



Ruling of the
Inquiry Committee
concerning
the Hon. Lori Douglas
with respect to certain
Preliminary Issues

Décision du
Comité d'enquête
au sujet de
l'hon. Lori Douglas
concernant certaines
questions préliminaires

(v. originale en anglais)

15 May 2012

le 15 mai 2012

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**RULING ON THE ROLE OF INDEPENDENT COUNSEL
and
PRODUCTION OF DOCUMENTS TO THE INQUIRY COMMITTEE**

Background of Events

[1] This Inquiry Committee (Committee) was constituted by a Review Panel of the Canadian Judicial Council under subsection 1.1(3) of the *Canadian Judicial Council Inquiries and Investigations By-laws (By-laws)* and under the authority of s. 63(3) of the *Judges Act*, R.S.C. 1985, c. J-1 to inquire into the alleged conduct of the Honourable Lori Douglas, Associate Chief Justice of the Manitoba Court of Queen’s Bench (Judge). On September 6, 2011, the Honourable Catherine Fraser, Chief Justice of Alberta, was appointed by the Vice-Chairperson of the Judicial Conduct Committee as Chairperson of the Committee. The other members of the Committee are the Honourable Derek Green, Chief Justice of Newfoundland and Labrador, the Honourable Jacqueline Matheson, Chief Justice of the Supreme Court of Prince Edward Island, Mr. Barry Adams, member of the Law Society of Upper Canada and Me Marie-Claude Landry, Ad. E., member of the Barreau du Québec. The original Committee included Chief Justice Warren Winkler of Ontario but other work obligations required him to resign from the Committee and Chief Justice Green took his place on December 2, 2011.

[2] Upon its appointment, the Committee was not provided with any documentation concerning the reasons for establishing the Committee. The Council provided such documentation to Guy Pratte who was appointed Independent Counsel “to present the case” to the Committee. It was also provided to Sheila Block, Counsel for the Judge (Judge’s Counsel). In submissions to the Committee dated October 12, 2011, Judge’s Counsel stated that: “Justice Douglas objects to any substantive material, including the complaint(s) being provided to the Committee until the Independent Counsel has issued the notice of allegations setting out the framework for the inquiry.” Independent Counsel expressed agreement with this view on October 17, 2011.

[3] The subject material includes a written complaint (Complaint 1) and the decision of the Review Panel of the Council (Review Panel Decision), which decided that this Committee would

be constituted. It also includes what Judge's Counsel referred to as "two discs, apparently anonymously submitted to the [Council]." These were treated as another complaint about the Judge (Complaint 2) by the Executive Director of the Council, acting under the direction of the Vice-Chairperson of the Judicial Conduct Committee. For convenience, we sometimes refer to these materials, including the discs, as documents.

[4] On November 16, 2011, at the request of the Committee, George Macintosh, QC, Counsel to the Committee, met by telephone with Independent Counsel and Judge's Counsel, to discuss the progress of preparation of notice of allegations. Notice is to be provided by Independent Counsel to the Judge in accordance with subsection 5(2) of the *By-laws*. On December 7, 2011, Independent Counsel wrote a procedural update for the Committee. He advised that he hoped by early February 2012 to submit either a draft notice of allegations for the Committee's consideration or recommend why no allegations should go forward.

[5] On December 19, in an effort to enable the Committee to determine the scope of this inquiry and to proceed to a hearing as soon as possible, the Committee sought to crystallize the issue of its access not only to the Complaints but also the Review Panel Decision. Thus, the Committee asked Independent Counsel and Judge's Counsel to address the following question in written submissions:

Does the Committee have the jurisdiction to receive and review the complaints, or all or any part of the review panel's decision, or both, at the same time as, or before, it receives the notice of allegations? If so, is there any reason why the Committee should not receive and review those materials?

[6] Written submissions were received in January of this year. Judge's Counsel opposed the Committee's review of both Complaints asserting: (1) the Committee had not yet decided that either Complaint was a "proper complaint" subject to the Council's jurisdiction; (2) the Committee's jurisdiction had not yet been engaged and was contingent on Independent Counsel recommending that an inquiry go forward; and (3) if and when Independent Counsel

recommended proceeding with an inquiry, all parties should then be given the opportunity to make formal submissions on whether the Complaints constitute proper complaints. Judge's Counsel further asserted that the Committee had no jurisdiction to review the Review Panel Decision at any time and that it was Independent Counsel's role to establish the framework for the inquiry.

[7] Independent Counsel submitted that: (1) there was no impediment to the Committee's reviewing Complaint 1 immediately but the Committee should not review any material referred to in that Complaint prior to "receiving Independent Counsel's recommendations and submissions as to possible allegations" against the Judge; (2) it would be premature for the Committee to review the Review Panel Decision and a decision on whether to do so should also await the results of Independent Counsel's investigation and recommendations; and (3) Complaint 2 should not be reviewed at that time as the Committee "may not have jurisdiction to do so" or doing so would constitute an unjustified infringement of the Judge's privacy rights. Instead, again a decision should await Independent Counsel's "report and recommendations as to whether any allegations should go forward, and on what grounds".

[8] On February 29, the Committee met in person in Ottawa to review those submissions and consider the status and timing of notice of allegations. The Committee decided that there would be a case management meeting with counsel to discuss certain procedural issues including notice of allegations. That meeting was held in Ottawa on March 10, attended by the Chairperson, Counsel to the Committee, Independent Counsel, Judge's Counsel and two other counsel assisting Independent Counsel and Judge's Counsel respectively. During that case management meeting, the Chairperson raised the question of the timing of the issuance of notice of allegations. Independent Counsel indicated that he intended to issue the "report" referred to above. That course of action was supported in large measure by Judge's Counsel.

[9] This approach raised in turn a general issue as to the role of independent counsel in the inquiry process. Counsel were requested to address this issue and, in particular, the following four questions which were sent to Independent Counsel and Judge's Counsel on March 14:

(1) In issuing a notice of allegations under s. 5(2) of the Bylaws, does independent counsel have the jurisdiction or authority to delete from that notice any complaints, allegations or matters the review panel has referred on for inquiry by the Inquiry Committee?

(2) Does independent counsel have the jurisdiction or authority to recommend not proceeding with any complaints, allegations or matters the review panel has referred on for inquiry by the Inquiry Committee without calling evidence relating to that recommendation?

(3) If the answer to (2) is yes, does the Inquiry Committee have the discretion to reject that recommendation and if so, to what extent? If the discretion is limited, then what are the parameters or governing principles for the exercise of that discretion by the Inquiry Committee?

(4) If the Inquiry Committee declines to accept a recommendation by independent counsel not to proceed with a particular complaint, allegation or matter, is the independent counsel's ability to continue to fulfill the obligations imposed on independent counsel with respect to that complaint, allegation or matter then compromised in fact or in appearance?

Counsel provided their written submissions addressing those questions on April 4 and April 11.

[10] This Ruling addresses issues related to these questions about the role of independent counsel as well as to the previous questions in relation to the production of documents to the Committee.

Introduction to Ruling

[11] The role of independent counsel can only be understood in the context of the role of an inquiry committee established under the authority of s. 63(3) of the *Judges Act*. This understanding must be informed by the Council's *Complaints Procedures*, its *By-laws* and its related *Policies*, including *Policy on Inquiry Committees*, *Policy on Independent Counsel*, and *Policy on Counsel Conducting "Further Inquiries"*. In this respect, the pivotal function of a review panel, established under subsection 1.1(1) of the *By-laws*, must also be understood. In other words, the responsibilities of an independent counsel are necessarily shaped and circumscribed particularly by the role of an inquiry committee established under s. 63(3) of the *Judges Act*. It is also important to bear in mind the purpose for which the role of independent counsel was created and the interpretation of that role by the Council itself through its *Policies*. The history of the creation of that role and the related purpose has been documented in the book Ed Ratushny, *The Conduct of Public Inquiries* (Irwin Law, 2009) at pages 230 et seq.

