Crown Attorneys, The Attorney General, and Judicial Discipline: A Comment on *Lauzon v Ontario (Justices of the Peace Review Council)*

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ABSTRACT

Should the consequences for judicial misconduct be different depending solely on the identity of the person who makes a complaint? In a surprising decision, the Ontario Court of Appeal in *Lauzon v Ontario (Justices of the Peace Review Council)* holds that dispositions downstream from complaints by Crown attorneys (or any other member of the executive branch of government) should be lower than other dispositions because the vindication of such complaints is inherently dangerous to judicial independence and the separation of powers. In this comment, I look closely at the reasoning in *Lauzon* and respectfully suggest that that reasoning is problematic. In particular, I note that judicial councils operate independently and that Crown attorneys are subject to high standards as identified both by courts and by law societies as their professional regulators. I also suggest that the identification of this novel proposition was unnecessary to decide the appeal.

Key words: Crown attorneys, Attorney General, Justices of the Peace, Judicial Discipline

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I. INTRODUCTION

The importance of judicial independence in a free and democratic society is uncontroversial. To put it concisely, "[t]he overarching worry, rooted in the constitutional separation of powers, is that the executive or legislative branches could intervene to push judges towards their preferred outcomes".[1] At the same time, judicial immunity to accountability is not absolute and cannot be absolute.[2] Many of the lawyers who appear in front of judicial officers are Crown attorneys or represent the government. These lawyers may sometimes have concerns about the conduct of these judicial officers and decide to make a complaint to the relevant judicial council. But these lawyers are unavoidably part of the executive branch of government. How then should the ability of those lawyers, or other members of the executive, to make legitimate complaints about members of the judiciary be reconciled with the constitutional principle of judicial independence from the executive? In other words, should complaints made by members of the executive branch of

1 *Lauzon v Ontario (Justices of the Peace Review Council), 2023* ONCA 425 at para 35, Lauwers JA for the panel [*Lauzon*], rev'g 2021 ONSC 6174 (Div Ct) *[Lauzon* (Div Ct)], leave to appeal to SCC denied, 40900 (9 May 2024), rev'g in part *In the Matter of a Hearing Under Section 11.1 of the Justices of the Peace Act, RSO 1990, c J.4, as amended, Concerning Three Complaints about the Conduct of Justice of the Peace Julie Lauzon, Reasons for Decision* (7 May 2020, Justice of the Peace Review Council, Toronto, Ontario) [*Lauzon JPRC (Merits)*] and *Reasons for Decision on Disposition* (27 November 2020, Justice of the Peace Review Council, Toronto, Ontario) [*Lauzon JPRC (Disposition)*]; *Justices of the Peace Act*, RSO 1990, c J.4, s 11.1 [JOPA]. The underlying decisions on the merits and the disposition are available online, < https://www.ontariocourts.ca/ocj/jprc/public-hearings-decisions/#Justice_of_the_Peace_Julie_Lauzon> [perma.cc/54QT-UQY6]; <https://www.ontariocourts.ca/ocj/files/jprc/decisions/2020-lauzon-reasons-EN.docx> [perma.cc/7TZ6-EEUM]; <https://www.ontariocourts.ca/ocj/files/jprc/decisions/2020-lauzon-appendices-EN.pdf> [perma.cc/KC6D-XA45]; <https://www.ontariocourts.ca/ocj/files/jprc/decisions/2020-lauzon-reasons-disposition-EN.docx> [perma.cc/2EPZ-V8N8].

2 See e.g. *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 44 [*Moreau-Bérubé*], discussed e.g. in *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 27.

government, including but not limited to Crown attorneys, be treated differently than complaints by other lawyers or other members of the public?

In *Lauzon v Ontario (Justices of the Peace Review Council)*, the Ontario Court of Appeal (Lauwers JA for the panel) applies and emphasizes a previously unrecognized proposition of law: disciplinary dispositions against a judicial officer that flow from a process that began with a complaint by a Crown attorney (or any other member of the executive branch of government) inherently imperil judicial independence and public confidence in that independence – even in the absence of any finding of bad faith or improper motive in connection to that complaint.[3] Thus, any consequences downstream from such a complaint should be less serious than if the complaint were made by someone outside of the executive. In this comment, I reflect on *Lauzon* and explain its novelty and the ways in which it is problematic.

