CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY PURSUANT TO SUBSECTION 63(2) OF THE *JUDGES ACT* REGARDING THE HONOURABLE LORI DOUGLAS, ASSOCIATE CHIEF JUSTICE (FAMILY DIVISION) OF THE MANITOBA COURT OF QUEEN'S BENCH

WRITTEN REPRESENTATIONS OF INDEPENDENT COUNSEL ON THE JURISDICTION OF THE INQUIRY COMMITTEE TO CONSIDER ALLEGATIONS OF INAPPROPRIATE USE OF THE REPRESENTATIONAL ALLOWANCE PROVIDED FOR UNDER SUBSECTION 27(6) OF THE *JUDGES ACT*

I. BACKGROUND

1. On August 20, 2014, Independent Counsel provided the Inquiry Committee and counsel for the Honourable Lori Douglas, Associate Chief Justice (Family Division) of the Manitoba Court of Queen's Bench ("**ACJ Douglas**"), with a Notice of her Intention to Seek Directions from the Inquiry Committee as to whether or not allegations formulated by the Honourable Chief Justice Glenn Joyal ("**CJ Joyal**"), of the Manitoba Court of Queen's Bench, should be included in the scope of the present inquiry (the "**Notice of Intention**").

2. CJ Joyal's allegations pertain to the allegedly inappropriate use by ACJ Douglas of the representational allowance that she is entitled to pursuant to subsection 27(6) of the *Judges Act* (the "**Act**"), in light of her status as a Chief Justice within the meaning of section 16 of the Act (the "**Expense Allegations**").

3. At a case management teleconference held on August 26, 2014, the Inquiry Committee indicated that it wished to receive additional written submissions on the issue of its jurisdiction to include the Expense Allegations in the scope of the present inquiry. These are Independent Counsel's submissions in response to this request.

II. THE INQUIRY COMMITTEE HAS THE JURISDICTION TO CONSIDER ANY RELEVANT COMPLAINT OR ALLEGATION PERTAINING TO ACJ DOUGLAS THAT IS BROUGHT TO ITS ATTENTION

A. The applicable statutory scheme

4. Part II of the Act pertains to the constitution of the Canadian Judicial Council (the "**CJC**") and its role in conducting inquiries concerning superior court judges.

5. The jurisdiction of the CJC to conduct the present inquiry is rooted in subsection 63(2) of the Act, which provides that the CJC "*may investigate any complaint or allegation made in respect of a judge of a superior court*".[1] To do so, an Inquiry Committee can be constituted in accordance with subsection 63(3) of the Act.

6. The Act is mostly silent about the functions and jurisdiction of an Inquiry Committee, other than with respect to its power to summon persons and witnesses and to enforce their attendance, which is set out in subsection 63(4) of the Act.

7. However, paragraph 61(3)(c) of the Act provides that the CJC may make by-laws "*respecting the conduct of inquiries and investigations described in section 63*".[2] The CJC has indeed done so, by adopting the CJC *Inquiries and Investigations By-Laws* (the "**By-Laws**").

8. While subsection 63(3) of the Act is silent on the circumstances in which an Inquiry Committee is to be constituted, the By-Laws are not, and provide at section 1.1 that an Inquiry Committee is to be constituted when a Review Panel decides that an Inquiry Committee should be constituted "*where the matter may be serious enough to warrant removal*".[3]

9. Subsection 5(1) of the By-Laws set out the jurisdiction of an Inquiry Committee, which is that it "*may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention*".[4] Of note, an Inquiry Committee's jurisdiction is thus not limited to "complaints" which have been formally filed with the CJC, and the By-Laws do not state that an Inquiry Committee can only consider complaints or allegations brought to its attention by a Review Panel. To the contrary, subsection 5(1) of the By-Laws specifically states "*any relevant*

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[1] *Judges Act*, RSC 1985, c J-1 s 63(2) **[TAB 1]**.

[2] *Ibid.* s 61(3)(c) **[TAB 1]**.

[3] *Canadian Judicial Council Inquiries and Investigations By-Laws*, SOR/2002-371, s 1.1 **[TAB 2]**.

[4] *Ibid.*, s 5(1) **[TAB 2]**.

complaint or allegation".[5]

10. In fact, pursuant to section 12 of the By-Laws, an Inquiry Committee could even be directed by the members of the CJC considering an Inquiry Committee report to conduct supplementary inquiries or investigations where it finds that an Inquiry Committee report is unclear or incomplete.

B. CJC Policies

11. The CJC has adopted three policies regarding inquiries conducted pursuant to section 63 of the Act: the *Policy on Inquiry Committees*; the *Policy on Independent Counsel*; and, the *Policy on Council Review of Inquiry Committee Report* (collectively, the "**CJC Policies**").

12. The *Policy on Inquiry Committees* explicitly contemplates, in a manner which is consistent with subsection 5(1) of the By-Laws, that an Inquiry Committee may wish to examine allegations that were not considered by the Review Panel that decided to constitute an Inquiry Committee, and that an Inquiry Committee has the jurisdiction to do so:

> "*There may be additional allegations about the Judge's conduct that were not contained in the initial complaint or request under section 63(1) of the* Act. *For example, these could come to light as a result of publicity given to 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****.* [Emphasis added]"[6]

13. The *Policy on Independent Counsel* is consistent in this regard, and in fact directs Independent Counsel to consider "*the relevance of any other complaints or allegations against the judge, beyond the scope of the instant complaint or*

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[5] [5] *Ibid.*, s 5(1) **[TAB 2]**.

[6] *Canadian Judicial Council Policy on Inquiry Committees* **[TAB 3]**.

request under section 63(1)".[7]

C. The Ruling of the previous Inquiry Committee with respect to certain preliminary issues

14. On May 15, 2012, the previous Inquiry Committee issued a Ruling dealing with respect to certain preliminary issues for which it had requested submissions from previous Independent Counsel and from counsel for ACJ Douglas. One of the issues that was dealt with was the purpose of the notice of allegations in the inquiry process. The previous Inquiry Committee held that, where a notice of allegations is drafted:

> "*such 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*; (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 matters being considered under subsection 5(1) of the* By-laws*, independent counsel may be required to provide a supplementary notice to the judge.*"[8]

15. The previous Inquiry Committee also discussed the interplay between the report of the Review Panel and Independent Counsel's subsequent investigation:

> "*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* [Independent Counsel] *will consider the position of counsel for the judge and may seek guidance of the committee and make recommendations.* ***But if other***

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[7] *Canadian Judicial Council Policy on Independent Counsel* **[TAB 4]**.

[8] *Ruling of the Inquiry Committee Concerning the Honourable Lori Douglas with respect to Certain Preliminary Issues* (May 15, 2012) at para 31; see also paras 38, 50, 66 **[TAB 5]**.

> ***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.*** [Emphasis added]"[9]

16. The hearing before the previous Inquiry Committee commenced on June 25, 2012. At the outset, the Chairperson of the Inquiry Committee, the Honourable Catherine Fraser, Chief Justice of Alberta, confirmed that the scope of the inquiry was being broadened as follows:

> "*In order to remove any uncertainty, we wish to make it clear that this committee will proceed in accordance with the allegation filed by independent counsel as refined by this committee. That allegation consists of two dimensions, both of which are related to the judge's alteration of a personal diary that allegedly described an encounter with Mr. Chapman.*
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> *The first aspect of the allegation is the judge's alleged failure to fully disclose facts to independent counsel during his investigation. The second aspect of this allegation is that the judge's alteration of the diary was itself an attempt to mislead the Canadian Judicial Council's investigation into her conduct, and I should make it clear that that is an alleged attempt to mislead the Canadian Judicial Council's investigation into her conduct.*
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> *The committee therefore confirms that both of these are "being considered" by this committee in accordance with the council bylaws.*"[10]

III. THE NOTICE OF INTENTION

17. While conducting her investigation, Independent Counsel became aware that CJ Joyal had filed a complaint with the CJC over the Expense Allegations.

18. On October 7, 2013, Independent Counsel wrote to Mr. Sabourin requesting communication of CJ Joyal's complaint in order to determine if, consistent with the *Policy on Inquiry Committees* and the *Policy on Independent Counsel*, direction should be sought from the Inquiry Committee as to whether or not to

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[9] *Ibid.* at para 67; see also paras 78-81 **[TAB 5]**.

[10] Transcript of the hearing of 25 June 2012 at p 96, line 10 – p 97, line 7 **[TAB 6]**.

include the Expense Allegations in the scope of the present inquiry.[11]

19. On October 16, 2013, Ms. Josée Gauthier, Judicial Conduct Registrar at the CJC, transmitted to Independent Counsel CJ Joyal's letter of complaint and related correspondence from the Honourable Shane Perlmutter, Associate Chief Justice (General Division) of the Manitoba Court of Queen's Bench.[12]

20. At the time, counsel for ACJ Douglas objected to Independent Counsel being provided with a copy of CJ Joyal's complaint, as well as to Independent Counsel's jurisdiction to investigate the Expense Allegations.[13] As such, counsel for ACJ Douglas refused to provide Independent Counsel with ACJ Douglas' response to the Expense Allegations, despite Independent Counsel's request that she do so.

21. In addition, when Independent Counsel met with ACJ Douglas on August 12, 2014, counsel for ACJ Douglas reiterated her objection to Independent Counsel's jurisdiction to investigate the Expense Allegations and refused to allow Independent Counsel to ask questions of ACJ Douglas in relation with the Expense Allegations.

22. Independent Counsel thus reviewed the Expense Allegations with the sole benefit of CJ Joyal's complaint. Subsequent to this review, Independent Counsel formed the view that the Expense Allegations are relevant to the ultimate issue to be decided by the CJC in the context of its inquiry pursuant to subsection 63(2) Act regarding ACJ Douglas, namely whether ACJ Douglas has become incapacitated or disabled from the due execution of the office of judge by reason of any of the factors set out in subsection 65(2) of the Act.

23. Independent Counsel accordingly filed, on August 20, 2014, the Notice of Intention.

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[11] Letter from Suzanne Côté, Ad. E. to Norman Sabourin, dated October 7, 2013 **[TAB 7]**.

[12] Letter from Josée Gauthier to Suzanne Côté, Ad. E., dated October 16, 2013 with enclosures **[TAB 8]**.

[13] Letters from Sheila Block to Suzanne Côté, Ad. E., dated October 22, 2013 and November 1, 2013 **[TAB 9]**.

IV. RESPONSE TO ACJ DOUGLAS' SUBMISSIONS ON THE NOTICE OF INTENTION

24. Subsequent to the filing of the Notice of Intention, counsel for ACJ Douglas wrote to counsel for the Inquiry Committee setting out her submissions on the Notice of Intention, which are that the Inquiry Committee has no jurisdiction to consider the Expense Allegations.[14] In support of this conclusion, counsel for ACJ Douglas raises two points, namely that: (i) the Expense Allegations were not referred to the Inquiry Committee by the Review Panel; and (ii) the Expense Allegations are not "*serious enough to warrant removal*".

A. Allegations can be considered by an Inquiry Committee even if they have not been referred to the Inquiry Committee by a Review Panel

25. Counsel for ACJ Douglas concludes her submissions on the fact that the Expense Allegations were not referred to the Inquiry Committee by the Review Panel by stating that:

> "*Therefore, the discretion afforded to an inquiry committee in s. 5(1) of the* By-laws *must be limited to the complaints that have been forwarded to the Committee through the screening process. The committee's jurisdiction to consider "any relevant complaint or allegation pertaining to the judge that is brought to its attention" must be limited to the discretion to consider complaints and allegations sent forward by the review panel but which Independent Counsel does not think should go forward and therefore does not include in his or her notice of allegations, namely a Boilard-type motion.*"[15]

26. Independent Counsel is of the view that counsel for ACJ Douglas proposes an interpretation of the statutory framework and the CJC Policies which is too narrow and is inconsistent with the overall scheme. Counsel for ACJ Douglas has made similar submissions before the previous Inquiry Committee, which were not accepted and with which previous Independent Counsel also disagreed. The holdings of the previous Inquiry Committee were not the subject of any challenge by ACJ Douglas in the context of her judicial review proceedings before the

[14] Letter from Sheila Block to Chantal Chatelain, dated August 21, 2014 **[TAB 10]**.

[15] *Ibid.* at p 5 **[TAB 10]**.

Federal Court.

27. Firstly, the submission of counsel for ACJ Douglas would be perfectly correct if subsection 5(1) of the By-Laws stated that the Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention **by the Review Panel**. That is not how the By-Law is worded, and therefore one cannot conclude that the only body who can bring complaints or allegations to the attention of an Inquiry Committee is the Review Panel. There is simply no such limitation to the Inquiry Committee's jurisdiction.

28. Further, the CJC Policies make clear that there is no such limitation. In the *Policy on Inquiry Committees*, for example, it is provided that "*additional allegations about the Judge's conduct that were not contained in the initial complaint*" could, "***for example***", "*come to light as a result of publicity given to the forthcoming hearings or in the course of Counsel's preparation for them*".[16]

29. The reference therein to "*forthcoming hearings*" makes clear that what is contemplated are allegations that come to light subsequent to the constitution of an Inquiry Committee, and therefore subsequent to the consideration of a matter by a Review Panel, for the simple reason that, until a Review Panel decides to constitute an Inquiry Committee, there are no "*forthcoming hearings*". A Review Panel does not hold hearings.

B. *Cosgrove v Canadian Judicial Council*

30. Counsel for ACJ Douglas cites the decision of the Federal Court of Appeal in *Cosgrove v Canadian Judicial Council* ("*Cosgrove*"). In Independent Counsel's view, *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. Further, *Cosgrove* makes clear that the fact that the multi-stage review process is not followed in respect of all allegations does not necessarily breach a judge's procedural fairness rights.

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[16] *Canadian Judicial Council Policy on Inquiry Committees* **[TAB 3]**.

31. Clearly, if the Inquiry Committee decides to include the Expense Allegations within the scope of the present inquiry, ACJ Douglas will be deprived of the opportunity of having a member of the CJC Judicial Conduct Committee or the Review Panel close the file with respect to the Expense Allegations on the basis that the Expense Allegations are without merit, do not warrant further consideration, or are not serious enough to warrant removal, or where remedial measures have been undertaken, such that the Expense Allegations have been appropriately addressed, the whole pursuant to sections 5.1, 5.3 and 9.6 of the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges* (the "**Complaints Procedures**").[17]

32. Does this constitute a breach of ACJ Douglas' procedural fairness rights in the present circumstances? In Independent Counsel's submission, in light of the CJC Policies, the By-Laws and the Federal Court of Appeal decision in *Cosgrove*, it does not.

33. In *Cosgrove*, the debate before the Court focussed on the constitutionality of subsection 63(1) of the Act, which directs the CJC to constitute an Inquiry Committee at the request of the Minister of Justice of Canada or the Attorney General of a Province. The main argument advanced by the Honourable Paul Cosgrove was that the provision was unconstitutional given that, in those instances, the multi-stage review process contained in the By-Laws and the Complaints Procedures was not followed prior to the constitution of an Inquiry Committee.

34. The Honourable Karen Sharlow, for the Court, found that the multi-stage review process for complaints filed with the CJC is:

> "***advantageous*** *from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution*

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[17] *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, ss 5.1, 5.3, 9.6 **[TAB 11]**.

> *of a complaint by remedial measures, without the establishment of an Inquiry Committee.* [Emphasis added]."[18]

35. However, having analyzed the three factors which made the multi-stage review process advantageous for a judge, Justice Sharlow concluded that:

> "*the differences between the two complaint procedures are* ***relatively minor*** *when considered against the constitutional assurance of security of tenure given to judges of the superior courts, the constitutional role of attorneys general and the presumption that the attorneys general will act in accordance with their constitutional obligations, the substantial protection afforded by the appointment of independent counsel to the Inquiry Committee, and the procedural safeguards provided in the* Judges Act, *the Inquiry By-laws, and the Council's rules of practice.*"[19]

36. On the first factor, namely the lack of publicity of a complaint prior to the constitution of an Inquiry Committee, Justice Sharlow held "*that in the debate about the constitutionality of subsection 63(1), the risk of publicity should be given little weight*",[20] *inter alia* since "*the risk of publicity is present even with ordinary complaints because there are no constraints on a complainant who chooses to publicize the fact that a complaint has been made*".[21] In the present instance, the risk of publicity should equally be given no weight, given that the existence of the Expense Allegations is already in the public domain.

37. As for the issue of summary dismissal of a complaint, Justice Sharlow found that the difference between the multi-stage review process and the direct constitution of an Inquiry Committee:

> "*is that an ordinary unmeritorious complaint may be dismissed before an Inquiry Committee is established, while under the* Boilard *rule an attorney general's complaint may be dismissed at an early stage by the Inquiry Committee itself, either before or after its work is commenced, or it may*

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[18] *Cosgrove v Canadian Judicial Council*, 2007 FCA 103, [2007] 4 FCR 714 at para 77 **[TAB 12]**.

[19] *Ibid.* at para 82 **[TAB 12]**.

[20] *Ibid.* at para 78 **[TAB 12]**.

[21] *Ibid.* at para 79 **[TAB 12]**.

> *be dismissed later by the Council.* ***Those differences are trivial, in my view.*** [Emphasis added]."[22]

38. Here too, the Inquiry Committee could well direct the Expense Allegations to be included in the scope of the inquiry and nonetheless decide to summarily dismiss the Expense Allegations in the course of the conduct of the inquiry. As Independent Counsel has not fully investigated the Expense Allegations, she is not in a position to formulate a recommendation of summary dismissal at the present time, but does not rule out the possibility that she may do so once her investigation is complete.

39. Independent Counsel agrees with Justice Sharlow however that whether the Expense Allegations are summarily dismissed by a member of the CJC Judicial Conduct Committee, a Review Panel, the present Inquiry Committee or even the members of the CJC considering the Inquiry Committee's report is not material to the imperative of preserving ACJ Douglas' procedural fairness rights.

40. This leads to the last factor considered by Justice Sharlow, namely the issue of remedial measures. As found by Justice Sharlow, if the Expense Allegations were to be summarily dismissed, there can be no recommendation for removal based on the Expense Allegations, such that the question of whether ACJ Douglas was prevented from having the file closed in exchange for remedial measures would not be relevant. In fact, ACJ Douglas would have the benefit of having the file closed without having to satisfy any remedial measures.

41. Conversely, if the Inquiry Committee finds that the Expense Allegations amount to conduct that warrants removal, "*there can be no valid objection to the establishment of an Inquiry Committee on the basis that an ordinary complainant might be satisfied with a lesser remedy*".[23]

42. In sum, Independent Counsel does not view the inclusion of the Expense Allegations within the scope of the present inquiry as undermining ACJ Douglas'

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[22] *Ibid.* at para 80 **[TAB 12]**.

[23] *Ibid.* at para 81 **[TAB 12]**.

procedural fairness rights. In fact, since the Expense Allegations are already in the public domain, Independent Counsel actually views their inclusion in the scope of the inquiry as being beneficial to ACJ Douglas should these allegations turn out to be unwarranted. In this regard, Independent Counsel shares the view of the previous Inquiry Committee, expressed in its May 15, 2012 ruling:

> "*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.*"[24]

C. *Hryciuk v Ontario (Lieutenant Governor)*

43. It is also necessary to discuss ACJ Douglas' reliance on the decision of the Ontario Court of Appeal in *Hryciuk v Ontario (Lieutenant Governor)* ("***Hryciuk***"), which has no application in the present instance in light of the material differences between the Act, the By-Laws and the Ontario *Courts of Justice Act*, as it was at the time of the Court's decision in *Hryciuk* (the "**Ontario Act**").

44. First, subsection 49(1) of the Ontario Act dictates that the Ontario Judicial Council "*shall take such action to investigate **the** complaint as it considers advisable* [emphasis of the Court]".[25] Then, pursuant to subsection 49(7) of the Ontario Act, the Ontario Judicial Council "*may report its opinion **regarding the complaint** to the Attorney General and may recommend, (a) that an inquiry be held under section 50* [emphasis of the Court]".[26]

45. Subsection 46(1) of the Ontario Act sets out the test for removal of a judge as follows:

> "*A provincial judge may be removed from office before attaining retirement age **only if**,*
>
> *(a) a complaint regarding the judge has been made to the Judicial Council;*

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[24] *Ruling of the Inquiry Committee Concerning the Honourable Lori Douglas with respect to Certain Preliminary Issues* (May 15, 2012) at para 84 **[TAB 5]**.

[25] *Hryciuk v Ontario (Lieutenant Governor)* (1996), 31 OR (3d) 1 at p 10 **[TAB 13]**.

[26] *Ibid.* at p 11 **[TAB 13]**.