[12] It may be helpful, at the outset, to clarify the nature of these various documents. The *Judges Act* is, of course, a statute and is binding law. The *By-laws* have the status of a "statutory instrument", which is created by the Council under the authority of the *Judges Act*. These *By-laws* also have the force of law.

[13] The *Complaints Procedures* along with the other *Policies* noted earlier were adopted by a resolution of the Council and have the legal status of a "policy". Ordinarily, a "policy" is not legally binding but there is an expectation that it will be followed unless there is a justifiable reason to depart from it. In some circumstances, an unjustifiable departure from a policy could amount to a breach of the legal principle of fairness.

The "Investigation" Process

[14] The jurisdiction of the Council to conduct an inquiry into complaints or allegations

against a judge is found in s. 63 of the *Judges Act*, which reads in pertinent part:

(1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court ... should be removed from office ...

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court ...

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

[15] A number of things should be noted about these provisions. First, there are two ways in which conduct proceedings against a superior court judge may be initiated: (a) by a request of the federal Minister of Justice or a provincial attorney general to commence an “inquiry” as to whether the judge should be removed from office (s. 63(1)); or (b) by a “complaint or allegation” from any source (s. 63(2)). Second, the process under s. 63(1) involves an “inquiry” immediately whereas the process under s. 63(2) involves at the start an “investigation” which may lead to an “inquiry”. Third, unlike the inquiry under s. 63(1), the investigation under s. 63(2) is not limited to a consideration of whether the judge should be removed from office. The investigation, at least in the initial stages, can be into conduct that is less serious than conduct which could potentially result in removal from office. Fourth, either process “may” result in a formal “inquiry” conducted by an inquiry committee. In this case, we are dealing with the investigation process under s. 63(2) that was initiated by a complaint.

[16] The constitution of an inquiry committee where an allegation or complaint has been received under s. 63(2) should not be regarded as the commencement of a new or separate process that is severable from the rest of the “investigation” but a continuation of it in a more formal manner with procedural safeguards built into it throughout in fairness to the judge involved.

[17] The “investigation” process under s. 63(2) is therefore one interconnected process consisting of several stages. The earlier stages are established under the *Complaints Procedures*. These earlier and informal stages may culminate in the appointment of a review panel. They consist of a review by the Chairperson of the Judicial Conduct Committee to determine whether the complaint is “without merit or does not warrant further consideration” (section 5.1(a)(i)). If the conclusion is that the complaint has merit or warrants further consideration, the matter can be referred to a review panel (section 5.1(d)). In so doing, the Chairperson may provide the review panel with such information which could “assist the Panel’s consideration of the file” (section 9.1). This emphasizes the interconnectedness of the procedures as part of one overall investigatory process.

[18] The purpose of the review panel is “to decide whether an Inquiry Committee should be constituted under subsection 63(3)” of the *Judges Act* where the matter may be serious enough to warrant removal (*By-laws*, subsection 1.1(3)). It follows from this that the decision of the review panel to constitute an inquiry committee is key to determining the scope of an inquiry committee’s mandate. This emphasizes again that the formal inquiry is a continuation of the broader investigation process. It also means that the inquiry committee draws its authority to act from the referral from the review panel and it is to the review panel’s decision that the inquiry committee must look when determining the scope of its mandate, at least initially.

Role of Review Panel

[19] A review panel performs a pivotal function in the complaints process. It provides the last opportunity to resolve a serious complaint without resorting to a full public hearing. The review panel must decide whether, despite the complaint and its exposure to public scrutiny, public confidence would not be undermined by the judge remaining in office. That conclusion might be reached by considering the judge’s past record as a judge, the judge’s recognition of the concerns about the conduct in question, the unlikelihood of such conduct being repeated and

other mitigating factors. Remedial measures may also be adopted in some circumstances. On the other hand, the review panel may conclude that, after considering all of the circumstances, the public interest requires a full hearing where oral testimony as well as all of the other evidence may be fully presented and tested. The criterion for a review panel to decide that an inquiry committee shall be constituted is whether “the matter may be serious enough to warrant removal” under subsection 1.1(3) of the *By-laws*.

[20] The current role of the review panel was only established as a result of the Council’s review of its entire judicial conduct process initiated in 2009, leading to changes adopted in 2010. Prior to that, the review panel only had authority to recommend to the full Council that an inquiry committee be constituted. This prior involvement of the full Council in deciding whether an inquiry committee should be constituted demonstrates the importance of that decision. The changes that resulted from the 2009 review now give the review panel itself the power to constitute an inquiry committee. This delegation does not diminish the significance of this function. Rather, it recognizes that the full Council may later have to deliberate on the inquiry committee’s report so that it should not also make the decision to establish the inquiry committee. The previous process was vulnerable to the criticism that it offended the principle that one cannot be a “judge in one’s own cause”.

[21] The significance of the review panel’s function and the application of that principle is found in section 9.10 of the *Complaints Procedures* which states:

After a Panel has completed its consideration of a complaint, the members of the Panel shall not participate in any further consideration of the same complaint by the Council.

The review panel makes a substantial decision affecting rights. The importance of this function is also demonstrated by the degree of procedural fairness required. Section 9.4 provides that the judge must receive “any information to be considered by the Panel”. Section 9.5 requires that the

judge be provided “a reasonable opportunity to make written submissions” as to whether an inquiry committee should be constituted.

[22] While a complaint forms the starting point for determining what the allegations or “case” against the judge might be, those allegations may evolve at the preliminary or “informal” stage as a result of analysis by the Chairperson of the Judicial Conduct Committee or by the review panel, or both. The investigation process initiated by a complaint could start out as being very broad. Through the review and sifting by the Chairperson, then by a review panel, the original allegations could be winnowed down to include only those that are regarded as serious enough to warrant removal. Further information might also be considered as a result of “further inquiries” conducted by Outside Counsel who may be appointed by either or both of them for this purpose. In other words, an original complaint does not necessarily define the scope of the matters before an inquiry committee.

[23] The evolution of the scope of complaints can be illustrated by the role of Outside Counsel in conducting further inquiries. This step in the investigation process is authorized by the Council’s *Complaints Procedures*. It may be initiated by the Chairperson of the Judicial Conduct Committee after reviewing the response of the judge to the complaint and any other relevant material that has been provided. It may also be initiated by a review panel at the later stage of the investigation when the review panel must decide whether the matter may be serious enough to warrant removal. The Council’s *Policy on Counsel Conducting “Further Inquiries”* was adopted in 2002. It was subsequently replaced with key elements now included in a standard letter of instructions from the Executive Director of the Council to the counsel who is retained to perform the role of Outside Counsel in each individual case. But the basic purpose of the role of Outside Counsel remains the same. It is simply to attempt to clarify the allegations against the judge and gather evidence which, if established, would support or refute those allegations. Outside Counsel must obtain the judge’s response to those allegations and evidence, and present all of this information to the Chairperson or review panel.

[24] This *Policy* (now reflected in the standard letter) clearly contemplated that the “further inquiries” could extend beyond the allegations that arise directly from the initial complaint(s). It stated:

The role of Counsel undertaking further inquiries is to focus on the allegations made. However, if any additional, credible and serious allegations of inappropriate conduct or incapacity on the part of the judge come to the Counsel’s attention, Counsel is not precluded from inquiry into those matters as well.

This simply reflects the potential evolution of the allegations referred to above.