II. BACKGROUND

The matter in *Lauzon* arose from the publication of a column written by Ottawa Justice of the Peace Her Worship Julie Lauzon and published online and in print by the *National Post* in 2016.[4] In the column, JP Lauzon was critical of bail court and particularly of Crown attorneys appearing before her, referring to "cynicism and bullying", stating that "Ottawa's main bai[l] court, and many others throughout the country, have devolved into dysfunctional bodies", and accused Crown attorneys appearing before her of, among other things, "scream[ing] at me and basically throw[ing] a temper tantrum".[5]

Three senior Crown attorneys – the provincial Assistant Deputy Attorney General (Criminal), the president of the Ontario Crown

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3 While the reasons in *Lauzon* raise important questions of administrative law and freedom of expression (see especially paras 127-168, discussing the applicability and application of *Doré v Barreau du Québec*, 2012 SCC 12), my focus in this comment is on the impact of complaints being made by Crown attorneys. But see Paul Daly, "*Webber Academy Foundation v Alberta (Human Rights Commission)* and *Lauzon v. Ontario (Justices of the Peace Review Council)*: Charter Values, Charter Rights and Adjudicative Tribunals" (2024) 37 CJALP 73.

4 Julie Lauzon, "When courts don't follow the law" *The National Post* (15 March 2016) A9, 2016 WLNR 7996024.

5 *Ibid.*

Attorneys' Association, and the federal Director of Public Prosecutions – filed complaints with provincial Justices of the Peace Review Council.[6] The complaints were reviewed by the Complaints Committee of the Council, which referred the matter to a Hearing Panel.[7]

A. The Hearing Panel

The unanimous Hearing Panel ultimately found that:

> Her Worship made disparaging and insulting comments and allegations of misconduct, both general and specific, against the Crown Attorneys without regard to the personal and professional reputations of individuals whom she did not name but who she knew could be identified within the courthouse community…
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> [S]he failed in her duty to take the necessary care to express herself in a dignified and restrained manner so as not to lose public confidence in her objectivity or compromise the integrity, independence and impartiality of her office. The words she used, we find, were neither judicious nor measured. They were neither civil nor dignified. Instead, they were accusatory, insulting, inflammatory, and personal.[8]

The panel held that this was misconduct and had "create[d] an apprehension that she was biased against the Crown Attorneys".[9]

Several other points from the hearing are important to my analysis. JP Lauzon, in a notice of constitutional question, both asserted an improper limitation of her freedom of expression under the *Canadian Charter of Rights and Freedoms*[10] and also questioned "whether and to what extent Justice of the Peace Lauzon should be protected and insulated from the external influence of Attorneys General, that could potentially be seen to be undermining her ability to adjudicate impartially."[11] On these bases, JP Lauzon initially sought a declaration (including that "the Attorney General

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6 *Lauzon*, *supra* note 1 at para 3.

7 *Ibid* at para 4.

8 *Lauzon JPRC (Merits)*, *supra* note 1 at paras 143, 245. The panel rejected an additional allegation about in-court comments made about a previous decision by a justice of the Superior Court.

9 *Ibid* at para 145.

10 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b).

11 *Lauzon JPRC (Merits)*, *supra* note 1 at paras 14, 16.

for Ontario, and/or the Attorney General for Canada interfered with the judicial independence of Justice of the Peace Lauzon to conduct her cases and make her decisions as she sees fit, through complaints made leading to JPRC discipline proceedings").[12] As JP Lauzon later noted, her initial argument on judicial independence before the hearing panel was "that the provincial legislation [*JOPA*], inasmuch as it permitted complaints to be made by members of the executive branch, was unconstitutional".[13] However, in an oral argument before the hearing panel, she clarified that she sought merely a stay under section 24(1) of the *Charter* (in relation to the freedom of expression issue) or a dismissal.[14] JP Lauzon also alleged "a concerted campaign" to remove her from office.[15] The panel held that there was no evidence of "improper motive" or animus by any of the three complainants and that, even if there was an improper motive or animus, "the independent investigation of the three complaints, and subsequent decision of the independent JPRC committee to require a hearing before this independent tribunal inoculates these proceedings against an attack on the basis of an abuse of process".[16] Moreover, the panel held that the fact that the complainants were Crown attorneys and delegates of the Attorney General was not unconstitutional or "an improper or arbitrary interference with Her Worship's judicial independence".[17] Again emphasizing the intervening role of the JPRC process, the panel expressly recognized that judicial independence was not absolute and that "[o]ne of the measures to safeguard judicial independence is a complaints process whereby complaints about alleged judicial misconduct are adjudicated upon in a fair, impartial manner by an independent tribunal composed primarily of judicial officers."[18]

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12 *Ibid* at para 17; *Lauzon JPRC (Merits)*, *supra* note 1, *Factum of the Respondent* at para 101, as contained in Leave to Appeal to Court of Appeal for Ontario, *Motion Record of the Responding Party*, vol 5 at Tab 48.