> ***and***
>
> *(b) the removal is recommended by an inquiry under section 50 on the ground that the judge has become incapacitated from the due execution of his or her office* [...] [emphasis of the Court]"[27]

46. This specific statutory language led the Honourable Rosalie Abella (as she then was), for the Court, to hold as follows:

> "*Section 49(1) directs the Judicial Council to investigate* ***the*** *complaint; section 49(7) directs the Judicial Council to report its opinion on the need for an inquiry with respect to* ***the*** *complaint. The Lieutenant Governor's discretion in s. 50, therefore, to order an inquiry into whether a judge should be removed, is limited to* ***the*** *complaints investigated by the Judicial Council. Read in this way, the removal from office referred to in the concluding paragraph of the Order-in-Council is a potential* ***outcome*** *of the Inquiry's examination into the authorized complaints, not a general mandate.*
>
> *The Inquiry Judge had a specific, narrow mandate under the legislation; to conduct an inquiry, not into the general question of whether Judge Hryciuk should be removed, but into whether he should be removed* ***because of those complaints referred to her by the Judicial Council****, namely the two complaints referred to in the Order-in-Council. By hearing three additional complaints not so referred, she exceeded her jurisdiction.* [Emphasis of the Court]"[28]

47. The jurisdiction of the present Inquiry Committee, as set out in the Act and the By-Laws, is markedly different than that which was conferred upon the Inquiry Judge in *Hryciuk*, to the point where Justice Abella's reasoning, while perfectly valid in the context of the Ontario Act, cannot be transposed to the context of the Act and the By-Laws.

48. First, subsections 1.1(1) and (3) of the By-Laws, provide that:

> "*(1) The Chairperson or the Vice-Chairperson of the Judicial Conduct Committee who considers a complaint or allegation*

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[27] *Ibid.* at p 11 **[TAB 13]**.

[28] *Ibid.* at p 13 **[TAB 13]**.

> *made in respect of a judge of a superior court may, if they determine that the matter warrants further consideration, constitute a Review Panel to decide whether an Inquiry Committee should be constituted under subsection 63(3) of the Act.*
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> [...]
>
> *(3) The Review Panel may constitute an Inquiry Committee in any case where the matter may be serious enough to warrant removal."*[29]

49. The above language shows that, while a member of the Judicial Conduct Committee considers a complaint or an allegation, when he or she determines that the constitution of a Review Panel is warranted, it is not to consider whether the instant complaint or allegation is serious enough to warrant removal, but whether "*the matter*" is. In the same manner, the Review Panel does not constitute an Inquiry Committee to review a complaint or "*the*" complaint, but rather to consider "*the matter*".

50. Subsection 5(1) of the By-Laws then provides the Inquiry Committee with the jurisdiction, in examining "*the matter*" referred to it by the Review Panel, to "*consider **any** relevant complaint or allegation pertaining to the judge that is brought to its attention* [emphasis added]",[30] which, contrary to the Ontario Act, is a general mandate rather than a narrow one.

51. In this case, the Review Panel actually considered issues that went beyond the complaints which had been filed with the CJC. Indeed, neither Mr. Chapman nor the anonymous complainant alleged or complained of ACJ Douglas' non-disclosure of the incidents of 2003 on her application for judicial appointment. Despite this, the Review Panel properly identified and examined this additional issue in the context of its review of "*the matter*" and concluded that this issue may engage paragraphs 65(2)(b) and (d) of the Act and may be serious enough

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[29] *Canadian Judicial Council Inquiries and Investigations By-Laws*, SOR/2002-371, s 1.1 **[TAB 2]**.

[30] *Ibid.*, s 5(1) **[TAB 2]**.

to warrant removal.[31]

52. The rationale for this broad mandate, both at the Review Panel and Inquiry Committee stage, is well explained in the CJC's former *Policy on Counsel Conducting "Further Inquiries"* which was cited by the previous Inquiry Committee in its Ruling of May 15, 2012:

> "*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."*[32]

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[31] *Report of the Review Panel Constituted Pursuant to the* Complaints Procedures *of the Canadian Judicial Council Regarding the Honourable A. Lori Douglas* (July 4 2011) at para 51 **[TAB 14]**.

[32] *Ruling of the Inquiry Committee Concerning the Honourable Lori Douglas with respect to Certain Preliminary Issues* (May 15, 2012) at para 25 **[TAB 5]**.

53. Independent Counsel recognizes that the last sentence of the Policy cited by the previous Inquiry Committee in the above passage does not apply at this stage, since the present inquiry is no longer at the informal stage of the consideration of the conduct of ACJ Douglas. However, this passage was cited by the previous Inquiry Committee in support of its finding that allegations could be added to the scope of the inquiry at the Inquiry Committee stage, and Independent Counsel is of the view that the policy considerations set forth in this passage remain valid even where a matter has progressed to an Inquiry Committee, notwithstanding this last sentence.

D. The Expense Allegations engage paragraph 65(2)(b) of the Act

54. Finally, with respect to ACJ Douglas' second submission, that the Expense Allegations are not "*serious enough to warrant removal*", ACJ Douglas appears to imply that this is the case because the Expense Allegations have not merit, for a variety of reasons which are set out in her submissions, including, *inter alia*:

(a) the Commissioner for Federal Judicial Affairs (the "**Commissioner**") has not expressed any concerns with respect to the impugned expenses;

(b) the Commissioner approved the impugned expenses;

(c) the Commissioner declined ACJ Douglas' offer to repay any of the impugned expenses; and,

(d) that CJ Joyal has no right to access information about the impugned expenses and does not exercise any oversight role with respect to the impugned expenses.

55. Independent Counsel agrees that allegations which do not engage one of the four factors set out in subsection 65(2) of the Act should not be considered by an Inquiry Committee. Further, allegations which are unsupported by any evidence need not be considered.

56. It is on this basis that Independent Counsel has agreed that no further consideration of the allegations of sexual harassment formulated by Alexander

Chapman is warranted, consistent with the conclusion of the Review Panel with respect to these allegations. Indeed, Independent Counsel is satisfied, following her investigation, that these allegations are unsupported by any evidence.

57. The Expense Allegations are of a different order, and Independent Counsel is of the view that there is evidence that could support a finding of misconduct on ACJ Douglas' part, such that paragraph 65(2)(b) of the Act is engaged. ACJ Douglas has not, in her submissions, taken the position that, if the Expense Allegations were founded, they could not support a finding of misconduct.

58. Rather, ACJ Douglas has taken the position that the Expense Allegations are simply not founded for a number of reasons which have been summarized above. If the Expense Allegations are included in the scope of the present inquiry, the Inquiry Committee may well find, having weighed all the evidence in favour and against a finding of misconduct, that no such finding of misconduct should be made with respect to the Expense Allegations.

59. Independent Counsel, after having completed her investigation of the Expense Allegations, may even recommend to the Inquiry Committee that the Expense Allegations be summarily dismissed in the event Independent Counsel reaches the conclusion that the evidence which is favourable to ACJ Douglas with respect to the Expense Allegations is overwhelming.

60. At the moment, however, it cannot be said that there is no evidence to support a finding of misconduct with respect to the Expense Allegations. It cannot be denied, either, that there is evidence that is favourable to ACJ Douglas' position on the Expense Allegations. Ultimately, further investigation is required, and the Inquiry Committee will have to weigh the evidence.

61. The ultimate conclusion that is to be reached by the Inquiry Committee with respect to the Expense Allegations is not, however, a relevant consideration when deciding whether or not to include the Expense Allegations in the scope of the present inquiry. Rather, the relevant considerations are twofold:

(a) Does the Inquiry Committee have the jurisdiction to include the Expense Allegations within the scope of the present inquiry?; and,

(b) Are the Expense Allegations, if founded, capable of leading to a finding that ACJ Douglas has been guilty of misconduct within the meaning of paragraph 65(2)(b) of the Act?

62. Independent Counsel is of the view that both questions should be answered in the affirmative. At the very least, it is clear, in Independent Counsel's submission, that the first question must be answered in the affirmative and that it would be premature at this stage to conclusively rule out an affirmative answer to the second question. As a result, the Expense Allegations should be included in the scope of the present inquiry.

Dated at Montreal, this 12th day of September, 2014

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TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Judges Act

Loi sur les juges

R.S.C., 1985, c. J-1

L.R.C. (1985), ch. J-1

Current to September 1, 2014

À jour au 1 septembre 2014

Last amended on June 19, 2014

Dernière modification le 19 juin 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

PART II

CANADIAN JUDICIAL COUNCIL

INTERPRETATION

Definition of "Minister"

58. In this Part, "Minister" means the Minister of Justice of Canada.

CONSTITUTION OF THE COUNCIL

Council established

59. (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

(*a*) the Chief Justice of Canada, who shall be the chairman of the Council;

(*b*) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;

(*c*) the senior judges, as defined in subsection 22(3), of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice; and

(*d*) the Chief Justice of the Court Martial Appeal Court of Canada.

(*e*) [Repealed, 2002, c. 8, s. 104]

(2) and (3) [Repealed, 1999, c. 3, s. 77]

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6; 1999, c. 3, s. 77; 2002, c. 7, s. 195, c. 8, s. 104.

Objects of Council

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

Powers of Council

(2) In furtherance of its objects, the Council may

(*a*) establish conferences of chief justices and associate chief justices;

PARTIE II

CONSEIL CANADIEN DE LA MAGISTRATURE

DÉFINITION

Définition de «ministre»

58. Dans la présente partie, «ministre» s'entend du ministre de la Justice du Canada.

CONSTITUTION ET FONCTIONNEMENT DU CONSEIL

Constitution

59. (1) Est constitué le Conseil canadien de la magistrature, composé :

a) du juge en chef du Canada, qui en est le président;

b) des juges en chef, juges en chef associés et juges en chef adjoints des juridictions supérieures ou de leurs sections ou chambres;

c) des juges principaux — au sens du paragraphe 22(3) — des cours suprêmes du Yukon et des Territoires du Nord-Ouest et de la Cour de justice du Nunavut;

d) du juge en chef de la Cour d'appel de la cour martiale du Canada.

e) [Abrogé, 2002, ch. 8, art. 104]

(2) et (3) [Abrogés, 1999, ch. 3, art. 77]

Choix d'un suppléant

(4) Chaque membre du Conseil peut nommer au Conseil un suppléant choisi parmi les juges du tribunal dont il fait partie; le suppléant fait partie du Conseil pendant la période pour laquelle il est nommé. Le juge en chef du Canada peut choisir son suppléant parmi les juges actuels ou anciens de la Cour suprême du Canada.

L.R. (1985), ch. J-1, art. 59; 1992, ch. 51, art. 25; 1996, ch. 30, art. 6; 1999, ch. 3, art. 77; 2002, ch. 7, art. 195, ch. 8, art. 104.

Mission du Conseil

60. (1) Le Conseil a pour mission d'améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l'uniformité dans l'administration de la justice devant ces tribunaux.

Pouvoirs

(2) Dans le cadre de sa mission, le Conseil a le pouvoir :

a) d'organiser des conférences des juges en chef et juges en chef adjoints;

(*b*) establish seminars for the continuing education of judges;

(*c*) make the inquiries and the investigation of complaints or allegations described in section 63; and

(*d*) make the inquiries described in section 69.

R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26; 2002, c. 8, s. 105.

b) d'organiser des colloques en vue du perfectionnement des juges;

c) de procéder aux enquêtes visées à l'article 63;

d) de tenir les enquêtes visées à l'article 69.

L.R. (1985), ch. J-1, art. 60; 1992, ch. 51, art. 26; 2002, ch. 8, art. 105.

Meetings of Council

61. (1) The Council shall meet at least once a year.

Réunions du Conseil

61. (1) Le Conseil se réunit au moins une fois par an.

Work of Council

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

Travaux

(2) Sous réserve des autres dispositions de la présente loi, le Conseil détermine la conduite de ses travaux.

By-laws

(3) The Council may make by-laws

(*a*) respecting the calling of meetings of the Council;

(*b*) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(*c*) respecting the conduct of inquiries and investigations described in section 63.

R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

Règlements administratifs

(3) Le Conseil peut, par règlement administratif, régir :

a) la convocation de ses réunions;

b) le déroulement de ses réunions, la fixation du quorum, la constitution de comités, ainsi que la délégation de pouvoirs à ceux-ci;

c) la procédure relative aux enquêtes visées à l'article 63.

S.R., ch. J-1, art. 30; S.R., ch. 16(2e suppl.), art. 10; 1976-77, ch. 25, art. 15.

Employment of counsel and assistants

62. The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.

R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 157, ss. 16, 17(F).

Nomination du personnel

62. Le Conseil peut employer le personnel nécessaire à l'exécution de sa mission et engager des conseillers juridiques pour l'assister dans la tenue des enquêtes visées à l'article 63.

S.R., ch. 16(2e suppl.), art. 10; 1976-77, ch. 25, art. 15 et 16; 1980-81-82-83, ch. 157, art. 16 et 17(F).

INQUIRIES CONCERNING JUDGES

ENQUÊTES SUR LES JUGES

Inquiries

63. (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 for any of the reasons set out in paragraphs 65(2)(*a*) to (*d*).

Enquêtes obligatoires

63. (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)*a*) à *d*).

Investigations

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

Enquêtes facultatives

(2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.

Inquiry Committee

(3) The Council may, for the purpose of conducting an inquiry or investigation under

Constitution d'un comité d'enquête

(3) Le Conseil peut constituer un comité d'enquête formé d'un ou plusieurs de ses

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.

membres, auxquels le ministre peut adjoindre des avocats ayant été membres du barreau d'une province pendant au moins dix ans.

Powers of Council or 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 or her 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; and

(*b*) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

(4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :

a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment — ou de l'affirmation solennelle dans les cas où elle est autorisée en matière civile — et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

Pouvoirs d'enquête

Prohibition of information relating to inquiry, etc.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci.

Protection des renseignements

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27; 2002, c. 8, s. 106.

(6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à huis clos.

L.R. (1985), ch. J-1, art. 63; 1992, ch. 51, art. 27; 2002, ch. 8, art. 106.

Publicité de l'enquête

Notice of hearing

64. 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 and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

R.S., 1985, c. J-1, s. 64; 2002, c. 8, s. 111(E).

64. Le juge en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

L.R. (1985), ch. J-1, art. 64; 2002, ch. 8, art. 111(A).

Avis de l'audition

REPORT AND RECOMMENDATIONS

Report of Council

65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Recommendation to Minister

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(*a*) age or infirmity,

(*b*) having been guilty of misconduct,

(*c*) having failed in the due execution of that office, or

(*d*) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5; 2002, c. 8, s. 111(E).

RAPPORTS ET RECOMMANDATIONS

Rapport du Conseil

65. (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.

Recommandation au ministre

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :

a) âge ou invalidité;

b) manquement à l'honneur et à la dignité;

c) manquement aux devoirs de sa charge;

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

L.R. (1985), ch. J-1, art. 65; L.R. (1985), ch. 27 (2e suppl.), art. 5; 2002, ch. 8, art. 111(A).

EFFECT OF INQUIRY

66. (1) [Repealed, R.S., 1985, c. 27 (2nd Supp.), s. 6]

Leave of absence with salary

(2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Annuity to judge who resigns

(3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council.

R.S., 1985, c. J-1, s. 66; R.S., 1985, c. 27 (2nd Supp.), s. 6.

67. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

CONSÉQUENCES DE L'ENQUÊTE

66. (1) [Abrogé, L.R. (1985), ch. 27 (2e suppl.), art. 6]

Congé avec traitement

(2) Le gouverneur en conseil peut accorder au juge reconnu inapte pour l'un des motifs énoncés au paragraphe 65(2) un congé, avec traitement, pour la période qu'il estime indiquée en l'espèce.

Pension au démissionnaire

(3) Si le juge dont il a constaté l'inaptitude démissionne, le gouverneur en conseil peut lui octroyer la pension qu'il aurait reçue s'il avait démissionné dès la constatation.

L.R. (1985), ch. J-1, art. 66; L.R. (1985), ch. 27 (2e suppl.), art. 6.

67. [Abrogé, L.R. (1985), ch. 16 (3e suppl.), art. 5]

68. [Abrogé, L.R. (1985), ch. 16 (3e suppl.), art. 6]

INQUIRIES CONCERNING OTHER PERSONS

Further inquiries

69. (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

(*a*) a judge of a superior court, or

(*b*) a person to whom section 48 of the *Parliament of Canada Act* applies,

should be removed from office for any of the reasons set out in paragraphs 65(2)(*a*) to (*d*).

Applicable provisions

(2) Subsections 63(3) to (6), sections 64 and 65 and subsection 66(2) apply, with such modifications as the circumstances require, to inquiries under this section.

Removal from office

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

R.S., 1985, c. J-1, s. 69; 1992, c. 1, s. 144(F), c. 51, s. 28; 1993, c. 34, s. 89; 2002, c. 8, s. 107.

ENQUÊTES SUR LES TITULAIRES DE POSTE

Enquêtes

69. (1) Sur demande du ministre, le Conseil enquête aussi sur les cas de révocation — pour les motifs énoncés au paragraphe 65(2) — des titulaires de poste nommés à titre inamovible aux termes d'une loi fédérale, à l'exception des :

a) juges des juridictions supérieures;

b) personnes visées par l'article 48 de la *Loi sur le Parlement du Canada*.

Dispositions applicables

(2) Les paragraphes 63(3) à (6), les articles 64 et 65 et le paragraphe 66(2) s'appliquent, compte tenu des adaptations nécessaires, aux enquêtes prévues au présent article.

Révocation

(3) Au vu du rapport d'enquête prévu au paragraphe 65(1), le gouverneur en conseil peut, par décret, révoquer — s'il dispose déjà par ailleurs d'un tel pouvoir de révocation — le titulaire en cause sur recommandation du ministre, sauf si la révocation nécessite une adresse du Sénat ou de la Chambre des communes ou une adresse conjointe de ces deux chambres.

L.R. (1985), ch. J-1, art. 69; 1992, ch. 1, art. 144(F), ch. 51, art. 28; 1993, ch. 34, art. 89; 2002, ch. 8, art. 107.

REPORT TO PARLIAMENT

Orders and reports to be laid before Parliament

70. Any order of the Governor in Council made pursuant to subsection 69(3) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

RAPPORT AU PARLEMENT

Dépôt des décrets

70. Les décrets de révocation pris en application du paragraphe 69(3), accompagnés des rapports et éléments de preuve à l'appui, sont déposés devant le Parlement dans les quinze jours qui suivent leur prise ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs de l'une ou l'autre chambre.

1974-75-76, ch. 48, art. 18; 1976-77, ch. 25, art. 15.

REMOVAL BY PARLIAMENT OR GOVERNOR IN COUNCIL

Powers, rights or duties not affected

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

RÉVOCATION PAR LE PARLEMENT OU LE GOUVERNEUR EN CONSEIL

Maintien du pouvoir de révocation

71. Les articles 63 à 70 n'ont pas pour effet de porter atteinte aux attributions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière de révocation des juges ou des autres titulaires de poste susceptibles de faire l'objet des enquêtes qui y sont prévues.

1974-75-76, ch. 48, art. 18; 1976-77, ch. 25, art. 15.

TAB 2

CJC
Canadian
Judicial Council

www.cjc.gc.ca

CANADIAN JUDICIAL COUNCIL
INQUIRIES AND INVESTIGATIONS BY-LAWS

As amended pursuant to the
By-laws amending the Canadian Judicial Council Inquiries and Investigations By-laws
adopted by Council pursuant to subsection 61(3) of the *Judges Act* and coming into force
14 October 2010

INTERPRETATION

1. The definitions in this section apply in these By-laws.

"Act" means the *Judges Act.* (*Loi*)

"Judicial Conduct Committee" means the committee of the Council established by the Council and named as such. (*comité sur la conduite des juges*)

CONSTITUTION AND POWERS OF A REVIEW PANEL

1.1 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee who considers a complaint or allegation made in respect of a judge of a superior court may, if they determine that the matter warrants further consideration, constitute a Review Panel to decide whether an Inquiry Committee should be constituted under subsection 63(3) of the Act .

(2) The Review Panel shall consist of three or five judges designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee, and the majority of the members of the Review Panel shall be members of the Council.

(3) The Review Panel may constitute an Inquiry Committee in any case where the matter may be serious enough to warrant removal.

(4) If the Review Panel decides to constitute an Inquiry Committee, it shall send its decision to the Minister without delay, together with a notice inviting the Minister to designate members of the bar of a province to that committee in accordance with subsection 63(3) of the Act.

CONSTITUTING AN INQUIRY COMMITTEE

2. (1) An Inquiry Committee constituted under subsection 63(3) of the Act shall consist of an uneven number of members, the majority of whom shall be members of the Council designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee.

(1.1) If the Minister does not appoint any members within 60 days of receiving the notice under subsection 1.1(4), the Chairperson or Vice-Chairperson of the Judicial Conduct Committee may appoint additional Council members to the Inquiry Committee to complete its composition.

(2) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee shall choose one of the members of the Inquiry Committee to be the chairperson of the Inquiry Committee.

(3) A person is not eligible to be a member of the Inquiry Committee if

(*a*) they are a member of the court of which the judge who is the subject of the inquiry or investigation is a member; or

(*b*) they participated in the deliberations of the Review Panel in respect of the necessity for constituting an Inquiry Committee.

INDEPENDENT COUNSEL

3. (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee shall appoint an independent counsel, who shall be a member of the bar of a province having at least 10 years standing and who is recognized within the legal community for their ability and experience.

