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RESEARCH ARTICLE/ÉTUDE ORIGINALE

The Ascent of the Canadian Judicial Council: Bill C-9 and the Move Towards Judicialized Governance

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Abstract

The Canadian Judicial Council is primarily responsible for regulating misconduct among federally appointed judges. Over the last decade, the Council has faced some highly publicized challenges to its authority when judges facing misconduct complaints commenced judicial review proceedings pursuant to the *Federal Courts Act*. In response to these challenges, the Council sought to immunize itself from judicial review, first by pleading its case in court and then by pressing for legislative changes in the form of Bill C-9. The new legislation, which exempts the Council from almost all external judicial oversight, was driven by the Council and assented to by a government willing to delegate its power to judicial elites. The legislation not only fails to provide adequate checks on the Council's power as an administrative decision maker, it represents a high-water mark in judicialized politics, pointing to a judicialization of governance in the area of judicial discipline.

Résumé

Le Conseil canadien de la magistrature est principalement chargé de réglementer l'inconduite des juges nommés par le gouvernement fédéral. Au cours de la dernière décennie, le Conseil a été confronté à des contestations très médiatisées de son autorité lorsque des juges faisant l'objet de plaintes pour inconduite ont entamé des procédures de contrôle judiciaire en vertu de la Loi sur les Cours fédérales. En réponse à ces contestations, le Conseil a cherché à s'immuniser contre le contrôle judiciaire, d'abord en plaidant sa cause devant les tribunaux, puis en faisant pression pour obtenir des changements législatifs sous la forme du projet de loi C-9. La nouvelle législation, qui exempte le Conseil de presque tout contrôle judiciaire externe, a été proposée par le Conseil et approuvée par un gouvernement désireux de déléguer son pouvoir aux élites judiciaires. Non seulement la législation ne prévoit pas de contrôles adéquats du pouvoir du Conseil en tant que décideur administratif, mais elle représente un point culminant dans la politique judiciarisée, indiquant une judiciarisation de la gouvernance dans le domaine de la discipline judiciaire.

Keywords: Canadian Judicial Council; judicial discipline; judicialization of governance; judicialization from above; *Federal Courts Act*

Mots-clés: Conseil canadien de la magistrature; discipline judiciaire; judiciarisation de la gouvernance; judiciarisation par le haut; *Loi sur les Cours fédérales*

Introduction

The Canadian Judicial Council (CJC or Council) is primarily responsible for judicial discipline, investigating cases of misconduct among federally appointed judges and making recommendations for their removal to the Minister of Justice. The last decade was a tumultuous one for the Council, which found itself embroiled in high-profile challenges to its authority by judges facing misconduct allegations. Aggrieved judges brought applications for judicial review pursuant to the *Federal Courts Act*, which authorizes Federal Court review of federal boards, commissions and tribunals. In response to these challenges, the Council sought to immunize itself from judicial review under the statute by advancing arguments in the Federal Court and the Federal Court of Appeal. Having failed in its bids to secure a legal decision proclaiming that it is beyond Federal Court review, the Council pressed for legislative changes to place it beyond review. These amendments, housed in Bill C-9, *An Act to Amend the Judges Act*, received Royal Assent on June 22, 2023.

This article examines two principal issues concerning Bill C-9. The first is the ramifications of exempting the Council, an administrative body that exercises public power, from judicial review. From an accountability perspective, the Council's efforts to immunize itself from challenge are troubling. In the wake of the legislative changes, the Council's independence as an administrative body is considerably enhanced, but without the checks and balances necessary to promote public confidence in its administration of the disciplinary process. At the same time, judges under scrutiny have been left with very limited avenues to ensure the legality of Council proceedings. The new legislation does little to augment the judicial independence of federally appointed judges whose conduct is under review. They face the prospect of misconduct proceedings carried out by an administrative body that is virtually beyond challenge.

The second aspect of the Bill that is examined concerns the process used to bring about the amendments. According to the governing party, the legislative change was driven by the Council; Bill C-9 was essentially a Council bill. Yet, the questions of who should regulate the judiciary and how are not legal questions. They are political questions because they engage with the balance of power among the judicial, legislative and executive branches. The government's delegation of legislative authority to the Council is concerning; it sets a new high-water mark in the judiciary's political influence, moving beyond the judicialization of politics to the judicialization of governance.

This examination proceeds in four parts. The article begins with a brief discussion of judicialized politics, paying particular attention to judicialization from above, where judicial empowerment is a political choice made by elected officials. In the second part of the article, the role played by the Canadian Judicial

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Council in assessing judicial misconduct is examined. The third part of the article moves on to discuss some of the most notable judicial misconduct cases in which judges challenged the decision making of the Council. The conduct of the Council has been wanting more than once, raising the stakes when it comes to exempting it from judicial review under the *Federal Courts Act*. Part three also includes a sketch of the most salient legal arguments offered by the Council to support its position. Bill C-9 is the focus of the fourth part of the article, which examines the Council's exemption from judicial review and the Bill's impact on judicial independence and accountability for both the Council and judges accused of misconduct. The process used to pursue the legislative changes is also examined here, which saw the government willingly and openly delegating its legislative power over judicial discipline to the Council.

The Judicialization of Politics in Canada

The judicialization of politics refers to an increasing reliance on the judiciary and judicial norms to address questions of public policy and pressing moral and political issues (Hirschl, 2011: 253). In Canada, judicialization is most often connected to the advent of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), which authorizes judges to nullify the choices of democratically elected legislators for rights violations, bringing the judiciary further into the policy-making realm and infusing Canadian politics with a new rights rhetoric (Russell, 1994; Kelly and Manfredi, 2009; Macfarlane, 2013b). While judicialization can take numerous forms, the core claim is that "courts have increasingly become places where substantive policy is made," breaching the distinction between law and politics (Ferejohn, 2002: 41). The extent of judicialization under the *Charter* is considerable; Canada is held out as a "leading exemplar" of the phenomenon (Macfarlane et al., 2023: 178). Courts routinely nullify legislation and offer guidance on how legislative sequels should be crafted. Legislatures, in turn, tend to comply with judicial pronouncements (Hirschl, 2004b; Macfarlane, 2013a).

