C.J.C. File No. 10-0216

CANADIAN JUDICIAL COUNCIL

COMPLAINT REGARDING

ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

SUBMISSIONS OF THE RESPONDENT, DOUGLAS, A.C.J. ON THE MOTION SEEKING DIRECTIONS REGARDING THE JOYAL "COMPLAINT"

September 22, 2014

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SUBMISSIONS OF THE RESPONDENT, DOUGLAS, A.C.J. REGARDING THE "DEEMED COMPLAINT"

PART I - OVERVIEW

1. The Independent Counsel is seeking directions from the Inquiry Committee ("the Committee") regarding whether she may include in her Notice of Allegations a so-called "complaint" that has not been vetted by the Judicial Conduct Committee or a Review Panel, even though the *Judges Act* ("the *Act*") and the Canadian Judicial Council Inquiries and Investigations *By-laws* ("*By-laws*") require vetting by both bodies. In this manner, the Independent Counsel misunderstands the nature of her role and the scope of her jurisdiction under the applicable legislation and regulations.

2. These submissions are intended to aid the Committee in its determination of whether the Joyal "complaint" is properly a complaint under the statutory scheme under which the CJC operates, and hence whether the Committee has the jurisdiction to consider the "complaint".

3. The "complaint", in CJC File no. 13-0084, filed by the Honourable Glenn Joyal, Chief Justice of the Manitoba Court of Queen's Bench, relates to approved expense claims of Associate Chief Justice Douglas ("Douglas ACJ"). Chief Justice Joyal made the complaint to the Executive Director of the CJC, and the Independent Counsel learned of the complaint through an anonymous leak to the press.

4. It would be an error of law and a serious breach of Douglas ACJ's procedural fairness rights for this Committee to permit Independent Counsel to include the Joyal "complaint" in her Notice of Allegations. This Committee has no jurisdiction to consider this "complaint" because it

has not worked its way through the mandatory four-step screening process set out in the *Act* for complaints submitted under s. 63(2) of the *Act*.

5. With respect, Independent Counsel's Actions thus far demonstrate a fundamental misunderstanding of her role within the statutory scheme. In her written representations, Independent Counsel suggests that this Committee include the Joyal "complaint" in the scope of its inquiry on the basis of the following legal errors:

(a) an interpretation of s. 5(1) of the *By-laws* which renders the previous sections of the *By-laws* and the multi-tiered gate-keeping process created thereunder meaningless;

(b) an interpretation of the *Act* which conflates the difference between a complaint submitted by an attorney general under s. 63(1) and an ordinary complaint submitted under s. 63(2);

(c) an interpretation of the *Act* which ignores the constitutional presumption of good faith afforded to attorneys general;

(d) an interpretation of her role and the role of this Committee which usurps the role of the prior stages of the multi-tiered gatekeeping process established under the *By-laws*;

(e) an interpretation of the role of this Committee which places this Committee into the position of being the judge in its own cause in a manner that fundamentally breaches the procedural fairness rights of Douglas ACJ; and

(f) an interpretation of the CJC's Policies, which do not have the force of law, that conflict with the plain meaning of the *By-laws*;

6. This Committee should avoid being led into error by the Independent Counsel and ought to refuse to consider the Joyal "complaint" in the scope of its investigation.

7. These submissions are set out in three parts:

(a) In the first part, we submit that this Committee has no jurisdiction to consider the Joyal "complaint".

(b) In the second part, we submit that it would be a serious breach of Douglas ACJ's procedural fairness rights for the Committee to consider the Joyal "complaint".

(c) In the third part, we submit that Independent Counsel has misapprehended her role under the *Act* and the *By-laws*.

PART II - FACTS

8. An anonymous leak to the press, a few hours after Justice Snider ordered a stay of the CJC's proceedings pending Douglas ACJ's application for judicial review, shortly after resulted in several media outlets running articles discussing the complaint the Chief Justice of the Manitoba Court of Queen's Bench, the Honourable Glenn Joyal, filed with the CJC regarding Douglas ACJ's representational allowance expense claims provided for under s. 27(6) of the *Judges Act*. Independent Counsel became aware of the Joyal "complaint" from these media reports.

