understanding of the role of courts and judges in our legal system. The Committee is firmly of the view that these are all worthwhile initiatives. In fact, the Committee is of the view that the Council should be doing more in some of these areas.

Clearly, the Council must embark on new kinds of activities cautiously. However, it is the Committee's view that the Council must expand its horizons while remaining totally faithful to its statutory mandate. Granted, the Council currently lacks the staffing and resources to do any more than it already does. The correct response to that problem is to seek the appropriate level of staffing and resources,<sup>4</sup> not to narrow the range of legitimate Council activities.

<sup>4</sup> See the discussion under H. "Staffing and Resources."

If the Council had adequate staffing and other resources, there is a good deal more that the Council could and should do “to promote efficiency and uniformity, and to improve the quality of judicial service.” The Council, working primarily through its committees, could make valuable suggestions on “model policies” and “best” or “preferred” practices for courts to follow in particular areas and provide general guidance to judges in respect of a broad range of issues relating to their judicial functions. Even if the Council were to limit itself only to issues relating to the administration of justice, there are a great many issues that the Council could address. These include, to name only a few, models of court governance in a parliamentary democracy; the use of technology in improving the efficiency of the courts; trial and pre-trial practices and procedures, including case management; court-managed alternative dispute resolution mechanisms and procedures; appellate procedures; court security; measures to ensure the timely delivery of reasons for judgments; practices regarding unrepresented litigants; measures to deal with the long-term disability of judges; the role of and support for supernumerary judges; support for chief justices; and the need for adequate funding for the courts. All of these are real and important issues affecting the Canadian judiciary and the manner in which it performs its functions.

Many of these issues are receiving little, if any, attention from governments, in some instances properly so, since they fall within the exclusive domain of the courts. And they do not appear to be of much if any interest to the law schools and other bodies conducting research into legal matters. If these issues are going to be dealt with, it will have to be the judiciary that deals with them. And the Council, assuming it is able to obtain the necessary resources, is well placed to play a lead role.

Given the broad range of issues open to the Council to consider, the Committee did not think it appropriate to recommend that the Council prioritize these in any particular order. The setting of such priorities is best left to the Council once the necessary additional resources have been secured. What is important at this point is that the Council appreciate that its broad statutory mandate provides it with a firm basis upon which to broaden significantly the range of activities in which it engages.

RECOMMENDATION:

6. The Council should extend the range of activities in which it is engaged as consistent with its statutory mandate.

In addition to the general review of Council activities, the Committee also examined particular subject areas of special importance: Judicial Education, Public Information and Information Technology.

**(ii) Judicial Education**

The Committee examined closely the relationship between the Council and the National Judicial Institute (NJI), the body primarily responsible for judicial education.<sup>5</sup> It considered the following possible adjustments in the role of the Council in this area: (a) the Council’s Judicial Education Committee could play a greater role in the development of general policies and priorities in the area of judicial education than it now does; (b) the Council’s Judicial Education Committee could encourage the National Judicial Institute to provide periodic reports to the Committee and potentially the public on the state of judicial education in Canada (primarily to give greater visibility to the impressive educational program that exists); and (c) the Council’s Judicial Education Committee could consider advocating greater federal and provincial government support for judicial education.

<sup>5</sup> See also the discussion in Section G. (iii) “The National Judicial Institute.”

The Committee has decided to endorse only the first two of these possibilities. As to the first, the Council's Judicial Education Committee already performs a significant role in approving courses proposed to it by the NJI and other judicial education organizations. However, there is also an important role for that committee to play in the development of general policies and priorities in the field of judicial education.<sup>6</sup>

As for the suggestion that the Judicial Education Committee should encourage the National Judicial Institute to provide it with periodic reports on the state of judicial education in Canada, the Committee sees this as an excellent idea. It is clearly important that the members of the Judicial Education Committee be aware of what is being done in this area, not only on a course-by-course basis, but on a general level. This will be of particular benefit to them if the committee becomes more active on the policy development front.

The Committee has two reasons for not endorsing the third of the above possibilities. One is the Committee's sense that, on the whole, the federal government has been generous in its support of judicial education generally and the educational programs organized by the National Judicial Institute in particular. The second stems from the fact that the National Judicial Institute's programs are open to provincially as well as federally appointed judges, while the Council's mandate is limited to the latter.

That said, there may be circumstances in which it might be necessary for the Judicial Education Committee to intervene on behalf of the National Judicial Institute to ensure that it has adequate resources to fulfil its mandate. Should such circumstances arise, the Committee notes that the Education

Committee's terms of reference begin with the words "to provide advice and recommendations to the Council with a view to ensuring that the federally appointed judiciary has access to high quality, effective, ongoing judicial education." These words provide ample authority to the Judicial Education Committee to intervene in this manner should it ever conclude that it is necessary to do so.

RECOMMENDATION:

7. The Council's Judicial Education Committee should (a) play a greater role in the development of general policies and priorities in the area of judicial education than it now does; and (b) encourage the National Judicial Institute to provide periodic reports on the state of judicial education in Canada.

An issue of growing importance in the area of judicial education is the involvement of Canadian judges in judicial education programs in other parts of the world. These programs are obviously of great importance to the establishment of the bedrock constitutional principles of democratic self-government, the rule of law, due process and judicial independence in the host countries. It should be, and is, a matter of considerable pride to the Canadian judiciary that the organizers of such programs often invite Canadian judges to participate in them. However, it is clear that these activities have the potential to put considerable pressure on the various courts from which the judges come. This is, therefore, a matter in which the Council has a real and important interest.

The Board of Governors of the NJI, which also has an interest in this matter, has recently approved the creation of a branch of the NJI that would have responsibility for coordinating

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<sup>6</sup> This role, it must be noted, is one that the Judicial Education Committee has already played on occasion in the past; its support in the mid-1990's for a program of social context education led to a major initiative in that area on the part of the NJI, one that resulted in significant new funding for that body and that is still in the process of being implemented.

international judicial education projects. That entity would be expected to keep track of lessons learned in the delivery of judicial education initiatives abroad. The Committee supports this initiative, but is strongly of the view that the Council needs to be involved to ensure that the interests of the courts for which Council members are responsible, and of the members of the public who make use of those courts, are taken into account in determining which Canadian judges are invited and permitted to participate in them. It is of critical importance that formal protocols be developed to govern the participation of Canadian judges in such programs. There is clearly an important role for the Council to play in the development and subsequent monitoring, by this new coordinating branch of the NJI or some other, of these protocols.

RECOMMENDATION:

8. The Council should (a) take steps to ensure that formal protocols governing the participation of Canadian judges in international judicial education programs are developed; and (b) ensure that the Council plays a role in the development and monitoring of those protocols.

**(iii) Public Information**

Shortly after the Council was created in 1971, its first by-laws established a “Public Relations Committee.” However, less than a year later, the Council accepted a report from the committee recommending that it be abolished because “[it] could not effectively operate without knowing the day-to-day details of the operations of the Council, as carried on by the Executive Committee.”

For many years thereafter, the Council operated with little if any public accountability. Occasionally the Council might issue a press release on some subject. Then, in an important initiative in the late 1980s, the Council began to release annual reports on its activi-

ties. Those annual reports provide a good deal of information about the Council, its mandate, its composition, its committee structure and, most importantly, the work that it has done in the preceding year. They also serve as an important vehicle for the accountability of the Council to the public in whose interest it acts.

In early 1999, after growing concerns on the part of many members of the Council that something needed to be done to improve the level of public understanding about the role played by courts and judges in our legal system, the Council established a Special Committee on Public Information. The primary function of that committee was to assist Council members to develop practical initiatives that they could put to use in their respective jurisdictions. At the moment, that committee, which has already done a great deal of valuable work, has the status simply of an *ad hoc* or special committee of the Council. In the view of this Committee, the Public Information Committee should be made a standing committee of the Council. This would not only give added importance to the work that it does, but it would also reflect the fact that the committee is addressing an ongoing rather than a short-term need.

RECOMMENDATION:

9. The Public Information Committee should be made a standing committee of the Council.

**(iv) Information Technology**

The growing importance of information technology to the administration of justice was the subject of considerable discussion within the Committee. The changes that new forms of information technology have brought about in the functioning of our courts in the last couple of decades have clearly been significant. There is every reason to believe that the potential exists for further new developments

to result in even more significant changes in the future. Because such changes can have a dramatic impact on both the “efficiency” and the “quality of judicial service” in the superior courts of this country, the Council has an important role to play. In fact, in the Committee’s view, the Council has to take more of a leadership role in this area than it has taken to date.

In the course of its discussions about information technology, the Committee considered many issues. Of particular concern to it were the following: the importance of ensuring that all members of the Council become computer literate, so that more of the communications between and among Council members and the staff can be conducted electronically; the security of the computer systems used by the judiciary (including the JAIN/Judicom system, which the Committee was advised is now used by more than 800 federally appointed judges); the need for more judges to be educated about the value of information technology to the performance of the judicial function; and the appropriate institutional structures and procedures to ensure that this area is properly governed. While these issues may not all be of equal importance, they do all need to be addressed, and the Council can and should have a role to play in addressing all of them.