Early studies of judicialized politics in Canada focused on "judicialization from below" (Hirschl, 2008: 96). In these accounts, the mechanism of judicialization is the interplay between minority social groups that use Charter litigation to seek policy concessions from courts, and a judiciary that is willing to expand its power in the policy realm (Morton and Knopff, 2000; Manfredi, 1997). However, the focus of this article is more aptly captured by the dynamics of "judicialization from above," where "strategic political deference to the judiciary alongside politically astute judicial behavior" drives judicialization (Hirschl, 2008: 97). Policy-making power is not always wrestled away from crestfallen politicians. Judicialization may be the result of a voluntary transfer of policy-making power to judges, where the delegation is most plausibly explained by a belief among political elites that the delegation serves their interests (Hirschl, 2004a: 8). However, identifying intentional delegations of policy-making power to courts is often "hard to positively ascertain" because political power holders are reluctant to disclose the transfer of power to the judiciary (Hirschl, 2008: 108). As discussed below, the transfer of power involving Bill C-9 was much less opaque.

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The Canadian Judicial Council

Judicial regulation is a profoundly political issue, having ramifications for the institutional power and legitimacy of the judicial, legislative and executive branches. In this respect, crafting a judicial discipline regime is a form of statecraft that must protect judicial independence while also ensuring judicial accountability (Devlin and Wildeman, 2021a: 6). The Canadian Judicial Council was established by the *Judges Act* in 1971 and is composed of the Chief Justice of Canada, the chief justices and associate chief justices of Canada's superior courts, and the Chief Justice of the Court Martial Appeal Court (Judges Act, 1985: s. 59 (1)). The Council is responsible for ensuring "the proper conduct" of federally appointed judges (Canadian Judicial Council, n.d.) and may undertake investigations pursuant to the *Judges Act* (1985: s. 60(2)). Prior to Bill C-9, while the Council had the ability to craft its own complaint procedures, it lacked remedial powers and was limited to making recommendations for removal to the Minister of Justice.

Importantly, for the purposes of this discussion, the federal government previously paid the legal fees incurred by judges during the discipline process, including the costs of judicial review proceedings. This practice flows from the constitutional nature of disciplinary proceedings pursuant to s. 99 of the *Constitution Act, 1867*, which stipulates that superior court judges hold office during good behaviour. It also respects judicial independence by bolstering the financial security of judges and ensuring that they are not forced to resign because of the costs associated with mounting a defence against misconduct allegations (Canada Department of Justice, 2016: 40–41). While the hourly rates charged by legal counsel assisting judges are "heavily discounted" in accordance with a Department of Justice tariff, the cost of paying the legal fees of judges increased considerably as more judges pursued judicial review (ibid: 40). Nonetheless, few complaints lodged with the Council have been deemed serious enough to proceed to a full-blown inquiry, and only five judges have been recommended for removal by the Council since 1971. In all cases, the judge resigned before a Parliamentary vote could occur.[1]

Challenging the Council

In its capacity as the administrative body that carries out disciplinary proceedings, the Council has faced legal challenges by judges in both the Federal Court and Federal Court of Appeal pursuant to the *Federal Courts Act*. The statute gives the Federal Courts exclusive and original jurisdiction to engage in the judicial review of federal boards, commissions and tribunals to ensure that decisions and processes comply with the rules of procedural fairness. According to s. 2(1) of the statute, a federal board, commission or tribunal includes "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (Federal Courts Act, 1985).

Justice Michel Girouard

The most infamous use of judicial review against the Council involved Justice Michel Girouard. In 2012, a drug trafficker-turned-informant claimed that the

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judge was a former client who used drugs on a "recurring basis" and had provided legal services in return for cocaine (Canadian Judicial Council, 2015a at para. 5). Additionally, videotape emerged allegedly showing Justice Girouard buying an illegal substance just a few weeks prior to his appointment in 2010. Though a misconduct complaint was pursued against Justice Girouard, the Council did not recommend the judge's removal because the videotape did not adequately establish the purchase of an illicit substance. This was communicated to the Minister of Justice by the Council in April 2016, some three years after the initial complaint was filed (*Girouard* v. *Canada,* 2018 at paras. 10–12). However, the *Girouard* saga did not end there. A majority of the Inquiry Committee that investigated the drug allegations concluded that the judge "deliberately attempted to mislead the Committee by concealing the truth" (Canadian Judicial Council, 2015b at para. 227; 239). Accordingly, in June 2016, a second complaint was filed against the judge. The second inquiry lasted more than 20 months and culminated in a Council recommendation for removal to the Minister of Justice in February 2018 (*Girouard* v. *Canada,* 2018 at paras. 16–17).

During the two complaints, Justice Girouard commenced 24 applications for judicial review (*Girouard* v. *Canada,* 2018 at para. 18). In the course of those proceedings, the Council advanced the claim that it was exempt from judicial review under the *Federal Courts Act*. This was not the first time the Council had made the claim, having previously challenged the jurisdiction of the Federal Court in proceedings commenced by Associate Chief Justice Lori Douglas. Justice Douglas faced allegations of misconduct when salacious pictures of her surfaced on the internet, which she claimed were posted without her knowledge or consent. She sought judicial review in relation to the process used in those proceedings, and in 2014, the Federal Court determined that it had jurisdiction to review the Council's proceedings (*Douglas* v. *Canada*, 2014).