9. In a letter dated October 7, 2013, Independent Counsel contacted Norman Sabourin, the Executive Director of the CJC, requesting "communication of Chief Justice Joyal's complaint".[1] In her letter, Independent Counsel indicated that she had "been made aware" of the Joyal "complaint" from media reports. She alluded, by way of example, to an August 20, 2013 article by Sean Kavanagh of the CBC.[2]

10. On October 16, 2013, Mr. Sabourin provided Independent Counsel with the letter from Chief Justice Joyal.[3] Mr. Sabourin sent the letter to Independent Counsel despite the objections of counsel to Douglas ACJ.[4] The letter had not been reviewed by the Chair or Vice-Chair of the Judicial Conduct Committee for a determination that the matter warranted further consideration by a Review Panel. Nor had the complaint raised in the letter been judged to be "serious enough to warrant removal" by a Review Panel.

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[1] Douglas ACJ's Compendium of Documents "Compendium", Tab 1

[2] Compendium, Tab 1

[3] Compendium, Tab 2

[4] Compendium, Tab 3 and 4

11. On August 20, 2014, the Independent Counsel delivered a notice to Douglas ACJ of Independent Counsel's intention to seek directions from the Committee regarding the inclusion of the Joyal "complaint" in her Notice of Allegation.

PART III - ARGUMENT

A. The Inquiry Committee has no jurisdiction to hear the Joyal "complaint"

12. The Independent Counsel seeks to include Joyal CJ's "complaint" in the scope of the present inquiry. This Committee cannot consider the allegation contained in Joyal CJ's letter, because it lacks the jurisdiction to do so. This Committee's jurisdiction to consider complaints is limited to complaints that have been screened as required by the express provisions of the *Act* and the CJC's own *By-laws* where the complaint is submitted under s. 63(1). The Joyal "complaint" was submitted under s. 63(1) of the *Act* but it has not been properly screened.

13. Section 63 of the *Act* and ss. 1.1-3 of the *By-laws* expressly tie the CJC's jurisdiction to a "complaint or allegation" rather than to the particular judge being investigated. Where one complaint has made it through the Review Panel stage to an Inquiry Committee, the Committee does not have discretion to investigate other complaints about that judge that did not go through the process laid out in the *By-laws*. In other words, it is not "open season" on that judge. Furthermore, the Review Panel and the Inquiry Committee are each linked to a complaint or allegation – they have no existence independent of a complaint or allegation.

Concept of relevance in the By-laws is limited to what is related to the complaint which resulted in the constitution of the Inquiry Committee

14. The Independent Counsel asserts that she has authority, pursuant to s. 5(1) of the *By-laws*, to consider any complaint that is relevant to Douglas ACJ, beyond the scope of the complaint which was considered in the initial stages of the CJC's investigation and which led to the constitution of an Inquiry Committee.

15. Any assessment of relevance requires a referent. Under a plain reading of the *Act* and the *By-laws*, that referent is, not the judge under investigation, but the complaint for which the Inquiry Committee was constituted.

16. The issue here is how to interpret s. 5(1), which states as follows:

> **5.** (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

17. The expression "complaint or allegation . . . that is brought to its attention" must refer to only those complaints or allegations that have worked their way through the multi-tiered process set out at ss. 1.1-3 of the *By-laws*. This proposition is supported by three well-established principles of statutory interpretation.

18. First, under the modern approach to statutory interpretation, which has repeatedly been endorsed by the Supreme Court of Canada, the words of an *Act* are to be read in their entire context, in the grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.[5] Regulations, too, are to be interpreted according to the modern approach.[6]

19. Second, regulations must be read in the context of their enabling *Act*, having regard to the language and purpose of the *Act* in general and more particularly the language and purpose of the relevant enabling provision. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*,[7] the Supreme Court of Canada rejected the "plain meaning" of a provision of the *Patented Medicines (Notice of Compliance) Regulations* in favour of an interpretation that harmonized the regulatory provision with the *Patent Act* as a whole. This point is emphasized by Ruth Sullivan: "Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read".[8]