13 *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Response to the Application for Leave to Appeal* at para 42; *JOPA*, *supra* note 1.

14 *Lauzon JPRC (Merits)*, *supra* note 1 at para 17.

15 *Ibid* at paras 91-93.

16 *Ibid* at paras 91-115 (quotation is from para 115) [citations omitted].

17 *Ibid* at paras 116-129 (quotation is from para 129).

18 *Ibid* at para 127, citing at paras 125-129 *Moreau-Bérubé*, *supra* note 2, and *Cosgrove v Canadian Judicial Council (FCA)*, 2007 FCA 103, leave to appeal to SCC refused, 32032

The panel diverged, however, on the appropriate disposition. The majority – including the provincial court judge member – held that it was necessary to recommend removal from office, while the JP member held that a reprimand and unpaid suspension of 30 days was sufficient.[19]

B. The Judicial Review and the Appeal

On judicial review, Aston and Swinton JJ for the Divisional Court panel held that both the determination on the merits and the disposition were reasonable. Importantly for my purposes, the Divisional Court panel explicitly stated that, on the question of whether "the filing of a complaint by an Attorney General is not unconstitutional or an improper or arbitrary interference with judicial independence in and of itself", "[t]he analysis and conclusion [of the Hearing Panel] on that point are lucid and correct".[20] Moreover, the Divisional Court panel found "no basis for this Court to interfere with the Hearing Panel's factual finding that there was no campaign to subvert the applicant's judicial independence".[21]

On her successful motion for leave to appeal to the Ontario Court of Appeal, JP Lauzon maintained her position "that the proceedings against her were the culmination of a campaign to disenfranchise her by the Ottawa Crown Attorney's office, and that this amounts to an abuse of the complaint process."[22] In her written arguments on the appeal itself, she argued that "the [Hearing] Panel failed to appreciate and account for the fact that its decisions risked being tainted by the existence of a coordinated campaign to disenfranchise the Appellant"[23] and that "the [Hearing] Panel needed to grapple with the proposition that the existence, or even the appearance, of a coordinated campaign militated against a finding of misconduct and the imposition of the severest possible sanction."[24]

(29 November 2007). I note that the three-member JPRC hearing panel included one provincial court judge and one JP. See *JOPA*, *supra* note 1, s 11.1(2).

19 *Lauzon*, *supra* note 1 at para 7.

20 *Lauzon* (Div Ct), *supra* note 1 at para 10, as noted e.g. in *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 36.

21 *Lauzon* (Div Ct), *supra* note 1 at para 13.

22 *Lauzon*, *supra* note 1, Leave to appeal to Court of Appeal for Ontario, *Factum of the Moving Party* at para 58.

23 *Lauzon*, *supra* note 1, *Factum of the Appellant* at para 3.

24 *Ibid* [Ont CA, *Factum of the Appellant*] at para 75.

The Court of Appeal panel held that the hearing panel's finding of misconduct was reasonable but its finding of anti-Crown bias was unreasonable and, on that basis, the disposition was unreasonable. The Court of Appeal panel instead substituted the disposition proposed by the dissenting member of the hearing panel.[25]

III. DISCUSSION

Against this backdrop, I consider the novel proposition recognized by the Court of Appeal panel and the implications of that novel proposition.

A. The Novel Proposition

The novel proposition in *Lauzon* is that disciplinary dispositions against a judicial officer that flow from a process that began with a complaint by a Crown attorney (or any other member of the executive), even in the absence of any finding of bad faith or improper motive in connection to that complaint, inherently imperil judicial independence and public confidence in that independence and thus should be lesser than dispositions that flow from a complaint made by someone who is not part of the executive. The foundation for the recognition of this novel proposition is the assertion by the Court of Appeal panel that "[a]t issue in this case are the scope of judicial independence and its limits.... By contrast, the Hearing Panel's focus was on the duty of impartiality."[26]

Throughout its reasons, the Court of Appeal panel repeatedly returned to the proposition that a complaint by a Crown attorney posed an inherent

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[25] In doing so, the Court of Appeal panel appears to suggest that the weight and deference given on judicial review may be explicitly affected by the varied experiences and identities of the panel members, such that here the dissent should be given special weight because it happened to be written by the JP member of the committee [emphasis added]: "The dissenting member, His Worship Thomas Stinson, then a Regional Senior Justice of the Peace, was *the only panellist with personal experience of the courtroom pressures that justices of the peace face*." (The panel supported this observation with an oblique reference to case law: "I note in passing Gonthier J's observation in Therrien (Re), 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 57: "in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers."") This proposition would have serious implications for the judicial review of decisions by panels with differing membership required by statute, which panel compositions are not unique to judicial discipline.