[25] This *Policy* also articulated the broader “public interest” rationale for expanding the scope of an investigation beyond an initial complaint, which rationale continues to be valid:

This approach is supported not only by the Judges Act and past practice, but also by sound policy considerations. First, a complaint is most frequently made directly to the Council by a member of the public. It should not be treated as a legal document which strictly confines the scope of the review of the Judge’s conduct. Normally, the review will be confined to the scope of the complaint but, occasionally, other allegations may arise. Secondly, the Council would be the subject of strong and justifiable criticism if it came to light that, in the course of reviewing the conduct of a judge, serious allegations of inappropriate conduct were ignored because they were not mentioned in the initial complaint. Thirdly, the incident which is the subject of the complaint may be only one example of a pattern of conduct on the part of the judge which renders him/her unable to fulfil the judicial role. Finally, there is no procedural unfairness to the judge in question since the judge must be given the opportunity to respond to sufficient information about the allegations and the material evidence to permit a full response and the answer of the judge must be included in the report of such further inquiries. It should also be kept in mind that this is still part of the informal stage of the consideration of the conduct of a judge.

In our view, that “informal stage” ends when a review panel makes the decision to constitute an inquiry committee and that decision includes the review panel’s reasons for doing so. Those reasons establish the allegations that have led to the review panel’s decision that “the matter may be serious enough to warrant removal” under subsection 1.1(3) of the *By-laws*. As such, they form the initial scope of the inquiry committee’s mandate.

Notice of Allegations

[26] There appears to be some confusion concerning the significance of notice of allegations under subsection 5(2) of the *By-laws*. It is important, therefore, to clarify just what role notice of allegations plays in the inquiry process.

[27] There is no provision in the *Judges Act* or *By-laws* that requires that an indictment-like document called a Notice of Allegations be issued as a step marking the initiation of the inquiry process. Section 64 of the *Judges Act* provides:

A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof ...

This provision enshrines the principle of procedural fairness in the complaint process. It requires “reasonable notice” to be given to the judge. It does not specify the form in which it is to be provided; it must simply be “reasonable”. It also applies, by its terms, at all stages of the investigation process. In fact, the *Complaints Procedures*, sections 3.5(c), 4.1, 7.2, 9.4, 9.5 and 9.9 recognize the importance of keeping the judge informed of what has been alleged against him or her during the investigation of the matter by the Chairperson of the Judicial Conduct Committee and by the review panel.

[28] As to the formal inquiry process itself, the *By-laws* also provide for notification of the judge:

5(2) The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

Again, this provision does not specify any particular form of notice. It must simply be “sufficient”. The judge must, however, have notice of all complaints or allegations that “are being considered” by the inquiry committee. It is reasonable to conclude that subsection 5(2) is directed primarily at ensuring procedural fairness to the judge by giving him or her notice of any matters, beyond those referred by the review panel, that the inquiry committee “may consider” under subsection s. 5(1).

[29] The judge will already have had notice, under section 9.9 of the *Complaints Procedures*, of the complaints or allegations that have been referred to the inquiry committee by the review panel, by virtue of the delivery of the decision of the review panel to the judge. Subsection 5(2) of the *By-laws* merely completes the process of ensuring that all matters being considered by the inquiry committee are brought to the attention of the judge so that the judge will have full disclosure and a full and proper opportunity to respond to them.

[30] It follows from this that neither s. 64 of the *Judges Act* nor subsection 5(2) of the *By-laws* require the drafting of an all-encompassing, conclusive document styled “Notice of Allegations” for delivery to the judge. As long as the judge receives “reasonable notice” or “sufficient notice” throughout, the judge’s procedural rights will be protected.

[31] That said, the Committee recognizes that a practice appears to have developed in recent cases for independent counsel to in fact prepare one formal notice of allegations. Although this is not legally required, there is nothing objectionable in principle in doing so provided it is recognized that such a notice must include: (i) a description of the essence of each of the complaints or allegations referred to the inquiry committee by the review panel; (ii) a description of any further complaints or allegations that independent counsel has identified in the course of preparation of the case to be presented to the inquiry committee and which independent counsel

considers ought to be brought to the committee's attention under subsection 5(1) of the *By-laws*; and (iii) any other complaint or allegation which has been brought to the attention of the inquiry committee by any other means and which are regarded as matters "being considered" by the inquiry committee under subsection 5(2). Because the inquiry committee may later add to the scope of the matters being considered under subsection 5(1) of the *By-laws*, independent counsel may be required to provide a supplementary notice to the judge. The drafting of a comprehensive notice has the practical effect of bringing together in one document all complaints or allegations the judge is expected to face. In this way, the judge will have a complete picture of the scope of the inquiry, subject of course to the possibility of that scope being altered as events unfold.

[32] It is not necessary for the purposes of this Ruling to define with particularity what the specific process should be in finalizing a notice of allegations. It may be that independent counsel will need to have some communication with the inquiry committee to determine what the inquiry committee determines it should "consider" within subsection 5(1) of the *By-laws*. That did not occur here and the time constraints now are such that this Committee chooses not to address the manner in which such consultations should occur in future. Instead, this Ruling provides for Independent Counsel to distribute a notice of allegations to the Judge and to the Committee without any prior involvement with this Committee. It must be stressed that this Committee retains the authority to amend the scope of this inquiry under subsection 5(1).

[33] We are concerned that submissions from the Independent Counsel may be at variance with the process described above. In a letter dated December 7, 2011, he wrote that he hoped to be in a position by early February 2012:

... to either put forward a draft Notice of Allegations for the Inquiry Committees consideration, or *to make recommendation as to why no allegations should go forward.* [Emphasis added.]

[34] Later, in a submission dated January 26, 2012, Independent Counsel, in support of his argument that the Committee ought not to review Complaint 2, submitted that such decision

should be postponed until after the Committee:

... has received Independent Counsel's report and recommendations as to whether *any* allegations should go forward, and on what grounds. [Emphasis added.]

[35] Finally, in a later submission dated April 4, 2012, Independent Counsel asserted "an ability to recommend to the Committee that a complaint and/or allegations *not go forward*." [Emphasis added.]

[36] If these comments are meant to suggest that an independent counsel has a discretion, in drafting a notice of allegations, to truncate the allegations referred to an inquiry committee by a review panel, it is incorrect. Further, there is no place even for an independent counsel to *recommend* that the notice of allegations be truncated. A matter referred to an inquiry committee by a review panel *must* be the subject of an inquiry even though it may be disposed of summarily by the inquiry committee. Indeed, an inquiry committee has no discretion not to deal, in some manner, with the matters referred to it by a review panel.

[37] In other words, a distinction must be drawn between the drafting of a notice of allegations and making a recommendation that an allegation in the notice be dealt with summarily. In the course of preparing the case, independent counsel may learn that there is no evidence to support an allegation contained in the decision of the review panel. When reporting this to the inquiry committee, it may agree. However, that allegation should still be included in a notice of allegations and ordinarily dealt with at the hearing as directed by the inquiry committee. The public nature of an inquiry requires transparency, particularly when an inquiry committee is dealing with an allegation that a review panel considered to be potentially capable of warranting the judge's removal from office.

[38] It follows that a notice of allegations can in most cases be readily prepared. It will contain the essence of the complaints or allegations which the review panel has referred to the

inquiry committee but may also contain additional allegations which the independent counsel suggests should also be dealt with or which the inquiry committee otherwise directs independent counsel to include.

Role of Inquiry Committee

[39] In discussing this topic, it is critical to address the fundamental issue of the nature of an “inquiry” as opposed to adversarial proceedings. Judges are accustomed to conducting trials in an adversarial system. Yet the *Judges Act* clearly states that an inquiry committee under s. 63 and the Council under s. 65 are to operate by way of an inquiry. What are the essential features and differences of each approach?

[40] In an adversarial system, each side gathers its own evidence, presents it as favourably as possible, and emphasizes weaknesses in the evidence of the other side. The judge plays an essentially passive role, primarily listening, and then rendering a decision. An inquiry is an inquisitorial process that requires the inquiry committee to conduct an active search for the relevant evidence as well as to assess it, and to make findings in its final report.