(2) 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.

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

COUNSEL TO THE INQUIRY COMMITTEE

4. The Inquiry Committee may engage legal counsel to provide advice and other assistance to it.

INQUIRY COMMITTEE PROCEEDINGS

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

(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.

6. (1) Any hearing of the Inquiry Committee shall be conducted in public unless, subject to subsection 63(6) of the Act, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest.

7. The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principle of fairness.

INQUIRY COMMITTEE REPORT

8. (1) The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.

(2) After the report has been submitted to the Council, the Executive Director of the Council shall provide a copy to the judge, to the independent counsel and to any other persons or bodies who had standing in the hearing.

(3) If the hearing was conducted in public, the report shall be made available to the public.

JUDGE'S RESPONSE TO THE INQUIRY COMMITTEE REPORT

9. (1) Within 30 days after receipt of the report of the Inquiry Committee, the judge may make a written submission to the Council regarding the report.

(2) On the judge's request, the Council shall grant an extension of time if it considers that the extension is in the public interest.

10. If the judge makes a written submission regarding the inquiry report, the Executive Director of the Council shall provide a copy to the independent counsel. The independent counsel may, within 15 days after receipt of the copy, submit to the Council a written response to the judge's submission.

MEETINGS OF COUNCIL CONCERNING THE REMOVAL OF JUDGES FROM OFFICE

10.1 (1) The most senior member of the Judicial Conduct Committee who is eligible and available to participate in deliberations concerning a removal of a judge of a superior court shall chair any meetings of Council related to those deliberations.

(2) If no member of the Judicial Conduct Committee is eligible and available to participate in deliberations, the most senior member of the Council who is eligible and available shall chair the meetings related to those deliberations.

(3) A quorum of 17 members of the Council is required when it meets to deliberate the removal from office of a judge of a superior court.

(4) In the event of the death or incapacity of a member during the deliberations, the remaining members constitute a quorum.

(5) During deliberations of the Council concerning the removal from office of a judge of a superior court, the Chairperson may only vote in respect of a report of the Council's conclusions on the matter in the event of a tie.

(6) Meetings of the Council involving deliberations concerning the removal from office of a judge of a superior court may be held in person, by audio-conference or by video conference.

CONSIDERATION OF THE INQUIRY COMMITTEE REPORT BY THE COUNCIL

11. (1) The Council shall consider the report of the Inquiry Committee and any written submission made by the judge or independent counsel.

(2) Persons referred to in paragraph 2(3)(*b*) and members of the Inquiry Committee shall not participate in the Council's consideration of the report or in any subsequent related deliberations of the Council.

12. If the Council is of the opinion that the report of the Inquiry Committee is unclear or incomplete and that clarification or supplementary inquiry or investigation is necessary, it may refer all or part of the matter in question back to the Inquiry Committee with specific directions.

REPORT OF COUNCIL

13. The Executive Director of the Council shall provide the judge with a copy of the report of its conclusions presented by the Council to the Minister.

COMING INTO FORCE

14. These by-laws come into force on January 1, 2003.

TAB 3

CJC
Canadian
Judicial Council

www.cjc.gc.ca

CJC Policies regarding Inquiries

Canadian Judicial Council
Policy on Inquiry Committees

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.

Prior to the hearings, Independent Counsel should advise the Committee and the Judge of the "case" Counsel intends to present, including the evidence and witnesses to be called. 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.

The Inquiry Committee may rely on its own counsel to act as a liaison with Independent Counsel and counsel for the Judge, both prior to and during the hearings. If any contentious issues are to be discussed, all three should meet together. The same should apply to substantive issues such as the scope of the inquiry. Such matters should be placed on the record once hearings have commenced, as well as any further guidance sought by Counsel and instructions given. Hearings do not necessarily need to be conducted with the same formality as a trial. Provided the principle of fairness has been respected throughout, strict rules of evidence are not necessarily binding. 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.

Since counsel to the Inquiry Committee does not participate in the hearings, they may assist in drafting rulings and the final report. Past practices regarding the final report have included: reviewing the Committee's drafting for critical analysis; preparing a first draft of all contextual and factual reporting; preparing a first draft of the Committee's entire report after monitoring the Committee's deliberations and receiving specific instructions in relation to key issues. The role of counsel in this respect is entirely within the discretion of the Inquiry Committee and, indeed, a Committee may even decide not to engage its own counsel.

Subject to the provisions of the *Judges Act* and Council's by-laws, the Inquiry Committee remains master of its own procedure. In a case where the Inquiry Committee finds that the judge engaged in serious misconduct, the Committee may choose to reconvene, in its absolute discretion, prior to submitting its report to Council, to review issues related to whether or not the matter warrants the judge's removal.

TAB 4

Canadian Judicial Council

Policy on Independent Counsel

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. The Inquiry Committee relies on Independent Counsel to present the evidence relevant to the allegations against the judge in a full and fair manner.

The role of Independent Counsel is unique. Once appointed, Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel's best judgement of what is required in the public interest. This is an important public responsibility that requires the services of Counsel who is recognized in the legal community for their ability and experience.

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

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. This should be done in a fair, objective and complete manner.

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. At the same time, it must be kept in mind that the judge could continue to serve as a judge in future, so that expressions about the judge's credibility or motives should be carefully considered.

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.

TAB 5

CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

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

15 May 2012

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

(v. originale en anglais)

le 15 mai 2012

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 inquires. 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, marshall 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. Tsige,* 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.

TAB 6

CJC
CCM

Canadian
Judicial Council

Conseil canadien
de la magistrature

Inquiry Committee
concerning
the Hon. Lori Douglas

Comité d'enquête
au sujet de
l'hon. Lori Douglas

Transcript
of the hearing of
25 June 2012

Procès-verbal
de l'audition du
25 juin 2012

(v. originale en anglais)

IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985, C. J-1 AS AMENDED INTO THE CONDUCT OF THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS OF THE COURT OF QUEEN'S BENCH OF MANITOBA

****

HELD BEFORE THE HONOURABLE CATHERINE FRASER
(CHAIRPERSON),
THE HONOURABLE DEREK GREEN,
THE HONOURABLE JACQUELINE MATHESON,
BARRY ADAMS, AND MARIE-CLAUDE LANDRY
at Court of Queen's Bench
363 Broadway, 4th Floor, Winnipeg, Manitoba
on Monday, June 25, 2012 at 10:00 a.m.

****

APPEARANCES:

Guy Pratte, Q.C. Kirsten Crain	Independent counsel appointed pursuant to the Complaints Procedure
Sheila Block Molly Reynolds	For The Honourable Associate Chief Justice Lori Douglas
Rocco Galati Dushani Sribavan	For Alex Chapman
George Macintosh, Q.C.	For the Inquiry Committee

in the one allowing the tweeting applies and no electronic communications from this courtroom are permitted.

Commission counsel is finalizing a record of written materials, submissions, and applications that have been generated to date in the course of these proceedings and that have led to the various rulings issued by this committee. Those materials should be ready for filing within the next week and they too will be available publicly on the council website.

As we begin this session of the proceedings, it's important to stress that, to date, no evidence has been heard by and tested before this committee. It would be premature not only for this committee but for anyone else, whether the media, counsel, or public, to speculate on the strength or weakness of any of the allegations which are the subject of this inquiry.

An issue has arisen with respect to one of the allegations, namely, allegation 4. Judge's counsel objected to the inclusion of this allegation as drafted by independent counsel and refined by this committee.

Committee counsel on our instructions advised judge's counsel that any challenge to the jurisdiction of this committee to inquire into allegation 4 must be raised at the opening of the hearing on June 25th. That is today. Judge's counsel subsequently advised the committee that she is not going to make any further submissions and is content to leave her objection on the record without more.

In order to remove any uncertainty, we wish to make it clear that this committee will proceed in accordance with the allegation filed by independent counsel as refined by this committee. That allegation consists of two dimensions, both of which are related to the judge's alteration of a personal diary that allegedly described an encounter with Mr. Chapman.

The first aspect of the allegation is the judge's alleged failure to fully disclose facts to independent counsel during his investigation. The second aspect of this allegation is that the judge's alteration of the diary was itself an attempt to mislead the Canadian Judicial Council's investigation into

her conduct, and I should make it clear that that is an alleged attempt to mislead the Canadian Judicial Council's investigation into her conduct.

The committee therefore confirms that both of these are "being considered" by this committee in accordance with the council bylaws.

At this point, I invite independent counsel and judge's counsel, that is, Mr. Pratte who is independent counsel and Ms. Block who is judge's counsel to advise whether they have any preliminary matters that they wish to raise.

MR. PRATTE: None from independent counsel. Thank you, Chief Justice.

THE CHAIR: Thank you, Mr. Pratte.

MS. BLOCK: Nothing in addition to which I've submitted in writing.

THE CHAIR: Thank you so much, Ms. Block. And that takes us to the various procedural issues that remain outstanding, and the first of these that we propose to deal with, unless this doesn't work for counsel, but the first is to hear from -- to deal with Mr. Chapman's application for standing, and

TAB 7

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October 7, 2013

Suzanne Côté, Ad. E.
Direct Dial: 514.904.8160
scote@osler.com
Our Matter Number: 1139305

Confidential

Sent By Electronic Mail

Norman Sabourin
Executive Director
Canadian Judicial Council
112 Kent Street
Place de Ville B
Ottawa (Ontario) K1A 0W8

Dear Sir:

Investigation of the Canadian Judicial Council ("CJC") of complaints and allegations made in respect of the Honourable Lori Douglas, Associate Chief Justice of the Manitoba Court of Queen's Bench

I am writing to you in my capacity of Independent Counsel to the Inquiry Committee investigating complaints and allegations made in respect of Associate Chief Justice Douglas pursuant to section 63 of the *Judges Act*.

Pursuant to the CJC *Policy on Independent Counsel*, I am "expected to take the initiative in gathering, marshalling and presenting the evidence before the Committee". I am also to consider "the relevance of any other complaints or allegations against the judge, beyond the scope of the instant complaint".

Indeed, the CJC *Policy on Inquiry Committees* contemplates that "[t]here may be additional allegations about the Judge's conduct that were not contained in the initial complaint" that, for example, "could come to light as a result of publicity given to the forthcoming hearing or in the course of Counsel's preparation for them."

I have been made aware of the fact that the Chief Justice of the Manitoba Court of Queen's Bench, the Honourable Glenn Joyal, has filed a complaint with the CJC over expense claims of Associate Chief Justice Douglas. I refer you for example to an article by Sean Kavanagh of the Canadian Broadcasting Corporation, published on August 20, 2013.

I believe that it is incumbent upon me to investigate the facts underlying the complaint of Chief Justice Joyal in order to determine if, consistent with the CJC *Policy on Inquiry Committees*, I am to seek direction from the Inquiry Committee to include Chief Justice

Joyal's allegations in the scope of the Inquiry. In order to do so, I hereby request communication of Chief Justice Joyal's complaint.

Yours very truly,

Suzanne Côté, Ad. E.
Partner
AF:

TAB 8

CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

Ottawa, Ontario K1A 0W8

Confidential

CJC File: 13-0084

16 October 2013

Ms Suzanne Côté
Osler, Hoskin & Harcourt LLP
1000 De la Gauchetière Street West
Suite 2100
Montréal, Québec H3B 4W5

Dear Ms Côté:

In response to your letter of 7 October 2013, Mr Sabourin has asked me to provide you with a copy of Chief Justice Joyal's letter of complaint regarding Associate Chief Justice Douglas and related correspondence from Associate Chief Justice Perlmutter. Mr Sabourin has advised Ms Block of his decision to provide you the complaint. He has also asked me to inform you that Council will issue a press release about the latest development shortly.

Yours sincerely,

Josée Gauthier
Judicial Conduct Registrar

Encls.

Pages 91 to 102 redacted.

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Pages 91 to 102 redacted.

TAB 9

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October 22, 2013

Suzanne Côté Ad. E.
Partner, Litigation
Osler, Hoskin & Harcourt LLP
1000 De La Gauchetière Street West, Suite 2100
Montréal Québec H3B 4W5

Dear Ms. Côté:

Re: CJC File No. 13-0084

I write further to my letter to Norman Sabourin on October 16, 2013.

You will have seen from my correspondence that I objected to the CJC's decision, made without notice to Douglas, ACJ and without affording her the opportunity to make submissions concerning your request, to provide you with a copy of the complaint in CJC file no. 13-0084.

This complaint file has not yet passed the initial stages of the CJC complaints process. It has not been reviewed by a member of the Judicial Conduct Committee or an independent, external person engaged on the JCC's behalf. It has not been considered by a Review Panel. It has not been forwarded to an Inquiry Committee for a hearing. No Independent Counsel has been appointed to investigate the evidence regarding the complaint. It is contrary to the complaints process set out in the CJC's statutory framework and procedures, and inconsistent with the judge's right to procedural fairness for you to review this matter. As such, we will not be providing you with a copy of the response filed on behalf of Douglas, ACJ. You have no right to this information and it is an invasion of the judge's privacy rights to have obtained it from the CJC.

You were appointed the Independent Counsel to present evidence to the Inquiry Committee constituted to review the allegations against Douglas, ACJ concerning the matters raised in the complaints made against her in 2010. Complaint file no. 13-0084 is entirely unrelated to those allegations and unrelated to the Inquiry Committee proceedings for which you have been appointed. It is Douglas, ACJ's position that you have no authority to receive, review, investigate or make recommendations as to the treatment of this complaint.

Apart from that, "the proceedings of the Inquiry Committee are stayed until final determination of the Applicant's application for judicial review" by order of the Federal Court. The Committee's authority to hear motions or other submissions and issue rulings or directions as to the scope of the inquiry is stayed. If your mandate with respect to the current Inquiry Committee proceedings does resume in the future, you will have no right to confidential material in the possession of the CJC relating to this unrelated matter. It should be noted that although the existence of a complaint was made public by an improper leak to the media by an

unidentified source, Joyal, CJ's letter remained a confidential document and you have no right to demand it and the CJC has no right to provide it to you.

Finally, the role of Independent Counsel is currently subject to scrutiny by the Federal Court in light of the CJC's and your assertion of a solicitor-client relationship between Independent Counsel and the CJC through the Vice-Chair of the Judicial Conduct Committee. You should await the final decision of the federal court determining the propriety of this claimed relationship.

Please return Joyal, CJ's confidential letter to Mr. Sabourin and destroy any copies and internal materials related to that complaint file.

Yours truly,

Sheila Block

per: Sheila Block

MR

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November 1, 2013

Suzanne Côté Ad. E.
Partner, Litigation
Osler, Hoskin & Harcourt LLP
1000 De La Gauchetière Street West, Suite 2100
Montréal Québec H3B 4W5

Dear Ms. Côté:

Re: CJC File No. 13-0084

I am writing in response to your letter to me of October 29, 2013.

At the outset, I would like to make clear that our client objects to your receipt of - and investigation into - the complaint in CJC file no. 13-0084. It is inappropriate, unfair and contrary to the CJC's established complaint procedure. However, we are currently focused on the hearing of her judicial review application (and the associated preliminary motions and appeal launched against her application by the CJC). As a result, we register our strong objection, and once we are through this process, we will address this further.

As you acknowledge, the Federal Court has stayed the Inquiry Committee proceedings pending a final determination of our client's application for judicial review. Even if the Court had not stayed the proceedings, you have no authority to investigate the complaint in CJC file no. 13-0084. Our client's application before the Court raises serious procedural fairness concerns. Contrary to your suggestion, this involves broad procedural fairness rights beyond simply receiving "fair and proper notice." It is a serious breach of her rights for you to have access to the complaint in CJC file no. 13-0084 and entirely improper for you to distribute or disclose it to anyone, including to the Inquiry Committee. Beyond notice obligations, our client is entitled to a fair and impartial investigation conducted in accordance with the established "multi-tiered" CJC procedure.

Our client's application for judicial review directly implicates your relationship with the CJC and the CJC's ability to provide you with privileged instructions. Your ability to continue as Independent Counsel is in question in this judicial review. It is particularly concerning that you have chosen to continue to conduct your investigation, which presumably means interviewing colleagues of Douglas, ACJ and members of the bar, about the very intrusive and damaging matters that caused the irreparable harm that justified the Court's order to stay the proceedings.

You fail to acknowledge that a final determination of our client's application may result in an order prohibiting the CJC proceedings from continuing in their current form. Instead, you have pre-judged the case, asserting that you are continuing your investigation "so to ensure that, once the application for judicial review is determined, the investigation can expeditiously proceed to its conclusion." In applying for intervention status you did not disclose your pre-judgment to the

Court. This raises issues about your ability to assist the Court as a neutral intervener in the application, and for any ongoing role as the impartial Independent Counsel should the Committee's proceedings resume.

I have already stated our client's position that you have no authority in your role as Independent Counsel to the currently constituted Inquiry Committee to receive, review, investigate or make recommendations as to the treatment of complaint file no. 13-0084. By requesting and receiving a one-sided account of the allegations raised in Joyal, CJ's confidential letter to the CJC you have acted beyond the scope of your current role in a manner that is contrary to the CJC's established procedures and unfair to our client.

The complaint in CJC file no. 13-0084 has not been subjected to the "multi-tiered" CJC screening process. This multi-tiered process is mandatory for "ordinary complaints" made pursuant to s. 63(1) of the *Judges Act*. It is one of the mechanisms that ensures the fairness of the complaint process for respondent judges. Your consideration of this complaint interferes with this mandatory structure and compromises the fairness owed to Douglas, ACJ.

Your letter suggests that because Associate Chief Justice Douglas is currently the subject of an investigation by an Inquiry Committee, any and all unrelated allegations or complaints that come to your attention may now be considered by you in your capacity as Independent Counsel without first being screened under the established process. This cannot be right. The CJC's complaints process is neither designed to investigate a judge's alleged conduct at large nor is it meant to open the floodgates to any possible allegation or complaint against a judge once an unrelated complaint involves a matter that is deemed "serious enough to warrant removal" by a Review Panel. Rather, the process is designed to screen individual complaints made to the CJC in order to determine first, at the JCC stage, if the matter raised in the complaint "warrants further consideration" and second, at the Review Panel stage, if the matter raised in the complaint "may be serious enough to warrant removal."

You should know that we have objected to the Inquiry Committee including any additional allegations beyond those contained in a complaint. We have objected to this Inquiry Committee's jurisdiction over counts in the existing Notice of Allegations as additional allegations are not provided for in the *Judge's Act*. That is a matter to be addressed at a later time. But even on the Committee's interpretation that related claims can be included, notwithstanding that the *Judges' Act* does not permit it (and the *By-Laws* cannot expand the jurisdiction given by Parliament), there is no basis to consider entirely separate unrelated complaints as you are improperly doing here. On your theory, any former disgruntled litigant could "pile on" with some long, simmering, resentment over a lost case and according to you and Mr. Sabourin, it could just be "thrown in" to the mix before Fraser CJ's Inquiry Committee. Can you not see how unfair this is?

Your interpretation of the CJC's screening procedure leads to the unfair result that once a judge is subject to investigation by the Inquiry Committee any other complaint that comes to the attention of the Independent Counsel may be included in the Committee's investigation if the Independent Counsel considers it to be something which may touch on "the ultimate issue to be decided by the CJC." You have absolutely no authority to make this determination. The CJC's screening procedure specifically contemplates two stages of review, the JCC stage and the Review Panel stage, aimed at making the precise determination you purport to make in relation to complaint file no. 13-0084, namely whether to raise the matter with the Inquiry Committee.

We caution you not to further breach our client's confidentiality rights and to take no steps concerning complaint file no. 13-0084. You should destroy all copies of the materials and provide an account of any disclosure or steps you have taken in respect of that complaint. You should also think long and hard about the irreparable harm aspects of your investigation that we refer to above, as well as the serious issues raised in the judicial review about your view that you can both fill the role of Independent Counsel and have the CJC as your client.

Yours truly,

Sheila Block

Sheila Block

TAB 10

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August 21, 2014

Chantal Chatelain
Langlois Kronström Desjardins
1002 Sherbrooke Street West
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Montreal, QC
H3A 3L6

Dear Ms. Chatelain:

Re: Independent Counsel's Request for Directions on Allegations against Douglas, ACJ

I would be grateful if you would direct this letter to the attention of the Inquiry Committee.

We write in respect of Independent Counsel's Notice of Intention to Seek Directions from the Inquiry Committee ("the Notice"). For ease of reference we refer in this letter to the complaints outlined in the Notice as "the Chapman complaint" and "the Joyal complaint", but we do not agree that these constitute complaints that may be considered by the Committee under s. 5(1) of the *By-laws*, a point to which we return below.

Douglas, ACJ provides the following submissions to assist the Committee in reaching a decision in respect of the Notice. These submissions do not represent the entirety of Douglas, ACJ's submissions on the merits of either the Chapman complaint or the Joyal complaint. Rather, they are provided to assist the Committee in its consideration of the Notice. If the Committee directs Independent Counsel to add either of these allegations to the Notice of Allegations, Douglas, ACJ reserves her right to make further submissions on the propriety of these allegations in the preliminary motions to be argued in October, 2014.