In respect of the last of these issues, the Committee became concerned that decisions relating to the use of information technology in the administration of justice, with significant implications for the judiciary, have been made with little input on the part of the Council. The Committee also became concerned that the involvement of the Canadian judiciary in this area might have become fragmented as a result of the creation of several different committees of a number of different organizations with overlapping mandates. In the end, however, the Committee has concluded that the existing committees are all performing distinctive roles in the area of information technology, and that there is

good reason for each of them to continue to exist. At the same time, it would be helpful to have greater coordination between and among the committees, and to that end it was suggested that the Council’s Judges Technology Advisory Committee add one representative each from both the Office of the Commissioner of Federal Judicial Affairs and the National Judicial Institute as members. In addition, it was accepted that all of the committees could look to the Council for leadership in promoting and advocating the effective and efficient use of technology in the superior courts.

RECOMMENDATION:

10. The Council should (a) encourage all members of the Council to become computer literate, in order to make it possible for more Council communications to be conducted electronically; (b) support the taking of such steps as are necessary to ensure that the information technology systems that are now and will in the future be used by federally appointed judges are fully secure; (c) encourage all federally appointed judges to develop the skills and understanding necessary to make use of information technology in the performance of their judicial functions; (d) add as members to the Judges Technology Advisory Committee representatives of both the Office of the Commissioner of Federal Judicial Affairs and the National Judicial Institute; and (e) generally take a leadership role in the use of information technology in the superior courts.

## G. Relationships with Other Institutions

From its inception in 1971, the Council has, quite properly, been protective of its independence, particularly from the other branches of government. Given the importance in our system of government of the

principle of judicial independence, this is entirely appropriate. Of necessity, however, the Council must from time to time interact with a range of different institutions, some from within the other branches of government, some not. In this section of the Report, the Committee examines the Council's relationships with several of the more important of these institutions.

**(i) Office of the Commissioner for Federal Judicial Affairs**

The Office of the Commissioner for Federal Judicial Affairs (OCFJA) was created by the addition of Part III to the *Judges Act* in 1978. The Council secretariat has always been located in premises separate from those used by the OCFJA, although that office is responsible for the "preparation of budgetary submissions" and "such other administrative arrangements as are necessary to ensure that all reasonable requirements, including those for premises, equipment and other supplies and services and for officers, clerks and employees [of the Council are met]."

The OCFJA performs a number of important functions in relation to, and on behalf of, the Canadian judiciary. Because of the importance of that office in relation both to the Canadian judiciary generally and to the Council in particular, the Committee considered whether the Council should recommend that, instead of reporting to the Minister of Justice, as he now does, the Commissioner should report to some other body and, if so, what that other body should be. One of the options was to have the Commissioner report to the Council, as Chief Justice Jules Deschênes had recommended in his report to the Council in 1981, *Maîtres chez eux - Masters in their own house*.

The Committee commissioned a special report<sup>7</sup> on that issue and the matter was presented and discussed at the Council seminar

in March 2001. In the end, the Committee reached the following conclusions, which were presented to and accepted by the Council in September 2001:

- (a) there should be no recommendation for change in the reporting relationship of the Commissioner to the Minister of Justice;
- (b) efforts should be made at the earliest opportunity to upgrade the classification of the Commissioner's position to a more senior level within the federal bureaucracy; and
- (c) efforts should be made to raise the awareness of federal government officials as to the needs of the federal judiciary, the importance of the role played by the judiciary generally in our system of government, and the nature and importance of the interest of the national government in addressing those needs and enhancing that role.

The Committee also recommended that the Council Chairperson take whatever steps she deems appropriate to communicate these conclusions to the Minister of Justice, which she has since done.

The OCFJA plays an important role in the area of information technology and its relevance to the federally appointed judiciary in Canada. In the Committee's view, that role is an important one, and one that the OCFJA should continue to play, and the Council should continue to support.

**RECOMMENDATION:**

- 11. The Council should support the role played by the Office of the Commissioner for Federal Judicial Affairs in the area of information technology as it applies to the role of the federally appointed judiciary in our justice system.

<sup>7</sup> Authored by Mr. James Mitchell, Sussex Circle, Ottawa.



## **(ii) Minister and Department of Justice**

It has for a long time been the practice of the Council to extend invitations to both the Minister and Deputy Minister of Justice to speak at meetings of the full Council. These occasions are important to Council members because the presentations of the Minister and the Deputy Minister serve to inform them of the priorities and activities of the federal government, including, and most importantly, the Department of Justice, that bear on the functioning of the court system. These occasions often give rise to a useful discussion about those priorities and activities. However, these discussions have not always been as productive from the Council's standpoint (and probably from the Minister's and Deputy Minister's standpoints as well) as they might have been. To make them more productive, the Committee is of the view that, prior to the meetings to which they are being invited, the Minister and Deputy Minister should be advised by the Executive Committee of the issues that members of Council have an interest in discussing with them. These issues should, of course, be formulated in terms of general policy and principle, rather than in terms of particular courts and jurisdictions. In addition, other occasions for interaction, particularly between the Deputy Minister and Council members, should be fostered. Council committees, including the Executive Committee, should be encouraged to consider inviting the Deputy Minister to their meetings from time to time to discuss matters of mutual interest and concern.

### RECOMMENDATION:

12. (a) The Council should continue the practice of inviting both the Minister and Deputy Minister of Justice to Council meetings.
- (b) Prior to the meetings to which they are being invited, the Minister and Deputy Minister should be advised by the Executive Committee of the issues of general policy and principle that members of Council are interested in discussing with them.
- (c) The Deputy Minister should be invited from time to time to attend meetings of Council committees, including the Executive Committee.

## **(iii) The National Judicial Institute**

The relationship between the Council and the National Judicial Institute has always been a close one, and the Committee fully expects that it will remain so in the future. In fact, if the Judicial Education Committee becomes more involved in the development of policy in this area, as this Committee recommends,<sup>8</sup> there is good reason to believe that that relationship will become even closer.

Precisely because of the importance of this relationship, in its first interim report to the Council in September 2000, this Committee recommended "that the Council agree that it is desirable that there always be at least one Council member, in addition to the Chief Justice of Canada, on the Board of Governors of the NJI, and that the member should preferably be the Chairperson, or at a minimum a member, of the Judicial Education Committee." The Council accepted that recommendation at its September 2000 annual meeting, and it now forms the basis of the Council's policy in this area. The Committee is also pleased to note that the Executive Director of the National Judicial Institute has

<sup>8</sup> See discussion in Section F (ii) "Judicial Education" and Recommendation 7(a).

been made an *ex officio* member of the Judicial Education Committee.

#### **(iv) The Canadian Superior Courts Judges Association**

The Canadian Superior Courts Judges Association (CSCJA) is a volunteer organization that serves the interests of the federally appointed *puisne* judges in Canada. Many of those same interests, of course, are served by the Council as well, for example, in areas such as judicial education, protection of judicial independence, the provision of adequate salaries and benefits, and so on. However, the organizations themselves are clearly different. The Council is a creature of statute with a statutorily prescribed membership and mandate. That mandate makes it clear that the overriding concern on the part of the Council must be the interests of the Canadian public in the administration of justice.

Occasionally, members of CSCJA express concern about the transparency, or lack thereof, in the Council's decision-making process, the design of certain judicial education programs, the limited involvement on the part of *puisne* judges in the judicial complaints process, and the fact that *puisne* judges are unable to take an active part in the making of Council decisions affecting their interests.

In its third interim report to the Council in September 2001, the Committee addressed the concern about the lack of transparency in Council decision-making. It recommended that, following each Council meeting, a brief report summarizing those matters that might be of particular interest to *puisne* judges be sent to all federally appointed judges. That recommendation was accepted by the Council and those reports are now being prepared and sent out on JAIN and by fax to Council members to be circulated to those judges who

are not JAIN users. In the Committee's view, these reports represent an important step in ensuring that *puisne* judges are kept abreast of both the issues affecting them that come before the Council and the manner in which those issues are addressed by the Council.

That same concern is addressed elsewhere in this Report in the recommendation that *puisne* judges become eligible for full membership on some Council standing committees, as well as special and advisory committees and sub-committees of all of these.<sup>9</sup> If, as this Committee believes will be the case, those committees take on added importance in the future, the fact that they will include *puisne* judges should significantly enhance the transparency of the decision-making process within the Council as well as provide *puisne* judges with a meaningful opportunity to participate actively in it.

The Council has for a long time worked in cooperation with the CSCJA (and its predecessor, the Canadian Judges Conference) in relation to the issue of judicial salaries and benefits. This aspect of the relationship between the two organizations is important and will almost certainly remain intact in the future. The terms of reference that this Committee has drafted for the Judicial Salaries and Benefits Committee state that it should both "collaborate, as appropriate, with the counterpart committee of the Canadian Superior Courts Judges Association," and "develop with it, as appropriate, and where so approved by the Council, joint submissions to the Judicial Compensation and Benefits Commission."