[41] Where facts are in dispute in civil litigation, conducted under the common law system of procedure, a judge has to decide, whether on the balance of probabilities, a case has been made out by a plaintiff. That decision is made within the confines of the evidence as led by the parties. The judge has no right to travel outside that evidence on an independent search on his or her own part for the truth. If the evidence is inconclusive, the judge must simply apply the rules as to onus and standard of proof and make a decision. By contrast, an inquiry committee establishes its own parameters under its mandate and may go where the evidence leads.

[42] The distinction between the two processes is not rigid. In an adversarial process, a judge may personally pursue a line of questioning of a witness that the judge considers important to the issues and that counsel have not adequately explored. An inquiry committee is certainly entitled

to do so at its hearings. But it may also elect to play a more passive role, relying on the parties and independent counsel to explore the strengths and weaknesses of the evidence. The essential difference is that in the adversarial process, the parties are responsible for collecting and presenting the evidence to the judge. By contrast, in an inquiry under the *Judges Act*, the inquiry committee is ultimately responsible for the collection and presentation of the evidence for the benefit of the Council and the public, while providing a fair opportunity for affected parties to participate. Independent counsel assists the inquiry committee in fulfilling this responsibility.

[43] Members of an inquiry committee are entitled to take a proactive role in the questioning of witnesses which, at times, could resemble cross-examination. But in order to enhance the perceived fairness of hearings, committee members usually choose to play a more passive role. Although there are no “sides”, as in a trial, opposing “interests” are inevitable in investigative inquiries. An inquiry committee under the *Judges Act* provides perhaps the most extreme example of a judge’s strong personal interest in the outcome, since it is entirely about the alleged conduct of a specific judge and whether that judge should be removed from office. This then leads to the obvious issue. Who will ask the difficult questions that need to be answered?

[44] The position of independent counsel was established for this purpose. It allows for the gathering, marshalling and presenting of the evidence to be done by independent counsel. It is the responsibility of such independent counsel not only to present the evidence but also to “test” that evidence, when necessary. This may require the introduction of contradictory evidence and “tough” questioning through cross-examination. The status of independent counsel permits such aggressive advocacy while dissociating the inquiry committee from any views that might be reflected in that advocacy. At the same time, the inquiry committee remains entirely free to direct that additional evidence be adduced or avenues explored on issues it considers to be relevant.

[45] The *Judges Act* is unequivocal in establishing that the process for assessing the conduct of a judge is to be in the nature of an inquiry. Section 63 provides:

(1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court or the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court or of the Tax Court of Canada.

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring....

As explained earlier, the terms “inquiry” and “investigation” in s. 63(3) refer to the stage at which an inquiry committee is established. If the inquiry is initiated under s. 63(1), the inquiry is the first stage without a complaint or screening process. The inquiry may also be initiated as a result of an investigation under s.63(2) that originated with a complaint. In this case, the complaint proceeded through various stages of screening before this Committee was constituted. These provisions also reveal that an inquiry committee is to report back to the Council. The

inquiry committee's ultimate findings and recommendations will no doubt be important, but the final responsibility rests with the Council.

[46] The nature of an inquiry committee was described by the Supreme Court of Canada in *Ruffo* [1995] 4 SCR 267. There, Justice Gonthier, for the majority, discussed the role of a *Comité d'enquête* under the Quebec *Courts of Justice Act*, which is analogous to an inquiry committee under the *Judges Act*. He described its basic purpose as "relating to the welfare of the public". This observation emphasizes the strong public interest that is manifest in this Committee's mandate. Its role relates primarily "to the judiciary rather than the judge affected by the sanction." It is required to inquire into the allegations about a judge's conduct, determine whether they are justified and recommend the appropriate sanction to the *Conseil*. He elaborated on the nature of its inquiry at paras. [72] - [73]:

. . . the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.

In light of this, the actual conduct of the case is the responsibility not of the parties but of the *Comité* itself Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the *Conseil* decides to conduct an inquiry after examining a complaint lodged by one of its members, the *Comité* does not thereby become both judge and party: as I noted earlier, the *Comité's* primary role is to search for the truth, this involves not a *lis inter partes* but a true inquiry . . .

This emphasizes the fundamental obligation of an inquiry committee to take responsibility in the public interest for actively pursuing a thorough search for the truth in the conduct of an inquiry.

[47] The chief justices and lawyers who serve on inquiry committees, as well as counsel who appear before them, tend to be more familiar with the common law adversarial process than with the inquiry process. It is important for an inquiry committee to bear in mind that it is conducting

an “inquiry”. The assistance of independent counsel and counsel for the judge is necessary but it is the inquiry committee that is in control.

[48] For example, the independent counsel in *Boilard* recommended that the inquiry be divided into two phases that would permit the hearing to be closed after the first phase. The inquiry committee rejected this proposal and directed that counsel present the evidence. At the end of the hearings, independent counsel expressed the view that there was no allegation that could warrant removal. The inquiry committee concluded that the judge’s conduct was improper but did not warrant removal. In the end, the Council agreed with independent counsel rather than the inquiry committee but it was clear that this counsel was required to proceed as directed by the committee.

[49] Independent counsel in *Cosgrove* concluded that, in view of an “apology”, he would not call the four remaining witnesses. The inquiry committee, in effect, told him to do so and he did.

[50] The *By-laws* address some specific aspects of inquiry committee proceedings. Subsection 5(1) provides that:

The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

This provision reinforces the possibility that the scope of the allegations may change over the course of the process. The fact that subsection 3(2) refers to independent counsel’s presenting the case to the inquiry committee in no way undermines the broad powers conferred on the inquiry committee to establish the scope of the inquiry under subsection 5(1). Subsection 5(2) merely directs independent counsel to provide to the judge notice of complaints or allegations that fall within that scope. The giving of notice by independent counsel rather than by the inquiry committee reflects the rationale for having independent counsel, which is discussed under the next heading.

[51] Subsection 6(1) recognizes the public interest by requiring that hearings and other information before the inquiry committee are to be public unless the inquiry committee determines that the public interest and the due administration of justice require that all or part of the hearing be held in private.

[52] The Council adopted its *Policy on Inquiry Committees* in 2010. This *Policy* is discussed, together with the *Policy on Independent Counsel*, following the discussion under the next topic.

Role of Independent Counsel

[53] The concept of independent counsel arose during the *Marshall Inquiry* in 1990. Co-counsel for the inquiry committee met with the members prior to the hearings and provided advice directly to them. Donald Marshall Jr. was not a party to the hearings at the outset, but very early in the proceedings, counsel for one of the judges attacked his character. Counsel for the committee were required to react in a similarly adversarial manner. At that point, the committee decided it would no longer meet privately with their own counsel but would maintain an “arms-length” relationship with them. The hearings proceeded and concluded on that basis.

[54] The *Gratton Inquiry* followed in 1993 and, at the outset, the inquiry committee decided to bifurcate the roles of legal counsel by having one counsel act as “internal” counsel to the inquiry committee and another counsel to act independently of the committee. Chief Justice Bayda, as Chairperson, wrote to Chief Justice Lamer, as head of the Council as follows:

The Committee unanimously decided that an independent counsel should be appointed to gather, marshal and present any evidence relevant to the allegation. The Committee, which is deemed to be a superior court pursuant to ss. 63(4) of the Judges Act intends to maintain an “arm’s length” relationship with such counsel and to leave to his or her discretion the carriage of such allegation prior to and during the hearing.

He requested that the Council promptly appoint such an independent counsel and the request was granted.