20. Third, there exists a presumption that regulations and statutes are coherent and not inconsistent, both among themselves and as concerns one another. The courts seek to avoid a

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[5] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, BOA, Tab 1; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, BOA, Tab 2; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, BOA, Tab 3; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, BOA, Tab 4; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, BOA, Tab 5

[6] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, at para. 36 ("Regulations and orders in council must be interpreted in accordance with the modern principle of statutory interpretation."), BOA, Tab 6

[7] 2005 SCC 26, BOA, Tab 7

[8] Ruth Sullivan, Sullivan on the Construction of Statutes (4th ed.) at p. 368, BOA, Tab 8

conflict between statutory and regulatory provisions. Where a conflict is unavoidable, the statutory provision prevails.[9]

21. Applying the modern approach, s. 63(2) of the *Judges Act* authorizes the CJC to investigate a "complaint or allegation". The subject matter of the CJC's jurisdiction is the complaint or allegation, not the judge himself or herself. The text "an inquiry or investigation under this section" found in s. 63(3) must therefore refer to an inquiry or investigation regarding a "complaint or allegation", and not to a general warrant to investigate the judge about whom the complaint or allegation was made. The CJC may thus only constitute an inquiry committee for the purpose of looking into specific complaints or allegations. The constituting of the inquiry committee is thus linked to the making of a complaint or allegation.

22. The *By-laws* complete and implement the statutory scheme set out at s. 63 of the *Act*. The *By-laws* interpose an intermediate step between the making of a complaint and the investigating of it: the Review Panel. Under the principles of interpretation set out above, the provision for the Review Panel process described at s. 1.1 of the *By-laws* must be interpreted in the context of s. 63. The term "matter" in s. 1.1(1) refers to the "complaint or allegation", which itself, by reference to the scheme and language of s. 63, means the complaint or allegation for which the Inquiry Committee had been constituted. Similarly, in s. 1.1(3), the "matter" must mean the complaint or allegation, and not generally refer to the particular judge. Therefore, the Panel can recommend the constitution of an Inquiry Committee only where the particular complaint or allegation is serious enough, if proved, to warrant the removal of a judge.

23. Independent Counsel attempts to distinguish *Hryciuk v. Ontario (Lieutenant Governor)* on the basis that the Ontario *Courts of Justice Act* refers to a "complaint" where the *By-laws* refer to a "matter".[10] She thus misunderstands the nature of the statutory scheme under the *Judges Act* in two ways. First, as explained below, the word "matter" in the *By-laws* must refer to a "complaint or allegation" that has been vetted through the multi-tiered screening process. Second, the *Act* provides that the CJC "may . . . make the inquiries and the investigation of

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[9] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, BOA, Tab 9

[10] (1996), 31 O.R. (3d) 1 (C.A.), BOA, Tab 10; Written Submissions of Independent Counsel, at paras. 43-53

complaints or allegations described in section 63"[11]. The *Act* does not refer to a "matter". As a statute is paramount to a regulation, the *By-laws* cannot expand the scope of the Committee's jurisdiction beyond what is set out in the *Act*.[12]

24. Under Independent Counsel's theory of the Committee's jurisdiction, once there exists one complaint that is serious enough, if proved, to warrant the removal of a judge, all sorts of other complaints – even those not remotely serious enough to warrant the removal of a judge – may be considered by the Committee. This theory must be wrong, for those other complaints would side-step the Review Panel process, clearly in violation of the *By-laws*. As discussed below, Independent Counsel's theory is also in conflict with the *Act*.

25. The consequences of piling on un-vetted complaints would be harmful both to the judge who is the subject of the complaints, and to the public's confidence in the administration of justice. If the Committee were permitted to add to the scope of its inquiry any allegation that came to its attention, disgruntled former litigants who had appeared before the judge could potentially air their grievances without any protection for the judge's reputation. Furthermore, if the Committee has discretion to determine which complaints may come before it, then the Committee truly is the judge in its own cause.