#### RECOMMENDATION:

13. The Council should continue to work in cooperation, as appropriate, with the Canadian Superior Courts Judges Association in respect of the issue of judicial salaries and benefits.

<sup>9</sup> See discussion in Chapter III. E. "Committee Membership — Participation of *Puisne* Judges and Non-judges" and Recommendation 25.

The Committee's final point with respect to the relationship between the Council and the CSCJA relates to the Council's practice of having representatives of the Council meet with the representatives of the CSCJA once a year in conjunction with the Council's mid-year meeting. Those meetings have been useful to both the Council and the CSCJA and the Committee therefore supports the continuation of this practice.

RECOMMENDATION:

14. The Council's practice of having representatives of the Council meet with representatives of the Canadian Superior Courts Judges Association once a year should continue.

## H. Staffing and Resources

### (i) Role of the Council Secretariat

The essential role of the Council secretariat is, as it always has been, to support the Council, its committees and its members in their carrying out of the Council's statutory mandate. Such support includes the giving of advice, the implementation of decisions taken, and such other administrative and executive functions as are necessary to the efficient and effective carrying out of that mandate. The determination of Council policy and the making of decisions in furtherance of its objects remain, of course, the exclusive responsibility of the Council itself.

### (ii) Needs

When the Council was created, the original members made a conscious decision that they were not going to establish a large secretariat. The feeling of those members was that the work of the Council should be performed by Council members themselves. A junior lawyer from the Department of Justice was seconded

to act as secretary to the Council, and one other support person was hired. This level of staffing remained intact until the late 1980s, when a second support person was added. It was only in the mid-1990s that a separate counsel position within the secretariat was created.

The ability of an organization to function effectively depends in large part on the staffing and other resources it has at its disposal. The Council has been and continues to be exceedingly fortunate in having had a loyal, competent and hard-working staff to assist it in carrying out its important statutory mandatory. However, as acknowledged in a study commissioned by the Council Chairperson,<sup>10</sup> the level of staffing is currently well below what it should be given the broad range of activities in which the Council is now engaged and the burden that those activities place on the small number of people that work in the Council's secretariat. On the basis of that finding, the consultants recommended that the Council seek Treasury Board approval for three additional staff positions. This the Council asked the OCFJA to do in the fall of 2000. Approval has not yet been obtained. If the request is ultimately granted, the Council secretariat would include, in addition to the current four positions, three additional positions of Legal Counsel, an Assistant, both of whom would be involved in complaints work, and a Research Officer, who would direct contract research and provide support to Council committees; the Council would also have additional money for contract assistance.

The Committee realizes that the Council will have to secure additional resources if it is going to be able to extend its range of activities, as recommended in this Report. However, it has concluded that the most efficient and effective approach would be to seek additional contract money for research and

<sup>10</sup> Report of Consulting and Audit Canada entitled "Resource Requirements Study for the Canadian Judicial Council" (August 2000).

advisory services rather than increase its staff further. This approach has the advantage of being consistent with the goal of minimizing increases in full-time staff resources (favoured, understandably, by government resource analysts). It also has the benefit of providing the Council with greater flexibility and thereby enhancing the Council's functional efficiency. After there has been some experience with the new resources, assuming they are obtained, the Council Chairperson and the Executive Director will be in a better position to determine whether the Council should seek additional full time staff resources, and if so, what they should be.

RECOMMENDATION:

15. (a) The Council should make every effort to ensure that the request for additional staffing and resources now before Treasury Board is granted.
- (b) The Council should seek additional resources for contract research and advisory services as part of that request.
- (c) The decision whether to ask Treasury Board for additional staffing positions and resources above and beyond those now being requested should be postponed until the Council has had some experience with the new positions and contract resources now being sought.

That said, there is one aspect of the Council's staffing needs that the Committee thinks it important to address now. That aspect relates to the qualifications of the people within the Council secretariat who provide advice to the Judicial Conduct Committee in respect of complaints. It is the view of this Committee (and of the Chair and Vice-Chairs of the Judicial Conduct Committee) that, given the increasing complexity and sophistication of many of the complaints that the Council now receives, such staff persons must be lawyers with experience in administrative law.

Further, the role of Executive Director has expanded and this, too, requires a change in the qualifications required of that official. The Executive Director now has a more substantial role to play in relation to individual complaint files; has responsibility for overseeing the legal work carried out by other staff persons in the area of judicial conduct; and must ensure on a day-to-day basis the smooth functioning of the complaints process and its compliance with the duty of fairness, the rules of natural justice, as well as the requirements of the *Judges Act* and the Council's by-laws. The Committee believes that, in future, the Executive Director must be a person with significant legal training and experience. To reflect this, the position should be re-named "Executive Director and General Counsel."

RECOMMENDATION:

16. (a) The persons within the Council secretariat who provide advice to the Judicial Conduct Committee in respect of complaints should be lawyers with experience in administrative law.
- (b) The Council's Executive Director should be a person with significant legal training and experience.

**(iii) Organizational Structure of the Secretariat**

The organizational structure of the Council secretariat at the moment has the Council's Executive Director overseeing three staff people — the Counsel (who primarily provides support to the Judicial Conduct Committee in its handling of complaints) and two Administrative Services Officers (who provide administrative support to the Executive Director and Counsel and to the Council and its committees).

The Committee has assumed for the purposes of considering the structure of the new and enhanced Council secretariat that it will be increased only by the three new positions now being requested from Treasury Board.<sup>11</sup> On the basis of that assumption, the Committee has decided to recommend the structure outlined in Appendix I to this Report.

RECOMMENDATION:

17. The structure of the new Council secretariat should be as outlined in Appendix I.

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<sup>11</sup> See Recommendation 15.

## Chapter III

### THE COUNCIL IN ACTION — THE COMMITTEE STRUCTURE

#### A. Governance through Committees

The ability of an organization to perform its assigned functions in an effective and efficient manner depends on a number of factors. Prominent among them is what this Committee came to call the “governance structure” of the organization. In Chapter II of this Report, the Committee addressed some governance structure issues, such as the membership of the Council itself. This part examines the operation of Council committees.

If the Council is to remain at its current size and become more active than it now is, the Council must have stronger and more effective committees. The inability of a 39-person Council to act as an effective deliberative body means that most of the real work of the Council must be done by its committees. In particular, the Executive Committee, which, by virtue of its mandate, is the only body capable of acting as an effective deliberative body in relation to the work of the Council as a whole, must take on an even more important role than it currently has.

As the expert on governance whose advice the Committee sought, Mr. James Mitchell, noted in his report, “an appropriate governance structure for an organization such as the CJC is one that enables the Council to do its business effectively in a way which suits both the nature of the Council and the needs and preferences of its members. The goal is clarity, efficiency and flexibility. There is no perfect model.” The “appropriate governance structure” that emerges from his analysis of the Council’s mandate, size and composition can, in the Committee’s view, be summarized as follows:

- (i) “The size of the Council makes the creation and effective functioning of the Executive Committee a key element of effective governance. The Executive Committee must be designed and mandated in the by-laws in a way that both

legitimizes its role and substantial powers, and at the same time respects the non-hierarchical nature of the Council’s membership.”

- (ii) Subject to a number of caveats, “there would appear to be some wisdom in not binding the committees excessively.” The suggested caveats are that: the committees must have clear terms of reference; the work of the committees must fulfil a Council purpose; the priorities for the committees must be endorsed by the full Council or its Executive Committee; and the committees must not contravene the specific or general direction of the full Council or the Executive Committee in such matters as sub-committees, meeting frequency and activities.
- (iii) In light of the fact that “Council members’ main duty is to the courts over which they preside and administer, ...[and that] they work on committees as volunteers,” in order for Council’s committees to be effective, it is important that: the committees focus their limited time on issues that really matter to the Council; they use the limited support available from the staff to the best effect; and they enjoy appropriate flexibility in how they do their work (e.g., use of teleconferences, work by sub-committees, etc.).

The approach taken by this Committee in the area of governance reflects these considerations, in relation to both factual premises and the principles that emerge from them.

The suggestion that all Council committees should have written terms of reference is particularly useful. In furtherance of it, the Committee has drafted terms of reference for most Council committees and has received comments and suggestions on them from those committees. Appended to this Report are the final versions of those terms of reference (see Appendix II).

RECOMMENDATION:

18. The Council should approve the terms of reference for Council committees contained in Appendix II.

## B. The Executive Committee

The Council's current by-laws provide that the Executive Committee "is responsible for the supervision and management of the affairs of the Council and has all the powers vested in the Council" (except in certain limited areas). The creation of a committee with such significant authority reflected, no doubt, a number of considerations, including the need to have a group within the Council with the authority to speak for it in relation to urgent matters.