Despite this finding, the Council again challenged the Federal Court's jurisdiction in the *Girouard* proceedings. First, the Council argued that it enjoyed the status of a superior court by virtue of s. 63(4) of the *Judges Act* (1985), which provided that when undertaking an inquiry or investigation, the CJC or an Inquiry Committee "shall be deemed to be a superior court." The Council argued that this deeming provision transformed it into a superior court, exempting the Council from the Federal Court's jurisdiction over boards, commissions and tribunals (*Girouard* v. *Canada,* 2018 at para. 26). This assertion was rejected by both the Federal Court and the Federal Court of Appeal, which concluded that s. 63(4) did not make the Council or its inquiry committees a court. It simply granted the powers of a superior court for the purpose of undertaking investigations and to offer immunity from prosecution to investigating judges (*Girouard* v. *Canada*, 2018 at para. 142; *Canada* v. *Girouard*, 2019 at para. 27).

Second, the Council contended that its authority over judicial conduct is not statute based but constitutional in nature, a claim characterized by the Federal Court as a "rather peculiar argument" (*Girouard* v. *Canada*, 2018 at para. 5). Despite being the statutory creation of the *Judges Act*, the Council argued that its jurisdiction over judicial discipline is grounded in the separation of powers and constitutionalized by s. 99 of the *Constitution Act, 1867*, which provides that "the judges of the superior courts shall hold office during good behaviour, but shall

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be removable by the Governor General on address of the Senate and House of Commons" (Canadian Judicial Council, 2018 at para. 26). The Council reasoned that because its powers are constitutional in nature, rather than statutory, it is not subject to the *Federal Courts Act* as a board, commission or tribunal whose powers have been conferred on it by an Act of Parliament pursuant to s. 2(1) (*Canada* v. *Girouard*, 2019 at paras. 38). This argument was also dismissed by both courts, which found that the only source of the Council's jurisdiction is the *Judges Act*. As the Federal Court of Appeal succinctly put it: "Had the Act not been adopted by Parliament the Council simply would not exist" (ibid at para. 40).

Third, the Council argued that subjecting its decisions to judicial review negatively impacts judicial independence. The claim here was that the judicial independence of Council members is undermined by judicial review because they hold a different status than members of other administrative tribunals. Members of the Council are judges who "play a constitutional role as protectors of the rule of law," a role they continue to play in the realm of judicial discipline (Canadian Judicial Council, 2018 at para. 93). The Council also contended that the ability to pursue judicial review of Council proceedings "adds nothing to security of tenure" for judges facing misconduct allegations (ibid at para. 102). Instead, the Council claimed that "removal by Parliament constitutes the highest possible form of protection of judicial independence" because it enhances security of tenure (ibid).

The Federal Court of Appeal rejected these arguments, finding that the judicial independence of Council members is not at stake in judicial review proceedings because they do not act in a judicial capacity but as administrative decision makers exercising ordinary statutory powers (*Canada* v. *Girouard*, 2019 at para. 99). It further found that the judicial independence of judges facing misconduct allegations is enhanced by judicial review because it ensures that Council proceedings respect the rule of law and hold the Council accountable in its exercise of public power (ibid at paras. 102–103). Moreover, in the absence of recourse to the Federal Courts, how would allegations of procedural injustice be resolved? Having the Minister of Justice or Parliament review allegations of irregularities in the process used by the Council would surely undermine the separation of powers and, consequently, judicial independence (ibid at para. 101).

Finally, the Council argued that judicial review undermines the efficiency of the disciplinary process by creating undue delays (ibid at paras. 85–87). This claim was also rejected by the Federal Court of Appeal; efficiency concerns could not trump the need for procedural fairness in the disciplinary process (*Canada* v. *Girouard*, 2019 at paras. 105). Interestingly, while the efficiency issue was pressed by the Council before the Federal Court of Appeal, it was the Federal Court that commented rather expansively on the Council's own lack of efficiency in handling Justice Girouard's misconduct complaints, noting that the Council had spent close to five years investigating the judge and that those investigations had not been impacted by the judge's applications for judicial review (*Girouard* v. *Canada*, 2018 at paras. 12–18). This timeline did not accord with the obligations of the Council "as an institution responsible for promoting efficiency, consistency and accountability in Canada's superior courts" (ibid at para. 19).

The potential ramifications of the Council's efforts to escape the reach of the *Federal Courts Act* were also the subject of judicial commentary. Placing CJC decisions

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beyond review would leave the Council accountable only to the Council—as judge, jury and executioner—in matters that carry the potential for profound professional and personal ramifications (ibid at para. 5). As noted by both courts, the Council itself has recognized the tremendous gravity of a recommendation for removal, stating in a 2014 report that when the Council finds a judge has become incapacitated or disabled from the due execution of their office, it constitutes capital punishment for the judge's career (*Girouard* v. *Canada*, 2018 at para. 166; *Canada* v. *Girouard*, 2019 at para. 105). The idea that the CJC should operate without external judicial oversight was simply untenable. It amounted to an exercise of "absolute power" that is antithetical to the principles of democracy and the need for all public power to be exercised in accordance with the law (*Girouard* v. *Canada*, 2018 at para. 6).

In addition to waging battles in the courtroom, the CJC pleaded its case in the court of public opinion. Former Executive Director of the Council, Norman Sabourin, offered public statements about the matter in *The Lawyer's Daily*, criticizing the Minister of Justice for failing to pursue Justice Girouard's removal. The article's title suggested that taxpayers were footing "massive litigation costs" because of the Minister's inaction (Schmitz, 2018). No mention was made of the five years taken by the Council to investigate Justice Girouard. The first article was followed by another, in which Chief Justice Wagner also criticized the Minister of Justice for failing to address the Council's recommendation to remove Justice Girouard. The articles did not escape the attention of the Federal Court. Their timing and pointed criticism led the Federal Court to question "whether the CJC was pressuring the minister to proceed with Justice Girouard's removal without regard for the judicial proceedings that are legitimately before this Court" (*Girouard* v. *Canada*, 2018 at para. 180).