Douglas, ACJ submits that there is no jurisdiction for the Inquiry Committee to consider either of these allegations at this time for two reasons. First, the CJC *By-laws* establish a mandatory multi-tiered screening process that has not been followed in respect of either complaint. The Committee lacks the jurisdiction to consider a complaint that has not been sent forward by the Review Panel in its decision to constitute an inquiry committee under s. 1.1(3) of the *By-laws*. Second, even if the screening process had been properly followed in this case, Douglas, ACJ submits that neither complaint rises to the level that "may be serious enough to warrant removal." As such, there is no jurisdiction for an inquiry committee to consider either allegation. In this regard, it must be remembered that neither of these complaints is a complaint by the Minister of Justice under s. 63(1) of the *Judges Act*, and as a result, an inquiry is not mandatory. Where an inquiry is not mandatory under s. 63(1), Council must follow its own statutory procedures established under the *By-laws* which mandate the multi-tiered screening process.

In addition to the Committee's lack of jurisdiction, it would be a serious breach of Douglas,

ACJ's procedural fairness rights for this Committee to consider either the Chapman complaint or the Joyal complaint. Section 7 of the *By-laws* requires the Inquiry Committee to conduct its investigation in accordance with the principle of fairness. Douglas, ACJ is entitled to expect that the scope of the Committee's investigation will be limited to complaints that had properly made their way through the mandatory screening process. Where the complaint is not made under s. 63(1) of the *Act*, the respondent judge is entitled to expect that the CJC will follow the procedure established in its *By-laws* for screening complaints through various gatekeepers before they are aired publicly at an inquiry committee hearing. A direction to Independent Counsel to add either the Chapman complaint or the Joyal complaint to the Notice of Allegations, where neither complaint has been referred to the Committee by a review panel, would constitute a serious breach of Douglas, ACJ's procedural fairness rights.

I. Neither Complaint has been Referred to the Committee by the Review Panel

There is a mandatory four stage screening process for complaints against federally appointed judges made under s. 63(2) of the *Judges Act*.[1] The multi-tiered process is established in the CJC's *By-laws*. The first level is a review by the Executive Director of the CJC who determines whether the complaint warrants the opening of a file. The second level of review is conducted by the Chair or Vice-Chair of the Judicial Conduct Committee. The Chair or Vice-Chair may dispose of the complaint summarily or may refer it to a review panel after considering comments from the judge. At the third level, a complaint that has been referred by the Chair or Vice-Chair is considered by a review panel of three or five judges. If the review panel concludes that the complaint is "serious enough to warrant removal" then it may constitute an Inquiry Committee. Only once a review panel has determined that a complaint made under s. 63(2) is "serious enough to warrant removal" does an inquiry committee have jurisdiction to inquire into the complaint.

Neither the Chapman complaint nor the Joyal complaint has been referred to the Committee by a review panel. As such, neither complaint is within the Committee's jurisdiction to consider, and neither can be added to the Notice of Allegations. In 2011, Wittmann, CJ referred the Chapman complaint to a Review Panel. The Review Panel retained Marjorie Hickey of McInnis Cooper LLP to investigate as Outside Counsel. After receiving Ms. Hickey's report, the Review Panel determined that there was no evidence to support the Chapman complaint. Although it sent two other allegations forward for investigation by an inquiry committee, the Chapman complaint was not sent forward.

Independent Counsel Guy Pratte subsequently considered the Chapman complaint when investigating the allegations that were sent forward by the Review Panel and affirmed that there was no evidence to support including that complaint in his notice of allegations. The former Inquiry Committee ordered Mr. Pratte to include it as an allegation. This decision was erroneous and this Committee should not fall into the same error. Nonetheless, as set out below, evidence concerning the Chapman complaint occupied most of the 2012 hearing and demonstrated that Douglas, ACJ had no involvement with any of the matters alleged in the complaint, following which the former Inquiry Committee asked counsel for submissions as to whether the complaint should be dismissed without further evidence.

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[1] This multi-stage process is discussed in greater detail by the Federal Court of Appeal in *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, in affidavits sworn by Norman Sabourin, the CJC's Executive Director and General Counsel, and is contained in the CJC's *By-laws*.

The Joyal complaint has not even been referred to a review panel by the Chair or Vice-Chair of the Judicial Conduct Committee. The Chair of the Judicial Conduct Committee has decided that no further steps are to be taken in respect of the Joyal complaint – as such, the complaint file is being held in abeyance. It was not referred to a review panel, and no review panel has determined that it may be serious enough to warrant removal. The complaint has not passed the second level of review: the Judicial Conduct Committee has not even determined whether to dispose of the complaint summarily.

Given that Joyal, CJ is a member of the Judicial Conduct Committee, it would be particularly unfair and would raise serious concerns if his complaint were to be treated in a manner that bypassed the legislated screening process and treated in the same way as if it were a complaint made by an Attorney General under s. 63(1) of the *Judges Act*. Independent Counsel's request for and Mr. Sabourin's provision of the Joyal complaint were completely unfounded. Complaints at this stage are kept confidential by the CJC as it has not been determined by the screening process that there should be a public airing via an inquiry committee proceeding. Our correspondence to Mr. Sabourin and Ms. Côté in that regard is enclosed.

The Federal Court of Appeal has clearly distinguished between complaints about a federally appointed judge made by the Minister of Justice or provincial Attorneys General under s. 63(1) of the *Judges Act* and complaints made under s. 63(2) of the *Act*.[2] In upholding the constitutionality of the mandatory investigation into complaints made under s. 63(1) of the *Act*, the Court explained the different procedures as follows:

> Most complaints about judicial conduct are submitted under subsection 63(2) of the *Judges Act*, and are subject to a screening procedure that, in the vast majority of cases, results in a decision that no investigation or inquiry is warranted. However, if the federal Minister of Justice or the Attorney General of a province requests the Council pursuant to subsection 63(1) of the *Judges Act* to commence an inquiry as to whether the judge should be removed from office for one of the reasons specified in paragraphs 65(2)(a) to (d), the screening procedure applied to complaints under subsection 63(2) is not engaged. ...
>
> I will now describe the screening procedure followed when a complaint is made under subsection 63(2) of the Judges Act, which is the procedure that is <u>omitted</u> when an Attorney General requests the commencement of an inquiry under subsection 63(1).
>
> A complaint under subsection 63(2) (which I will refer to as an "ordinary complaint") may be made by anyone, including a chief justice (that was the situation in Gratton, cited above). Even an attorney general may have recourse to subsection 63(2) rather than subsection 63(1) and presumably may do so to make a complaint about the conduct of a judge that may not warrant removal for any of the reasons set out in paragraphs 65(2)(a) to (d).
>
> The Council normally does not publicize ordinary complaints or the results of the complaints procedure, unless the result is the establishment of an Inquiry Committee. However, the complainant is not obliged to keep the complaint confidential and may not do so.

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[2] *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103. A copy of the Federal Court of Appeal's decision is enclosed.

> An ordinary complaint is subject to a multi-tiered procedure to determine whether an inquiry is warranted. The procedure is set out in detail in the Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges: "Complaints Procedures".[3]

The Court discussed the advantages of the multi-tiered procedure in paragraphs 77-81 of its decision. The Ontario Court of Appeal has also discussed the purposes of the multi-tiered judicial discipline process in *Hryciuk v. Ontario (Lieutenant Governor)*[4]. Both Courts emphasized the need for a multi-tiered screening procedure to ensure that unmeritorious complaints are resolved early without subjecting the respondent judge to the reputational harm involved in a public inquiry. In *Hryciuk*, the Ontario Court of Appeal explained that multi-tiered screening procedures for complaints against judges are also necessary to maintain public confidence in the administration of justice and the judiciary. If spurious or unwarranted complaints are allowed to proceed in a public hearing (unless ordered otherwise under the *Judges Act*[5]) serious harm may be done to the judge's reputation. This concern is particularly relevant in this case where the Federal Court has found that irreparable harm has already been done to Douglas, ACJ through the process before the first Inquiry Committee.[6]

An investigation of complaints by the Inquiry Committee that are not properly within the Committee's jurisdiction and which, as will be discussed in greater detail below, are not "sufficiently serious to warrant removal" threatens to cause serious and "irreversible damage to [Douglas, ACJ's] reputation and, more importantly, to [her] ability to maintain public confidence in his or her judicial capacities."[7] It is for this reason, in part, that Council determined that only where an allegation is determined by a review panel to be "sufficiently serious to warrant removal" that an inquiry committee should be constituted to consider the complaint. There is good reason this determination and this gatekeeping step is not required in connection with complaints made under s. 63(1). First, an Attorney General is entitled to a presumption that he or she will exercise their authority in good faith, objectively, independently, and in the public interest. Second, 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). Neither of these elements exists for complaints made under s. 63(2).

The Notice relies on portions of the CJC's policies and s. 5(1) of the *By-laws* to suggest that the Committee may omit to follow the multi-tiered screening procedure for complaints made under s. 63(2) of the *Act*. In light of the Federal Court of Appeal's decision in *Cosgrove* and well-established principles of statutory interpretation, such an interpretation of the policies and s. 5(1) of the *By-laws* is not justified for two reasons:

1. The *By-laws* must be read coherently and in their entirety. Interpreting s. 5(1) to mean that an inquiry committee could consider *any* complaint or allegation regardless of

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[3] *Cosgrove, supra* note 2, paras. 2, 66-69.

[4] *Hryciuk v. Ontario (Lieutenant Governor)* (1996), 31 O.R. (3d) 1. A copy of the Ontario Court of Appeal's decision is enclosed.

[5] *Cosgrove, supra* note 2, para. 79.

[6] *The Honourable Lori Douglas v. Attorney General of Canada*, 2013 FC 776, para. 29. A copy of Justice Snider's decision granting Douglas, ACJ's motion for a stay is enclosed.

[7] *Hryciuk, supra* note 4, para. 36.

whether it had been referred to it by a review panel would render the prior sections of the *By-laws* and the multi-tiered screening procedure meaningless. In the words of the Court of Appeal in *Hryciuk*, an interpretation which eliminates the screening provisions would "defeat the whole purpose of the legislative scheme."[8] This is the effect of Independent Counsel's interpretation of s. 5(1) of the *By-laws*.

2. The distinction between complaints made under s. 63(1) and s. 63(2) of the *Judges Act* would be rendered meaningless. Parliament's clear intention to distinguish between complaints made by the Minister of Justice and provincial Attorneys General and others must be respected. Circumventing the multi-tiered screening procedure in this case would elevate the Chapman complaint and the Joyal complaint to the status of complaints made by the Minister of Justice under s. 63(1).

Therefore, the discretion afforded to an inquiry committee in s. 5(1) of the *By-laws* must be limited to the complaints that have been forwarded to the Committee through the screening process. The committee's jurisdiction to consider "any relevant complaint or allegation pertaining to the judge that is brought to its attention" must be limited to the discretion to consider complaints and allegations sent forward by the review panel but which Independent Counsel does not think should go forward and therefore does not include in his or her notice of allegations, namely a Boilard-type motion.[9]

In addition to the above jurisdictional issues, the Joyal Complaint raises additional issues that bar the Committee from considering it at this time. Section 5(1) of the *By-laws* is clear that the discretion that is granted to inquiry committees to consider other complaints only applies in respect of "relevant" allegations. The Joyal complaint cannot be a "relevant" complaint. The Notice suggests that the Joyal complaint is relevant, because it goes to the ultimate issue of whether "Douglas, ACJ has become incapacitated or disabled from the due execution of the office of judge by reason of any of the factors set out in subsection 65(2) of the *Judges Act*." This argument was explicitly rejected by the Court of Appeal in *Hryciuk*.[10]

II. Neither Complaint is "Serious enough to warrant removal"

Douglas, ACJ submits that neither the Chapman complaint nor the Joyal complaint may be "serious enough to warrant removal" and as such the Committee lacks the jurisdiction to

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[8] *Hryciuk, supra* note 4, para. 38.

[9] The Boilard rule was established in the context of the CJC's investigation into a complaint made against Justice Boilard. In the CJC's December 2003 report to the Minister in that case the CJC explained the Boilard rule as follows: Where the Minister of Justice or an Attorney General of a province questions a judicial decision and requests an inquiry under s. 63(1) of the Act, but makes no allegation of bad faith or abuse of office and where, on its face, the judicial decision itself discloses no indication of bad faith or abuse of office, then, the Council would be justified in considering, or an Inquiry Committee appointed under s. 63 should consider, as a preliminary matter, whether there is anything to rebut the presumptions of good faith and due and proper consideration of the issues. Although the circumstances may vary from case to case, if there is nothing of that nature, the Council or an Inquiry Committee should, as a general rule, decline to deal with the matter further on the basis that the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry.

[10] *Hryciuk, supra* note 4, para. 40.

consider either of these complaints. This test must be satisfied before an inquiry committee can consider a complaint in order to ensure that unnecessary and unjustified harm is not inflicted on a judge's reputation and on public confidence in the administration of justice.

The Chapman complaint

The lack of evidentiary support for the Chapman complaint and the reasons this complaint cannot be "serious enough to warrant removal" are evidenced by the following:

1. The Review Panel did not send the Chapman complaint forward as an allegation to the Inquiry Committee. The Review Panel's decision was that there was no evidence to support the Chapman complaint following a thorough investigation by Marjorie Hickey, its outside counsel.

2. Mr. Pratte, the former Independent Counsel, conducted a thorough investigation and similarly found no evidence to support the Chapman complaint. His original Notice of Allegations did not include the Chapman complaint. The former Inquiry Committee improperly, and without jurisdiction, required Mr. Pratte to add the Chapman complaint to the NOA.

3. Chapman's evidence at the first Inquiry Committee hearings was that no sexual touching occurred. He testified that the meetings arranged by Mr. King and Chapman, without Ms. Douglas' knowledge, where Chapman was introduced to Ms. Douglas were completely innocuous. There was no discussion of Mr. King's fantasies or of his enlisting Chapman to have his wife meet and engage in conversation with Chapman. This testimony was completely contrary to the allegations in his complaint. Enclosed with this letter are excerpts from Mr. Chapman's evidence.

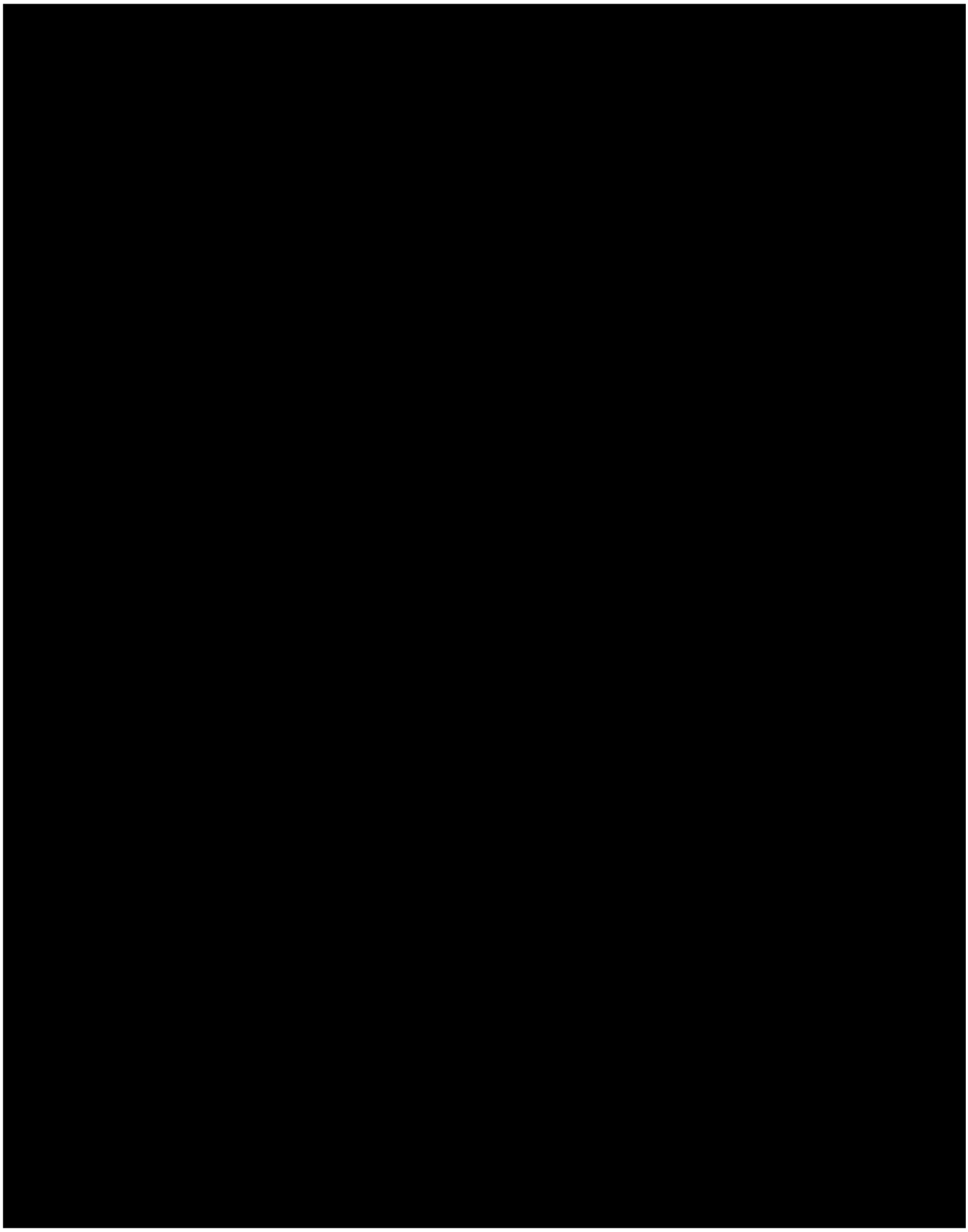
4. Chapman's evidence at the first Inquiry Committee hearings that Ms. Douglas did not sexually harass him is consistent with the sexual harassment complaint he made in 2003. In June 2003, Chapman threatened King and Thompson Dorfman Sweatman with a lawsuit for sexual harassment. Chapman made no threats, claims, or allegations against Ms. Douglas for anything. Enclosed with this letter is the settlement letter and release Mr. King and Chapman agreed to in 2003 in connection with Chapman's complaint.

5. The first time Chapman raised any allegations against Ms. Douglas was in 2010 after he decided that there was a conspiracy against him in the Manitoba courts as a result of his prior dealings with Mr. King. Chapman only raised allegations against Douglas, ACJ after he appeared before Joyal, J (as he then was) at a pre-trial hearing in an action Chapman had brought against the Winnipeg police. Joyal, J advised him that his claim was not likely to succeed. Chapman's reaction to that advice was to breach the terms of his settlement with Mr. King and re-post the intimate images of Douglas, ACJ on the internet, images that he had wrongly kept for over 7 years. This is a classic example of the infliction of harm associated with "revenge porn". Chapman lashed out at the person who was most vulnerable and who would suffer the most. In 2003, the intimate images of Ms. Douglas had been posted to a single, private, paid membership site without her consent and were immediately removed once this violation was discovered. In 2010, Mr. Chapman sent the images to the CBC, the CJC, the Law Society of Manitoba, and had them posted publicly on the internet in an attempt to obtain revenge for the injustices he

perceived the judiciary was inflicting on him, including a costs award against him in favour of Mr. King.

6. Even before all of the evidence was presented in connection with the Chapman complaint, the first Inquiry Committee was prepared to hear submissions on "whether there [was] a basis for proceeding further with Allegation 1 [the Chapman complaint]." The Committee proposed that all counsel would make those submissions at the commencement of the hearing the following day, less than 24 hours later. The relevant except from the Committee's ruling on July 26, 2012 is enclosed. Even the Committee that required the Chapman complaint to be added over the objection of Independent Counsel, and had funded Rocco Galati as Chapman's lawyer so a strong case would be pursued against the judge, was signaling that the complaint was specious.

7. Ms. Côté has not met with Chapman through the course of her investigation. In fact, Ms. Côté has advised that Chapman has left the country. Ms. Côté determined that in order to fulfill her mandate, she must re-interview the witnesses who were interviewed by Mr. Pratte in his team. Furthermore, Douglas, ACJ has received no disclosure from Ms. Côté to suggest that she has any evidence to support the Chapman complaint. There has been no disclosure of evidence that could support the position that Ms. Douglas was involved in any sexual harassment of Chapman or that she was aware of any part of Mr. King's scheme.