This Committee's recommendations relating to increasing the range of Council activities<sup>12</sup> and enhancing its level of staffing and resources<sup>13</sup> provide compelling additional reasons for having an Executive Committee with such ample authority. If Council committees are to become more active, it is critically important that there be a responsive body to which these committees can report and a forum in which the work of the committees can be coordinated, directed, reviewed and discussed. In addition, with an expanded secretariat, the Executive Committee will have an enhanced management role — directing staff activities, apportioning resources amongst committees and setting general priorities. This Committee also suggests that the Executive Committee assume the role formerly played by the Finance Committee and that it have responsibility for approving the creation of sub-committees.<sup>14</sup>

It is important, therefore, that the composition of the Executive Committee reflect its significance. This Committee proposes that the Executive be composed of the chairpersons of the main Council standing committees, as well as a number of at-large members. In addition to the chair of the Judicial Conduct Committee, the chairs of the Administration of Justice Committee, the Judicial Independence Committee, the Judicial Education Committee, the Appeal Courts Committee and the Trial Courts Committee should be members of the Executive Committee. These are all exceedingly significant and active committees of the Council and, as such, it is important that they be represented, through their chairpersons, on the Executive Committee. In addition, the Executive should include three Council members elected at large as it is important that membership on the Executive Committee be open to any Council member who wishes to serve on it. In total, including the Council Chairperson, who should obviously continue to preside, and the two Vice-Chairpersons, the Executive would be composed of eleven members.

RECOMMENDATION:

19. The Executive Committee should consist of the following eleven persons:

- (a) the Chairperson of the Council;
- (b) the two Vice-Chairpersons of the Council, one of whom will be the chair of the Judicial Conduct Committee;
- (c) the chairs of the Administration of Justice Committee, the Judicial Independence Committee, the Judicial Education Committee, the Appeal Courts Committee and the Trial Courts Committee; and
- (d) three other Council members elected at large.<sup>15</sup>

<sup>12</sup> See Recommendation 6.

<sup>13</sup> See Recommendation 15.

<sup>14</sup> See Supplementary Recommendations 29 and 30.

<sup>15</sup> See also Supplementary Recommendations 31 and 32, dealing with the process for determining membership and the setting of terms, and Supplementary Recommendations 33 and 34, relating to the composition of the Nominating Committee.

### C. Judicial Conduct

Under the by-laws of the Council as they now stand, the Executive Committee is also the Judicial Conduct Committee. It is the view of this Committee that the Judicial Conduct Committee should be separate from the Executive Committee. The current arrangement carries with it the implication that all of the members of the Executive Committee are actively involved in the work of the Judicial Conduct Committee.

However, in fact, only three or four members of the Executive Committee are actively involved in the work of the latter. Severing completely the connection between the two committees would also allow for greater flexibility in selecting members to the Judicial Conduct Committee, each of whom will have the responsibility for managing a number of complaint files, either as the Chair or one of the Vice-Chairs of the Committee. Provided the Chair of the Judicial Conduct Committee remains a member of the Executive Committee — which, under the regime that this Committee is proposing, would continue to be the case — the connection between the two committees will remain strong, and the oversight role of the Executive Committee in this critically important area will remain intact.

RECOMMENDATION:

20. (a) The Judicial Conduct Committee should be a separate standing committee from the Executive Committee.
- (b) Because of the special nature of the Judicial Conduct Committee, the Chairperson of the Council should have particular responsibility with respect to determining its members and their terms of office.

### D. Standing Committees

At present, the standing committees of the Canadian Judicial Council are as follows: the Judicial Conduct Committee; the Judicial Education Committee; the Judicial Independence Committee; the Judicial Salaries and Benefits Committee; the Administration of Justice Committee; the Finance Committee; the Appeal Courts Committee; the Trial Courts Committee; and the Nominating Committee.<sup>16</sup>

This Committee recommends only two changes to this list. Both were referred to earlier in this Report: (i) that the Finance Committee be abolished and its functions transferred to the Executive Committee; and (ii) that the Public Information Committee be made a standing committee.

RECOMMENDATION:

21. The following committees should all be standing committees of the Council:
  - Judicial Conduct Committee;
  - Judicial Education Committee;
  - Judicial Independence Committee;
  - Judicial Salaries and Benefits Committee;
  - Administration of Justice Committee;
  - Public Information Committee;
  - Appeal Courts Committee;
  - Trial Courts Committee; and
  - Nominating Committee.<sup>17</sup>

The full Council currently meets twice a year, once in the early fall and once in the early spring. Typically, all Council committees meet in conjunction with these meetings. The Committee has considered whether both of these practices should continue.

<sup>16</sup> Note that the Executive Committee is treated as being in a special category under the Council's by-laws.

<sup>17</sup> See Supplementary Recommendation 35 in relation to the appointment of the chairs of the Judicial Salaries and Benefits Committee, the Public Information Committee and the Nominating Committee.



The Committee's conclusion is that one Council meeting a year would not be sufficient given the volume and importance of the work that the Council is doing. Further, the opportunity that full Council meetings afford Council members to meet and discuss informally issues of common concern with their colleagues is a valuable one. On the other hand, increasing the number of meetings would be unduly burdensome on Council members given all of their other responsibilities.

With respect to the meetings of Council committees, the critical consideration is the need to ensure that when the full Council is called upon to resolve important issues of principle, it is in a position to do so in a considered manner, on the basis of a full and accurate factual foundation, with adequate time to reflect upon the competing arguments, and after a full and frank discussion. As important to the functioning of the Council as its committees are, it must be remembered that the *Judges Act* assigns ultimate responsibility to the full Council. It is the role of the committees, with the assistance of the Council secretariat, to assist the full Council in meeting that responsibility by providing it with the necessary factual foundations and competing arguments. And they must do so in an efficient, thorough and timely manner.

This Committee is strongly of the opinion that the current practice with respect to the holding of committee meetings is unsatisfactory. In its view, as a general rule, committee reports should be considered by Council members well in advance of its two plenary meetings. No major policy issues or recommendations should be sent to the Council just a day or two before those meetings, as the present system effectively requires. In the absence of circumstances requiring urgent action, the Council should not be asked to consider an important recommendation from any committee without adequate time.

Council committees should therefore be strongly encouraged to meet between the annual and mid-year Council meetings, using conference calls and video-conferencing whenever possible, and should report to the Council on an ongoing basis, rather than only at the annual and mid-year meetings. This does not mean that Council committees should no longer meet in conjunction with the annual and mid-year Council meetings; in fact, there may be good reason for some Council committees to meet in conjunction with at least Council's annual meeting, and there is certainly good reason for the Executive Committee and the Trial Courts and Appeal Courts committees to meet in conjunction with the mid-year meeting. The critical point is that the full Council must be given adequate time to prepare for the discussion and ultimate resolution of important issues of principle. That means that Council committees must be prepared to meet more often than they now do, and at times other than full Council meetings.

This change simply entails encouraging all Council committees to meet between the two full Council meetings, using conference calls and video-conferencing whenever feasible, and to provide reports on an ongoing basis, rather than, as they do now, only at the full Council meetings.

This change in committee operation will address, at least in part, any concern that the full Council risks becoming somewhat of a "rubber-stamp." There is a natural reluctance to question the conclusions and recommendations made by committees if the members of the Council have little time to consider and reflect upon them prior to the meeting of the Council. By contrast, if the members of the Council do have adequate time, they will be less inclined to defer. The recommendations that the Committee is making here should, therefore, enhance not only the effectiveness but also the democratic character of the Council's decision-making process.

- RECOMMENDATIONS:
22. The full Council should continue to meet twice a year.
  23. The Council committees should (a) be strongly encouraged to meet as and when required between Council’s annual and mid-year meetings, using conference calls and video-conferencing whenever possible; and (b) report to the full Council on an ongoing basis, rather than only at the annual and mid-year Council meetings.

Many of the recommendations that the Committee has made in this part of its Report have implications for Part 1 of the existing Council by-laws, which were adopted by the Council in 1998. For that reason, the Committee has prepared a set of what it has decided to call “Operating Procedures” to replace Part 1 of the by-laws. (The term has been borrowed from the Judicial Conference of the United States, which does not have by-laws as such.) These “Operating Procedures” simply give formal expression to the recommendations in this Report. However, a number of these recommendations cannot be implemented without an increase in the level of staffing and resources available to the Council. Accordingly, the Committee recommends that the proposed Operating Procedures be implemented as soon as it is feasible to do so.

- RECOMMENDATION:
24. The Council should repeal Part 1 of the April 1998 by-laws and approve a set of “Operating Procedures” that reflect the Recommendations in this Report, to be implemented as soon as it is feasible to do so — in some cases, once the required staffing and resources are in place.

## E. Committee Membership — Participation of *Puisne* Judges and Non-judges

Clearly, many matters relating to judicial governance are of great interest not only to Council members but also to *puisne* judges and members of the public. It is important, therefore, that Council members be aware of and sensitive to the views of both *puisne* judges and the public in relation to these matters. Above, the Committee outlined its reasons for not recommending a change in the composition of the Council and noted that there was a more meaningful way for *puisne* judges and non-judges to contribute to the work of the Council. In the Committee’s view, that way is through their participation in the work of the Council’s committees.