[55] The same approach was adopted by the subsequent *Bienvenue, Flynn, Flahiff* and *Boilard Inquiries*. Independent counsel remained subject to the directions of each inquiry committee. No suggestion was made in any of those inquiries that the role of independent counsel went beyond gathering, marshalling and presenting the evidence and making related submissions.

[56] Subsection 3(2) of the *By-Laws* provides that the independent counsel “shall present the case to the Inquiry Committee” as well as making submissions on law and procedure. This goes no further than to describe this role. The “case”, essentially, means “the case against the judge” but it also must be presented fairly. Subsection 3(3) provides that the presentation must be done “impartially”. This merely reflects the ordinary role that any inquiry committee would expect from counsel who is presenting the evidence that is the subject of its mandate.

[57] Subsection 3(3) also states that independent counsel must act “in accordance with the public interest”. This means that such counsel does not act in the usual way of a solicitor receiving instructions from a client. Does this requirement grant any mandate beyond presenting the case and making related submissions? It does not. Then why does it exist? It exists because, apart from the Minister of Justice and Parliament, the *Judges Act* places the sole responsibility for assessing a judge’s conduct in the hands of the entire Council. This led the Council to consider a number of issues in attempting to establish a process that would not only meet the legal threshold of fairness but would also go further by establishing a paragon of both perceived fairness to the judge and public confidence in its process.

[58] Following are the kinds of questions that Council attempted to resolve in the course of its deliberations during its review commenced in 2009. If the Council were to give instructions to independent counsel, how could the Council be perceived as acting impartially if it were also instructing counsel on how to present the case against a judge whose conduct it will be

assessing? This would be very different from an inquiry committee giving directions to counsel at an inquiry hearing where everything done by the inquiry committee would be in a public forum and subject to scrutiny by both the public and counsel for the judge. Even if it were desirable, how would the Council provide such instructions to counsel? What kind of instructions would be given? Would it be desirable to establish uniform instructions and, if so, why not give them directly to counsel as the *Policy on Independent Counsel* already did?

[59] The Council decided that the best course of action was to retain the existing approach, namely, establish uniform instructions and give them directly to independent counsel. However, it was recognized that further clarification and emphasis of the scope of the role of independent counsel was required. It was hoped that this would provide a consistent framework that would avoid idiosyncratic decision-making by individual counsel. The purpose of this Ruling is to establish unequivocally what we consider to be the proper role of independent counsel.

Related Policies and By-Laws of the Canadian Judicial Council

[60] The experiences gained from the *Matlow* and *Cosgrove Inquiries* were significant in causing the Council to initiate its review in 2009. As a result, in 2010, the *Policy on Independent Counsel* was amended and a new *Policy on Inquiry Committees* adopted.

[61] The legal nature of a “policy” was addressed earlier, but these *Policies* have another legal significance beyond the one discussed. They provide the Council’s own interpretation of the law related to its judicial conduct process, including the role of inquiry committees, outside counsel and independent counsel. That takes on special significance because of this passage in the judgment of the Supreme Court of Canada in *Moreau-Berubé*, 2002 SCC 11, [2002] 1 SCR 249 at paragraph [62]:

. . . issues of statutory interpretation by the Council should attract considerable deference and reviewing courts should not intervene

unless the interpretation adopted by the Council is not one that it can reasonably bear.

It follows that independent counsel must be meticulous in respecting what Council has determined to be the purpose and scope of the various roles established in its judicial conduct process.

[62] The original *Policy on Independent Counsel*, which came into force on January 1, 2003, stated:

The role of Independent Counsel is recognized by the By-laws and is unique. Once appointed by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee, Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel's best judgment of what is required in the public interest. This is an important public responsibility that requires the services of Counsel of high ability, experience and stature in the legal community.

Independent Counsel is, of course, subject to the rulings of the Inquiry Committee, but is expected to take the initiative in marshalling and presenting the evidence before the Committee.

Although Independent Counsel "shall present the case to the Inquiry Committee", this does not mean that Counsel acts on behalf of the complainant or the Council. Nor does Counsel act on behalf of the Minister or Attorney General who may have initiated the constitution of the Inquiry Committee.

Independent Counsel does not act as a "prosecutor". Rather, such Counsel presents the evidence and related submissions to the Inquiry Committee with full appreciation of the objective concerns underlying the complaint or allegations, with complete fairness to the judge who is the subject of the Inquiry Committee, and conscious of the importance of conducting the proceedings in a manner that will enhance public confidence in the judiciary.

[63] Concerns arose out of the roles played by independent counsel in the *Matlow* and

Cosgrove Inquiries. There was a concern that independent counsel may not have fully appreciated that their role was to act as an advocate to present the case against the judge. As a result, the judges who were the subject of these inquiries had strong representation but the case for removal may not have been fully presented. Accordingly, the 2010 revisions to the *Policy on Independent Counsel* added the following passage to emphasize the basic purpose for creating this role which we have earlier described:

The central purpose for establishing the position of Independent Counsel is to permit such counsel to act at “arm’s length” from both the Canadian Judicial Council and the Inquiry Committee. This allows Independent Counsel to present and test the evidence forcefully, without reflecting any predetermined views of the Committee or the Council.

[64] The following passages were also added to reinforce the need for strong advocacy by independent counsel:

The public interest requires that all of the evidence adverse to the judge, as well as that which is favourable, be presented. This also may require that evidence, including that of the judge, be tested by cross-examination, contradictory evidence or both.

Independent Counsel is impartial in the sense of not representing any client but must be rigorous, when necessary, in fully exploring all issues, including any points of contention that might arise. Where necessary, Independent Counsel may need to adopt a strong position in regard to the issues.

The amended *Policy* also deleted the sentence that stated that independent counsel was not to act as a “prosecutor”. There was a concern that this sentence might have inhibited independent counsel from playing a stronger role.

[65] Paragraphs 22 to 25 of the *Report of the Cosgrove Inquiry Committee* describe “changes of position” on the part of independent counsel that reflect the kind of negotiation that one might

expect in civil litigation but is not appropriate in the context of an inquiry. To ensure that it was clear that independent counsel do not have the authority to negotiate settlements in inquiries, the following paragraph was also added to the amended *Policy*:

Unlike other settings, such as civil litigation, Independent Counsel has no authority to negotiate a “resolution” of the issues before the Inquiry Committee. However, Independent Counsel’s submissions will be considered by the Inquiry Committee.

This constitutes a clear direction from the Council to independent counsel that their role is simply to present the case and make submissions where appropriate but not to intrude on the responsibility of the inquiry committee, itself, to deal with the merits in assessing the conduct of the judge.

[66] Finally, the following passage was added in the amended *Policy*:

As a preliminary issue, consideration should be given to the relevance of any other complaints or allegations against the judge, beyond the scope of the instant complaint or request under section 63(1). Additional witnesses may have to be interviewed and documents obtained.

This demonstrates that the inquiry committee is relying on independent counsel to begin with reference to the scope of the allegations established by the review panel in gathering the evidence to be marshalled for presentation before the committee. When putting the case (evidence) together, there may be a further development in the evolution of the allegations. This is the scope of the subsection 5(2) responsibility of independent counsel, which is subject to the authority of the inquiry committee. The inquiry committee may also supplement that role under subsection 5(1) by deciding to consider any other relevant complaint or allegation that has come to its attention.

[67] This is not to suggest that independent counsel should launch an entire *de novo*

investigation on his own. The complaint(s) and decision of the review panel will be the starting point in determining the nature of the evidence that must be gathered, marshalled and presented in support of the allegations that the decision of the review panel identifies. He will consider the position of counsel for the judge and may seek the guidance of the committee and make recommendations. But if other misconduct is revealed, the considerations noted earlier may become relevant. This is reinforced by the inquiry committee's jurisdiction to broaden the scope of the inquiry under subsection 5(1) as well.