[26] *Lauzon*, *supra* note 1 at paras 17-18.

risk to judicial independence. For clarity, I draw together these comments here:

> The relevant implication in this case is the risk that the public could see JP Lauzon's removal from office as an instance of the successful interference by the executive branch, within which Crown prosecutors function, against judicial officers who take issue with the conduct of Crown prosecutors in courtrooms…
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> To put it simply, judicial conduct that offends the other branches of government might motivate those branches to act in such a way as to undermine judicial independence by asserting that the conduct should be punished as misconduct. These competing tensions were at play in this case…
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> …The complaints against JP Lauzon were from Crown prosecutors about how she described the conduct of some of them in her courtroom. This constellation of interests has obvious separation of powers implications…
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> Beyond doubt, a core component of judicial independence is security from removal from office, particularly at the behest of representatives of other branches of government who might object to judicial decisions…
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> Accordingly, it was incumbent on the majority to consider carefully whether its removal recommendation at the behest of senior Crown law officers, who are part of the executive branch of government, could undermine other justices of the peace in their ability to control the process of their courtroom and to speak out about issues they see in court…
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> The effect on JP Lauzon of losing her office as justice of the peace and her livelihood is obviously severe, but the systemic concerns go much deeper. The possible consequences for judicial independence from offending or annoying the executive have particular salience in JP Lauzon's case. It was, after all, members of the executive branch of government (senior Crown prosecutors) who together filed complaints against her. Her removal would signal that the executive can interfere with the independence of the judiciary where it disapproves of a judicial officer's challenge, via truthful speech if intemperately expressed in part, to the conduct of government actors – Crown prosecutors. If JP Lauzon's conduct were condemned and she were to be removed from the bench, other judges might be dissuaded from being critical of the administration of justice under the authority of the executive, which would undermine judicial independence, freedom of expression and the separation of powers.[27]

In its analysis of the disposition, the Court of Appeal panel is clear that, by definition, a removal recommendation downstream from a complaint by a

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[27] *Ibid* at paras 35, 40, 43, 46, 47, 157 [citations omitted].

Crown attorney has a negative impact on the judicial independence of other judicial officers and public confidence in that judicial independence.[28] For this reason, any disciplinary matter initiated by a complaint by a Crown attorney should result in a less severe disposition than one initiated by a complaint by someone other than a Crown attorney.[29]

These problems identified by the Court of Appeal panel flow from the mere fact that a complaint was made by a Crown attorney, regardless of the merits or *bona fides* of that complaint or the processes by which it is considered by the Council. It must be emphasized here that the Court of Appeal panel does not explicitly dispute, or even appear to implicitly dispute, the factual findings below that there was no animus or improper motive by the complainants. Thus, this novel proposition – that a complaint by a Crown attorney poses an inherent risk to judicial independence and should therefore result in a lesser disposition – applies independently of any evidence of bad faith.

This novel proposition is a weaker version of the proposition initially advanced by JP Lauzon, that a complaint by the Attorney General improperly interfered with judicial independence. As indicated by Presenting Counsel in their factum before the hearing panel: "If the applicant were correct on this issue, then the Crown could never complain about a justice of the peace to the JPRC, lest it undermine or create the perception that it is undermining judicial independence. This position defies logic."[30] Indeed, recall that JP Lauzon abandoned her initial submission that, to the extent that the enabling legislation allowed such a complaint, that legislation was unconstitutional.[31] In parallel, this weaker version as adopted by the Court of Appeal is inherently problematic, insofar as any vindication of any such Crown complaint necessarily risks undermining judicial independence.

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28 *Ibid* at paras 153-157.

29 See *Lauzon supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 34: "No less problematic and contrary to other appellate jurisprudence is Lauwers JA's holding that judicial independence concerns are heightened when the complainant is a member of the executive."