On the heels of its loss in the Federal Court of Appeal, the Council announced that it would seek leave to appeal the *Girouard* decision to the Supreme Court of Canada to settle the issue of Federal Court jurisdiction. The Council cited the constitutional nature of the issue, its national importance and its relationship to judicial independence. The press release concluded with a statement calling for legislative reform in the area of judicial discipline to provide a transparent process whose "ultimate goal" was to "foster ongoing public confidence in the judiciary" (Canadian Judicial Council, 2019). Despite the Council's public proclamation about the constitutional significance of its appeal, the Supreme Court refused leave on December 12, 2019 (*Canadian Judicial Council* v. *Girouard, et al.*).

Justice Patrick Smith

In the midst of the *Girouard* proceedings, the Council pressed the issue of judicial review in another notable misconduct case involving Justice Patrick Smith. In April 2018, Justice Smith received an urgent request from Lakehead University to serve as the Interim Dean of the Faculty of Law, replacing Angelique EagleWoman, who had resigned earlier in the year amid allegations of institutional racism (*Smith* v. *Canada*, 2020 at para. 12). On April 30, Justice Smith received the approval of his Chief Justice and the Minister of Justice to serve a six-month term as Dean, under specific conditions (ibid at paras. 14–17). On May 9, Norman Sabourin wrote to Justice Smith and his Chief Justice, stating that Justice Smith's decision to serve as interim Dean was under review.

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To be clear, no complaint had been lodged against the judge. Instead, Mr. Sabourin relied on the Council's rules of procedure that allowed him to review matters regarding the behaviour of superior court judges in his role as Executive Director (ibid at para. 20). Of particular concern was the fact that Indigenous leaders were calling for Angelique EagleWoman to be replaced by an Indigenous person and for her allegations to be fully investigated (ibid at para. 21). The Chief Justice replied immediately, explaining that Justice Smith had her permission as well as the permission of the Minister of Justice, and that conditions had been put in place to ensure that "the appointment would attract no remuneration, that Justice Smith's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation" (ibid at para. 23). In response, Mr. Sabourin referred the matter to the Vice-Chair of the Council's Judicial Conduct Committee, Justice Robert Pidgeon, who referred the issue to a Review Panel.

Justice Smith then resigned from the law school and requested a reconsideration of the decision to constitute a Review Panel. When that request was rejected, Justice Smith commenced an application for judicial review and asked for a stay of the Review Panel's proceedings. The Attorney General of Canada also requested that the Review Panel suspend its activities pending the outcome of the stay application (ibid at para. 47). Showing its disregard for the idea that its decisions could be reviewed by the Federal Court, the Review Panel issued a decision before Justice Smith's stay application could be heard. It concluded that the judge had breached an ethical obligation by inserting himself into a public controversy surrounding the law school and using his prestige to bolster the faculty's reputation. However, as his conduct was not sufficiently serious to warrant removal, no further action would be taken (ibid at para. 48).

In Justice Smith's proceedings before the Federal Court, both the Canadian Superior Courts Judges Association and the Ontario Superior Court Judges' Association intervened in support of Justice Smith. The proceedings ended with the Federal Court offering a scathing review of the Council, suggesting that the Review Panel had engaged in "reverse engineering," interpreting relevant statutes in untenable ways to achieve a desired outcome (ibid at para. 77). With respect to the charge that Justice Smith had wrongly involved himself in a public controversy, the Federal Court found that the real controversy was the behaviour of the Council, which had been soundly criticized by judges, lawyers and members of the public for its treatment of Justice Smith (ibid at para. 127). The decision of Norman Sabourin to review the matter was also the subject of judicial commentary. Given that the removal of Justice Smith would require the participation of the Minister of Justice, who had approved Justice Smith's request to serve as interim Dean, what chance would there be of removal (ibid at paras. 156–58)? The Federal Court concluded that the Council's pursuit of Justice Smith was a misuse of its disciplinary powers and an abuse of process (ibid at para. 170).

The Trouble with Council Immunity from Judicial Review

Despite being a statutory entity exercising public power conferred by Parliament, the Council defiantly rejected the jurisdiction of the Federal Court to review its decision making. In advancing this position, the CJC showed little concern for

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the possibility that its accountability as an administrative body might impact public confidence in the judiciary or the disciplinary process. It also failed to grapple with its own fallibility despite high-profile cases in which its behaviour was wanting. Instead, it proceeded as though its decision making could never be tainted by procedural inequities, let alone racism or sexism. This was a bold position to take given that the CJC had been admonished by many members of the legal community for the sexism that informed the Douglas inquiry, with former Supreme Court Justice John Major characterizing the Council's handling of the complaint as "puritanical" (Kauth, 2016). Arguing that the Council should simply be beyond review was a rather startling stance to take given the tarnish left on the Council by the *Douglas* and *Smith* proceedings and the role the Council is expected to play in enhancing public confidence in the judiciary.

At the same time, the legal argumentation offered by the Council, including its claim that a body created by statute some 50 years ago is a constitutional entity, was certainly strained. Arguing that a judge's removal by Parliament is the "highest possible form of protection of judicial independence" was similarly curious, especially given the Council's insistence that its jurisdiction over discipline is a constitutional power that inheres in the judicial independence that the separation of powers ensures. Parliamentary approval contributes to security of tenure in so far as it constitutes part of the process to remove a judge—at least in theory. However, it remains unclear how judicial independence is threatened by the prospect of judicial review yet strengthened by Parliament's power to remove a judge or reject the Council's recommendations respecting removal. The precise way in which the process enhances judicial independence, which is predicated on insulating the judiciary from the power of the executive and legislative branches, is not obvious.

Nor did the Council's position succeed in differentiating between its own independence and the independence of the individual judges the Council regulates. There was no acknowledgement of the fact that enhancing the independence of the first does not necessarily enhance the independence of the second (Hausegger et al., 2015: 176). In the absence of an external mechanism for judicial review, there is no avenue to ensure that Council proceedings respect the rights of judges and no way to assure the Minister of Justice and Parliament that their own assessments of judicial misconduct cases are founded on Council reports generated by processes that accord with the law.