Yours very truly,

Sheila Block

Sheila Block

cc: Suzanne Cote
Alexandre Fallon

TAB 11

CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges

Procédures relatives à l'examen des plaintes déposées au Conseil canadien de la magistrature au sujet de juges de nomination fédérale

Short Title:
"Complaints Procedures"

Titre abrégé :
« Procédures relatives aux plaintes »

Approved by the
Canadian Judicial Council

effective 3 April 2014

Approuvées par le
Conseil canadien de la magistrature

en vigueur le 3 avril 2014

Complaints Procedures
of the Canadian Judicial Council

1. Definitions

In these Procedures,

"*Act*" means the *Judges Act*;

"complaint" means a complaint or allegation;

"chief justice" is a Council member who is a Chief Justice or Senior Judge;

"Council" means the Canadian Judicial Council established pursuant to section 59 of the *Act*;

"Inquiry Committee" means a Committee constituted under subsection 63(3) of the *Act;*

"Outside Counsel" means a lawyer who is not an employee of the Council;

"Panel" means a Review Panel constituted pursuant to section 1.1 of the *Canadian Judicial Council Inquiries and Investigations By-laws*.

Procédures relatives aux plaintes
du Conseil canadien de la magistrature

1. Définitions

Les définitions qui suivent s'appliquent aux présentes procédures.

« avocat externe » Un avocat qui n'est pas un employé du Conseil.

« comité d'enquête » Un comité constitué conformément au paragraphe 63(3) de la *Loi*.

« comité d'examen » Un comité constitué en vertu de l'article 1.1 du *Règlement administratif du Conseil canadien de la magistrature sur les enquêtes*.

« Conseil » Le Conseil canadien de la magistrature constitué en vertu de l'article 59 de la *Loi*.

« juge en chef » Un membre du Conseil qui est juge en chef ou juge principal.

« *Loi* » La *Loi sur les juges*.

« plainte » Une plainte ou une accusation.

2. Receipt of Complaint and Opening of File

2.1 The Executive Director, under the direction of the Chairperson of the Judicial Conduct Committee as defined in section 3.3 below, is responsible for all administrative aspects related to the judicial complaints process.

2.2 The Executive Director shall open a file when a complaint about a named, federally appointed judge made in writing is received in the Council office from any source, including from a member of the Council who is of the view that the conduct of a judge may require the attention of the Council. The Executive Director shall not open a file for complaints which, although naming one or more federally appointed judges, are clearly irrational or an obvious abuse of the complaints process.

2.3 A complaint received from an anonymous source shall be treated to the greatest extent possible in the same manner as any other complaint.

2. Réception d'une plainte et ouverture d'un dossier

2.1 Le directeur exécutif, sous la direction du président du comité sur la conduite des juges, tel qu'il est défini à l'article 3.3, est chargé de tous les aspects administratifs des procédures relatives aux plaintes.

2.2 Sur réception, au bureau du Conseil, d'une plainte formulée par écrit concernant un juge de nomination fédérale, le directeur exécutif ouvre un dossier. Ces plaintes peuvent être formulées par quiconque, y compris par un membre du Conseil qui estime que la conduite d'un juge pourrait exiger l'attention du Conseil. Le directeur exécutif n'ouvre pas de dossier dans le cas des plaintes qui, même si elles concernent un ou plusieurs juges de nomination fédérale, sont nettement irrationnelles ou constituent un abus manifeste de la procédure relative aux plaintes.

2.3 Une plainte provenant d'une source anonyme est, dans la mesure du possible, traitée de la même façon que toute autre plainte.

3. Review by the Chairperson or Vice-Chairpersons of the Judicial Conduct Committee

3.1 The Chairperson of the Council does not participate in the consideration of any complaint by the Council.

3.2 The Executive Director shall refer a file to either the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee in accordance with the directions of the Chairperson of the Committee. The Chairperson or a Vice-Chairperson shall not deal with a file involving a judge of their court.

3.3 Throughout the remainder of these procedures "Chairperson" refers to either the Chairperson or one of the Vice-Chairpersons of the Judicial Conduct Committee established by the Council.

3.4 After a file has been opened, and upon receipt of a letter from the complainant asking for the withdrawal of his or her complaint, the Chairperson may:

(*a*) close the file and categorize it as "withdrawn"; or

(*b*) proceed with consideration of the complaint on the basis that the public interest and the due administration of justice require it.

3. Examen de la plainte par le président ou par un vice-président du comité sur la conduite des juges

3.1 Le président du Conseil ne peut participer à l'examen d'une plainte par le Conseil.

3.2 Le directeur exécutif transmet un dossier au président ou à un vice-président du comité sur la conduite des juges conformément aux directives du président du comité. Ni le président non plus que les vice-présidents ne doivent examiner un dossier mettant en cause un juge qui est membre de la même cour qu'eux.

3.3 Pour l'application des dispositions qui suivent, le terme « président » désigne le président ou l'un des vice-présidents du comité sur la conduite des juges constitué par le Conseil.

3.4 Si, après l'ouverture d'un dossier, le président reçoit une lettre dans laquelle le plaignant demande le retrait de sa plainte, il peut :

a) soit fermer le dossier et le classer dans la catégorie des plaintes « retirées »;

b) soit décider de poursuivre l'examen de la plainte, considérant que l'intérêt public et la bonne administration de la justice l'exigent.

3.5 The Chairperson shall review the file and may

(*a*) close the file if he or she is of the view that the complaint is

(i) trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration, or

(ii) outside of the jurisdiction of the Council because it does not involve conduct; or

(*b*) seek additional information from the complainant; or

(*c*) seek the judge's comments and those of their chief justice.

3.6 When the Chairperson has closed a file under this section, the Executive Director shall provide to the judge and to their chief justice a copy of the complaint and of the letter advising the complainant that the file has been closed.

4 Request for Comments from Judge / Chief Justice

4.1 Where the Chairperson has decided to seek comments pursuant to paragraph 3.5(*c*), the Executive Director shall write to the judge and their chief justice requesting comments.

3.5 Le président examine le dossier et peut, selon le cas :

a) fermer le dossier s'il estime :

(i) que la plainte est frivole ou vexatoire, qu'elle est formulée dans un but injustifié, qu'elle est manifestement dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,

(ii) que la plainte n'est pas du ressort du Conseil, parce qu'elle ne met pas en cause la conduite d'un juge;

b) demander des renseignements supplémentaires au plaignant;

c) demander des commentaires au juge et à son juge en chef.

3.6 Lorsque le président a fermé un dossier aux termes du présent article, le directeur exécutif remet au juge et à son juge en chef une copie de la plainte de même qu'une copie de la lettre informant le plaignant de la fermeture du dossier.

4. Demande de commentaires au juge ou à son juge en chef

4.1 Lorsque le président a décidé de demander des commentaires conformément à l'alinéa 3.5*c*), le directeur exécutif écrit au juge et à son juge en chef leur demandant de formuler des commentaires.

5. Consideration of Response of the Judge

5.1 The Chairperson shall review the response from the judge and the judge's chief justice, as well as any other relevant material received in response to the complaint, and may

(*a*) close the file where:

(i) the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or

(ii) the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint; or

(*b*) hold the file in abeyance pending pursuit of remedial measures pursuant to section 5.3; or

(*c*) retain Outside Counsel to conduct a confidential investigation, if the Chairperson is of the view that such investigation would assist in considering the complaint; or

(*d*) refer the file to a Panel.

5. Examen de la réponse du juge

5.1 Le président examine la réponse du juge et du juge en chef, de même que tout autre document pertinent reçu en réponse à la plainte. Il peut prendre l'une ou l'autre des décisions suivantes :

a) fermer le dossier dans l'un ou l'autre cas suivant :

(i) il conclut que la plainte est dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,

(ii) le juge reconnaît que sa conduite était déplacée et le président est d'avis qu'il n'est pas nécessaire de prendre d'autres mesures en ce qui concerne la plainte;

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

c) mandater un avocat externe pour mener une enquête confidentielle, si le président est d'avis qu'une telle enquête faciliterait l'examen de la plainte;

d) déférer le dossier à un comité d'examen.

5.2 When closing the file pursuant to subparagraph 5.1(*a*)(ii), the Chairperson may, in writing, provide the judge with an assessment of their conduct and express any concerns the Chairperson may have about the judge's conduct.

5.3 In consultation with the judge's chief justice and with the consent of the judge, the Chairperson may

(a) recommend that any problems identified as a result of the complaint be addressed by way of counselling or other remedial measures, and

(b) close the file if satisfied that the matter has been appropriately addressed.

5.4 When the Chairperson closes a file, the Executive Director shall provide to the judge and to their chief justice a copy of the letter informing the complainant that the file has been closed.

6. Complaints involving a Council Member

6.1 When proposing to close a file that involves a member of the Council, the Chairperson shall refer the complaint and the proposed reply to Outside Counsel who shall provide their views on the proposed disposition of the complaint.

5.2 Lorsqu'il ferme le dossier conformément au sous-alinéa 5.1*a*)(ii), le président peut écrire au juge pour lui faire part de l'évaluation de sa conduite et lui exprimer ses préoccupations à l'égard de celle-ci.

5.3 En collaboration avec le juge en chef du juge et avec le consentement du juge, le président peut:

a) recommander que les problèmes relevés par suite de la plainte soient traités en ayant recours à des services de consultation ou à d'autres mesures correctives;

b) fermer le dossier s'il est satisfait que les problèmes relevés ont été traités de façon appropriée.

5.4 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

6. Plaintes mettant en cause un membre du Conseil

6.1 Lorsque le président propose de fermer un dossier mettant en cause un membre du Conseil, il soumet la plainte et la réponse proposée à un avocat externe, qui donne son avis sur la décision qui est proposée relativement à la plainte.

7. Outside Counsel Investigation

7.1 If the Chairperson retains Outside Counsel to conduct an investigation under paragraph 5.1(*c*), the Executive Director shall so inform the judge and their chief justice.

7.2 Outside Counsel may conduct a confidential investigation in order to obtain information necessary to render legal advice to the Chairperson with respect to a complaint. Confidentiality during the investigative phase is crucial to preserving the Council's ability to fully, effectively and fairly investigate a complaint.

7.3 Outside Counsel may conduct confidential interviews in the course of such an investigation.

7.4 The information and documents gathered during the investigation, and the names of persons interviewed, will as a general practice be kept confidential. However, the need for confidentiality during the investigative phase must be balanced with the judge's right to be provided with sufficient information to be able to meaningfully respond. Outside Counsel shall provide the judge with sufficient information about the allegations and the material evidence to permit the judge to respond, and any such response shall be provided to the Chairperson.

7. Enquête d'un avocat externe

7.1 Si le président mandate un avocat externe pour mener une enquête supplémentaire en vertu de l'alinéa 5.1*c*), le directeur exécutif en informe le juge et son juge en chef.

7.2 L'avocat externe peut mener une enquête confidentielle afin d'obtenir l'information nécessaire pour fournir un avis juridique au président au sujet d'une plainte. La confidentialité est essentielle pendant l'étape de l'enquête afin de préserver la capacité du Conseil à enquêter au sujet d'une plainte de façon efficace et juste.

7.3 L'avocat externe peut mener des entrevues confidentielles dans le cadre de l'enquête.

7.4 L'information et les documents recueillis pendant l'enquête, de même que le nom des personnes qui ont participé à des entrevues, conservent généralement un caractère confidentiel. Cependant, le besoin de confidentialité pendant l'étape de l'enquête doit être réconcilié avec le droit du juge à recevoir suffisamment d'information pour pouvoir répondre utilement. L'avocat externe fournit au juge suffisamment de renseignements sur les allégations formulées et les éléments de preuve qui s'y rapportent pour lui permettre de répondre; toute réponse du juge est transmise au président.

8. Consideration of Outside Counsel's Legal Report

8.1 Upon completing their investigation, Outside Counsel shall provide a Legal Report to the Chairperson. The Legal Report shall contain the legal analysis of the information obtained in the course of the investigation, the judge's response as referred to in section 7.4, if any, and Outside Counsel's legal advice relevant to the matter.

8.2 The Chairperson shall review the Legal Report of Outside Counsel and may

(*a*) close the file on any grounds specified in paragraph 5.1(*a*); or

(*b*) hold the file in abeyance pending pursuit of remedial measures under section 5.3; or

(*c*) refer the file to a Panel.

8.2 When the Chairperson closes a file, the Executive Director shall provide to the judge and his or her chief justice a copy of the letter informing the complainant that the file has been closed.

8. Examen du rapport juridique de l'avocat externe

8.1 Après avoir terminé son enquête, l'avocat externe remet au président un rapport juridique. Le rapport juridique contient l'analyse juridique de l'information recueillie dans le cadre de l'enquête, la réponse du juge prévue à l'article 7.4, le cas échéant, et l'avis juridique de l'avocat externe à l'égard de l'affaire.

8.2 Le président examine le rapport juridique de l'avocat externe et peut décider de :

a) fermer le dossier pour l'un des motifs précisés à l'alinéa 5.1*a*);

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

c) déférer le dossier à un comité d'examen.

8.2 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

9. Consideration by a Panel

9.1 In referring a file to a Panel for consideration, the Chairperson may provide the Panel with such information which, in the Chairperson's opinion, could assist the Panel's consideration of the file.

9.2 After referring a file to a Panel, the Chairperson shall not participate in any further consideration of the merits of the complaint by the Council.

9.3 The Executive Director shall write to the judge and their chief justice, informing them of the constitution of the Panel.

9.4 When a file is referred to a Panel, the judge shall be provided with any information to be considered by the Panel that the judge may not have previously received.

9.5 The Panel shall provide the judge with a reasonable opportunity to make written submissions to the Panel, including on whether there should or should not be an investigation under subsection 63(3) of the *Act*.

9.6 After reviewing the file and considering any written submissions from the judge, the Panel may:

(*a*) direct that further inquiries be made by Outside Counsel in accordance with the provisions of section 7;

9. Comité d'examen

9.1 Lorsqu'il défère un dossier à un comité d'examen, le président peut lui fournir tout renseignement qui, à son avis, peut être utile à l'examen du dossier.

9.2 Après avoir renvoyé un dossier à un comité d'examen, le président ne peut participer à aucun autre examen du bien-fondé de la plainte par le Conseil.

9.3 Le directeur exécutif informe par écrit le juge et son juge en chef de la constitution d'un comité d'examen.

9.4 Lorsqu'un dossier est renvoyé à un comité d'examen, on doit fournir au juge tout renseignement qui doit être considéré par le comité d'examen et que le juge n'a pas déjà reçu.

9.5 Le comité d'examen doit donner au juge la possibilité raisonnable de lui présenter des observations écrites, notamment sur la question de savoir si une enquête devrait ou ne devrait pas être menée en vertu du paragraphe 63(3) de la *Loi*.

9.6 Après avoir examiné le dossier et les observations écrites du juge, le comité d'examen peut :

a) demander qu'un avocat externe mène une enquête supplémentaire conformément à l'article 7;

(*b*) close the file if it decides that no Inquiry Committee should be constituted under subsection 63(3) of the *Act* because the matter is not serious enough to warrant removal;

(*c*) hold the file in abeyance pending pursuit of remedial measures by the Panel in the same manner as may be done by the Chairperson pursuant to section 5.3;

(*d*) decide that an Inquiry Committee shall be constituted under subsection 63(3) of the *Act* because the matter may be serious enough to warrant removal.

9.7 When closing the file pursuant to paragraph 9.6(*b*), the Panel may, in writing to the judge, provide an assessment of the judge's conduct and express any concerns the Panel may have about the judge's conduct.

9.8 When the Panel closes a file, the Executive Director shall provide to the judge and to their chief justice a copy of the letter informing the complainant that the file has been closed.

9.9 When the Panel has decided that an Inquiry Committee shall be constituted, the Executive Director shall provide to the judge and their chief justice a copy of the Panel's decision.

b) fermer le dossier s'il décide qu'aucun comité d'enquête ne devrait être constitué conformément au paragraphe 63(3) de la *Loi*, au motif que l'affaire n'est pas suffisamment grave pour justifier la révocation;

c) mettre le dossier en suspens en attendant l'application de mesures correctives par le comité d'examen de la même manière que l'application de celles-ci par le président, conformément à l'article 5.3;

d) décider qu'un comité d'enquête doit être constitué en vertu du paragraphe 63(3) de la *Loi*, au motif que l'affaire peut être suffisamment grave pour justifier la révocation.

9.7 Lorsqu'il ferme le dossier conformément à l'alinéa 9.6 *b*), le comité d'examen peut adresser au juge une lettre dans laquelle il lui fait part d'une évaluation de sa conduite et lui exprimer ses préoccupations à l'égard de celle-ci.

9.8 Lorsque le comité d'examen ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

9.9 Lorsque le comité d'examen décide qu'un Comité d'enquête doit être constitué, le directeur exécutif remet au juge et à son juge en chef une copie de la décision du Comité d'enquête.

9.10 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.

9.10 Lorsque le comité d'examen a terminé son examen de la plainte, ses membres ne peuvent participer à aucun autre examen de cette plainte par le Conseil.

10. Notification of Judge When Judge Appears to be Seized of Subject Matter of Complaint

10. Notification du juge lorsqu'il appert que le juge est saisi d'une affaire visée par la plainte

10.1 If at any time it appears to the Chairperson or the Panel that the judge remains seized with a matter that is the subject of the complaint, they may defer any communication with the judge by:

(*a*) sending a letter addressed to the judge to the judge's chief justice requesting that he or she provide the letter to the judge when the Chief Justice considers it appropriate to do so; or

(*b*) delaying writing to the judge until the judge is no longer seized of the matter referred to in the complaint.

10.1 Si, à n'importe quel moment, il appert au président ou au comité d'examen que le juge est saisi d'une affaire visée par la plainte, ils peuvent reporter toute communication avec le juge :

a) soit en envoyant une lettre adressée au juge à son juge en chef, en demandant au juge en chef de la remettre au juge lorsqu'il estimera qu'il est opportun de le faire;

b) soit en attendant, avant d'écrire au juge, qu'il ne soit plus saisi de l'affaire visée par la plainte.

11. Notification of Complainant

11. Notification du plaignant

11.1 The Executive Director shall inform the complainant by letter when a complaint file is closed by the Chairperson, a Panel or the Council, and the basis on which the file was closed.

11.1 Lorsqu'un dossier relatif à une plainte est fermé par le président, par un comité d'examen ou par le Conseil, le directeur exécutif en informe le plaignant par lettre, en précisant les motifs de la fermeture du dossier.

11.2 The Executive Director may inform the complainant by letter when a file is held in abeyance under paragraphs 5.1(*b*), 8.1(*b*) and 9.6(*c*).

11.2 Lorsqu'un dossier est mis en suspens conformément aux alinéas 5.1*b*), 8.1*b*), et 9.6*c)*, le directeur exécutif peut en informer le plaignant par lettre.

11.3 The Executive Director may inform the complainant by letter when the Chairperson or a Panel refers a file to Outside Counsel for further inquiries under paragraph 5.1(c) or 9.6(*a*).

11.4 The Executive Director may inform the complainant by letter when the Chairperson refers a file to a Panel under paragraph 5.1(*d*) or 8.1(*c*).

11.5 When a Chairperson or Panel defers any communication with the judge under section 10, communication with the complainant may also be deferred accordingly.

11.6 When a Panel has decided that an investigation under subsection 63(2) of the *Act* shall be held, the Executive Director shall inform the complainant by letter.

11.7 In the event that an Inquiry Committee has been constituted, the complainant shall be advised by letter when the Inquiry Committee has made a report of its findings and conclusions to the Council and, if the Inquiry Committee conducted its hearings in public, the complainant shall be provided with a copy of the report.

11.3 Lorsque le président ou un sous-comité transmet un dossier à un avocat externe pour qu'il mène une enquête supplémentaire conformément à l'alinéa 5.1*c*) ou 9.6*a*), le directeur exécutif peut en informer le plaignant par lettre.

11.4 Lorsque le président renvoie un dossier à un comité d'examen conformément à l'alinéa 5.1*d*) ou 8.1*c*), le directeur exécutif peut en informer le plaignant par lettre.

11.5 Lorsque le président ou un sous-comité reporte toute communication avec le juge conformément à l'article 10, toute communication avec le plaignant peut également être reportée.

11.6 Lorsqu'un comité d'examen décide qu'une enquête doit être tenue aux termes du paragraphe 63(2) de la *Loi*, le directeur exécutif en informe le plaignant par lettre.

11.7 Lorsqu'un comité d'enquête a été constitué, le plaignant doit être informé par lettre lorsque le comité d'enquête a remis un rapport de ses constatations et de ses conclusions au Conseil et, dans le cas où le comité d'enquête a tenu ses audiences publiquement, une copie du rapport est remise au plaignant.

TAB 12

A-562-05

2007 FCA 103

The Attorney General of Canada (*Appellant*)

v.

The Honourable Mr. Justice Paul Cosgrove (*Respondent*)

and

The Canadian Superior Court Judges Association, The Criminal Lawyers' Association, The Canadian Council of Criminal Defence Lawyers, Independent Counsel, The Attorney General of Ontario, The Attorney General of New Brunswick, The Attorney General of Nova Scotia (*Interveners*)

INDEXED AS: COSGROVE v. CANADIAN JUDICIAL COUNCIL (F.C.A.)

Federal Court of Appeal, Sexton, Evans and Sharlow JJ.A. —Toronto, December 11, 2006; Ottawa, March 12, 2007.