30 *Lauzon JPRC (Merits), supra* note 1, *Factum of Presenting Counsel* at para 14 [emphasis in original], as contained in Leave to Appeal to Court of Appeal for Ontario, *Motion Record of the Responding Party*, vol 5 at Tab 49.

31 See above note 13 and accompanying text.

B. The Legal Basis for the Novel Proposition

With the greatest of respect, the Court of Appeal panel provides little support for this specific proposition, gives no clear and specific legal authority for this proposition, and asserts it with little supporting analysis as essentially being self-evident. Neither does the panel ascribe this proposition to judicial notice or their own personal experience as judges.

This novel proposition could at most be described as inspired by existing law. Indeed, in some ways it is inconsistent with existing law.[32] More specifically, this novel proposition does not necessarily or obviously follow from the sources that the panel cites in support, as opposed to the general principle that judicial independence must allow judges freedom, latitude, and protection from retaliation. Other than basic statements about the meaning and importance of judicial independence from *Ethical Principles for Judges*[33] and a single law review article from 1984 (for the prospect that without judicial independence, "judicial officers might retreat into timorous silence"),[34] the Court of Appeal panel primarily supports this specific proposition with a discussion from the reasons in *Moreau-Bérubé v New Brunswick (Judicial Council)* in which Arbour J emphasizes "the liberty of the judge to hear and decide cases without fear of external reproach" and the imperative that "[w]hile acting in a judicial capacity, judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen", and cautions that "the [Judicial] Council must *be* acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings."[35]

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[32] See e.g. *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 6: "at the invitation of neither party, the Court of Appeal announced a new approach to the principles of judicial independence and the separation of powers in the judicial complaints process — an approach that is irreconcilable with decisions of this Court and other appellate courts."

[33] *Lauzon*, *supra* note 1 at para 34, citing Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 1998). See now Canadian Judicial Council, *Ethical Principles for Judges* at 44, 5.B.4 (Ottawa: The Council, 2021), online: <cjc-ccm.ca>.

[34] *Lauzon*, *supra* note 1 at para 39, note 22, citing Jeremy Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29:3 McGill LJ 369.

[35] *Lauzon*, *supra* note 1 at paras 44-46; *Moreau-Bérubé, supra* note 2 at paras 56, 57, 72.

Moreover, the Court of Appeal panel makes no mention of the decision of the Federal Court of Appeal in *Cosgrove v Canadian Judicial Council (FCA)*.[36] In *Cosgrove*, the court rejected a constitutional challenge to a statutory provision that allowed the federal Attorney General or a provincial Attorney General to require a hearing be held by the Canadian Judicial Council. While *Cosgrove* was not binding on the Court of Appeal panel or on any of the other decision-makers in this process, it was certainly relevant – and if the common law on judicial discipline in Ontario should be different than corresponding common law at the federal level, it would be instructive and transparent to identify and acknowledge that difference and provide an explanation for it. JP Lauzon, as respondent on the motion for leave to appeal to the Supreme Court of Canada, argued that *Cosgrove* was no longer relevant, because she had abandoned her position that the Ontario JP statute was unconstitutional to the extent it allowed complaints to be made by members of the executive.[37] However, while *Cosgrove* was specifically about the constitutionality of the federal regime, under which a complaint by any federal or provincial Attorney General skipped the investigatory phase and advanced directly to a hearing, the rationale for the decision was much broader:

> The most important constraint [on this Attorney General complaint power], in my view, flows from the traditional constitutional role of attorneys general as guardians of the public interest in the administration of justice. Attorneys general are constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest.[38]

The panel in *Cosgrove* explicitly noted that this presumption of good faith applied not only to the Attorney General's filing of a complaint but also to the federal Attorney General's decision to propose the joint address for removal of a judge:

> Like all acts of an Attorney General, the Minister's discretion in that regard is constrained by the constitutional obligation to act in good faith, objectively, independently and with a view to safeguarding the public interest. It is *presumed*,

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36 *Cosgrove v Canadian Judicial Council (FCA)*, 2007 FCA 103 [*Cosgrove*], discussed e.g. in *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Reply of the Applicant* at paras 2, 5-7; *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 35.

37 *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Response to the Application for Leave to Appeal* at paras 41-42.

38 *Cosgrove*, *supra* note 36 at para 51 [authorities omitted].