26. When interpreting s. 5(1) of the *By-laws*, the term "complaint or allegation" must be interpreted coherently with the rest of the *By-laws* and the *Act*, including the nature of the CJC's jurisdiction under the *Act*. A complaint or allegation that was not made by the Minister of Justice or the attorney general of a province under s. 63(1) can only be brought to the attention of an Inquiry Committee through the Review Panel process, pursuant to s. 63(3) of the *Act* and the *By-laws*.[13]

27. The adjective "relevant" in s. 5(1) modifies not simply the nouns "complaint" or "allegation", but the noun phrase "complaint or allegation . . . that is brought to its attention" – and that phrase must be interpreted to mean the universe of complaints that were processed

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[11] *Judges Act*, s. 60(2)(c)

[12] *Ontario Public School Boards' Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184, at para. 49 (Gen. Div.), BOA, Tab 11

[13] An attorney general may also bring an ordinary s. 63(2) complaint: *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, at para. 67, BOA, Tab 12.

through s. 1.1 (and especially 1.1(3)) of the *By-laws*. The conjunction of "may" and "relevant" in s. 5(1) indicates that the Inquiry Committee has the discretion to assess the relevance of the complaints or allegations that have been brought to its attention through the Review Panel process.

28. Reliance on s. 12 of the *By-laws* does not support Independent Counsel's position. Section 12 does not afford the Council tasked with reviewing the Committee's report the ability to require the Committee to conduct inquiries into complaints or allegations that were not before the Committee. Rather, the purpose of s. 12 of the *By-laws* is to allow the Council to require the Committee - the fact-finding body - to conduct further investigations into the complaints or allegations that were before it in order to clarify or render more complete its report.

29. Under this analysis of the *Act* and the *By-laws*, and applying well-accepted principles of statutory interpretation, the conclusion must be that the *Act* and the *By-laws* do not authorize an Inquiry Committee that was constituted to investigate one particular complaint or allegation then to investigate a different complaint that did not go through the Review Panel process.

An Inquiry Committee has limited subject-matter jurisdiction, rather than plenary jurisdiction over the conduct of the judge about whom a complaint was made

30. Under the proper reading of the *Act* and the *By-laws*, an Inquiry Committee cannot investigate a complaint or allegation that was not itself responsible for that Committee's existence. Indeed, the Inquiry Committee as an entity under s. 63(3) of the *Act* exists solely to investigate a complaint or allegation against a judge that has worked its way through the screening process described above. The Inquiry Committee has limited subject-matter jurisdiction. The Inquiry Committee does not have plenary jurisdiction over *any* allegation that concerns Douglas ACJ.

31. The basis of an Inquiry Committee's jurisdiction is analogous to an arbitration clause, under which the arbitral panel has jurisdiction only over disputes "arising from" an agreement. Once constituted, the panel does not gain the authority to hear and decide a dispute between the same parties where the dispute is collateral to the agreement. Similarly, the Inquiry Committee has a limited mandate, circumscribed by the *Act* and the *By-laws* as set out above.

32. Independent Counsel notes that the previous Inquiry Committee endorsed a broader interpretation of the statutory framework in its May 15, 2012 ruling.[14] She now implies in her submissions before this Committee that it is now relevant that Douglas ACJ decided not to seek judicial review of that particular aspect of the ruling. The previous Inquiry Committee did not render a final determination. Consequently, there is no basis in law for the suggestion that Douglas ACJ's decision not to seek judicial review of the previous Inquiry Committee's decision to include within the scope of its review allegations that were not forwarding to it by a Review Panel is *res judicata* of her objection in this case.

33. There is an element of judgment as to when to seek judicial review of various aspects of an Inquiry Committee's rulings and Douglas ACJ, without waiving any objection to aspects of the previous Committee's conduct, did not immediately seek judicial review of all perceived errors. Nonetheless, Douglas ACJ objected to aspects of the previous Inquiry Committee's conduct. Douglas ACJ's application for judicial review, brought in August 2012, arose out of the reasonable apprehension of bias on the part of the previous Inquiry Committee. Under the circumstances at the time it was clear to both Douglas ACJ and then Independent Counsel that the proceeding could not continue without court review but there was no waiver of Douglas ACJ's other objections to certain aspects of the Committee's conduct and certain of its decisions.