Insofar as *puisne* judges are concerned, they should be eligible for full membership on standing, special and advisory committees of the Council (with the exception of certain standing committees identified below). They should also be eligible for membership on sub-committees created by the Council’s standing, special and advisory committees.

There are many reasons for recommending that *puisne* judges be eligible for membership on Council committees. One is that it permits the Council to benefit from the tremendous wealth of relevant expertise and experience that a great many *puisne* judges possess. For example, the Committee believes that many *puisne* judges are in a position to make important contributions to the work of the Judicial Education Committee and the Administration of Justice Committee, to name but two. Another reason is to permit the committees, and hence the Council, to reduce somewhat the often heavy burden that falls on the shoulders of those who serve on particularly active committees. Yet another is the increased transparency of the work of the Council that the involvement of *puisne* judges will bring.

In the Committee's view, however, there are some committees on which it would be inappropriate for *puisne* judges to serve. These committees are the Executive Committee, the Judicial Conduct Committee, the Trial Courts and Appeal Courts Committees, the Judicial Salaries and Benefits Committee and the Nominating Committee. The reasons for these exceptions vary from committee to committee. Before setting out those reasons, it should be borne in mind that the fact that *puisne* judges would be unable to serve on certain committees does not mean that they would not be able to serve on sub-committees that these committees may establish. If, as the Committee expects will be the case, the use of such sub-committees becomes more common, this should allow for a significant degree of participation on the part of *puisne* judges in the Council's affairs.

The composition of the Executive Committee would be limited to Council members because it is likely going to play an increasingly powerful executive role on behalf of the whole Council. It would be incongruous to have persons who are not members of the Council playing an active role in that committee.

With respect to the Judicial Conduct Committee, as a result of an amendment to the Council's by-laws in 1998, it is now possible for *puisne* judges to be involved as a member of a Panel in the handling of a complaint. The Committee supports the continued involvement of *puisne* judges at that stage. However, involving *puisne* judges in the initial stage of reviewing complaints would be quite a different matter. It is to the individual members of the Judicial Conduct Committee, specifically the Chair and the Vice-Chairs, that complaints go at the initial stage, and those members have the authority to dispose of complaints at that stage if they think it appropriate to do so. It is the view of this Committee that it would not be appropriate for individual *puisne* judges to have that authority in respect of complaints about other *puisne* judges.

The main purpose of the Trial Courts and Appeal Courts Committees is to provide the members of those committees — who between them make up the full membership of the Council — with an opportunity to discuss in an open and frank manner, and in their capacity as chief justices and associate chief justices, the problems that they and their respective courts are experiencing. Often, the discussion within these committees focuses on issues relating to the management and administration of individual courts, including matters such as the assignment of judges to cases and the distribution of the court's overall workload. The purpose of these committees is obviously an extremely important one. The Committee believes that it would significantly hamper the ability of the two committees to fulfil this purpose if their meetings were open to *puisne* judges. That said, if the Council expands the scope of its functions, as expected, there is every reason to believe that these two committees will create more sub-committees to explore in depth, and make policy recommendations in relation to, specific issues of concern to them. The fact that *puisne* judges will be eligible to serve on such sub-committees means that they will be able to assist in a real way in the fashioning of Council policy.

The reason for excluding *puisne* judges from membership in the Judicial Salaries and Benefits Committee should be apparent. The Canadian Superior Courts Judges Association has its own such committee. Moreover, the Council committee has worked closely with, and can be expected to continue to work closely with, the Association's committee. In short, there is no need, in this Committee's view, to permit *puisne* judges to sit on the Council's Judicial Salaries and Benefits Committee.

Finally, the role played by the Nominating Committee also makes that committee unsuitable for *puisne* judge membership. It would not be appropriate for the Council committee that has a significant hand in

determining who will serve as the chairs of important Council committees to have as members people who are not themselves members of the Council.

Having decided that *puisne* judges should be eligible for membership on most Council committees, the Committee considered whether those committees should be obligated to include *puisne* judges as members. In the end, the Committee decided against it. It should be left to the committees themselves to decide whether they should have *puisne* judges as members and, if so, how many. However, Council committees should be strongly encouraged to add *puisne* judges to their membership.

RECOMMENDATION:

25. (a) *Puisne* judges should be eligible to become members of the following standing committees of the Council — the Administration of Justice Committee, the Judicial Education Committee, the Judicial Independence Committee and the Public Information Committee.
- (b) *Puisne* judges should be eligible for membership in special and advisory committees of the Council.
- (c) *Puisne* judges should be eligible for membership on all sub-committees created by standing, special and advisory committees of the Council.
- (d) The Council should strongly encourage these committees to add *puisne* judges to their membership and to the membership of their sub-committees whenever they think it beneficial to do so.<sup>18</sup>

As for non-judges, they should be eligible to serve on Council standing and special committees, not as full members, but as advisors. While it may be that this distinction between *puisne* judges and non-judges will in time

disappear, at the moment this Committee believes there to be a difference in the respective roles in, and contributions to, the work of the Council of these two groups. Given the nature of advisory committees, however, the Committee suggests that non-judges be eligible for full membership on them. One of the most successful committees of the Council now is the Judges Technology Advisory Committee, which includes three active non-judge advisors. Further, the Study Leave Committee has since its creation had two law deans as full members. Other Council committees have also, from time to time, retained the services of non-judge advisors. That has been true, for example, of this Committee. Council committees should continue to avail themselves of the expertise and experience that such persons can provide.

RECOMMENDATION:

26. Non-judges should be invited, as circumstances suggest, to serve as advisors to standing and special committees or as members of advisory committees.

## F. Sub-committees, Special Committees and Advisory Committees

Special committees can be defined as committees that are established to perform a specific task on the Council's behalf, usually within a limited time frame. Section 39 of Part 1 of the Council's by-laws grants authority to create them to the Chairperson, the Executive Committee and the full Council. Examples of such committees from the recent past include the Trial Court Structures Committee, the Public Information Committee and this Committee.

Special committees can perform a useful service to the Council and the authority to create them should remain intact. However, the

<sup>18</sup> See Supplementary Recommendations 36, 37 and 38 with respect to the process for selecting *puisne* judges to serve on Council committees and terms of service.

Council must be careful not to use this authority too frequently; a proliferation of special committees is not in the Council's interests. Specific tasks that can fairly be said to fall within the terms of reference of a particular standing committee should, as a general rule, be assigned to that committee. The adoption of formal terms of reference for each of the standing committees will assist in this regard.<sup>19</sup>

In addition, all special committees should have written terms of reference, as well as a limited life-span, which ideally should be spelled out in those terms of reference. Generally speaking, any special committee that appears to be fulfilling a continuing or long-term purpose on behalf of the Council should be made a standing committee.

RECOMMENDATION:

27. (a) The Council should continue to have the authority to create special committees.
- (b) As a general rule, tasks that can be said to fall within the terms of reference of a standing committee should be assigned to that committee rather than to a special committee.
- (c) All special committees should have written terms of reference and a limited life-span.
- (d) Generally speaking, any special committee that is found to be fulfilling a continuing purpose should be made into a standing committee.

Advisory committees are created by the Council to enable it and its members to receive advice and assistance on an ongoing basis from persons with a particular expertise. The authority to create such committees also comes from s. 39 of Part 1 of the Council's existing by-laws. Their membership has included not only Council members, but also *puisne* judges. In fact, Council's limited expe-

rience with such committees — in particular, the Judges Technology Advisory Committee — indicates that such committees can be chaired by non-Council members.

As the history of the Judges Technology Advisory Committee makes clear, advisory committees can be useful to the Council and, therefore, the power to create them should remain intact. Again, however, the Council should exercise caution in its use of this power. Such committees, it should be borne in mind, are not the only vehicle by which the Council can profit from the knowledge and experience of non-judges: Council committees, both standing and special, can avail themselves of outside expertise by adding non-judges as advisors.

As in the case of standing and special committees, it is the Committee's view that advisory committees should have written terms of reference. To this end, the Committee has included in Appendix II updated terms of reference for the Judges Technology Advisory Committee and the Study Leave Advisory Committee.

RECOMMENDATION:

28. (a) The Council should continue to have the authority to create advisory committees.
- (b) All advisory committees should have written terms of reference.<sup>20</sup>

<sup>19</sup> See Recommendation 18.

<sup>20</sup> See Supplementary Recommendation 39 with respect to reporting relationships of all committees.

## Chapter IV

### CONCLUSIONS

This report has addressed a broad spectrum of issues pertaining to the role, mandate, functions and operation of the Canadian Judicial Council. Those issues range from the suitability of the Council's enabling legislation to the composition of the Council's staff. Given the breadth of these matters, it may be useful to draw them together under three general themes: Responding to Demand; Building Capacity; and Reaching Out.