> in the absence of evidence to the contrary, that the Minister will fulfil that obligation.[39]

Indeed, JP Lauzon in her factum for the JPRC hearing recognized, albeit without citing *Cosgrove* or any other authority, that "[t]here is a presumption that the Attorney General for Ontario will not act improperly."[40] If complaints from the Attorney General are not inherently suspect given their role as the Chief Law Officer of the Crown and a member of Cabinet, it is unclear why complaints by Crown attorneys, who exercise their delegated authority as members of the apolitical public service, should be inherently suspect. However, even if the Court of Appeal panel accepted *Cosgrove* as correct, the panel seems to say that such a complaint is still problematic even though the Attorney General or Crown complainant is presumed to act in good faith. In other words, the motivation is irrelevant, as the problem comes solely from the identity of the complainant and not their lack of *bona fides*.

C. Other Considerations Relevant to the Novel Proposition

There are three other relevant considerations that the Court of Appeal panel did not address.

First, the Court of Appeal panel makes no mention of, and thus gives no apparent weight to, the protective and curative function of the independence of the Review Council and its processes.[41] In other words,

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39 *Ibid* at para 64 [emphasis added].

40 *Lauzon JPRC (Merits), supra* note 1, *Factum of the Respondent* at para 55, as contained in Leave to Appeal to Court of Appeal for Ontario, *Motion Record of the Responding Party*, vol 5 at Tab 48. (Lauzon asserted that this presumption had been displaced: para 56).

41 See especially *Ruffo (Re)*, 2005 QCCA 1197 at para 28. See also *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at paras 28-29, 37 and especially at para 35 [citations omitted]: "where the investigative and adjudicative aspects of a judicial complaints process afford sufficient institutional independence to neutralize the potential for interference by government or other external actors, the identity of the complainant in a particular proceeding is irrelevant to determining whether the judicial officer has engaged in judicial misconduct and in determining the least onerous remedial sanction needed to restore public confidence.". See also *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Reply of the Applicant* at para 1: "The Court of Appeal's approach ignores the unique role judicial councils play in safeguarding judicial independence." See also paras 2-8. See above note 16 and accompanying text.

the source of the complaint has no impact on the evaluation and disposition of the complaint because of the intervening steps and independent safeguards between the initial complaint and the ultimate disposition. The Court of Appeal panel appears to assume that the reasonable and informed member of the public – which it identifies elsewhere as the appropriate perspective[42] – would, despite being informed and reasonable, neither know nor appreciate that there exists a properly designed mechanism for considering and adjudicating complaints about judicial officers and that mechanism would minimize if not eliminate any influence coming from the identity of the complainant.[43]

Second, the Court of Appeal panel did not explicitly consider the functional independence of Crown attorneys from the executive or the role of the Law Society of Ontario in supervising the conduct of all lawyers, including Crown attorneys other than in their exercise of prosecutorial discretion.[44] Complaints against judges or justices of the peace would not come within prosecutorial discretion.[45] While it is unusual for law societies to discipline Crown attorneys,[46] and there are no reported precedents in which a law society has disciplined or attempted to discipline a lawyer for complaints made in bad faith to a judicial council, a reasonable and informed member of the public would presumably understand that if Crown attorneys were to make complaints in bad faith they would risk such

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42 *Lauzon*, *supra* note 1 at para 48, citing *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 60, 67.

43 See *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 37.

44 See e.g. *Krieger v Law Society of Alberta*, 2002 SCC 65.

45 See *ibid* at para 47: "[W]hat is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum."

46 See e.g. Andrew Flavelle Martin, "Twenty Years After *Krieger v Law Society of Alberta*: Law Society Discipline of Crown Prosecutors and Government Lawyers" (2023) 61:1 Alta L Rev 37.

consequences. For example, the hearing panel in *Law Society of Upper Canada v Ann Bruce* held that repeated in-court references to a judicial council were misconduct, not only because they "were attempts at intimidation. As such they were disrespectful and uncivil behaviour directed at the Court" but also because these references

> may serve to communicate to the public that there is some procedure, apart from rights of appeal, that counsel can readily invoke to circumvent or set aside decisions of the court. Leaving such an impression with members of the public undermines the very important presumption of judicial independence.... [This] amounts to misconduct as it tends to bring the administration of justice into disrepute by fostering false impressions or beliefs regarding the principle of judicial independence.[47]

The lawyer in *Ann Bruce* was not a Crown attorney. Indeed, both the rules of professional conduct and the case law articulate higher standards for prosecutors than other lawyers. For example, the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada states that "[w]hen acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect".[48] Similarly, the Supreme Court of Canada in *R v Boucher* was explicit that "[t]he role of prosecutor excludes any notion of winning or losing.... It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."[49]

Third, the Court of Appeal panel seems to understate the reality that, as Crown attorneys frequently appear in bail court, they like any such counsel may find it necessary to complain about the conduct of a judicial

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47 2013 ONLSHP 6 at paras 107-108.