34. The subsequent resignation of all of the members of the previous Inquiry Committee has, at least temporarily, rendered moot any potential application for judicial review of the May 15, 2012 ruling. Independent Counsel, nevertheless, relies on that ruling in her Written Representations. Independent Counsel's reliance on the previous Inquiry Committee's ruling is counter to her representations to this Committee and Douglas ACJ that she was starting the process afresh.[15]

35. Moreover, the May 15, 2012 ruling of the previous Inquiry Committee was raised as part of the facts underlying Douglas ACJ's application for judicial review. Douglas ACJ relied on this ruling to demonstrate the previous Inquiry Committee's pattern of conduct that informed her reasonable apprehension of bias allegation. It was in this ruling that the previous Committee

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[14] Written Representations of the Independent Counsel at para. 26

[15] On several occasions, Independent Counsel has advised this Committee and Douglas ACJ that her investigation was a *de novo* one.

instructed Independent Counsel to present the "strongest case possible in support of the allegations *against* the judge"[16] (emphasis added). The Committee subsequently issued a statement on May 19, 2012 to the effect that Independent Counsel was to act in an impartial manner, presenting evidence both favourable and unfavourable to the judge.

36. Any reliance on the previous Inquiry Committee's ruling that was framed in the context of presenting the "strongest case possible in support of the allegations against the judge" would risk raising serious procedural fairness concerns.

B. Repudiating the multi-tiered complaint screening process will cause a fundamental breach of Douglas ACJ's procedural fairness rights

37. Section 7 of the *By-laws* requires that the Inquiry Committee conduct its investigation in accordance with the principle of fairness. Douglas ACJ is entitled to expect that the scope of this Committee's investigation will be limited to complaints that are properly before this Committee, *i.e.* those that have made their way through the mandatory screening process. An unjustified departure from an established procedure can amount to a breach of procedural fairness.[17] The Joyal "complaint" has not gone through the necessary screening process.

38. The purpose of the multi-tiered process under the *Act* and the *By-laws* is to maintain public confidence in the administration of justice and the judiciary.[18] The multi-tiered regulatory procedure set out in the *By-laws* ensures that unmeritorious complaints are resolved early, without subjecting the respondent judge to unnecessary reputational harms.[19] Independent Counsel admits this is the case in seeking to bypass the process in this case which is done without authority and manifestly unfair.

39. The Federal Court has found that the conduct of the previous Inquiry Committee has already caused irreparable harm to Douglas ACJ.[20] Consideration of the Joyal "complaint" will cause further irreparable harm. This is particularly the case given the unmeritorious nature of the complaint. While Douglas ACJ's position is that a consideration of the merits of the Joyal

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[16] May 15, 2012 ruling, Compendium, Tab 5

[17] *Black v. Advisory Council for the Order of Canada*, 2012 FC 1234 aff'd 2013 FCA 267, BOA, Tab 13

[18] *Hryciuk v. Ontario (Lieutenant Governor)* (1996), 31 O.R. (3d) 1 (C.A.), BOA, Tab 10

[19] *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, BOA, Tab 12

[20] *Douglas v. Canada (Attorney General)*, 2013 FC 776, at para. 21, BOA, Tab 14

"complaint" is entirely outside the jurisdiction of this Committee, a review of Douglas ACJ's response to the complaint evidences serious issues about the allegations raised therein.[21] Douglas, ACJ must be afforded the opportunity to have the Joyal "complaint" dismissed at an early stage.

40. This Committee is in danger of being both the prosecutor and judge of the Joyal "complaint". Independent Counsel has failed to articulate what standard of review ought to apply to this Committee's own determination of whether to add the Joyal "complaint" to the scope of its inquiry. Independent Counsel also fails to articulate how this Committee could maintain its impartiality to adjudicate whether the allegations in the Joyal "complaint" warrant a recommendation for removal after having made the decision to include the complaint within the scope of its inquiry. Independent Counsel has provided no answer to these important issues.