#### A. Responding to Demand

The Committee has concluded that the demands on the Council are increasing and that it is both necessary and appropriate for the Council to respond to those demands. The Council is a key national institution that serves the public interest by developing model policies and practices for the administration of the federally appointed courts, and by showing leadership in important areas of judicial governance. The Council must prepare itself to deal with the growing demands in such areas as judicial dispute resolution, use of information technology and public information, to name only a few.

The Committee has found that the basic framework under which the Council operates is satisfactory — namely, its statutory mandate and legislated powers (see Recommendations 1 and 3). However, the Committee suggests that the Council should conduct itself according to a set of general principles, consistent with its mandate and its overarching duty to serve the public interest (see Recommendation 2). Within these parameters, the Council should undertake a broader range of activities that respond energetically and sensitively to the growing demands on the courts and the judiciary in Canada (see Recommendation 6).

There are some particular areas identified by the Committee in which it is clear that the Council should be doing more. One is judicial education. The Council should be

playing a larger role in the development of policies guiding the delivery of programs by the National Judicial Institute (see Recommendation 7). It is also important that the Council be involved in establishing protocols for judicial participation in international education projects (see Recommendation 8). The important work in which the Council has been engaged in the area of public information should be recognized as an ongoing responsibility and, accordingly, its Special Committee on Public Information should be made a standing committee of the Council (see Recommendation 9). Finally, but certainly not least, the Council should make a particular effort to provide leadership in the challenges and opportunities presented by developments in the application of information technology to the administration of justice (see Recommendations 10 and 11).

#### B. Building Capacity

Clearly, if the Council is to be in a position to respond meaningfully to the demands placed on it, it must take steps to ensure that it has the necessary resources to do so. In short, it must build its capacity, proportionate to those demands.

There are various kinds of resources at the Council's disposal. First, there are the Council members themselves. The Committee does not recommend any reduction in the size of the Council's membership, in part because the workload requires a relatively large number of members in order to ensure that the burden can be spread as widely as possible (see Recommendation 4). However, keeping the membership as it is means, realistically, that the administration of Council affairs will largely fall to the Executive Committee. It is important, therefore, that the Executive Committee be of a manageable size and that the chairs of the principal Council committees be among its members (see Recommendation 19).

Most substantive work at the Council is done in committees. Committees and their members are another major resource of the Council. In order to focus committee work and aid in the setting of priorities, this Committee has recommended that all committees have written terms of reference (see Recommendations 18, 20 and 27). In addition, with some exceptions, committees should have the benefit of the knowledge and expertise that *puisne* judges can bring to the table (see Recommendation 25), as well as the assistance of non-judges as advisors (see Recommendation 26). Finally, committees should function more dynamically by meeting when necessary (by conference call or video-conference, if appropriate) and reporting on an ongoing basis, rather than just at the two Council meetings per year (see Recommendations 22 and 23).

Another important resource for the Council is, of course, its staff. This Committee has already noted a deficiency in the current staff complement and recommended a modest increase to it in September 2000. Rather than seeking to expand the Council's secretariat further, however, the Committee suggests that contract resources be sought so that expert research and policy advice can be obtained in as efficient a manner as possible (see Recommendation 15). To ensure that the Council has the benefit of the legal advice it requires to discharge its mandate, the Committee recommends that certain staff members have appropriate legal experience and training (see Recommendations 16 and 17).

Finally, the Committee recognizes that information technology is an underused resource of the Council. It recommends that Council members become more familiar with the advantages of this technology and put it to work to improve communication among Council and committee members. Of course, appropriate security measures have to be in place in order for this technology to be used effectively by the judiciary. In these and other

related areas, the Council should be playing a leadership role (see Recommendation 10).

### C. Reaching Out

It is essential, of course, that the Council recognize its role and mandate, and put into place the corresponding means and resources to perform its public duty. It is equally important that it be seen to function in a manner that corresponds with reasonable expectations about how an institution with an obligation to serve the public interest should conduct itself in the 21st century. In the Committee's view, this means that the Council should reach out more and include *puisne* judges and non-judges in the development of policies and practices relating to the administration of justice. While the Committee acknowledges that the Council's relationships with others should continue and be reinforced (e.g., with the Minister and Deputy Minister of Justice, Recommendation 12; the Canadian Superior Courts Judges Association, Recommendations 13 and 14), it also encourages the creation of new linkages with persons outside the Council.

This is evident in the Committee's recommendation that the Chairperson of the Council create an advisory group consisting of knowledgeable and experienced members of the public (legally and non-legally trained) and *puisne* judges and sub-committees (see Recommendation 5). This will create an important means by which the Chairperson, and through her the Executive Committee and the full Council, can obtain the views and perspective of non-Council members on matters relating to judicial administration and governance. The Committee also encourages the addition of *puisne* judges and non-judge advisors to Council committees (see Recommendations 25 and 26). These measures will not only give the Council the benefit of a wider range of ideas and suggestions, they will also enhance the Council's transparency and, hence, its credibility as a strong and forward-looking national institution.

## SUMMARY OF RECOMMENDATIONS

### A. Principal Recommendations

1. The Council's statutory mandate should remain in its current form; that is, "to promote efficiency and uniformity, and to improve the quality of judicial service" in the federally appointed courts.
2. The Council should adopt a set of principles to guide the manner in which it executes its statutory mandate, namely:
  - (a) The Council must be guided by the constitutional principles of federalism, judicial independence, judicial accountability, equality, the rule of law and due process;
  - (b) The Council must set its own policies and priorities; the role of the Council secretariat is advisory, administrative and executory in nature;
  - (c) The governance structure of the Council should be one that, through the effective use of active committees, promotes efficiency and flexibility in operation, while respecting the ultimate responsibility of the full Council for the carrying out of its statutory mandate;
  - (d) In fulfilling its responsibility to carry out its statutory mandate, the Council should operate on the principles of democratic decision-making, including the equality of all of its members;
  - (e) The Council should be mindful of both the representative role it plays in relation to the federally appointed judiciary as a whole and the experience and expertise that are available to the Council from within that judiciary; and
  - (f) The overarching duty of the Council is to ensure that in all that it does it is guided by a commitment to serving the public interest in the administration of justice.
3. The statutory powers of the Council are adequate and should be maintained.
4. The membership of the Council should continue as provided at present in the *Judges Act*.
5. The Council should endorse the creation of an advisory group chaired by the Chairperson of the Council and the members of which would be selected by her in consultation with the Executive Committee. It would consist of knowledgeable and experienced members of the public (legally and non-legally trained) and *puisne* judges. Its role would be to act as a sounding board for the Chairperson in relation to issues that she may wish to raise with it, and to provide a means by which the opinions and comments of well-informed persons outside of the Council could be shared with the Executive Committee and/or the full Council.
6. The Council should extend the range of activities in which it is engaged as consistent with its statutory mandate.
7. The Council's Judicial Education Committee should (a) play a greater role in the development of general policies and priorities in the area of judicial education than it now does; and (b) encourage the National Judicial Institute to provide periodic reports on the state of judicial education in Canada.
8. The Council should (a) take steps to ensure that formal protocols governing the participation of Canadian judges in international judicial education programs are developed; and (b) ensure that the Council plays a role in the development and monitoring of those protocols.



9. The Public Information Committee should be made a standing committee of the Council.
10. The Council should (a) encourage all members of the Council to become computer literate, in order to make it possible for more Council communications to be conducted electronically; (b) support the taking of such steps as are necessary to ensure that the information technology systems that are now and will in the future be used by federally appointed judges are fully secure; (c) encourage all federally appointed judges to develop the skills and understanding necessary to make use of information technology in the performance of their judicial functions; (d) add as members to the Judges Technology Advisory Committee representatives of both the Office of the Commissioner of Federal Judicial Affairs and the National Judicial Institute; and (e) generally take a leadership role in the use of information technology in the superior courts.
11. The Council should support the role played by the Office of the Commissioner for Federal Judicial Affairs in the area of information technology as it applies to the role of the federally appointed judiciary in our justice system.
12. (a) The Council should continue the practice of inviting both the Minister and Deputy Minister of Justice to Council meetings.  
(b) Prior to the meetings to which they are being invited, the Minister and Deputy Minister should be advised by the Executive Committee of the issues of general policy and principle that members of Council are interested in discussing with them.  
(c) The Deputy Minister should be invited from time to time to attend meetings of Council committees, including the Executive Committee.
13. The Council should continue to work in cooperation, as appropriate, with the Canadian Superior Courts Judges Association in respect of the issue of judicial salaries and benefits.
14. The Council's practice of having representatives of the Council meet with representatives of the Canadian Superior Courts Judges Association once a year should continue.
15. (a) The Council should make every effort to ensure that the request for additional staffing and resources now before Treasury Board is granted.  
(b) The Council should seek additional resources for contract research and advisory services as part of that request.  
(c) The decision whether to ask Treasury Board for additional staffing positions and resources above and beyond those now being requested should be postponed until the Council has had some experience with the new positions and contract resources now being sought.
16. (a) The persons within the Council secretariat who provide advice to the Judicial Conduct Committee in respect of complaints should be lawyers with experience in administrative law.  
(b) The Council's Executive Director should be a person with significant legal training and experience.
17. The structure of the new Council secretariat should be as outlined in Appendix I.
18. The Council should approve the terms of reference for Council committees contained in Appendix II.