[68] There is further elaboration on this issue in the following passage in the *Policy on Inquiry Committees*:

There may be additional allegations about the Judge's conduct that were not contained in the initial complaint or a request under section 63(1) of the Act. For example, these could come to light as a result of publicity given to the forthcoming hearings or in the course of Counsel's preparation for them. Subject to the Committee's direction, and subject to fair and proper notice to the judge, such additional allegations could be included in the scope of the Inquiry. The Committee may also direct the Independent Counsel to explore additional issues and present additional evidence. The Committee may also act on its own to explore additional issues.

These last two sentences lay to rest any suggestion that the independent counsel has any "control" over what an inquiry committee may hear and consider.

[69] The last point is driven home even more forcefully by the opening paragraph of this *Policy*, which states:

An Inquiry Committee has complete responsibility for, and control over, the scope and depth of its inquiry into the conduct of a judge. At the outset and over the course of the hearings, it relies heavily upon Independent Counsel to ensure that all relevant evidence is gathered, marshalled, presented and tested at its hearings. But it does not "abandon" its own responsibility to such counsel since the

Canadian Judicial Council relies upon the Committee for a complete report. One of the key functions of the Committee is to make findings of fact.

In other words, it is the inquiry committee's inquiry and not that of the independent counsel. It also emphasizes that the inquiry committee must take full responsibility for fact-finding and cannot delegate this function to independent counsel.

[70] This *Policy* also emphasizes, and properly so, that the public interest may be a significant factor in how proceedings are conducted. Even if the evidence is weak, it may be important for the public to hear that evidence to maintain confidence in the entire process:

Agreed positions on facts may reduce the need to present viva voce evidence but the Committee must still consider whether such evidence should be adduced at the hearing, in the public interest.

This further reinforces the nature of the process as a public inquiry rather than civil litigation that only engages the interests of "the parties". The public interest and corresponding need for public transparency and public confidence in the inquiry process is a crucial aspect of an inquiry committee's responsibility.

[71] The role of independent counsel is given legal status by subsection 3(1) of the *By-Laws* which provides for the appointment of such counsel. Counsel's duties are then specified in subsection 3(2) which states:

The independent counsel shall present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings.

Apart from presenting the evidence, independent counsel's role is limited to making "submissions". Indeed, even the duty to make submissions is restricted to "questions of procedure or applicable law". Submissions beyond these categories are at the pleasure of the

inquiry committee. In reality, an inquiry committee will welcome the submissions and recommendations of independent counsel on a wide range of issues, both prior and through to the conclusion of the hearings. Further, if the judge makes submissions to the full Council when it considers the inquiry committee's report, independent counsel may make submissions to the full Council in response.

[72] Of course, making submissions can include making recommendations. Under the heading "Notice of Allegations", we provided an example as to when independent counsel might make submissions at the outset of the hearings because he or she was unable to find any evidence in support of a particular allegation. It would be appropriate to recommend to an inquiry committee that such an allegation be addressed summarily by the inquiry committee in the manner we described. The inquiry committee also would expect to receive submissions at the conclusion of the evidence, as to the strength of the case against the judge, as an aspect of the forceful advocacy envisioned in the creation of this role. But there is no decision-making authority. Any decisions related to such submissions are entirely within the jurisdiction of the inquiry committee.

[73] Subsection 3(3) sets out the obligation of the independent counsel in carrying out those duties specified in subsection 3(2):

The independent counsel shall perform their duties impartially and in accordance with the public interest.

The point to stress is that this subsection relates only to how independent counsel will carry out the duties assigned to that role. Those duties are simply to present the case and make submissions. That is the role of independent counsel. Subsection 3(3) is not the source of any additional authority beyond that.

[74] The scope or mandate of an inquiry committee is established by subsection 5(1):

The inquiry committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

Subsection 5(2) gives independent counsel the responsibility of providing sufficient notice to the judge of any complaints or allegations that the inquiry committee may choose to consider. The giving of notice by independent counsel rather than by the inquiry committee falls squarely within the rationale for having independent counsel. It provides for independent counsel rather than the inquiry committee to transmit to the judge the allegations that the judge must face. While this could be viewed as an additional “duty” of independent counsel, it in no way undermines the authority conferred on the inquiry committee under subsection 5(1). Specifically, the inquiry committee has the jurisdiction and duty to establish the scope of the inquiry under this subsection and under subsection 5(2), independent counsel merely provides the notice required by law in compliance with the principle of fairness.

Submissions on these Issues by Independent Counsel and Judge’s Counsel

[75] The Committee decided that it would be preferable to present our conclusions about the role of independent counsel in the comprehensive manner expressed above rather than by responding only to specific submissions from counsel. This allowed a more complete integration of the history, context and inter-relationship of the legal components and the other bodies involved in the entire process. We believe that the above discussion encompasses all of the issues raised in the submissions of both counsel. However, in addition, we wish to address two specific aspects of those submissions. These relate to the role of the review panel and that of independent counsel in recommending that the inquiry committee not proceed in relation to allegations that, in the opinion of independent counsel, are without merit.

[76] The pivotal role of the review panel was discussed earlier. A review panel makes the decision that the complaint(s) cannot be resolved informally and must be the subject of a full public hearing. The criterion for reaching this conclusion is that the matter must be serious enough to warrant the judge’s removal from office. That is a very serious conclusion to reach

and one which engages many aspects of judicial independence, including not only fairness to the judge but also public confidence in the manner in which complaints about judicial conduct are addressed. The suggestion that a review panel performs an essentially administrative role untethered to any serious consideration of potentially relevant evidence cannot be sustained. Similarly, the suggestion that a review panel performs no real screening function is also without merit. The facts speak for themselves. In the life of the Council, there have only been three cases in which a screened complaint has been referred to an inquiry committee. Thus, the role of a review panel is anything but perfunctory.

[77] The Review Panel in this case consisted of three chief justices and two other superior court judges. They would have considered all of the documentation on the complaints files, including any responses by the Judge to the Chairperson about the complaint(s). An Outside Counsel was appointed to investigate further and interviewed potential witnesses, resulting in a report, which was considered by the Review Panel. The Judge received notice of the contents of the report of that investigation, and was given a reasonable opportunity to make written submissions to the Review Panel, including whether an inquiry committee should be constituted. The Review Panel made a substantial decision affecting the rights of the Judge in full compliance with procedural fairness.

[78] The Review Panel's decision to constitute an inquiry committee marked the end of the "informal stage" of the consideration of the conduct of the Judge. We are of the view that the reasons of the Review Panel for making that decision must form the initial mandate of the Committee that the Review Panel has caused to come into existence. Any such reasons are integral to its rationale for creating this Committee and in essence set out the initial terms of reference for this Committee. We agree that a review panel does not "find facts" but it does assess all of the available, relevant information and issues. On that basis, the Review Panel decided that a full public hearing was required.

[79] With respect to the role of independent counsel, Judge's Counsel stated that after a

review panel decides that an inquiry committee will be constituted:

. . . the independent counsel is explicitly given the role of conducting a thorough, impartial investigation and based upon that investigation, drafting a notice of allegations, if any, to be advanced against the judge. (April 4/12, para. 15)

No authority is cited for this proposition and we do not consider it accurate. As discussed earlier, the decision of a review panel must form the initial mandate of an inquiry committee. The duties of independent counsel are established by section 3 of the *By-Laws*. Those duties are to “present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law” The initial “case” is that established by the review panel.