41. Douglas ACJ's position on this issue is that any decision by this Committee to add the Joyal "complaint" to the scope of this inquiry could lead to a reasonable apprehension of bias on the part of this Committee. In conducting an analysis into allegations of bias, the reviewing court will consider the perspective of an "informed person" "viewing the matter realistically and practically - and having thought the matter through."[22] In this case, the reasonably informed person would know that this Committee's decision to add the Joyal "complaint" was made in complete disregard for the legislated institutional structures that have been put in place by the CJC to ensure that only sufficiently serious complaints are considered at the public Inquiry Committee stage.

C. Independent Counsel misapprehends her role under the *Judges Act* and the *By-laws*

42. Independent Counsel has asserted that the CJC Policy on Independent Counsel requires her to consider the relevance of any other complaints or allegations against the judge, beyond the scope of the complaint for which the Committee was constituted. She further asserts that it is her "obligation" to present all of the evidence regarding those complaints.[23]

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[21] A review of the issues raised by the Joyal "complaint" is contained in the letter from Ms. Block to this Committee on August 22, 2014.

[22] *Taylor v. Canada (Attorney General)*, 2003 FCA 55, paras. 92, 93, BOA Tab 15

[23] Compendium, Tab 6

43. Independent Counsel misunderstands her role in two senses. First, she ignores the clear, legislated distinction between complaints made by the Minister of Justice or a provincial attorney general, and those made by everyone else. Second, she substitutes herself for the Executive Director of the CJC, the Chair or Vice-Chair of the Judicial Conduct Committee, or the Review Panel, or all three. She consequently defeats the purpose of the legislative scheme governing judicial conduct.

There is only one way to by-pass the complaint screening process, and it does not apply here

44. The *Judges Act* provides only one avenue for a complaint against a judge to by-pass the screening procedure and go directly to an Inquiry Committee: s. 63(1). Under that provision, an Inquiry Committee must inquire into a complaint against a judge made by the Minister of Justice or the attorney general of a province. The screening process that is required under s. 63(2) is not engaged by and does not apply to such a complaint. Independent Counsel, being neither the Minister of Justice nor the attorney general of a province is not entitled to forward a complaint directly to the Committee for its consideration. Chief Justice Joyal, too, is neither the Minister of Justice nor the attorney general of a province.

45. Independent Counsel's position conflates the differences between complaints submitted by attorneys general under s. 63(1) and those submitted by everyone else under s. 63(2). Indeed, to consider the Joyal "complaint" would be to render meaningless the distinction between complaints made under s. 63(1) and s. 63(2). Parliament clearly intended to distinguish between those complaints made, on the one hand, by the Minister of Justice and provincial Attorneys General, and, on the other, those made by everyone else.

46. Independent Counsel's written representations misinterpret the Federal Court of Appeal's decision in *Cosgrove*. Her submissions incorrectly state that the Court of Appeal's decision in *Cosgrove* "supports the position that the multi-stage review process for complaints, including the consideration of complaints by a Review Panel, need not necessarily be followed with respect to all allegations pertaining to a judge." This interpretation of the *Cosgrove* decision is without justification.

47. In *Cosgrove*, the Court of Appeal was specifically asked to consider the constitutionality of s. 63(1) of the *Act*. Its determination that s. 63(1) passed constitutional muster does not stand for the principle that complaints submitted under s. 63(2) may be considered without the multi-tiered vetting process.

48. Independent Counsel submits that the Court's conclusion in *Cosgrove* that the differences between the two complaint procedures - a s. 63(1) complaint being referred directly to an Inquiry Committee and a s. 63(2) complaint being considered through the multi-tiered process - are minor means that the protections offered through the multi-tiered process for considering s. 63(2) complaints are minor. This interpretation of the Court's reasons is incorrect.

49. Rather, the Court meant that in light of certain additional protections afforded to a judge responding to a s. 63(1) complaint, including the constitutional constraints imposed on the actions of attorneys general, the other protections which are provided for in the multi-tiered complaint procedure in that context are not necessary under a s. 63(1) complaint. The Court's reasons in this regard do not mean that the additional protections afforded by the multi-tiered complaint procedure are "minor", or optional or unnecessary, for a judge responding to a s. 63(2) complaint. These protections are, in fact, mandated by the legislative scheme.