19. The Executive Committee should consist of the following eleven persons:
  - (a) the Chairperson of the Council;
  - (b) the two Vice-Chairpersons of the Council, one of whom will be the chair of the Judicial Conduct Committee;
  - (c) the chairs of the Administration of Justice Committee, the Judicial Independence Committee, the Judicial Education Committee, the Appeal Courts Committee and the Trial Courts Committee; and
  - (d) three other Council members elected at large.
20. (a) The Judicial Conduct Committee should be a separate standing committee from the Executive Committee.
  - (b) Because of the special nature of the Judicial Conduct Committee, the Chairperson of the Council should have particular responsibility with respect to determining its members and their terms of office.
21. The following committees should all be standing committees of the Council:
  - Judicial Conduct Committee;
  - Judicial Education Committee;
  - Judicial Independence Committee;
  - Judicial Salaries and Benefits Committee;
  - Administration of Justice Committee;
  - Public Information Committee;
  - Appeal Courts Committee;
  - Trial Courts Committee; and
  - Nominating Committee.
22. The full Council should continue to meet twice a year.
23. The Council committees should (a) be strongly encouraged to meet as and when required between Council's annual and mid-year meetings, using conference calls and video-conferencing whenever possible; and (b) report to the full Council on an ongoing basis, rather than only at the annual and mid-year Council meetings.
24. The Council should repeal Part 1 of the April 1998 by-laws and approve a set of "Operating Procedures" that reflect the Recommendations in this Report, to be implemented as soon as it is feasible to do so — in some cases, once the required staffing and resources are in place.
25. (a) *Puisne* judges should be eligible to become members of the following standing committees of the Council — the Administration of Justice Committee, the Judicial Education Committee, the Judicial Independence Committee and the Public Information Committee.
  - (b) *Puisne* judges should be eligible for membership in special and advisory committees of the Council.
  - (c) *Puisne* judges should be eligible for membership on all sub-committees created by standing, special and advisory committees of the Council.
  - (d) The Council should strongly encourage these committees to add *puisne* judges to their membership and to the membership of their sub-committees whenever they think it beneficial to do so.
26. Non-judges should be invited, as circumstances suggest, to serve as advisors to standing and special committees or as members of advisory committees.
27. (a) The Council should continue to have the authority to create special committees.
  - (b) As a general rule, tasks that can be said to fall within the terms of reference of a standing committee should be assigned to that committee rather than to a special committee.

- (c) All special committees should have written terms of reference and a limited life-span.
  - (d) Generally speaking, any special committee that is found to be fulfilling a continuing purpose should be made into a standing committee.
28. (a) The Council should continue to have the authority to create advisory committees.
- (b) All advisory committees should have written terms of reference.

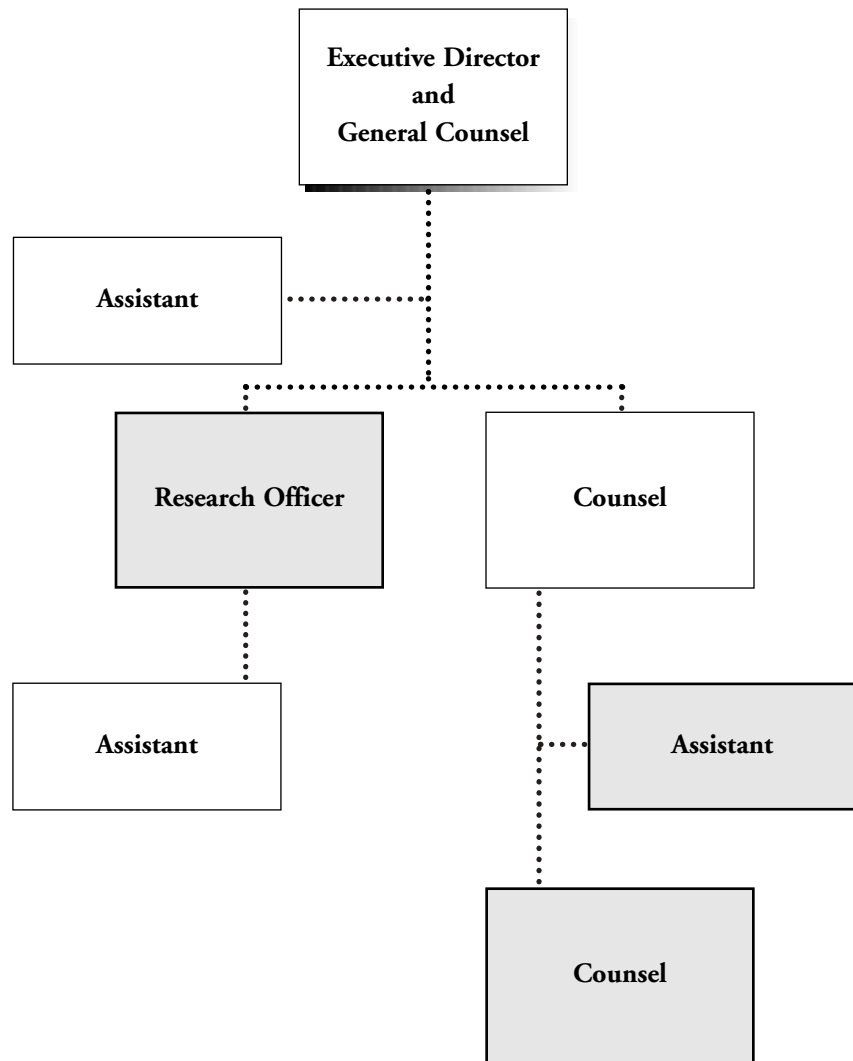
## **B. Supplementary Recommendations**

29. The Finance Committee should be abolished and its responsibilities reassigned to the Executive Committee.
30. The Executive Committee should have the authority to approve the creation of sub-committees by standing, special and advisory committees of the Council.
31. Membership in the Executive Committee should be determined as follows:
- (a) The two Vice-Chairpersons of the Council would continue to be chosen by the Chairperson;
  - (b) The chairs of the five standing committees represented on the Executive Committee, other than the Judicial Conduct Committee, should be appointed by the Council on the recommendation of the Nominating Committee after consultation with the Council Chairperson; and
  - (c) The three at large members should be elected by the Council following recommendations from the Nominating Committee.
32. The terms of the members of the Executive Committee should be staggered to allow for continuity while ensuring ongoing change.
33. The composition of the Nominating Committee should continue to be determined as it now is; however, membership on the first Nominating Committee should be determined by the existing Executive Committee on the recommendation of the current Nominating Committee, with one member to be appointed to a three-year term, another to a two-year term and the third to a one-year term.
34. Members of the Executive Committee should not be eligible for appointment to the Nominating Committee.
35. (a) The chairs of the Judicial Salaries and Benefits Committee and the Public Information Committee should be appointed by the full Council on the recommendation of the Nominating Committee after consultation with the Council Chairperson
- (b) The chair of the Nominating Committee should continue to be the senior member of that committee.
36. Authority over the appointment of *puisne* judges to Council committees and sub-committees should rest with the chairs of those committees, subject to the following two conditions:
- (a) that all *puisne* judges must be made aware of the fact that they are now eligible to serve on these committees and be given an opportunity to express an interest in doing so; and
  - (b) that prior to appointing a *puisne* judge to a Council committee, the chair of the committee must obtain the consent of that judge's chief justice.

37. *Puisne* judges should be made aware of their eligibility to serve on Council committees and sub-committees by the Council Chairperson, be invited by her to express their interest in serving on such committees by completing a questionnaire and be advised by her that their ability to serve on such committees will be contingent on the consent of their chief justice.
38. (a) Both Council members and *puisne* judges should serve on standing committees for a three-year term, with the possibility of extension for a further one to three year period, for a maximum of six years' service in total.
- (b) Standing committee chairs should serve for three-year, non-renewable terms.
39. (a) Special and advisory committees should report to the body that establishes them.
- (b) Committees that deal with matters relating to individual judges, to the extent only that they deal with such matters, should report to the Executive Committee.
- (c) Otherwise, all committees should report to the full Council.

# Appendix I

## PROPOSED NEW ORGANIZATIONAL STRUCTURE FOR THE CJC



(The shaded boxes are the proposed new positions.)