Constitutional Law — Appeal from Federal Court decision Judges Act, s. 63(1) unconstitutional to extent giving provincial attorneys general legal power to compel Canadian Judicial Council to commence inquiry into conduct of superior court judge without screening procedure applied to complaints about judicial conduct submitted under Act, s. 63(2) — Respondent, Superior Court Judge of Ontario, presiding over murder trial — Granting motion for stay of proceedings for violations of defendant's rights under Canadian Charter of Rights and Freedoms — Attorney General of Ontario thereafter requesting inquiry into respondent's conduct during murder trial on basis conduct undermining public confidence in administration of justice — Judicial independence essential to rule of law, but not requiring judges' conduct be immune from scrutiny by legislative, executive branches of government — Consistent with Canadian constitutional principles that role of attorneys general in protection of public interest in administration of justice includes participation in review of conduct of judges of superior courts of respective provinces — Of three essential conditions of judicial independence, security of tenure at issue herein — Constitution Act, 1867, s. 99(1) giving judges of superior courts highest possible assurance of security of tenure — Only Governor General on address of Senate, House of Commons may remove judge from office — Complaint, inquiry, screening procedures under ss. 63(1), (2) reviewed — Act, s. 63(1) constitutional when reasonable person test applied — Appeal allowed.

Judges and Courts — Appeal from Federal Court decision Judges Act, s. 63(1) unconstitutional to extent giving provincial attorneys general legal power to compel Canadian Judicial Council to commence inquiry into conduct of superior court judge without screening procedure applied to complaints about judicial conduct submitted under Act, s. 63(2) — Pursuant to Act, s. 63(1), if federal Minister of Justice or provincial attorney general requests Council to commence inquiry for removal of judge from office, screening procedure applied to complaints under s. 63(2) not engaged — Procedure for removal of judges found in part in Part II of Act and in part in Canadian Judicial Council Inquiries and Investigations By-laws — Although screening procedure followed for ordinary complaint under Act, s. 63(2) advantageous for judges, differences between two complaint procedures relatively minor considered against constitutional protections, procedural safeguards — S. 63(1) constitutional — Appeal allowed.

This was an appeal from a Federal Court decision that subsection 63(1) of the *Judges Act* (Act) is unconstitutional in so far as it gives provincial attorneys general legal power to compel the Canadian Judicial Council (Council) to commence an inquiry into the conduct of a judge of a superior court without the screening procedure applied to complaints about judicial conduct submitted under subsection 63(2). Most complaints about judicial conduct are submitted under subsection 63(2) of the Act and are subject to a screening procedure that mainly results in a decision that no investigation or inquiry is warranted. However, if the federal Minister of Justice or the attorney general of a province requests the Council, pursuant to subsection 63(1) of the Act, to commence an inquiry as to whether the judge should be removed from office for one of the reasons specified in paragraphs 65(2)(*a*) to (*d*), the screening procedure applied to complaints under subsection 63(2) is not engaged.

The respondent is a Judge of the Superior Court of Justice of Ontario who has presided over countless cases, including many civil and criminal matters involving the Attorney General of Ontario. During the murder trial of Julia Elliott, the respondent granted stay of proceedings based on his conclusion that there had been over 150 violations of Ms. Elliott's rights under the *Canadian Charter of Rights and Freedoms*. The Ontario Court of Appeal set aside the stay of proceedings and ordered a new trial. Under subsection 63(1) of the Act, the Attorney General of Ontario requested that an inquiry be commenced into the respondent's conduct during the *Elliott* trial alleging that the respondent's conduct had undermined public confidence in the administration of justice in Ontario. Shortly thereafter, an Inquiry Committee was appointed. The Council issued a press release regarding the impending inquiry, which received significant media coverage. It was determined that the respondent would not sit on any cases until the inquiry was resolved. The respondent brought an application to the Inquiry Committee challenging the constitutionality of subsection 63(1) of the Act on the basis that it infringed the constitutionally protected independence of the judiciary but the application was dismissed. On judicial review of that decision, the Federal Court found that subsection 63(1) of the Act did not meet the minimal standards required to ensure respect for the principle of judicial independence. The issue was whether the role given to provincial attorneys general pursuant to subsection 63(1) of

the Act constitutes a constitutional infringement of judicial independence.

Held, the appeal should be allowed.

Judicial independence is the single most important element in the rule of law in a democratic society. But judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. Furthermore, although judges of the superior courts are appointed by the Governor General pursuant to section 96 of the *Constitution Act, 1867*, provincial attorneys general are not necessarily precluded by law from participating in the review of the conduct of superior court judges. As descendants of the Attorney General of England, the attorneys general are required to fulfil the traditional constitutional role of protecting the public interest in the administration of justice. The public interest in an appropriate procedure for the review of the conduct of judges is an aspect of the public interest in the administration of justice. It is therefore consistent with Canadian constitutional principles for provincial attorneys general to play a part in the review of the conduct of judges of the superior courts of their respective provinces.

Three essential conditions of judicial independence are security of tenure, financial security and institutional independence with respect to matters of administration bearing on the exercise of the judicial function. Security of tenure was the element of concern in the present case. Subsection 99(1) of the *Constitution Act, 1867*, gives judges of the superior courts the highest possible assurance of security of tenure and states that only the Governor General on address of the Senate and House of Commons may remove a judge from office. However, the *Constitution Act, 1867* does not establish guidelines for the procedure to be followed when the Senate and House of Commons are asked to consider whether the conduct of a judge warrants removal. This solution involved the enactment of Part II of the *Judges Act* which created the Council and empowered it to conduct investigations into judicial conduct and to report its recommendations to Parliament. The procedure is found in part in the *Judges Act* and in part in the *Canadian Judicial Council Inquiries and Investigations By-laws*, made by the Council pursuant to paragraph 61(3)(*c*) of the Act. Despite the existence of the inquiry procedure, the Governor General's power to remove a judge from office is not affected by the Act (section 71). The attorneys general's discretion to compel the commencement of an inquiry under subsection 63(1) of the Act is limited by their constitutional obligation to exercise their discretionary authority in good faith, objectively, independently and in the public interest and their right to request the commencement of an inquiry 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 (*c*) of the Act.

As for the inquiry procedure initiated by the attorney general under subsection 63(1), Inquiry Committee proceedings must be conducted in accordance with the principle of fairness. The judge must be given notice of the allegations of the complainant and an opportunity to respond

and to be heard. The issues of the inquiry are also reviewed by a number of different individuals ensuring the best available knowledge and experience regarding constitutional principles and the work of the judiciary. Also, independent counsel guide the substantive and procedural aspects of the inquiry, including the public's interest in maintaining the independence of the judiciary.

An ordinary complaint under subsection 63(2) is subject to a multi-tiered procedure to determine if an inquiry is warranted. The vast majority of ordinary complaints are dismissed summarily. Although the screening procedure followed for an ordinary complaint about judicial conduct under subsection 63(2) of the Act is advantageous from the judge's point of view because the complaint is resolved without publicity, is dismissed if unmeritorious and is resolved early on by remedial measures, the differences between the two complaint procedures are relatively minor when considered against the constitutional assurance of security of tenure, the constitutional role of Attorneys General and the presumption that they will act in accordance with their constitutional obligations, procedural safeguards in the *Judges Act* and Inquiries By-laws and Council's rules of practice. A reasonable and right-minded person knowing the relevant facts and circumstances viewing the matter realistically and practicably and having thought the matter through would not have a reasonable apprehension that subsection 63(1) of the Act would impair a judge's impartiality because of the particular procedure followed therein. Subsection 63(1) is constitutional.

statutes and regulations judicially considered

An Act to amend the Judges Act and the Financial Administration Act, S.C. 1970-71-72, c. 55, s. 11.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

Canadian Judicial Council Inquiries and Investigations By-laws, SOR/2002-371.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 92(14), 96, 99, 135.

Department of Justice Act, R.S.C., 1985, c. J-2, ss. 2(2), 5.

Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 303(2).

Inquiries Act, R.S.C. 1952, c. 154, s. 13.

Inquiries Act, R.S.C., 1985, c. I-11.

Judges Act, R.S.C., 1985, c. J-1, ss. 61(3)(*c*), 63(1) (as am. by S.C. 2002, c. 8, s. 106), (2) (as am. *idem*), 65(2) (as am. by R.S.C., 1985 (2nd Supp.), c. 27, s. 5; S.C. 2002, c. 8, s. 111(E)), (3).

Ministry of the Attorney General Act, R.S.O. 1990, c. M.17, s. 5(d).

cases judicially considered

applied:

Gratton v. Canadian Judicial Council, [1994] 2 F.C. 769; (1994), 115 D.L.R. (4th) 81; 78 F.T.R. 214 (T.D.); *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369; (1976), 68 D.L.R. (3d) 716; 9 N.R. 115; *Valente v. The Queen et al.*, [1985] 2 S.C.R. 673; (1985), 52 O.R. (2d) 779; 24 D.L.R. (4th) 161; 23 C.C.C. 3d) 193; 49 C.R. (3d) 97; 19 C.R.R. 354; 37 M.V.R. 9; 64 N.R. 1; 14 O.A.C. 79.

considered:

R. v. Elliott (1999), 105 O.T.C. 241; [1999] O.J. No. 3265 (S.C.J.); revd (2003), 181 C.C.C. (3d) 118; 114 C.R.R. (2d) 1; 179 O.A.C. 219 (Ont. C.A.); *Landreville v. The Queen*, [1973] F.C. 1223; (1973), 41 D.L.R. (3d) 574 (T.D.); *Landreville v. The Queen*, [1977] 2 F.C. 726; (1977), 75 D.L.R. (3d) 380 (T.D.); *Landreville v. R.*, [1981] 1 F.C. 15; (1980), 111 D.L.R. (3d) 36 (T.D.).

referred to:

In the Matter of the Canadian Judicial Council's Inquiry Regarding Justice Paul Cosgrove, reasons addressing the constitutionality of subsection 63(1) of the *Judges Act*, R.S.C., 1985, c. J-1, 16/12/04; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; (1986), 30 D.L.R. (4th) 481; 26 C.R.R. 59; 70 N.R. 1; *R. v. Lippé*, [1991] 2 S.C.R. 114; (1991), 64 C.C.C. (3d) 513; 5 C.R.R. (2d) 31; 5 M.P.L.R. (2d) 113; 128 N.R. 1; 39 Q.A.C. 241; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; (1997), 204 A.R. 1; 156 Nfld. & P.E.I.R. 1; 150 D.L.R. (4th) 577; [1997] 10 W.W.R. 417; 121 Man. R. (2d) 1; 49 Admin. L.R. (2d) 1; 118 C.C.C. (3d) 193; 11 C.P.C. (4th) 1; 217 N.R. 1; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249; (2002), 245 N.B.R. (2d) 201; 209 D.L.R. (4th) 1; 36 Admin. L.R. (3d) 1; 281 N.R. 201; 2002 SCC 11; *Hunt v. T&N, plc*, [1993] 4 S.C.R. 289; (1993), 109 D.L.R. (4th) 16; [1994] 1 W.W.R. 129; 37 B.C.A.C. 161; 85 B.C.L.R. (2d) 1; 21 C.P.C. (3d) 269; 161 N.R. 81; *Attorney General of Canada et al. v. Law Society of British Columbia et al.*, [1982] 2 S.C.R. 307; (1982), 137 D.L.R. (3d) 1; [1982] 5 W.W.R. 289; 37 B.C.L.R. 145; 19 B.L.R. 234; 66 C.P.R. (2d) 1; 43 N.R. 451; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; (2002), 312 A.R. 275; 217 D.L.R. (4th) 513; [2003] 1 W.W.R. 193; 7 Alta. L.R. (4th) 1;43 Admin. L.R. (3d) 167; 168 C.C.C. (3d) 97; 4 C.R. (6th) 255; 293 N.R. 201; 2002 SCC 65.

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Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges: "Complaints Procedures". Approved by the Canadian Judicial Council September 27, 2002.

Scott, Hon. Ian G. "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 *U.T.L.J.* 109.

APPEAL from a Federal Court decision ([2006] 1 F.C.R. 327; (2005), 261 D.L.R. (4th) 447; 2005 FC 1454) that subsection 63(1) of the *Judges Act* is unconstitutional since it gives provincial attorneys general legal power to compel the Canadian Judicial Council to commence an inquiry into the conduct of a superior court judge without the screening procedure applied to complaints about judicial conduct submitted under subsection 63(2) thereof. Appeal allowed.

appearances:

Donald J. Rennie, Kathryn A. Hucal and *Christine E. Mohr* for appellant.

Chris G. Paliare and *Richard P. Stephenson* for respondent.

James T. Eamon for intervener The Canadian Superior Court Judges Association.

Alan D. Gold and *Robert Matthew Barteaux* for interveners The Criminal Lawyers' Association and The Canadian Council of Criminal Defence Lawyers.

Earl. A. Cherniak, Q.C. for intervener Independent Counsel.

Robert E. Charney and *Zachary Green* for intervener The Attorney General of Ontario.

Gaétan Migneault for intervener The Attorney General of New Brunswick.

No one appearing for intervener The Attorney General of Nova Scotia.

solicitors of record:

Deputy Attorney General of Canada for appellant.

Paliare Roland Rosenberg Rothstein, Toronto, for respondent.

Gowling Lafleur Henderson LLP, Calgary, for intervener The Canadian Superior Court Judges Association.

Gold & Associates, Toronto, for interveners The Criminal Lawyers' Association and The Canadian Council of Criminal Defence Lawyers.

Lerners LLP, Toronto, for intervener Independent Counsel.

Attorney General of Ontario, Toronto, for intervener The Attorney General of Ontario.

Attorney General of New Brunswick, Fredericton, for intervener The Attorney General of New Brunswick.

Attorney General of Nova Scotia, Halifax, for intervener The Attorney General of Nova Scotia.

The following are the reasons for judgment rendered in English by

[1] SHARLOW J.A.: Part II of the *Judges Act*, R.S.C., 1985, c. J-1 (sections 58 to 71),

establishes the Canadian Judicial Council (the Council), consisting of the Chief Justice of Canada, all chief justices and associate chief justices of the superior courts, and certain senior judges of the superior courts. Among other things, Part II of the *Judges Act* empowers the Council to investigate and conduct inquiries into complaints about the conduct of judges of the superior courts.

[2] Most complaints about judicial conduct are submitted under subsection 63(2) [as am. by S.C. 2002, c. 8, s. 106] of the *Judges Act*, and are subject to a screening procedure that, in the vast majority of cases, results in a decision that no investigation or inquiry is warranted. However, if the federal Minister of Justice or the Attorney General of a province requests the Council pursuant to subsection 63(1) [as am. *idem*] of the *Judges Act* to commence an inquiry as to whether the judge should be removed from office for one of the reasons specified in paragraphs 65(2)(*a*) to (*d*) [as am. by R.S.C., 1985 (2nd Supp.), c. 27, s. 5; S.C. 2002, c. 8, s. 111(E)], the screening procedure applied to complaints under subsection 63(2) is not engaged.

[3] The Federal Court has held that subsection 63(1) of the *Judges Act* is unconstitutional in so far as it gives a legal power to provincial attorneys general to compel the Council to commence an inquiry into the conduct of a judge of a superior court without the screening procedure applied to complaints submitted under subsection 63(2). The reasons for that decision are reported as *Cosgrove v. Canadian Judicial Council*, [2006] 1 F.C.R. 327 (F.C.).

[4] Before this Court is an appeal of that judgment. For the following reasons, I would allow the appeal.

[5] For convenience, these reasons are organized under the following headings [Editor's Note: The index was omitted for reasons of brevity].

1. Preliminary note on terminology

[6] The decision under appeal deals with the constitutionality of subsection 63(1) of the *Judges Act* only in relation to the attorneys general of the provinces. The federal Minister of Justice is, *ex officio*, the Attorney General of Canada (subsection 2(2) of the federal *Department of Justice Act*, R.S.C., 1985, c. J-2). Therefore, where it is necessary in these reasons to refer collectively to all persons who have the right under subsection 63(1) of the *Judges Act* to compel the Council to commence an inquiry into the conduct of a judge of a superior court, I will use the term "attorneys general." Where it is necessary to differentiate, I will use the term "Minister" or "Attorney General of Canada" to refer to the federal Minister of Justice or the Attorney General of Canada, and the term "provincial attorney general" to refer to the attorney general of a province.

2. Facts

[7] Justice Cosgrove is a Judge of the Superior Court of Justice of Ontario. He was appointed to the Ontario County Court in 1984. In 1989, he became a Judge of the Ontario Court (General Division) upon the restructuring of the Ontario courts. The name of that Court has since been changed to the Superior Court of Justice.

[8] Justice Cosgrove has presided in countless cases during his judicial career, including many civil and criminal matters involving the Attorney General of Ontario.

[9] From 1997 to 1999, Justice Cosgrove presided in the murder trial of Julia Elliott. The prosecution of Ms. Elliott was conducted by counsel employed by the Attorney General of Ontario, in accordance with the normal practice in Ontario. Ms. Elliott was also represented by counsel.

[10] Over the course of the trial, Ms. Elliott's counsel moved three times for a stay of proceedings. The first two motions were denied. The third was granted on September 7, 1999 on the basis of the conclusion of Justice Cosgrove that there had been over 150 violations of Ms. Elliott's rights under the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. The Crown in right of Ontario was also ordered to pay Ms. Elliott's legal costs from the outset of the proceedings.

[11] The individuals implicated in the Charter violations, as found by Justice Cosgrove, included 11 Crown counsel and senior members of the Ministry of the Attorney General of Ontario. Justice Cosgrove's reasons are reported as *R. v. Elliott* (1999), 105 O.T.C. 241 (S.C.J.).

[12] Counsel employed by the Attorney General of Ontario, again in accordance with the normal practice, appealed the decision of Justice Cosgrove. Counsel for Ms. Elliott (not the same counsel who had represented her at trial) conceded that the findings of breaches of the Charter and abuse of process could not be sustained and that the award of costs was not warranted, but argued that the stay of proceedings was appropriate because Ms. Elliott's counsel at trial was incompetent and that it was his actions, not those of Crown counsel or other government officials, that resulted in a breach of Ms. Elliott's Charter rights. The Ontario Court of Appeal did not accept that argument. On December 4, 2003, the Crown's appeal was allowed, the stay of proceedings was set aside, and a new trial was ordered, for reasons that are summarized as follows (*R. v. Elliott* (2003), 181 C.C.C. (3d) 118 (Ont. C.A.), at paragraph 166):

We conclude this part of our reasons as we began. The evidence does not support most of the findings of Charter breaches by the trial judge. The few Charter breaches that were made out, such as non-disclosure of certain items, were remedied before the trial proper would have commenced had the trial judge not entered the stay of proceedings. The trial judge made numerous legal errors as to the application of the Charter. He made findings of misconduct

against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.

[13] On April 23, 2004, the Attorney General of Ontario wrote to the Council requesting pursuant to subsection 63(1) of the *Judges Act* that an inquiry be commenced into the conduct of Justice Cosgrove during the *Elliott* trial. Relying on material from the trial and the appeal, the Attorney General of Ontario expressed the opinion that the conduct of Justice Cosgrove throughout the trial had so undermined public confidence in the administration of justice in Ontario that Justice Cosgrove had become incapable of the due execution of his office, within the meaning of subsection 65(2) of the *Judges Act*.

[14] The opinion expressed by the Attorney General of Ontario was said to be based on the test for judicial incapacity stated in the 1990 *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (also published (1990), 40 *U.N.B.L.J.* 212) [at page 27]:

Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[15] In accordance with the usual practice of the Council, Justice Cosgrove was provided with a copy of the complaint and a letter outlining certain aspects of the procedure that would be followed, including the appointment of an Inquiry Committee and the appointment of independent counsel.

[16] On April 27, 2004, the Council issued a press release announcing that, at the request of the Attorney General of Ontario, there would be an inquiry into the conduct of Justice Cosgrove in relation to the *Elliott* trial. Justice Cosgrove was not consulted before the press release was issued. The press release received significant media coverage.

[17] Between September 7, 1999 when Justice Cosgrove rendered his decision staying the *Elliott* proceedings, and April 23, 2004 when the Attorney General of Ontario submitted his complaint, Justice Cosgrove heard a number of civil and criminal matters involving the Attorney General of Ontario, including two in which individuals appeared as counsel who had also acted as Crown counsel in the *Elliott* trial. In none of those cases was Justice Cosgrove asked to recuse himself.

[18] As a result of discussions after April 27, 2004 between Justice Cosgrove and the Chief Justice of the Superior Court of Justice, it was determined that Justice Cosgrove would not sit on any cases until the inquiry was resolved.

[19] Shortly after the complaint of the Attorney General of Ontario was received by the Council, an Inquiry Committee was appointed. The Chairperson is Chief Justice Lance Finch of the British Columbia Court of Appeal. The other members are Chief Justice Allan Wachowich of the Alberta Court of Queen's Bench, Chief Justice Michael MacDonald of the Supreme Court of Nova Scotia, Mr. John Nelligan, Q.C. of the Ontario Bar, and Ms. Kirby Chown of the Ontario Bar. Mr. Earl Cherniak, Q.C., was appointed independent counsel to the Inquiry Committee.