50. In particular, the Court noted that there are limits on the discretion of attorneys general in submitting complaints under s. 63(1). The "most important constraint" - which Independent Counsel fails to take note of in her written submissions - is the "constitutional role of attorneys general and the presumption that the attorneys general will *Act* in accordance with their constitutional obligations." Attorneys general are "constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest."[24] Complainants under s. 63(2) are not endowed with a constitutional presumption of good faith.

51. The second constraint imposed on attorneys general under s. 63(1) is that an attorney general is entitled to request the "commencement of an inquiry under subsection 63(1) only in relation to judicial conduct that is sufficiently serious to warrant removal of the judge from office for one of the reasons specified in paragraphs 65(2)(a) to (d)."[25] Complainants under s. 63(2) are

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[24] *Cosgrove* at para. 51, BOA, Tab 12

[25] *Ibid* at para. 52, BOA, Tab 12

not similarly constrained. Instead, a Review Panel is tasked with determining whether a s. 63(2) complaint or allegation may be serious enough to warrant removal before constituting an Inquiry Committee to investigate the complaint.

Independent Counsel cannot usurp the gate-keeping role of the multi-tiered complaint screening process

52. Before a complaint may be considered by an Inquiry Committee, the *By-laws* and s. 63 of the *Act* require that a complaint must be reviewed by the Executive Director of the CJC, the Chair or Vice-Chair of the Judicial Conduct Committee, and a Review Panel. Independent Counsel is now seeking to dispense with procedures set out in the legislative scheme. To do so would "defeat the whole purpose of the legislative scheme."[26]

53. Independent Counsel's tenuous interpretation of s. 5(1) of the *By-laws* would effectively sweep aside the screening process, whose inherent purpose is both to maintain public confidence in the administration of justice, and to protect the procedural fairness rights of respondent judges, such as Douglas ACJ.

54. As noted above, Independent Counsel asks this Committee to step into the role of the Review Panel to determine whether or not the Joyal "complaint" may be serious enough to warrant removal. Independent Counsel has specifically failed to address the standard of review that this Committee ought to apply to its determination of whether or not to add the Joyal "complaint" to the scope of its inquiry.

The CJC's Policy on Independent Counsel is not law

55. Independent Counsel relies on the CJC's policies to support her interpretation of s. 5(1) of the *By-laws* that an Inquiry Committee may consider complaints that were not considered by a Review Panel. In doing so, Independent Counsel's position is based in an error of law that relies on an interpretation of the CJC's policies that directly conflicts with clear provisions of the *Act* and the *By-laws*.

56. Whatever guidance the CJC's Policy on Independent Counsel provides, that document does not have the force of law. Where it is in conflict with an act of Parliament or with

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[26] *Hryciuk* at para. 38, BOA, Tab 10

regulations promulgated under an Act, the terms of the Policy must yield. Here, the *Judges Act* and the *By-laws* provide clear guidance on whether, and under what conditions precedent, the Committee may consider the Joyal "complaint". As explained above, this Committee has no jurisdiction to consider the "complaint", and to do so would constitute a severe breach of Douglas SCJ's right to procedural fairness.

57. This Committee has important work to do. It is tasked with significant responsibility under the *Judges Act*. However, this Committee is not a free-standing tribunal whose general mandate is to inquire into any aspect of Douglas ACJ's conduct. And Independent Counsel is not a bespoke prosecutor, charged with the duty to run down any grievance against Douglas ACJ that Independent Counsel happens to learn about from the press.

PART IV – CONCLUSION

58. For the reasons discussed above, the Inquiry Committee must refuse to permit Independent Counsel to include the Joyal "complaint" in her Notice of Allegations, and must refuse to consider the Joyal "complaint".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sheila Block

Sheila Block

Molly Reynolds per RW

Molly M. Reynolds

Sarah Whitmore

Sarah Whitmore

Counsel for Associate Chief Justice Douglas