Bill C-9

As important as the Council's efforts to escape the authority of the Federal Court is the legitimacy crisis to which these cases contributed. The *Douglas, Girouard* and *Smith* proceedings saw the legitimacy of the Council and its disciplinary procedures challenged not only by individual judges who were being investigated but by associations representing superior court judges and even the Attorney General. Legal scholars Richard Devlin and Sheila Wildeman connect these high-profile cases to a broader decline in public confidence in the judicial discipline regime (2021b: 71). During this same period, shockwaves were sent through the Canadian public about sexism in the judiciary when a complaint was brought against Justice Robin Camp in 2015. Justice Camp infamously asked a young Indigenous sexual

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assault complainant why she could not have kept her knees together to prevent penetration (Dick 2020: 133–34).

In the wake of these cases, there was a sharp rise in the number of complaints made to the Council. While fewer than 200 complaints were filed annually between 2010 and 2014, in the next three years, the number of complaints rose to 281, 351 and 359 (Devlin and Wildeman, 2021b: 71). Moreover, according to a 2020 report released by the Council, 649 complaints were lodged between April 2019 to March 2020 (Canadian Judicial Council, 2020: 1). In tandem with these developments, the Council started to review its discipline procedures, issuing a background paper in 2014, making some changes to its by-laws in 2015 and suggesting additional reforms in 2016 that would require amendments to the *Judges Act* (Devlin and Wildeman, 2021b: 75–76).

As government officials turned their minds to the creation of a new judicial discipline framework, the legislative realm emerged as another institutional venue where the Council could push its agenda, one that might yield more favourable results (Baumgartner and Jones, 1991: 1045). The Council had the benefit of being an insider that had been administering the judicial discipline regime since its creation. It also had the advantage of working within a legislative realm whose members were already well accustomed to the judicial oversight of public policy. Here, it is useful to consider how judicialization affects relationships among the judiciary, other political institutions and the political strategies of specific interests (Mayrl, 2018: 518). Under the conditions of judicialization, it might be prudent for a minority social group lacking widespread public support to ask a court to wield its policy-making power at a government's expense. However, the Council's litigation strategy impacted judicial power dynamics in a very different way. The Federal Courts had been asked to elevate the CJC's standing at the expense of their own jurisdiction, an invitation that was declined without hesitation and with some indignation.

While the status of Council members as judicial elites won the CJC no favour among Federal Court judges, the judicialized legislative realm offered an institutional venue that was less hostile to the Council's objectives. The zero-sum power struggle over Federal Court jurisdiction could be by-passed in the legislative realm where political decision makers would consider Council proposals (Pralle, 2003). Additionally, the Council had previously succeeded in pushing for changes to a bill regulating judicial education, arguing that Parliament had no constitutional right to direct judicial training and that attempting to do so constituted an affront to judicial independence (Cairns-Way and Martinson, 2019: 391–93). Pushing back on legislators using the discourse of judicial independence had already proved an effective Council strategy in the legislative realm.

The Design of Bill C-9

On December 16, 2021, Minister of Justice David Lametti introduced Bill C-9, *An Act to amend the Judges Act*, which received Royal Assent on June 22, 2023. The new legislation ushers in significant changes to the structure of judicial discipline. It confers power on the Council to impose a range of sanctions short of removal and provides for the presence of lay persons at certain stages of the discipline

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process. However, one aspect of the Bill is particularly noteworthy: Bill C-9 removes access to judicial review in the Federal Courts. The new legislation creates four Council panels to review complaints, including internal appeal panels (ibid: ss. 89–130). Importantly, in the re-vamped structure of judicial misconduct procedures, there is only one avenue for external legal review. Section 137 of the Bill allows a judge to seek leave to appeal the decision of the Council's Appeal Panel to the Supreme Court of Canada. This provision is intended to foreclose applications for judicial review to the Federal Court and Federal Court of Appeal, giving the Council legislatively what it was unable to achieve from the courts—immunity from Federal Court review—a concerning development given the past conduct of the Council and the broader issue of its institutional accountability as an administrative body.

Committee proceedings before the House and Senate marked the landscape of the debate about the Bill and s. 137 in particular. While the prevailing discourse surrounding the need for the Bill was enhancing public confidence in the administration of justice, the government, the Council and the Office of the Commissioner for Federal Judicial Affairs seemed rather singularly focused on the efficiency of the complaints system, emphasizing cost and timelines when justifying s. 137. The case of Justice Girouard also played a central role in defending the provision. Not only had his applications for judicial review been paid for with public monies, but he resigned from the bench with a full pension. Critics, including Justice Minister David Lametti, attributed this to the judge's persistent use of judicial review to extend the clock, without reference to the five years taken by the Council to investigate the judge (House Standing Committee on Justice and Human Rights, 2022a). Nor did supporters of the Bill question whether public confidence hinges primarily on efficiency. Appearing on behalf of the Canadian Association for Legal Ethics before both the House of Commons Standing Committee on Justice and Human Rights (JUST) and the Senate Standing Committee on Legal and Constitutional Affairs (LCJC), Professor Richard Devlin spoke to the range of factors that promote public confidence in the judiciary. While independence and accountability are key factors in the design of a complaints process, numerous other values also must be considered of which efficiency is just one.[2]

Section 137 and the lack of access to judicial review via the Federal Courts was criticized by numerous witnesses in Committee proceedings. In its written submission to LCJC, the Canadian Bar Association (CBA) criticized the provision and supported the addition of an appeal to the Federal Court of Appeal, by right, to challenge final decisions of the Council before seeking leave to appeal to the Supreme Court. The CBA reasoned that the addition was necessary because of the difficulty in obtaining leave to appeal to the Supreme Court, which only grants leave to cases of public importance as per s. 40(1) of the *Supreme Court Act* (1985). Notably, between 2015 and 2020, only 8.3% of applications for leave to appeal were granted (The Advocates' Society, 2022: 5). In 2022, only 6.8% of applications for leave to appeal were granted (Supreme Court of Canada, 2023: 31). On this basis, the CBA argued that where the Council is in error, a judge might be unable to obtain relief because the threshold for leave is so high (2023: 3).