48 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended April 2024), online: < https://flsc.ca/what-we-do/model-code-of-professional-conduct/> [perma.cc/4WS9-FB7S] [*FLSC Model Code*], r 5.1-3. Commentary 1 elaborates that "the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately."

49 *Boucher v The Queen*, 1954 CanLII 3 (SCC), [1955] SCR 16 at 24. The Court of Appeal panel cites to *Boucher* on this point but for a different purpose. See *Lauzon*, *supra* note 1 at para 99.

officer in that court, particularly in response to criticism by that judicial officer of the conduct of specific Crown attorneys or Crown attorneys generally – especially when that criticism uses intemperate language.

If nothing else, the Court of Appeal panel was less than generous to the hearing panel in pointing out that this novel proposition "is a principle to which the Hearing Panel paid scant attention."[50] Not having the benefit of the future reasons of the Court of Appeal recognizing this novel proposition, it seems understandable that the hearing panel did not consider it.[51]

D. Implications of the Novel Proposition

While not mentioned in the reasons of the Court of Appeal panel, the Attorney General for Ontario in its factum before the hearing panel emphasized that the statutory responsibilities of the Attorney General, which themselves have constitutional roots, include "superintend[ing] all matters connected with the administration of justice in Ontario" and "superintend[ing] all matters connected with judicial offices".[52] Absent some constitutional declaration, this novel proposition seems to quietly undercut the ability of the Attorney General to fulfill their statutory mandate – or at least to mean that that statutory mandate is an inherent threat to judicial independence.

Even if this novel proposition was "surely indisputable", as asserted by JP Lauzon in her response to the unsuccessful motion for leave to appeal to the Supreme Court of Canada,[53] the reasons of the Court of Appeal panel would still be problematic. This is primarily because the Court of Appeal panel does not acknowledge that this proposition is a novel one, and so the panel does not explain this change in the law or identify its contours, leaving judicial officers and judicial review bodies with uncertainty over the implications of his decision. In other words, even if this novel proposition

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50 *Lauzon*, *supra* note 1 at para 47.

51 See *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 34.

52 *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5, quoted in *Lauzon JPRC (Merits)*, *supra* note 1, *Factum of the Intervener Attorney General for Ontario* at para 15, as contained in Leave to Appeal to Court of Appeal for Ontario, *Motion Record of the Responding Party*, vol 5 at Tab 50.

53 *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Response to the Application for Leave to Appeal* at para 45.

of law is correct, the Court of Appeal panel provided little direction as to its impact on the judicial complaints process as a whole. As the Review Council put it in its factum and reply on the unsuccessful motion for leave to appeal to the Supreme Court of Canada,

> The Court of Appeal's decision creates uncertainty about the proper principles for adjudicating and disposing of judicial complaints, especially complaints initiated by provincial or federal government employees....Without clarification from this Court, judicial councils will be left to speculate about the significance to attach to the identity of complainants when assessing whether a judicial officer has engaged in judicial misconduct and in crafting an appropriate disposition.[54]

For example, should complaints committees apply a higher standard to evaluate complaints by Crown attorneys? Should there be a separate but parallel process for such complaints? The reasons of the Court of Appeal panel could certainly support these implications. Moreover, with respect, it is unclear from the reasons of the Court of Appeal panel why a hearing panel should consider the impact that a complaint by the Attorney General has on judicial independence only at the disposition stage, not at the merits stage. It is thus unclear whether and how, in response to *Lauzon* judicial councils should change their policies and Parliament and the legislatures should change their statutes on judicial oversight.

E. The Need for the Novel Proposition

Despite all of this, it is unclear that the result of the appeal would have or should have been different if the novel proposition is removed from the analysis. The direct result of the appeal was only to reduce the sanction. That could have been done without advancing a novel proposition of law, despite the panel's strong view on the wrongfulness of the decisions below.[55] For example, the Court of Appeal panel gave extensive reasons for why the hearing panel's finding of bias was unreasonable.[56] The admonition of La Forest J, dissenting in the *Provincial Judges' Reference*, is worth repeating:

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54 *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Memorandum of Argument of the Applicant* at para 6; *Lauzon*, *supra* note 1, Leave to appeal to SCC, *Reply of the Applicant* at para 8.