[20] Justice Cosgrove brought an application to the Inquiry Committee to challenge the constitutionality of subsection 63(1) of the *Judges Act* on the basis that it infringes the constitutionally protected independence of the judiciary. On December 16, 2004, the Inquiry Committee dismissed the application, giving written reasons [*In the Matter of the Canadian Judicial Council's Inquiry Regarding Justice Paul Cosgrove*, reasons addressing the constitutionality of section 63(1) of the *Judges Act*, R.S.C., 1985, c. J-1].

[21] On January 20, 2005, Justice Cosgrove commenced an application in the Federal Court for judicial review of the decision of the Inquiry Committee dismissing his constitutional challenge. By virtue of subsection 303(2) of the *Federal Courts Rules*, SOR/98-106 [r. 1 (as am. by SOR/2004-283, s. 2)], the Attorney General of Canada was named as the respondent in that application. On October 26, 2005, the application for judicial review was allowed. The order reads as follows [at paragraph 180]:

1. This application for judicial review is allowed;

2. The December 16, 2004 decision of the Inquiry Committee is set aside;

3. This Court declares that to the extent that subsection 63(1) of the *Judges Act* confers the right on a provincial attorney general to compel the Canadian Judicial Council to inquire into the conduct of a judge, the provision does not meet the minimal standards required to ensure respect for the principle of judicial independence, and is thus invalid;

4. This Court further declares that the Inquiry Committee is without jurisdiction to proceed with this inquiry; and

5. Costs were not sought, nor are they ordered.

[22] The Attorney General of Canada, representing the Crown in right of Canada, has appealed the order of the Federal Court. For ease of reference, I will refer to the appellant as the "Crown."

[23] Intervening in support of the Crown's appeal are the attorneys general of Ontario, New Brunswick and Nova Scotia, and independent counsel.

[24] Intervening in support of the position of Justice Cosgrove are the Criminal Lawyers' Association, the Canadian Council of Criminal Defence Lawyers, and the Canadian Superior Court Judges Association.

3. Standard of review

[25] The Judge concluded that the standard of review applicable to the Inquiry Committee's decision on the constitutional question raised in this case is correctness, and that the standard of review on its findings of fact is patent unreasonableness. I agree. No other standard of review has been proposed.

4. Findings of fact

[26] The undisputed facts are summarized above. There are only two conclusions of the Inquiry Committee that could be characterized as findings of fact.

[27] First, the Inquiry Committee found no basis for concluding that the Attorney General of Ontario has relied upon subsection 63(1) of the *Judges Act* for an improper purpose. That conclusion is not challenged. (Indeed, it appears there was no allegation of that nature against the Attorney General of Ontario.)

[28] Second, the Inquiry Committee found no basis for concluding that judges of the superior courts are intimidated by the knowledge that an Attorney General may compel the Council to commence an inquiry into their conduct. That conclusion was intended to address concerns raised by Justice Cosgrove about the potential chilling effect of subsection 63(1) on a judge of a superior court who is asked to make a finding adverse to the Attorney General. However, counsel for Justice Cosgrove argued, and I agree, that this finding is of little consequence because the question of whether there is an unconstitutional infringement of judicial independence is tested objectively, not on the basis of the perceptions of individual judges.

5. Judicial independence and judicial conduct

[29] An independent judiciary is essential to the rule of law in a democratic society. Indeed, the Inquiry Committee in this case said that judicial independence is the single most important element in the rule of law in a democratic society, followed closely by the necessity for an independent bar (Inquiry Committee decision, paragraph 26). I agree.

[30] The independence of the judiciary is a constitutional right of litigants, assuring them that judges will determine the cases that come before them without actual or apparent interference from anyone, including anyone representing the executive or legislative arms of government: see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at page 69, and *R. v. Lippé*, [1991] 2 S.C.R. 114, at

page 139.

[31] Justice Strayer expressed this principle as follows in *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769 (T.D.), at page 782 (cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paragraph 329):

Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged". [Footnotes omitted.]

[32] However, judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at paragraphs 58-59.

6. Whether provincial attorneys general have any role in reviewing judicial conduct

[33] One question raised in this case is whether provincial attorneys general have or should have any part to play in the review of the conduct of judges of the superior courts given that, by virtue of section 96 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]], judges of the superior courts are appointed by the Governor General. It was pointed out in argument that there is no evidence that provincial attorneys general had any such responsibilities or powers prior to the enactment of subsection 63(1) of the *Judges Act*. Assuming that is so, it does not necessarily follow that provincial attorneys general are precluded by law from participating in the review of the conduct of judges of the superior courts.

[34] Under the Canadian Constitution, the superior courts of the provinces are the descendants of the royal courts of justice, and thus are courts with inherent jurisdiction over all matters except to the extent that a different forum is validly specified by law: *Hunt v. T&N, plc*, [1993] 4 S.C.R. 289; *Attorney General of Canada et al. v. Law Society of British Columbia et al.*, [1982] 2 S.C.R.

307. Similarly, the attorneys general collectively are the descendants of the Attorney General of England (see section 135 of the *Constitution Act, 1867*, section 5 of the federal *Department of Justice Act*, paragraph 5(d) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17 and analogous provisions in other provincial statutes relating to the office of Attorney General). The legislatures of the provinces have exclusive legislative authority with respect to the administration of justice in the province (subsection 92(14) of the *Constitution Act, 1867*).

[35] An important aspect of the traditional constitutional role of the Attorney General of England is to protect the public interest in the administration of justice. In Canada, that role is now shared by all attorneys general — the provincial attorneys general within their respective provinces, and the Attorney General of Canada in federal matters.

[36] The public interest in an appropriate procedure for the review of the conduct of judges is an aspect of the public interest in the administration of justice. Therefore, it seems to me to be consistent with Canadian constitutional principles for provincial attorneys general to play a part in the review of the conduct of judges of the superior courts of their respective provinces.

7. Constitutionality of subsection 63(1) of the *Judges Act*

[37] While it is appropriate for provincial attorneys general to play some role in the review of judicial conduct, the question in this case is whether the particular role given to the provincial attorneys general by subsection 63(1) of the *Judges Act* impairs judicial independence.

(a) The objective test

[38] Whether a particular statutory provision is unconstitutional because it infringes judicial independence must be tested objectively and practically. The relevant question, paraphrasing from the reasons of Justice de Grandpré in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at page 394, is whether a reasonable and right-minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension that the statutory provision would impair a judge's impartiality. This test is intended to minimize the effect of subjective perceptions and individual sensitivities, as well as remote and speculative possibilities, while at the same time recognizing the importance of public perception in ensuring public confidence in the impartiality of judges.

[39] Three essential conditions of judicial independence, as recognized in *Valente v. The Queen et al.*, [1985] 2 S.C.R. 673, are security of tenure, financial security, and institutional independence with respect to matters of administration bearing on the exercise of the judicial function. The element of judicial independence of concern in this case is security of tenure. That is because one possible outcome of an inquiry under the *Judges Act* is that the Council may

recommend to the Minister that the judge be removed from office, and the Minister may agree and set in motion the parliamentary procedure required for the judge's removal from office.

[40] Also, history has shown that an inquiry requested by an Attorney General under subsection 63(1) of the *Judges Act* may result in the judge's resignation. Since 1977, there have been seven requests by an Attorney General for an inquiry under subsection 63(1). Four of those resulted in a recommendation that the judge not be removed. One of those (the 1990 Marshall Inquiry) [Nova Scotia. *Royal Commission on the Donald Marshall, Jr., Prosecution*] involved five judges, two of whom resigned before the Inquiry commenced. Of the remaining three cases, two resulted in the judge's resignation before the Inquiry commenced its work, and one resulted in the judge's resignation after a recommendation of removal.

[41] The question to be asked is this: Would a reasonable and right-minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, have a reasonable apprehension that subsection 63(1) of the *Judges Act* would impair a judge's impartiality because it requires the Council to commence an inquiry at the request of a provincial attorney general, without engaging the screening procedure applied to complaints about judicial conduct made under subsection 63(2)?

(b) Applying the objective test

[42] The hypothetical reasonable person who must consider this question would understand the role of a judge of a superior court, the relevant constitutional principles (including those summarized above, and the constitutional provision by which judges of the superior courts are assured security of tenure), the historical and legislative context, how and in what circumstances a judge may be removed from office, and the roles that may be played by the attorneys general and the Council in the investigation of judicial conduct complaints. The following discussion touches upon what I perceive to be the relevant aspects of all of those points.

(i) Section 99 of the *Constitution Act, 1867*

[43] An understanding of the security of tenure of judges of the superior courts must begin with the *Constitution Act, 1867*, which gives judges of the superior courts the highest possible assurance of security of tenure. Subsection 99(1) of the *Constitution Act, 1867*, reads in relevant part as follows:

99. (1) . . . the Judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

[44] The *Constitution Act, 1867*, does not establish guidelines for the procedure to be followed,

or the principles to be applied, when the Senate and House of Commons are asked to consider whether the conduct of a judge warrants removal. It is generally accepted that the Minister is responsible for presenting the question to the Senate and the House of Commons, but it seems that on those rare occasions when judicial conduct was in issue, the procedural details were devised on an *ad hoc* basis.

(ii) Historical context of Part II of the *Judges Act*

[45] The absence of procedural and substantive guidance created significant problems in the late 1960s in a case involving Justice Léo Landreville: see *Landreville v. The Queen*, [1973] F.C. 1223 (T.D.) (*Landreville No. 1*); *Landreville v. The Queen*, [1977] 2 F.C. 726 (T.D.) (*Landreville No. 2*); *Landreville v. R.*, [1981] 1 F.C. 15 (T.D.) (*Landreville No. 3*); Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), at page 88; and William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville* (Toronto: University of Toronto Press, 1996). The experience of that case led the Minister in 1971 to propose the enactment of what is now Part II of the *Judges Act* [*An Act to amend the Judges Act and the Financial Administration Act*, S.C. 1970-71-72, c. 55, s. 11].

[46] The complaint against Justice Landreville was conducted under the *Inquiries Act* [R.S.C. 1952, c. 154] (now R.S.C., 1985, c. I-11) by a retired Supreme Court Justice. The Commissioner concluded that Justice Landreville was unfit for the proper exercise of the judicial function. The Commissioner's report was tabled in the House of Commons in August of 1966 [*Inquiry Re: The Honourable Mr. Justice Leo A. Landreville*]. Later that year, a Special Joint Committee of the Senate and the House of Commons was appointed to "enquire into and report upon the expediency of presenting an address" for the removal of Justice Landreville from the office of judge. That Committee reported in April of 1967, and recommended removal proceedings, based at least in part on the report of the Commissioner [*Minutes of Proceedings and Evidence*, 27th Parl., 1st Sess.]. The matter had not yet come before Parliament when Justice Landreville resigned in 1967.

[47] Mr. Landreville later brought an application in the Federal Court, seeking to nullify the report of the Commissioner. The application resulted in a declaration by Justice Collier that the Commissioner erred in law in making a finding that was not within his terms of reference, and in failing to give proper notice of a certain allegation of misconduct as required by section 13 of the *Inquiries Act* (see *Landreville No. 2*, at page 759). The Judge in that case also commented that the Commissioner had not recorded Mr. Landreville's personal history in a completely objective way. Mr. Landreville later sued for the annuity that was not paid to him upon his resignation. It was determined that the Governor in Council had not properly considered his request for an annuity (see *Landreville No. 3*). Mr. Landreville's claim eventually was settled with an *ex gratia* payment.

[48] Many criticisms may be made about the procedure followed in the *Landreville* case, but it seems to me that the root of the problem was the lack of a fair and properly focused procedure for investigating complaints about the conduct of judges of the superior courts. The solution involved the enactment, in 1971, of Part II of the *Judges Act*. As stated above, those provisions established the Council and empowered the Council to conduct investigations into judicial conduct and to report its recommendations to Parliament.

(iii) Section 71 of the *Judges Act*

[49] I pause at this point to note that the power of the Governor General to remove a judge from office upon the joint address of the Senate and the House of Commons is not affected by anything done, or omitted to be done, under Part II of the *Judges Act*. Section 71 of the *Judges Act* is explicit on that point. That means, in my view, that it is possible in theory for a judge to be removed from office even if the inquiry procedure in Part II of the *Judges Act* is never engaged. As a practical matter, however, and especially with the lessons learned from the Landreville experience, it seems to me improbable that Parliament could be moved to recommend the removal of a judge without the kind of firm foundation in fact and principle that is likely to be obtained through an inquiry under Part II of the *Judges Act* or its functional equivalent.

(iv) Procedure for an Attorney General's complaint under subsection 63(1)

[50] The procedure followed in an inquiry into the conduct of a judge of a superior court is found in part in the *Judges Act*, and in part in the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371 (the Inquiry By-laws), made by the Council under the authority of paragraph 61(3)(*c*) of the *Judges Act*. In the discussion below, I summarize the provisions and rules governing the inquiry procedure that seem to me to be relevant to this case. However, it is useful first to take note of the limits on the discretion of an attorney general to exercise the power in subsection 63(1) to compel the commencement of an inquiry.

[51] The most important constraint, in my view, flows from the traditional constitutional role of attorneys general as guardians of the public interest in the administration of justice. Attorneys general are constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest: *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; The Honourable Ian G. Scott, "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 *U.T.L.J.* 109, at page 122; The Honourable J. C. McRuer, *Report of the Royal Commission Inquiry into Civil Rights*, Report No. 1, Vol. 2, chapter 62 (Toronto: Queen's Printer, 1968), at page 945; The Honourable R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa, ed., *The Cambridge Lectures 1979* (Toronto: Butterworths, 1981), at page 7. Attorneys general are entitled to the benefit of a rebuttable presumption that they will fulfil that obligation.

[52] A second constraint is found within subsection 63(1) itself. As I read that provision, 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*). The Council, in the *Report of the Canadian Judicial Council to the Minister of Justice under ss. 65(1) of the Judges Act Concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Québec* (2003), said (at page 3) that it may decline to commence an inquiry on the basis of a request under subsection 63(1), or the Inquiry Committee may decline to continue an inquiry, if the letter of request from an attorney general does not allege bad faith or abuse of office, and does not on its face disclose an arguable case for removal. In my view, this principle (which I will refer to as the "*Boilard* rule") is a valid expression of the general principle that a tribunal, as master of its own procedure, may decline to proceed in any case that is outside its mandate or is an abuse of its process.

[53] It is true that an attorney general, while acting in good faith, may submit a request that is not well founded. That is demonstrated by the fact that not every inquiry requested by an attorney general results in a recommendation for removal and that, in at least one instance, the request did not disclose even a *prima facie* case. However, the question of whether judicial conduct in a particular case warrants removal is a matter on which reasonable and knowledgeable people may disagree. The possibility that an attorney general may misjudge the seriousness of particular judicial conduct bears little weight in determining the constitutionality of subsection 63(1).

[54] I turn now to the inquiry procedure itself. The inquiry is conducted in the first instance by an Inquiry Committee, which has the power of a superior court to summon and compel the attendance of witnesses and to require the production of documents.

[55] An Inquiry Committee consists of an uneven number of members. The majority are members of the Council designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee of the Council. The others, designated by the Minister, may be members of the bar of a province of at least 10 years' standing. An Inquiry Committee cannot include any person who is a member of the same court as the judge who is the subject of the inquiry. The Chairperson or Vice-Chairperson of the Judicial Conduct Committee chooses the Chairperson of the Inquiry Committee.

[56] The Chairperson or Vice-Chairperson of the Judicial Conduct Committee also appoints independent counsel to the Inquiry Committee, who must be a member of the bar of a province of at least 10 years' standing whose ability and experience is recognized within the legal community. Independent counsel is responsible for presenting the case to the Inquiry Committee and making submissions on questions of procedure and applicable law that are raised during the proceedings. Independent counsel must perform their duties impartially and in the public interest.

[57] Proceedings of the Inquiry Committee must be conducted in accordance with the principle

of fairness. The judge who is the subject of the inquiry must be given reasonable notice of the subject-matter of the inquiry and of the time and place of any hearing, and must be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross- examining witnesses and adducing evidence on his or her own behalf. It is the responsibility of independent counsel to 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.

[58] A hearing of the Inquiry Committee is held in public unless the Inquiry Committee determines that the public interest and the due administration of justice requires that all or part of it be conducted in private or the Minister requires that it be held in public. The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest.

[59] The Inquiry Committee reports to the Council setting out its findings and conclusions as to whether or not a recommendation should be made for the judge's removal. A copy of the report is provided to the judge, to independent counsel and to any other person with standing before the Inquiry Committee. If the hearing was conducted in public, the report is made available to the public.

[60] Within 30 days of receiving the report of the Inquiry Committee, or such further time as may be allowed by the Council, the judge may make a written submission to the Council regarding the report. Independent counsel is provided with a copy of any written submission the judge makes to the Council and may submit a written response within 15 days.

[61] If the judge makes an oral statement to the Council, the statement is given in public unless the Council determines that it is not in the public interest to do so. Independent counsel must be present and may be invited to make an oral statement in response.

[62] The Council considers the report of the Inquiry Committee and any written submission or oral statement of the judge or independent counsel. Members of the Inquiry Committee do not participate in these deliberations.

[63] The Council provides the Minister with a report of its conclusions, and the record of the inquiry. A copy of the report is provided to the judge. If the Council is of the opinion that the judge has become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in subsection 65(2) of the *Judges Act* (namely, (a) age or infirmity; (b) having been guilty of misconduct; (c) having failed in the due execution of the office of judge; or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of the office of judge), the Council may, in its report to the Minister, recommend that the judge be removed from office.

[64] As explained above, the Council has no power to remove a judge from office. That can be done only by the Governor General on the joint address of the Senate and House of Commons. If the question of removal is to be put before Parliament, it is the Minister who does so. It is open to the Minister to put the question to Parliament, or to decline to do so. Like all acts of an Attorney General, the Minister's discretion in that regard is constrained by the constitutional obligation to act in good faith, objectively, independently and with a view to safeguarding the public interest. It is presumed, in the absence of evidence to the contrary, that the Minister will fulfil that obligation.

[65] I would emphasize five aspects of the inquiry procedure that, taken together, establish that the inquiry, once commenced, is fair to the judge who is the subject of the inquiry:

(1) The judge is given notice of the allegations of the complainant and an opportunity to respond and to be heard.

(2) The inquiry is entrusted in the first instance to a group of senior judges and lawyers, and their recommendation is reviewed independently by a larger group consisting of Chief Justices, Associate Chief Justices and other senior judges of the superior courts. That ensures that the issues are considered by a number of different individuals whose collective knowledge and experience is not only appropriate to the task, but the best available in terms of their knowledge of the relevant constitutional principles and the work of the judiciary.

(3) The substantive and procedural aspects of the inquiry are guided by the participation of independent counsel, who is required to act impartially and in the public interest, which necessarily includes the public's interest in maintaining the independence of the judiciary. I note parenthetically that it was independent counsel who argued for the summary dismissal of the Attorney General's request for an inquiry in the *Boilard* case (referred to above).

(4) The attorney general who requests an inquiry does not present or prosecute the case against the judge and has no formal role in the conduct of the inquiry.

(5) The outcome of the proceedings is a report and recommendation to the Minister, who must determine whether the matter will be referred to Parliament. The Minister, as the Attorney General of Canada, is obliged and presumed to consider that question in good faith, objectively, independently and in the public interest.

(v) Screening procedure for ordinary complaints under subsection 63(2)

[66] I will now describe the screening procedure followed when a complaint is made under subsection 63(2) of the *Judges Act*, which is the procedure that is omitted when an Attorney General requests the commencement of an inquiry under subsection 63(1).

[67] A complaint under subsection 63(2) (which I will refer to as an "ordinary complain") may be made by anyone, including a chief justice (that was the situation in *Gratton*, cited above). Even an attorney general may have recourse to subsection 63(2) rather than subsection 63(1) and presumably may do so to make a complaint about the conduct of a judge that may not warrant removal for any of the reasons set out in paragraphs 65(2)(*a*) to (*d*).

[68] The Council normally does not publicize ordinary complaints or the results of the complaints procedure, unless the result is the establishment of an Inquiry Committee. However, the complainant is not obliged to keep the complaint confidential and may not do so.

[69] An ordinary complaint is subject to a multi-tiered procedure to determine whether an inquiry is warranted. The procedure is set out in detail in the Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges: "Complaints Procedures".

[70] At the first level, the complaint is reviewed by the Executive Director of the Council to determine whether it warrants the opening of a file. No file is opened if the complaint is clearly irrational or an obvious abuse of the complaint process. If a file is opened, the complaint progresses to the second level.

[71] At the second level, the complaint is referred to the Chairperson (or the Vice-Chairperson) of the Judicial Conduct Committee. The Chairperson may dispose of the complaint summarily if it is outside the mandate of the Council (for example, a complaint that seeks a review of a judge's decision rather than a judge's conduct), or if it is trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration. If the complaint is not dismissed summarily, the Chairperson may seek additional information from the complainant, the judge or the judge's chief justice. The complaint may be dismissed, resolved on the basis of remedial measures, or referred to a panel. If it is referred to a panel, it progresses to the third level.