In response to this argument, Patrick Xavier, Senior Counsel for the Department of Justice, argued that judicial misconduct cases would not proceed to the Supreme

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Court via s. 40(1). Instead, they would proceed under s. 41, which provides the Supreme Court with jurisdiction "as provided in any other Act conferring jurisdiction" and contains no language limiting leave to issues of public importance (*Supreme Court Act*, 1985). Though Mr. Xavier opined that the Supreme Court might be more generous in granting leave with respect to its new jurisdiction under Bill C-9, he conceded that there was no guarantee it would be so inclined (Senate, Standing Committee on Legal and Constitutional Affairs, 2023).

While Mr. Xavier's commentary on s. 41 is noteworthy, it did little to address the legislation's failure to provide an appeal *by right* to an external judicial body. Nor did it speak to other challenges that come with ousting judicial review by the Federal Courts. The Supreme Court has made clear that its purpose is not to correct errors of the courts below; its focus is the development of legal doctrine (The Advocates' Society, 2022: 4). Additionally, the Bill does not seem to account for the possibility that a Supreme Court justice might face misconduct allegations, a pertinent question given the complaint made against Supreme Court Justice Russell Brown in January 2023 (Canadian Judicial Council, 2023). If the Court was ineligible to hear an appeal brought by one of its members, what right of appeal would a Supreme Court justice have?

The CBA also focused on enhancing public confidence in the discipline process. Adding an appeal to an external judicial authority by right would comply with the importance of open courts by offering transparency to the Council's disciplinary processes (2023: 3). It argued that as a critical component of Canada's system of democracy, the Council must be both "accountable to and accepted by the public" in order to build and retain confidence in the integrity of the Council's disciplinary proceedings (ibid: 5). Finally, and importantly, the CBA addressed the Council's fallibility, stating that "Just as no court is perfect, no disciplinary system or adjudicator is beyond error. . . . Despite the CJC's care in making a decision and recognizing that its hearing members are highly qualified experts, it cannot be assumed that it will come to the correct result every time or that there will never be a procedural error" (ibid).

The position advanced by the CBA was echoed by other witnesses, including the Advocates' Society, a national association of litigation counsel. While acknowledging the government's concern for efficiency and the delays that judicial review can create, it argued that eliminating access to the Federal Court overcorrected the issue and could create "substantial unfairness" (2022: 1). Like the CBA, the Advocates' Society suggested that final decisions of the Council be subject to judicial review by the Federal Court of Appeal, by right. Otherwise, the CJC would be left virtually unaccountable. In the words of the Advocates' Society, "Bill C-9 creates a scheme in which the CJC is the investigator, the decision-maker, and the appellate authority with respect to allegations of judicial misconduct. . . . As a result, the CJC's administrative process and decisions are rendered practically immune from external review" (ibid: 2). Allowing final decisions of the CJC to be reviewed by the Federal Court of Appeal would streamline the complaints process to address efficiency concerns, while also providing necessary judicial oversight of the Council as an administrative decision maker. The latter would bolster public confidence in the administration of justice and enhance judicial independence by providing a fair process for the removal of judges (ibid: 6).

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The Trouble with Bill C-9

Throughout the proceedings before JUST and LCJC, public confidence in the judiciary was held out as central to the reform of the *Judges Act*. And, certainly, the inclusion of lay persons in discipline proceedings, though limited, is a step forward in improving transparency.[3] However, efficiency alone, prompted by a desire to prevent another case like *Girouard*, guided the creation of s. 137. Where public confidence in the discipline system was raised, the common refrain was that it was the length and cost of judicial review proceedings that undermined public confidence in the judicial discipline framework (Mr. Anandasangaree, House of Commons Debates, 2022). Yet, as already noted, Justice Girouard's applications for judicial review were not the only factor in the drawn-out proceedings concerning the judge. At the same time, Justice Smith, as well as Justice Douglas, had pressing concerns about the behaviour of the Council, necessitating judicial review to challenge the fairness of the proceedings. In both cases, the Council acted badly, while at the same time trying to escape review of its conduct. Bill C-9 now effectively places the Council beyond judicial oversight in the name of efficiency, offering only the hollow promise of a right to seek leave to appeal to the Supreme Court of Canada in a context where more than 90% of all leave applications fail. The irony of the structure of Bill C-9 is evident. If the Council failed to secure leave to appeal to the Supreme Court in *Girouard*, despite insisting that its reviewability is an issue of national importance, what are the chances of a lone judge in a misconduct case being granted leave?

At the same time, Bill C-9 falters in failing to ensure the Council's institutional accountability. In expressing the need to protect judicial independence, Gary Anandasangaree, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, stated that "allowing the judiciary to regulate the conduct of their own members in this manner is entirely appropriate. It rightly safeguards the courts against interference by the political branches, ensuring that judges can protect the Constitution and the rights of Canadians without fear of reprisal" (House of Commons Debates, 2022). While protecting the judiciary against political interference is a valid concern, what Bill C-9 enacts is not immunity of the judiciary from political interference but immunity of the *Council* from virtually all review. In this respect, the Bill fails to provide the external oversight that must apply to an administrative tribunal exercising powers delegated by Parliament.

There is one final point to make about Bill C-9. In *Douglas*, *Girouard* and *Smith*, the Federal Courts firmly asserted their jurisdiction to review the legality of the Council's decisions. What is less clear is the ability of Bill C-9 to oust the jurisdiction of the Federal Courts. The government made clear that the Bill does not transform the Council or its panels into courts of law; the CJC remains an administrative decision maker (Senate Debates, 2023b). Without amending the *Federal Courts Act* to declare the Council exempt from its operation, Bill C-9 creates a strange state of affairs. The Bill does not provide for judicial review by the Federal Courts, but does it do anything to prevent it? Is there anything stopping a judge from applying for judicial review, whether on an interlocutory basis or to challenge a final decision of the Council?