# Appendix II

## TERMS OF REFERENCE FOR COUNCIL COMMITTEES

Executive Committee 2

### **Standing Committees:**

Judicial Conduct Committee 3

Judicial Education Committee 3

Judicial Independence Committee 4

Judicial Salaries and Benefits Committee 4

Administration of Justice Committee 5

Public Information Committee 5

Appeal Courts Committee 6

Trial Courts Committee 6

Nominating Committee 7

### **Advisory Committees**

Judges Technology Advisory  
Committee 8

Study Leave Advisory Committee 8

## EXECUTIVE COMMITTEE

The Executive Committee is responsible for the supervision and management, including the financial management, of the affairs of the Council, and has all the powers vested in the Council except the matters listed in s. 5.5 of the Operating Procedures.

Without limiting the generality of the foregoing, the Committee

- sets the dates and locations of Council meetings;
- recommends priority areas for Council consideration;
- is responsible for addressing issues that may arise relating to the operations, staffing and activities of the Council secretariat;
- acts on behalf of the Council on any matter requiring urgent action between the Council meetings;
- is responsible for assigning to a particular standing committee any specific matter which in its view deserves the attention of a Council committee;
- may establish special committees and prescribe their powers, duties and membership;
- receives reports from time to time from all special committees and acts on their recommendations on behalf of the Council when it is appropriate to do so;
- approves the creation of or directs the creation of sub-committees of Council standing and special committees;
- considers from time to time the mandates of the standing Council committees and makes recommendations to the Council, as appropriate, for changes to the mandate(s);

- maintains contact with the Commissioner for Federal Judicial Affairs with respect to the needs of the federally appointed judiciary;
- shall perform such other duties as may be delegated from time to time by the Council.



## JUDICIAL CONDUCT COMMITTEE

To deal with complaints sent to the Council about the conduct of federally appointed judges in a manner that is fair to the judges subject to the complaints, sensitive to the complainants, respectful of judicial independence, and credible both to the judiciary and to the public.

Within this mandate the Committee may:

- make recommendations as necessary to the Council for amendments to the Council's procedures and by-laws for dealing with complaints;
- promote understanding by the public and the judiciary of the Council's complaints process including, *inter alia*, producing brochures and other information materials;
- revise from time to time as necessary the internal practices for dealing with complaints.
- consider and, as appropriate, make recommendations with respect to all other matters relating to the conduct of federally appointed judges.

## JUDICIAL EDUCATION COMMITTEE

To provide advice and recommendations to the Council with a view to ensuring that the federally appointed judiciary has access to high quality, effective, ongoing judicial education.

Without limiting the generality of the foregoing, the Committee may

- promote and encourage the pursuit by the judiciary of continuing judicial education;
- identify educational needs and priorities of judges and develop policies and priorities for continuing judicial education which respond to those needs and priorities;
- recommend which courses, seminars, and conferences would benefit the professional development of federally appointed judges and, therefore, should be supported by the payment of expenses pursuant to subsection 41(1) of the *Judges Act*;
- receive periodic reports on the work of the National Judicial Institute and, as appropriate, offer guidance in relation to the NJI's policies, curriculum and overall mandate.

## JUDICIAL INDEPENDENCE COMMITTEE

To enhance the understanding of and make recommendations to the Council aimed at protecting and promoting the independence of the judiciary.

Without limiting the generality of the foregoing, the Committee may

- identify situations that do, or that may, impinge on the independence of the judiciary, and propose responses or solutions for consideration by the Council and others where appropriate;
- request and consider reports from time to time of the activities of the Advisory Committee on Judicial Ethics;
- monitor issues relating to the *Ethical Principles for Judges* and propose to the Council amendments or additions to that document as appropriate;
- study and make recommendations as appropriate on legislative proposals that may affect directly or indirectly the independence of judges and of the courts;
- make proposals, as appropriate, with respect to the management of the courts insofar as the issues may impact on the independence of the judiciary;
- promote education on judicial independence in conjunction with the Public Information Committee and/or Judicial Education Committee.

## JUDICIAL SALARIES AND BENEFITS COMMITTEE

To study and make recommendations to the Council with regard to all matters affecting the salaries and benefits of federally appointed judges.

Without limiting the generality of the foregoing, the Committee may

- make recommendations to the Council about submissions which the Council may wish to make to the Judicial Compensation and Benefits Commission respecting salaries and benefits of chief justices;
- collaborate, as appropriate, with the counterpart Committee of the Canadian Superior Courts Judges Association;
- develop with it, as appropriate, and where so approved by the Council, joint submissions to the Judicial Compensation and Benefits Commission.

## ADMINISTRATION OF JUSTICE COMMITTEE

To provide advice and make recommendations to the Council on matters relating to the administration of justice, consistent with the Council's overall mandate to promote uniformity and efficiency and improve the quality of judicial service in courts across the country.

Without limiting the generality of the foregoing, the Committee may

- identify problems that do, or that may, bring the administration of justice into disrepute and propose responses or solutions for consideration by the Council and others;
- make recommendations for consideration of the courts in all aspects of the administration of justice including case management, how courts can better deal with self represented litigants, the role of judges in mediation or other forms of alternative dispute resolution, methods of court reporting and court interpreting, criminal and civil procedure, court structure, the appointment of judges, court management, etc.;
- study and, as appropriate, make recommendations on legislative proposals affecting the administration of justice.

## PUBLIC INFORMATION COMMITTEE

To provide advice and assistance to members of the Council, and to their respective courts on request, with respect to public information initiatives which courts might undertake to assist the public in better understanding the role of courts and judges in the judicial system.

Without limiting the generality of the foregoing, the Committee may

- assist court communications initiatives on request;
- provide communications advice on request;
- support development of court Web sites;
- support information exchange among court officials with media responsibilities;
- act generally as a clearing house for information exchange;
- report progress through *Perspective*, an occasional note produced by the Committee reporting on court outreach activities;
- support initiatives to assist journalists who report on courts and legal affairs;
- support court initiatives to develop educational programs for schools and school groups;
- undertake other activities as required by the Council or the Council's Executive Committee.

## **APPEAL COURTS COMMITTEE**

To exchange information among all Council members on Appeal Courts and

- identify, consider and, as appropriate, recommend solutions to problems unique to appellate court jurisdiction and procedures;
- consider and make recommendations to the Council with a view to increasing efficiency, promoting uniformity and improving the quality of judicial service in the administration of the courts.

## **TRIAL COURTS COMMITTEE**

To exchange information among all Council members on Trial Courts and

- identify, consider and, as appropriate, recommend solutions to problems affecting trial court jurisdiction and procedures;
- consider and make recommendations to the Council with a view to increasing efficiency, promoting uniformity and improving the quality of judicial service in the administration of the courts.

## NOMINATING COMMITTEE

To provide advice and make recommendations to the Council with respect to nominations to various Council committees, taking into account to the extent possible regional and jurisdictional representation.

Without limiting the generality of the foregoing, the Committee

- shall make recommendations at the annual meeting of the Council about the membership of the Council's Executive Committee and the membership of the Standing Committees (other than the Appeal Courts Committee, the Trial Courts Committee and the Judicial Conduct Committee);
- shall make recommendations, following consultation with the Council Chairperson, regarding the chairmanship of standing committees;
- may make recommendations, when requested to do so by the Council, the Executive Committee, or the Chairperson, about the membership of the Council's special or advisory committees;
- may arrange for questionnaires to be sent from time to time to all federally appointed judges inviting them to complete if they have an interest in being considered for membership on a Council committee.

## JUDGES TECHNOLOGY ADVISORY COMMITTEE

To provide advice and make recommendations to the Council on matters relating to the effective use of technology by the courts, consistent with the Council's overall mandate to promote uniformity and efficiency and improve the quality of judicial service in courts across the country.

Without limiting the generality of the foregoing, the Committee may

- support the development of standards for judicial information, court filings, evidence, judgments and other information in electronic form;
- promote better management and security of judicial data by undertaking research, supporting education, and preparing national standards;
- assist judges with the use of technology by publishing a newsletter, assisting in the organizing of education programs, etc.
- work with other committees of the Council to ensure that technology issues are properly considered in their deliberations;
- liaise as appropriate with court technology committees, the Office of the Commissioner for Federal Judicial Affairs and organizations outside the courts (such as CBA, Federation of Law Societies of Canada) to ensure that the standards approved by the Council can be implemented effectively and have a positive impact on the justice system;
- monitor and consider technical issues that may have an impact on access to justice.

## STUDY LEAVE ADVISORY COMMITTEE

To oversee the administration of and make recommendations to the Executive Committee with respect to the Study Leave Program of the Canadian Judicial Council/ the Council of Canadian Law Deans, and any other such related matters as may be requested from time to time by the Council or the Executive Committee.

Without limiting the generality of the foregoing, the Committee shall:

- consider all applications for the Study Leave Program, and make recommendations, through the Executive Committee, to the Minister of Justice for leaves of absence pursuant to para 54(1)(b) of the *Judges Act* for those judges the Committee approves for leave;
- provide advice and comments, when invited to do so by a chief justice, with respect to the leave programs of judges taking leaves of absence at academic institutions of between three and six months pursuant to para 54(1)(a) of the Act.