[80] However, the ultimate scope or mandate of the inquiry committee is subject to subsection 5(1) of the *By-Laws*, which authorizes the inquiry committee to “consider any relevant complaint or allegation pertaining to the judge”. This permits the inquiry committee to broaden the scope of the inquiry. The committee’s expectation (and corresponding role) of independent counsel with respect to potential, additional allegations was discussed earlier. But this is not an invitation for independent counsel to proceed on a “fishing expedition” in the hope of finding additional allegations against the judge. Instead, the function of addressing additional allegations is adjectival or incidental to fulfilling the basic duties of “gathering, marshalling and presenting the evidence” in relation to the allegations identified by the review panel. In this regard, it is incumbent on independent counsel to determine whether evidence gathered in the course of doing so reveals the existence of additional legitimate concerns for the inquiry.

[81] In other words, subsection 5(1) is broad enough to authorize the inquiry committee to expand the scope of the inquiry. During the course of the inquiry, the inquiry committee may decide that an allegation, including those identified by the review panel, may be dealt with summarily. In this respect, an inquiry committee would welcome any relevant submissions that independent counsel, counsel for the judge or any other party with standing might wish to make. We agree with the following excerpts from the submissions of Independent Counsel in relation

to his role:

... it is not Independent Counsel's role to weigh evidence... the circumstances in which Independent Counsel would recommend that an allegation not go forward based on a lack of credible evidence would be rare. (April 4/12, para. 28)

[82] We disagree with the following excerpts, which appear to contradict those above:

. . . Independent Counsel must always consider whether or not in his or her opinion the facts are capable, on a balance of probabilities, of supporting a finding of misconduct . . . If s/he is of the view that the facts could not support such a recommendation, then it is his/her duty to make a recommendation that the investigation be closed. (April 24, para. 29)

This submission effectively asserts that independent counsel can pre-empt the inquiry based on independent counsel's opinion of either the quality of the available evidence or the legal effect of such evidence, if accepted. In our view, it does not fall within the role of independent counsel to attempt to shut down an inquiry based on his or her opinion about the weight of the evidence on a balance of probabilities. Still less should this occur before all relevant evidence has been adduced. To do so amounts to taking over the role of the inquiry committee. Independent counsel has standing before an inquiry committee for a limited purpose. That purpose does not include appropriating responsibilities conferred on the inquiry committee under the statutory regime Parliament has prescribed for inquiring into the conduct of members of the federally-appointed judiciary.

[83] The Review Panel, consisting of five judges, has assessed all of the available information and decided that a public inquiry will be conducted. It is the responsibility of the five members of the Committee to weigh the evidence and submissions that are presented and to reach its own conclusions about the Judge's conduct. What the Committee requires from Independent Counsel is that he present in a fair and impartial manner the strongest case possible in support of the allegations against the Judge based on the gathering, marshalling and presentation of evidence

and the related submissions. The Judge is also represented by “Counsel of high ability, experience and stature in the legal community”. There can be no doubt that the Judge’s position will be presented forcefully and the evidence and submissions in support of the allegations will be tested forcefully. Similar advocacy is required in support of the allegations and that is made clear by the role of independent counsel that is established by the *By-laws* and related Council *Policies*. This approach is necessary for the Committee to be satisfied that it has fulfilled its responsibility in, not only providing fairness to the Judge, but also in maintaining public confidence that allegations of judicial misconduct are fully addressed.

[84] Of course, if Independent Counsel has determined that there is simply no available evidence in support of an allegation as stated in a notice of allegations, Independent Counsel may make submissions to that effect. It would then fall to the Committee, after hearing the submissions of others, and having full regard for the decision of the Review Panel, to determine what, if any, evidence should be presented in relation to that allegation. Even if the evidence is very weak, it may be in the public interest to expose that weakness at the public hearing, for example, to demonstrate that an allegation, which may have received wide publicity, is unfounded.

[85] Independent Counsel may make submissions based on his view of the public interest under subsection 3(3) of the *By-laws*. But as noted earlier, that guidance was only established because of the absence of a client who could give instructions. When an inquiry committee gives a ruling or direction on a matter, such a vacuum no longer exists to the extent of such a ruling or directions. It is the inquiry committee’s determination of the public interest rather than that of independent counsel that must prevail.

[86] Independent Counsel should also be alive to the possibility that his submissions may not be accepted by the Committee. Thus, he must be cautious in adopting strong positions with respect to matters that the Committee may require him to proceed with. The manner in which such a submission is made could affect public perception of his effectiveness in carrying out a

contrary direction of the Committee.

[87] Independent counsel played a prominent role in *Boilard* but that case does not alter any of the views expressed above. That inquiry committee was constituted under s. 63(1) of the *Judges Act*. It did not arise out of the Council's complaints process and thus, there was no complaint that was screened before a decision was made to constitute an inquiry committee. Under s. 63(1), an inquiry must be commenced on the mere request of the attorney general of a province, in that case, Quebec. There was no "vetting" process to which the complaint(s) in the present case have been exposed. There was no decision of a review panel to initiate the inquiry process. There was simply the request of the attorney general.

[88] This created a unique challenge for the *Boilard Inquiry* and for independent counsel in that case since the complaint was only about a judicial decision. Misconduct can only occur in making a judicial decision when it is made in bad faith or in abuse of judicial office. However, the attorney general's request contained no such allegation. Independent counsel then asked for any additional information in support of the complaint. But the attorney general indicated that he did not intend to "make any allegation or argument or to submit any conclusion" regarding the judicial decision or the circumstances in which it was made. Independent counsel then recommended to the inquiry committee that it dispose of the request "on a preliminary basis" as disclosing no allegation of misconduct. The inquiry committee declined to follow that advice and dealt with the case on its merits.

[89] The *Boilard Inquiry* illustrates that independent counsel may recommend that an allegation does not disclose cause for a finding of misconduct, or indeed that there is no case to present and therefore no case to answer, but an inquiry committee may reject any such recommendation and proceed to consider the allegation. It does not stand for the proposition that independent counsel may truncate the allegations referred to the inquiry committee by the review panel.

[90] The *Cosgrove Inquiry* was also established under s. 63(1) rather than as a culmination of the Council's internal complaints procedures. Indeed, the judge in that case raised a constitutional objection to that provision, in part, on the basis that he was denied the procedural safeguards that are inherent in the complaints procedures. In upholding the constitutionality of s. 63(1), the inquiry committee observed that:

Independent counsel is given a strong mandate. He or she must first consider whether the matter even warrants a case being brought forward to the Inquiry Committee for deliberation. Independent counsel can obtain the position of the respondent judge as to whether there is a case to present and, if so, how that case should be framed. These powers, implicit in the position of Independent Counsel, serve as an initial protection against unfounded allegations proceeding at all, and against any case proceeding on a basis unfair to the respondent judge.

(December 16, 2004, para. 17)

It must be stressed that this passage relates directly to an attorney general's request and merely describes what occurred in *Boilard* and presents that approach as a potential safeguard in the absence of the complaints process, which absence was under constitutional attack. More to the point, the case now before us involved the screening safeguards that are totally absent where an inquiry committee is constituted under s. 63(1).

[91] In our view, it is highly unlikely that an allegation could survive the complaints process and result in a review panel constituting an inquiry committee when there is no evidence at all to support a finding of misconduct. Of course, if that should appear to be the case, independent counsel and others could make submissions and the inquiry committee would make a ruling on whether there is any evidence to support an allegation in the notice of allegations.

Production of Documents to the Committee

[92] The documents in question were described above and consist of Complaint 1 and 2 and the Review Panel Decision. We understand that Judge's Counsel made representations strongly

objecting to Council providing these documents to the Committee. As a result, the Council decided to forward them to Independent Counsel and leave to the Committee the decision as to whether they should be provided to us.