Marc Giroux, Commissioner for Federal Judicial Affairs, seems to have confirmed that the Bill does not preclude judicial review by the Federal Courts.

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Appearing before JUST, Giroux commented on s. 146(2) of the Bill, which specifies that lawyers' fees for appeals to the Supreme Court will be covered but that the fees of lawyers representing judges in judicial review proceedings will not be paid (House Standing Committee on Justice and Human Rights, 2022b). Professor Richard Devlin was of the same view, stating that the provision implicitly acknowledges that judicial review could still occur under the new process and that "maybe, given the Federal Court of Appeal's decisions in recent years, it's saying that the Canadian Judicial Council cannot exclude judicial review" (House Standing Committee on Justice and Human Rights, 2022b).

Yet if judicial review is not precluded by the Bill, the choice to limit the external review of Council decisions to the Supreme Court of Canada makes little sense. If the government and the Council are hoping that judges buy into the new process and refrain from bringing applications for judicial review, it is imperative that the new process provide a real avenue to review Council decisions, which a right to seek leave to appeal to the Supreme Court simply does not satisfy. In the absence of a reliable review mechanism to hold the Council accountable, judges whose careers and reputations hang in the balance will inevitably seek judicial review, even if they must pay for legal proceedings themselves. The proposal to allow judges to appeal final decisions of the Council to the Federal Court of Appeal would go at least some way towards dissuading judges from commencing judicial review applications on an interlocutory basis or before both the Federal Court and Federal Court of Appeal. Thus, from an efficiency perspective, refusing any appeal as of right will surely encourage, if not necessitate, legal proceedings in the Federal Courts. Efficiency would likely be better served by including an intermediate, external right of appeal and doing more to move complaints through the Council in a timely manner.

Thus, while there are some laudable aspects to Bill C-9, the structure available to review the Council is not among them. The provision has been criticized by academics, the CBA and the Advocates' Society. Additionally, according to discussions in LCJC, while the Bill was presented by the government as a compromise between the Council and the Canadian Superior Courts Judges Association, the latter communicated to LCJC that it had withdrawn its support of the Bill, favouring the inclusion of a pathway to review decisions of the Council by right (Senator Dupuis, Senate Standing Committee on Legal and Constitutional Affairs, 2023). Although the Senate ultimately proposed an amendment allowing final Council decisions to be appealed to the Federal Court of Appeal, the government resisted the change.

The Move to Judicialized Governance

While the immunity granted to the Council by the Bill is troubling, so too is its genesis. At third reading in the Senate, the Bill's sponsor, Senator Pierre Dalphond, offered a rather startling statement: that legislating in the area of judicial misconduct was a matter for the judiciary. The Bill was not a government initiative, but an initiative of the Council, and rightfully so; it was the only acceptable way for the misconduct process in the *Judges Act* to be amended. Senator Dalphond's own words are instructive here:

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> Because the conduct review process is a matter to be left to the judiciary and not to the executive or Parliament, any legislative proposal to amend the current system must, in practice, respond to a request from the judiciary. This is what makes Bill C-9 different from other bills initiated by the government. Generally, a bill is a way for a government to put in place a new policy that it considers is in the best interests of Canadians, and the government can design it as it wishes, as long as it respects the Canadian Charter of Rights and Freedoms and the division of powers under the Constitution. (Senate Debates, 2023a)

Here, however, the Bill was "the result of extensive consultations initiated by the Canadian Judicial Council," as "the body at the very heart of the judicial conduct process" (ibid). After consultation with stakeholders and judges, the Department of Justice was asked to craft a bill that accorded with the consensus.

Senator Dalphond went on to explain how the origins of the Bill affected the process used to study it in committee. When members of the LCJC wanted the Minister of Justice to return and take questions about the Bill, Senator Dalphond instead asked the Council to return, arguing that the special nature of the Bill, its origins and the need to protect both judicial independence and the administrative independence of the Council warranted a different approach to Bill C-9. In his words, "In this context, it was understandable that the members of the committee had questions and were looking for clarification. That is why, rather than contact the minister, I contacted the Canadian Judicial Council to see whether they would agree to come back and appear before the committee again" (ibid.).

The position expressed by Senator Dalphond points to a high-water mark in judicialized politics in Canada. It represents the deepening of a well-established process through which judicial influence is exerted over public policy. However, the form of judicialization seen with Bill C-9 is of a different order. Charter litigation entails the aggrandizement of judicial power in the political realm as courts balance Charter rights against policy objectives and then issue decisions that constrain the policy options available to legislators. Deference to the judiciary has become the standard in Canada because where governments do chart their own legislative course in response to a judicial decision, they are often compelled to adopt the judiciary's position through subsequent litigation (Macfarlane et al., 2023: 178).

In comparison, the approach to Bill C-9 is more akin to a judicialization of governance, a state of affairs in which a government abdicates its responsibility to legislate and directly delegates that power to judicial elites. This form of judicialization from above will certainly be harder to track where it is undertaken discreetly. But for the commentary of Senator Dalphond, the process used in crafting Bill C-9 may not have come to light. At the same time, the ease with which the legislative initiative was characterized as a judicial matter, rather than a political question, should give us pause. The story of Bill C-9 illustrates both how instances of judicialized governance have the potential to fly under the public radar and how readily government actors may defend delegations of power to judicial elites on the ground that matters involving the judiciary are above politics.[4]

This is not to suggest that judicial elites sat idly by while the government declined to exercise its policy-making power over judicial discipline; the Council

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doggedly pursued enhanced control over the disciplinary process first through litigation and then through political channels. In the courts, it sought an exemption from Federal Court review. In the legislative realm, the Council did not merely secure the exemption it desired from legislators; it spearheaded the legislative initiative itself. There is no question that the Council's desire to function as the preeminent policy-making body for all things judicial was a driving force in crafting Bill C-9. Nonetheless, the Council's ascent as the leading voice in matters of judicial discipline was also a political choice made by Parliament, not a legal imperative that Parliament was obligated to respect.