55 *Ibid* at para 1: "Her Worship Julie Lauzon should be sitting as a justice of the peace. That she is not sitting is an injustice to be remedied." See also para 62 [emphasis added]: "These are very strong words, no doubt, but these words signal JP Lauzon's *righteous anger* at a deplorable state of affairs in bail court."

56 *Ibid* at paras 50-80, 81-103.

"courts are generally reluctant to comment on matters that are not necessary to decide in order to dispose of the case at hand. This policy is especially apposite in constitutional cases, where the implications of abstract legal conclusions are often unpredictable and can, in retrospect, turn out to be undesirable."[57] Indeed, given the separation of powers and judicial independence issues in *Lauzon*, his caution is particularly relevant:

> I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration. In such circumstances, it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions that are not necessary to decide the case before it.[58]

In this context, the identification of this novel proposition by the Ontario Court of Appeal is particularly problematic.

IV. CONCLUSION

The relationship among the executive, the legislature, and the judiciary unquestionably makes issues of judicial independence and judicial discipline complex. The government appoints and removes judicial officers and allocates funding and resources to the judiciary. However, the proposition discussed by the Court of Appeal panel in *Lauzon* is, with respect, both novel and unsupported.

In *Lauzon*, the Court of Appeal panel demonstrates commendable concern for judicial independence against the executive. In so doing, however, it recognizes a novel proposition of law: disciplinary dispositions against a judicial officer that flow from a process that began with a complaint by a Crown attorney (or any other member of the executive) – even in the absence of any finding of bad faith or improper motive in connection to that complaint – inherently imperil judicial independence and public confidence in that independence and thus should be lesser than dispositions that flow from a complaint made by someone who is not part

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57 *Ref re Remuneration of Judges of the Prov. Court of PEI; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at para 301, 150 DLR (4th) 577. Thanks to Adam Dodek on this point.

58 Ibid at para 302.

of the executive. With respect, this proposition is unsupported either by precedent or by the analysis of the Court of Appeal panel. Moreover, its contours and implications remain unclear, creating substantial and unnecessary uncertainty for judicial officers, review councils, counsel, and the general public.

It is undisputably the proper role of the courts, particularly appellate courts, to incrementally modify and advance the common law in novel ways. Even if this novel proposition was correct, in the absence of supporting authorities or analysis, there is little basis for a reader – a judge (had the Supreme Court of Canada granted leave to appeal), a Justice of the Peace, a member of the public, or a Crown attorney – to understand why it was correct.

In its commendable efforts to ensure respect and fairness for Justice of the Peace Lauzon and all Justices of the Peace, the Court of Appeal panel demonstrates little reciprocal concern for the reputational interests of Crown attorneys. Surely unintentionally, the reasons of the Court of Appeal panel have the effect of impugning the professionalism of Crown attorneys generally by suggesting that any complaints they make are inherently suspect. Indeed, the Court of Appeal panel while not mentioning *Cosgrove* seems to turn that decision on its head. Not only does the Court of Appeal panel fail to acknowledge the presumption in federal courts that the Attorney General will act "in good faith, objectively, independently, and in the public interest"[59] and fail to extend that presumption to Crown attorneys acting as delegates of the Attorney General. The Court of Appeal panel effectively reverses and makes non-rebuttable the presumption from *Cosgrove* by suggesting that any complaint by Crown attorneys or other actors in the executive is suspect or at least should be treated as suspect and should result in lesser downstream consequences than if the complaint was made by someone outside of the executive – even absent any indication of bad faith.

None of this is to say that all – or even most – Crown attorneys are sufficiently respectful of the stature and role of justices of the peace. As noted by the Court of Appeal panel,

> [J]ustices of the peace were and are routinely disrespected in the administration of justice by other justice system actors. It is quite obvious that justices of the peace

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59 *Cosgrove*, *supra* note 36 at para 51.

> deserve respect from other actors, particularly those with whom they most frequently interact – Crown prosecutors... Plainly, justices of the peace deserve, but at times have not been accorded, due respect from the other actors in the justice system, at least in the time before JP Lauzon's article was published.[60]

However, this novel proposition seems to encourage such respect in a manner that creates unacknowledged complications and uncertainty in the law.

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60 *Lauzon*, *supra* note 1 at para 64, 68.