[93] We agree with Independent Counsel that Complaint 1 is a matter properly before the Committee. We do not agree with the submission of Judge's Counsel that it cannot be reviewed by the Committee because our jurisdiction is not yet engaged. Her submissions on this issue state that we are not yet presiding over any inquiry hearing and "it is not yet known whether an inquiry will be held, and on what basis." This submission overlooks the obvious. It has been determined by the Review Panel that an inquiry will be held. The Review Panel Decision forms the foundational basis for that inquiry. Complaint 1 initiated this entire process and it should be before the Committee in its entirety. The process here involves an inquiry rather than an adversarial proceeding and the Committee is entitled to see all related documentation particularly since that documentation provides the background context for the inquiry.

[94] Both counsel submit that the Committee should not receive the Review Panel Decision. It was submitted that since the *Complaints Procedures* provide for the decision of a review panel to be given to the judge but are silent about providing it to the inquiry committee, Council intended that the inquiry committee should not see them. That omission may be explained as being so obvious that a specific requirement did not need to be stated. The earlier discussion of the role of a review panel makes clear that the decision of the review panel is a foundational document that the relevant inquiry committee should have.

[95] It has also been suggested that the *Complaints Procedures* themselves do not contemplate an inquiry committee seeing the decision of a review panel that constituted the inquiry committee. These *Procedures* state that, after a review panel has completed its work, review panel members are not to participate in any further consideration of the same complaint by the Council. This was said to illustrate that the inquiry committee members should not see the review panel's decision to avoid an apprehension of bias.

[96] We do not see any connection between that provision and any apprehension of bias on the part of the inquiry committee simply because the inquiry committee is provided with a copy of the reasons of the review panel. The provision with respect to the review panel is based on the administrative law principle that one is not to be a judge in one's own cause. In other words, having participated in a decision, review panel members should not participate in subsequent decisions involving the same party and subject matter. This has no application to an inquiry committee seeing an earlier document that deals with the same subject matter. The inquiry committee is not a jury. Its members are judges and senior lawyers who are quite capable of avoiding any "predetermination" despite having seen such a document. Judges frequently review documents and rule them inadmissible before hearing evidence on the same matter. It is difficult to understand why Independent Counsel and Judge's Counsel would have the Review Panel Decision but not the Committee itself.

[97] It was also argued that the Review Panel Decision was merely an administrative step, simply dealing with a threshold question of a different nature from the work of the Committee. We disagree. It made the important decision to create this Committee and we should know the purpose for which we were created, without that being filtered by Independent Counsel. Indeed, the Review Panel Decision may well be important to the Committee in assessing future recommendations of Independent Counsel.

[98] Judge's Counsel relied heavily on *Mackin v. New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405 as authority for not disclosing the Review Panel Decision to the Committee. However, we agree with Independent Counsel that because of the different statutory schemes and broader powers of the Committee and Council under the *Judges Act*, that case is not applicable here. The analogy in that case to a jury seeing a police report is inappropriate. In any event, that case was also based on the assumption that the process is an adversarial one. But it is not. The later decision of the Supreme Court in *Ruffo* makes it clear that the inquiry process is inquisitorial.

[99] Independent Counsel made references to the Judge's "privacy rights" and her "zone of privacy". He also cited the recent Ontario Court of Appeal decision in *Jones v. Tsiges*, 2012 ONCA 32, 108 OR (3d) 241. However, we were unable to ascertain from these submissions, any legal basis for the Committee not to receive the Review Panel Decision. We understand that privacy issues will be revisited in relation to Complaint 2.

[100] Complaint 2, consisting of the two discs, was the subject of strenuous objections by Judge's Counsel who refers to it as the "deemed complaint". She questions whether it constitutes a valid complaint and says that it raises serious legal issues as well as serious personal implications for the Judge. Judge's Counsel wants to make full submissions on these matters but argues that she is not able to do so until she receives the proposed notice of allegations that is being prepared by Independent Counsel. He fully supports her position on this issue. In these circumstances, the Committee will defer its consideration of this issue until after the notice of allegations has been distributed and further submissions are received.

Conclusions

[101] The Committee has complete responsibility for its process. It also has complete control of that process subject to the *Judges Act*, the *By-laws*, *Policies* and the principle of fairness. The role of Independent Counsel is to assist the Committee in carrying out its responsibilities by gathering, marshalling and presenting the case against the Judge before the Committee. In the absence of instructions from a client, Independent Counsel is guided by his perception of the public interest but that must give way to any directions that might be given by the Committee, which would be the over-riding determination of the public interest. Independent Counsel may make recommendations but must carry out his duties in a manner that does not impinge on the discretionary decision-making responsibility of the Committee. That responsibility extends to and includes all factual and legal issues as well as those involving mixed fact and law.

[102] It is important to bear in mind the nature of an inquiry process in contrast to the adversarial process of our criminal and civil justice systems. This has implications for the role of the Committee and the Judge as well as that of Independent Counsel. A related aspect of these proceedings is the importance of the public interest as an element of the manner in which hearings are conducted and decisions are taken. It is an overarching principle that encompasses fairness to the individual judge, the perception of the judiciary as an institution, the responsibility of the Council for the complaints process (including the manner in which complainants are treated) and the crucial component of public confidence as the cornerstone of judicial independence.

[103] The four questions asked by the Committee with respect to the role of independent counsel have generated much broader submissions, analysis and exposition of the nature of the entire inquiry process. However, the answers to these questions may be summarized as follows: (1) Independent counsel cannot delete any complaints, allegations or matters a review panel has referred on for inquiry. (2) Independent counsel may recommend not proceeding with any of these but the decision whether evidence must be called in relation to them rests entirely with the inquiry committee. (3) The inquiry committee may reject any recommendation that independent counsel may make in accordance with its mandate, including its view of the public interest and the law, including the principle of fairness. (4) Ordinarily, independent counsel may continue to act in spite of the inquiry committee rejecting any recommendation by independent counsel but independent counsel should be careful not to make such recommendations in a manner that could compromise the perception of his or her impartiality in such circumstances.

[104] For the reasons stated above, the Committee will defer consideration of the production of Complaint 2, until after the notice of allegations has been distributed and further submissions are received.

[105] The Committee must receive the Review Panel Decision and related documentation for the following reasons:

1. This is a foundational document that establishes the mandate and initial scope of the inquiry.
2. It is not evidence but merely a starting point for determining the scope and content of the inquiry and would not create an actual or perceived bias on the part of the Committee.
3. There is no unfairness from the absence of cross-examination before the Review Panel. Full cross-examination and other procedural fairness will be available in the inquiry.
4. The Committee must know what the Review Panel considered the case to be in order to assess the recommendations of Independent Counsel.
5. This inquiry is an inquisitorial and not an adversarial process. The suggestion that counsel could withhold relevant information from the Committee is inconsistent with the underlying premise of a search for the truth.

Orders

[106] Complaint 1 and the Review Panel Decision together with all related documentation are to be provided by Independent Counsel to the Committee forthwith.

[107] Independent Counsel is to provide notice of allegations to the Committee and Judge's Counsel by 6:00 p.m. Central Standard Time, May 18, and subsequently to any other parties granted standing.

[108] Written submissions by all parties with standing, with respect to Complaint 2, are due by June 7.

[109] Complaint 2 is to be provided to Counsel to the Committee forthwith but will not be seen by him or by the Committee subject to the Committee's ruling on this Complaint.

Issued this 15th day of May, 2012.

(Signed) "Catherine Fraser"

Chief Justice Catherine Fraser, Chair

(Signed) "J. Derek Green"

Chief Justice Derek Green

(Signed) "Jacqueline Matheson"

Chief Justice Jacqueline Matheson

(Signed) "Barry Adams"

Mr. Barry Adams

(Signed) "Marie-Claude Landry"

Me Marie-Claude Landry, Ad. E.

Independent Counsel: Guy J. Pratte and Kirsten Crain

Counsel for the Judge: Sheila Block and Molly Reynolds

Counsel to the Committee: George Macintosh, Q.C.

Consultant to the Committee: Ed Ratushny, Q.C.