Of course, the delegation of policy-making power to the Council is also troubling from a democratic standpoint. Determining the best way to structure a judicial discipline regime is not a legal question; it is an exercise in statecraft. It is an inherently political question that should be decided in the political realm through deliberation. The federal government's legislative deference to the Council not only furthered judicial policy making, it expanded the influence and authority of judicial elites by delegating the power to govern in an unprecedented way. The result is a bill that serves the Council's interests, with little support from the legal, judicial and academic communities.

The remaining query is why the government chose to delegate its authority over judicial discipline to the CJC. The Council's motives are easier to discern. While it made claims about its constitutional authority over judicial discipline, the truth is that the Council had suffered public embarrassment as its missteps were documented in judicial review proceedings. Additionally, it simply did not accept that "a mere Federal Court judge" could review the work of a judicial council composed of chief justices (*Girouard* v. *Canada,* 2018 at para. 98). The government's interest in ceding power to the Council is harder to identify. As Ran Hirschl argues, "incentives are abstract and hard to pinpoint. Paper trails are virtually nonexistent; few political power holders would publicly confess to strategic calculations in their support of such noble ventures as . . . judicial independence, let alone willful deference to the judiciary" (2008: 108). With that said, there are reasons that may have prompted the government to accede to the Council's request.

Given the increasing number of complaints against federally appointed judges, public and scholarly discontent about the failure to remove badly behaved judges and the persistent link between judicial misconduct and issues of gender, Indigeneity and racialization, keeping the discipline process firmly in the grasp of the Council permits the government to avoid blame when individual judges are not held accountable as the public would wish. Deferring to the Council also allows the government to avoid the charge that it is threatening the independence of an institution that is simply more respected than Parliament (Statistics Canada, 2023: 1). Additionally, the Council's disciplinary framework has its benefits. It promises to shorten the timeline for misconduct proceedings, aiding the public purse and helping to keep disputes involving aggrieved judges inside the Council.

At the same time, the decision to delegate policy-making power to judicial elites must be placed within the context of a deepening judicialization of political life and the ascending power of the Council. Parliament had previously capitulated to the Council on the issue of judicial education, despite unanimous support for more democratic oversight in the House. Rather than clawing back a judicial discipline

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initiative in the face of Council resistance, delegating responsibility to design a new disciplinary process may have been seen as the more efficient path forward with the least risk to government (Voigt and Salzberger, 2002: 294–97). Perhaps the real question is this: beyond championing lofty democratic principles that are routinely charged with threatening judicial independence, what benefit would be derived from choosing to fight the Council's judicial elites? Having explicitly rejected the Council's claim that its powers are constitutional in nature, a reversal in policy at some future time was not ruled out, though one would expect the Council to resist any such change.

Concluding Thoughts

The Canadian Judicial Council has played a central role in regulating judicial misconduct since its creation and there are good reasons for this. Judicial independence requires that judges be insulated from the legislative and executive branches so that they may uphold the rule of law and dispense their duties without fear or favour. However, judicial independence must be tempered by accountability, something that is sorely lacking in Bill C-9's treatment of the Council. Though the government acknowledges that Council hearing panels are not courts and that the Council is an administrative decision maker, it has all but exempted the Council from external judicial oversight. The Bill has placed the Council in a league of its own, offering it unparalleled power among administrative bodies in Canada and leaving it to judge the fairness of its own procedures and outcomes. The judges will judge the judges and the Council will judge the Council.

It is also critical to distinguish between the Council as an administrative body and the judges that the Council regulates. While the independence of the Council is strengthened tremendously by the Bill, the same cannot be said about the independence of federally appointed judges facing discipline. Limiting external appeal rights to leave to appeal to the Supreme Court does little to enhance individual judicial independence, nor does refusing to cover the legal fees of judges who engage in judicial review when there is no other way to have the legality of Council proceedings tested in a court of law. The constitutional nature of removal proceedings would seem to require more robust support for judges facing removal and better protection of their right to a process that accords with the law. This is not to deny that there will be judges who misuse legal proceedings to fight removal, but there will also be judges who rightly require access to an independent arbiter to review the Council's disciplinary process. It is worth considering who the latter judges are likely to be. The Council faced charges of sexism in the handling of the complaint against Justice Douglas. Will the judges needing recourse to external review be disproportionately drawn from the ranks of female, Indigenous, racialized minority and LGBTQIA+ judges?

Just as notable as the content of the Bill is the process used for the legislative initiative. While judicial empowerment in the policy realm is nothing new, Bill C-9 stands out as an exceptional instance of judicialization. Rather than being advanced through legal decision making in the courtroom, the judicialization exemplified by Bill C-9 proceeded by empowering the Canadian Judicial Council in the legislative realm with the full co-operation of the government. The "explosive

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formula" of power-seeking judicial elites and deferential elected officials has pushed judicialization beyond its previous limits (Hirschl, 2008: 97). The Bill represents a new high-water mark in judicialization, moving past judicialized politics towards a judicialization of governance in which political responsibility for crafting legislative initiatives regulating the judiciary is openly delegated to judicial elites.

Competing interests. The author declares none.

Notes

1 The five judges who were recommended for removal are Justices Jean Bienvenue, Paul Cosgrove, Robin Camp, Michel Girouard and Gérard Dugré. There are also a small number of cases in which the judge resigned at an earlier stage in the misconduct proceedings.
2 Professor Devlin cited impartiality, fairness, transparency, representativeness, proportionality, reasoned justification, and efficiency (House Standing Committee on Justice and Human Rights, 2022b).
3 Lay people, who are appointed by the Council, participate on only two of four panels. While the Senate proposed an amendment to include lay people on all panels, the amendment failed.
4 The author thanks the journal's anonymous reviewer for this important insight.

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