[72] At the third level, the complaint is considered by a panel of three or five judges (not including a judge who is a member of the same court as the subject of the complaint, and not including the Chairperson of the Judicial Conduct Committee). The judge is informed of the constitution of the panel, provided with any information not previously disclosed, and invited to respond. If the complaint is not considered serious enough to warrant an inquiry, it may be resolved at that stage with a letter of concern, or a recommendation of remedial measures. If the panel considers the complaint serious enough to warrant an inquiry, the panel makes a recommendation to the Council that an Inquiry Committee be established. That moves the complaint to the fourth level.

[73] At the fourth level, the Council considers the recommendation of the panel and decides

whether an inquiry is warranted. The judge has an opportunity to make submissions to the Council as to why the complaint should or should not be investigated further. If an inquiry is warranted, the Inquiry Committee procedure outlined above is followed.

[74] The experience of the Council is that the vast majority of ordinary complaints are dismissed summa-rily. Of the few that remain, almost all are resolved quickly with remedial measures or a letter of explanation. Only a miniscule percentage of ordinary complaints disclose conduct that warrants an inquiry, and even fewer result in a recommendation of removal.

(vi) Discussion

[75] The manner in which an ordinary litigant might perceive the power of an attorney general to compel the commencement of an inquiry into the conduct of a judge was graphically described by counsel for the interveners, the Criminal Lawyers' Association and the Canadian Council of Criminal Defence Lawyers. He posed the hypothetical case of a criminal defendant being prosecuted in a superior court by counsel employed by the attorney general, where the defendant knows that the attorney general may request an inquiry under subsection 63(1) of the *Judges Act*, and so is in a position to hurt the judge more than the defendant could possibly do by making an ordinary complaint under subsection 63(2). It was argued that an ordinary litigant might well apprehend that the judge would hesitate to give effect to a challenge to the propriety of an act of Crown counsel or others employed by the attorney general.

[76] In my view, this example is flawed, primarily because it assumes that the relevant constitutional question is considered from the subjective view of a litigant rather than on the basis of the objective test referred to above. More specifically, it fails to take into account the constitutional principle that an attorney general must not exercise the power under subsection 63(1) in order to "hurt the judge" and the presumption that the attorney general will not act improperly. It also disregards the fact that a complaint against a judge that is obviously unmeritorious, however it is made or by whom, is unlikely to cause lasting damage. If it is unmeritorious it is likely to be dismissed, either summarily or after an inquiry.

[77] In practical terms, the screening procedure followed for an ordinary complaint under subsection 63(2) of the *Judges Act* is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint by remedial measures, without the establish-ment of an Inquiry Committee. I will discuss each of these in turn.

[78] Publicity. Much was made in the argument before this Court that in this case, the publicity attached to the complaint made by the Attorney General of Ontario, coupled with the inevitable consequence that Justice Cosgrove was unable to sit once the matter was publicized, was harmful

or potentially harmful to the reputation of Justice Cosgrove. I have no doubt that a publicized complaint about judicial conduct is more difficult for a judge than an unpublicized complaint. However, it seems to me that in the debate about the constitutionality of subsection 63(1), the risk of publicity should be given little weight.

[79] Judicial or quasi-judicial procedures are conducted in public except in extraordinary circumstan-ces. That is normally the case for inquiries under the *Judges Act*, although the Council has the authority to conduct its proceedings in private if required by the public interest and the due administration of justice. At the same time, it must be said as a practical matter that the *Elliot* trial and appeal had attracted considerable publicity before the Attorney General requested an inquiry. In any event, the risk of publicity is present even with ordinary complaints because there are no constraints on a complainant who chooses to publicize the fact that a complaint has been made.

[80] Summary dismissal. Part of the function of the screening procedure for ordinary complaints is to facilitate the summary dismissal of complaints that on their face are unmeritorious. In the case of an attorney general's request for an inquiry under subsection 63(1), that function is served by the *Boilard* rule, which effectively permits the summary dismissal of a complaint by an attorney general if it is obviously unmeritorious or does not disclose judicial conduct warranting removal from office. The difference is that an ordinary unmeritorious complaint may be dismissed before an Inquiry Committee is established, while under the *Boilard* rule an attorney general's complaint may be dismissed at an early stage by the Inquiry Committee itself, either before or after its work is commenced, or it may be dismissed later by the Council. Those differences are trivial, in my view.

[81] Remedial measures. It seems to me that the possibility of a resolution with remedial measures is unlikely to be a factor in cases involving judicial conduct that would warrant removal of the judge from office. If an attorney general makes a request for an inquiry under subsection 63(1) on the basis of conduct that would not warrant removal from office, the *Boilard* rule would come into play and there would be no recommendation for removal. If the conduct would warrant removal, there can be no valid objection to the establishment of an Inquiry Committee on the basis that an ordinary complainant might be satisfied with a lesser remedy.

[82] In my view, the differences between the two complaint procedures are relatively minor when considered against the constitutional assurance of security of tenure given to judges of the superior courts, the constitutional role of attorneys general and the presumption that the attorneys general will act in accordance with their constitutional obligations, the substantial protection afforded by the appointment of independent counsel to the Inquiry Committee, and the procedural safeguards provided in the *Judges Act*, the Inquiry By-laws, and the Council's rules of practice.

[83] I return to the question posed above: Would a reasonable and right-minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, have a reasonable apprehension that subsection 63(1) of the *Judges Act* would impair a judge's impartiality because it requires the Council to commence an inquiry at the request of a provincial attorney general, without engaging in the screening procedure applied to complaints about judicial conduct made under subsection 63(2)? My analysis compels me to answer no. I conclude that subsection 63(1) of the *Judges Act* is constitutional.

[84] I have not overlooked the argument that subsection 63(1) of the *Judges Act* cannot be justified because it serves no practical purpose. That argument is based on the proposition that an attorney general may make an ordinary complaint under subsection 63(2) which will be the subject of an inquiry if it survives the screening. Perhaps the complaints procedure would not be substantially impaired if subsection 63(1) were repealed. However, it does not follow that subsection 63(1) is unconstitutional.

8. Conclusion

[85] I would allow this appeal, set aside the decision of the Federal Court, dismiss the application for judicial review, and refer this matter back to the Inquiry Committee.

[86] As the Crown has not asked for costs, none should be awarded.

SEXTON J.A.: I agree.

EVANS J.A.: I agree.

TAB 13

REPORTS OF CASES

DETERMINED IN

ONTARIO COURTS

Re Hryciuk and Lieutenant Governor by and with the Advice and Concurrence of the Executive Council et al.

[Indexed as: Hryciuk v. Ontario (Lieutenant Governor)]

Court of Appeal for Ontario, Catzman, Weiler and Abella JJ.A.
November 4, 1996

Administrative law — Inquiries — Judicial Council recommending that inquiry be held into two complaints against judge received by Council — Judge of General Division appointed to conduct inquiry under s. 50 of Courts of Justice Act — Inquiry judge having mandate to conduct inquiry only into question of whether judge should be removed because of two complaints referred to her by Judicial Council — Inquiry judge exceeding her jurisdiction by hearing three additional complaints not made to Judicial Council and not referred to in Order-in-Council appointing inquiry judge — Evidence of those three complaints forming integral part of her recommendation that judge be removed from office — Judge's appeal allowed — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 50.

After conducting an internal investigation into two complaints received with respect to Judge H, the Judicial Council recommended to the Attorney General that an inquiry be held with respect to those complaints. Accordingly, a judge of the General Division was appointed to conduct an inquiry under s. 50 of the *Courts of Justice Act*. After Judge H had closed his case, an adjournment was granted so that witnesses who were not immediately available could be heard. Shortly before the inquiry reconvened, Judge H was informed of three additional complaints, none of which was first made to the Judicial Council and none of which was referred to in the order-in-council appointing the inquiry judge. He objected to the new complaints being heard, but the inquiry judge agreed to hear them, stating that it was a public inquiry and that she was duty-bound to hear all relevant evidence. At the conclusion of the inquiry, she recommended that Judge H be removed from office. Judge H's application for judicial review was dismissed. He appealed.

Held, the appeal should be allowed.

Pursuant to s. 46 of the *Courts of Justice Act*, there can be no removal of a provincial court judge unless two prior conditions have been met: that a complaint has been made to the Judicial Council *and* that the removal is recommended for any of the reasons set out in s. 46(1)(*b*) after an inquiry has been held pursuant to s. 50. The three new complaints heard by the inquiry judge after Judge H had concluded his defence were not first made to, or investigated by, the Judicial Council. These complaints could not, therefore, be entertained by her. The language of the statute is unambiguous, and leaves no discretion to a judge conducting a s. 50 inquiry to hear new complaints not previously screened by the Judicial Council. The inquiry judge had a specific, narrow mandate under the legislation: to conduct an inquiry, not into the general question of whether Judge H should be removed, but into

whether he should be removed because of those complaints referred to her by the Judicial Council, namely the two complaints referred to in the order-in-council. By hearing three additional complaints not so referred, she exceeded her jurisdiction.

The inquiry judge based her recommendation on all the complaints she heard, including the ones she had no authority to hear. The evidence of those three complaints formed an integral part of her recommendation that Judge H be removed. It was, therefore, impossible to say what her recommendation would have been if her finding had been based only on the two complaints she had jurisdiction to hear.

Cases referred to

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35, [1986] 1 W.W.R. 577, 69 B.C.L.R. 255, 63 N.R. 353; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541

Statutes referred to

Courts of Justice Act (am. 1994, c. 12, s. 16), R.S.O. 1990, c. C.43, ss. 46, 47(5), 48(1)(*b*), 49(1), (3), (5), (7), (9), 50
Public Inquiries Act, R.S.O. 1990, c. P.41
Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 8

APPEAL from a judgment of the Divisional Court (1994), 18 O.R. (3d) 695, 115 D.L.R. (4th) 227, dismissing an application for judicial review of a recommendation that a provincial court judge be removed from office.

Brian H. Greenspan and *Sharon E. Lavine*, for appellant.
Leslie M. McIntosh, for respondents, Attorney General, Legislative Assembly for the Province of Ontario and the Lieutenant Governor in Council.
Dennis R. O'Connor, Q.C., and *Freya Kristjanson*, for respondent, the Honourable Madam Justice Jean MacFarland.

The judgment of the court was delivered by

ABELLA J.A.: —

Background

The process that resulted in a recommendation on November 24, 1993 that Judge Walter P. Hryciuk be removed from judicial office, was initiated on January 24, 1992 by a complaint from the Regional Director of Crown Attorneys to the Ontario Judicial Council. After the resulting internal investigation, the Judicial Council held *in camera* hearings in October 1992 with respect to two complaints, to determine if a public inquiry into these two complaints should be recommended.

In January 1993, the Judicial Council made such a recommendation to the Attorney General, and on February 3, 1993, a judge

of the General Division was appointed to conduct the inquiry. Notices were published in newspapers informing the public that hearings into the two complaints would start on September 13, 1993, and inviting the public to provide information or evidence.

The complaints were identified in the public notices as follows:

> This Inquiry into the question of whether His Honour Judge Walter P. Hryciuk, a Judge of the Ontario Court (Provincial Division), should be removed from office will, following the recommendation of the Judicial Council to the Attorney General, consider the following matters of complaint:
>
> 1. That His Honour Judge Walter P. Hryciuk, on Saturday, January 18, 1992, at Old City Hall, Toronto, did sexually assault . . . an Assistant Crown Attorney for the Toronto Region, by kissing her without her consent.
>
> 2. That His Honour Judge Walter P. Hryciuk, in 1988, made remarks of a sexual nature to . . . an Assistant Crown Attorney, and drew her attention to a sexually graphic light switchplate in his judicial chambers.

The public hearings started on September 13, 1993. By September 15, all the evidence dealing with the two complaints had been completed except for three witnesses who were unavailable until the end of September. Judge Hryciuk's counsel agreed to a two-week adjournment for the hearing of those witnesses on the understanding that full disclosure of their evidence would be provided and that there would be an opportunity to reply. That understanding was largely the reason Judge Hryciuk's counsel did not wait until after the adjournment before proceeding with his defence. Over the next three days, he called all of his witnesses, including Judge Hryciuk, and completed his case. On September 17, 1993, the inquiry was adjourned until September 30 to hear evidence relating to the two complaints from the three remaining witnesses.

What happened after September 17, 1993 forms the basis of Judge Hryciuk's application for judicial review. Rather than facing the three previously identified witnesses, he returned to the inquiry hearings on September 30, having been informed in the intervening two weeks that he would be facing three new complaints. He was informed about one of those complaints on September 24. He learned about two others on September 29, 1993, the day before the hearings were scheduled to resume. In fairness, he was informed about them almost as soon as they came to the attention of the inquiry's counsel.

There is no dispute that none of the new complaints was first made to the Judicial Council. Nor is there any dispute that the new complainants waited until after Judge Hryciuk had closed his case before they brought their complaints directly to the inquiry.

Two exchanges at the inquiry are of particular interest. The first took place on September 15, when inquiry counsel, having called all of his available witnesses, recommended the truncated procedure which eventually followed; namely, that he would call his remaining three witnesses in two weeks, but that the inquiry would continue to hear evidence, including any evidence Judge Hryciuk wished to call, subject to Judge Hryciuk's right to respond to the remaining three witnesses. Judge Hryciuk's counsel raised no objection to this suggested procedure, but asked for some assurances. The following exchange took place:

> Counsel for Judge Hryciuk: I have no objection to the procedure of the process, but do we have some assurance that the only witnesses that Judge Hryciuk will now face . . . will be McKenzie, Beneteau, and Hughes?
>
> Do we have some assurance that there won't be any other witnesses?
>
> Inquiry Judge: I'm not sure that Commission Counsel can give you that assurance until such times as they have been in touch with those witnesses.
>
> I think that the only assurance that you can be given at this point in time is that full disclosure will be made. I have insisted on that, that when counsel know, the information will be conveyed to you.
>
> If it turns out, as a result of those discussions, they learn that there may be another witness, then obviously that's something that will have to be disclosed to you, as well.
>
> But I'm not sure, at this point in time, that Commission Counsel can, nor do I think it appropriate that I put limits on those inquiries at this point in time.
>
> This is a public inquiry, and *I feel duty bound to hear all evidence if it's relevant.*
>
> . . . . .
>
> But I want to ensure that you, on behalf of your client, have full and complete disclosure of any such evidence, and full and complete opportunity to respond to it, in such manner as you deem fit.

(Emphasis added)

The second exchange took place on September 30 when the hearings resumed. Judge Hryciuk's counsel, in requesting an adjournment, stated:

> On Friday, last Friday, six days ago, we were made aware of another complaint. Yesterday, we were made aware of two more complaints. . . .
>
> I spoke with [inquiry counsel] this morning, and I may have misunderstood what he was talking about, but I don't want to be seen here as consenting to these complaints coming forward in a sense that it is within your jurisdiction.
>
> I'm saying that there must be, at some point — there has to be somewhere or some point where this case [*sic*] . . . we know what the case is . . .

. . . . .

> Judge Hryciuk and his family want this matter over with as quickly as possible.

In response, the inquiry judge ruled that she would in fact hear evidence of the new complaints, but granted an adjournment to October 4. Inquiry counsel also advised Judge Hryciuk's counsel that:

> If they wish to launch an application to challenge the jurisdiction to hear new complaints, obviously they are free to do so and nothing that I have said in any way is intended to at all limit them from exercising what they think are their rights in following what they consider to be an appropriate course of action.
>
> So, there is absolutely nothing, on our part, in any way to limit Judge Hryciuk from doing so.

Judge Hryciuk did not bring any such application. The inquiry then heard the evidence relating to three new complaints. One of the new complainants was a judge who observed an incident in the judges' common room between Judge Hryciuk and one of his female colleagues, which both Judge Hryciuk and that colleague denied ever happened. The second complainant was a court reporter who complained of a sexual assault while being hugged by Judge Hryciuk at a 1991 court Christmas party; and, while dancing with him at the same event, of inappropriate comments and behaviour. The third complainant was a judge who married the second complainant in 1993, and gave evidence that his wife told him these details shortly after they started dating in March 1993.

The inquiry judge's perception of her mandate was based on her interpretation of the relevant provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; on the concluding paragraph of the order-in-council appointing her; and on her identification of the process as a public inquiry under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, rather than as a discipline proceeding under the *Courts of Justice Act*. This analysis led her to the conclusion that she was obliged to hear *all* evidence which might be relevant to the issue of whether Judge Hryciuk should be removed from office, regardless of whether the complaints had first been made to the Judicial Council. As she stated in her reasons (p. 9):

> The issue before the public inquiry is whether a judge should be removed from office by reason of conduct incompatible with the execution of judicial office. It is a function of the inquiry to look at the totality of the judge's conduct.

The issue in this appeal is whether this conclusion, resulting in the hearing of three new complaints, was correct; or whether the inquiry judge exceeded her jurisdiction by not restricting her inquiry to the two complaints screened and referred by the Judicial Council.

Prior Proceedings

An application was made by Judge Hryciuk to the Divisional Court to quash the findings and recommendation of the inquiry: *Hryciuk v. Ontario (Lieutenant Governor)* (1994), 18 O.R. (3d) 695, 115 D.L.R. (4th) 227. The majority of the court was of the view that the application for judicial review should be dismissed on, among other grounds, the following:

— This was not, contrary to the views of the inquiry judge, a public inquiry under the *Public Inquiries Act*; it was a disciplinary process under s. 50 of the *Courts of Justice Act* to which the *Public Inquiries Act* applies. Nonetheless, there are no restrictions on what matters can be considered by the s. 50 inquiry unless such restrictions are found in the terms of the order-in-council. It was therefore within the discretion of the inquiry judge whether to admit new evidence.

— It was acknowledged that Judge Hryciuk was entitled to procedural fairness, given that "his reputation and livelihood" were at stake, including the right to pre-hearing disclosure found in s. 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. This section states:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished *prior to the hearing* with reasonable information of any allegations with respect thereto.

(Emphasis added)

While there was a technical violation of this section, the majority held that the *Statutory Powers Procedure Act* was not applicable to s. 50 hearings under the *Courts of Justice Act*. In any event, even if it were applicable, the section had been substantially complied with by the disclosures made by inquiry counsel between the two sets of hearings days.

— Even though all relevant evidence was potentially admissible, there must be finality to the process. At a certain point, no new allegations should be permitted. That point is normally reached, the majority concluded, when the judge who is the subject of the inquiry starts to testify. In this case,

Judge Hryciuk was "not afforded natural justice in that no consideration was given to the potential unfairness of entertaining the new complaints": *Hryciuk*, *supra*, at p. 711.

However, according to the majority, this was not a breach of natural justice going to the "basis of jurisdiction". Moreover, since the inquiry judge had a discretion to hear new evidence; since Judge Hryciuk acquiesced in and waived any procedural defect by failing to bring a stated case; and since Judge Hryciuk had suffered no prejudice, the majority declined to interfere with the inquiry judge's conclusion.

In dissent, Hartt J. concluded that Judge Hryciuk had been denied "the basic rights that every member of society enjoys" (*Hryciuk*, *supra*, at pp. 715-16) in not being advised prior to the commencement of the hearing what *all* the allegations of improper conduct would be. Judge Hryciuk, in his view, was erroneously treated as if he were entitled to no more notice than any other witness at a public inquiry would get, rather than being treated, as he should have been, as the *subject* of the inquiry.

While he agreed with the majority that this was in the nature of a discipline hearing, not a public inquiry under the *Public Inquiries Act*, Hartt J. nevertheless disagreed with his colleagues' conclusion that the inquiry judge had a discretion to proceed with new complaints after Judge Hryciuk had testified. In his view, the *Statutory Powers Procedure Act* and, in particular s. 8 of the Act, were clearly applicable. Accordingly, there was no discretion to hear allegations about which Judge Hryciuk was not informed prior to the start of the hearing. The inquiry judge consequently exceeded her jurisdiction in admitting new allegations into evidence, and thereby denied Judge Hryciuk a fair hearing.

As to why the court should interfere even though Judge Hryciuk had taken no clear objection to the process, Hartt J. cited the following observation of Le Dain J. in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at p. 661, 24 D.L.R. (4th) 44:

> . . . I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Finally, Hartt J. concluded that the process in this case was in violation of the legislative scheme outlined in ss. 46-50 of the *Courts of Justice Act* whereby the Judicial Council must first

consider complaints before they are the subject of a s. 50 inquiry. Any recommendation made after a s. 50 inquiry, in his view, could be based only on findings made in relation to complaints recommended for public hearing by the Judicial Council.

Hartt J. therefore held that the inquiry judge's decision to hear the new complaints, and her recommendation that Judge Hryciuk be removed from office, should be quashed.

In my view, the applicable legislative framework provides a complete answer to whether new complaints can be raised in the first instance at a s. 50 inquiry.

Before outlining the basis for my conclusions, however, I make two ancillary but related observations. First, I proceed on the assumption that judicial review is available, despite the contention of counsel on behalf of the Attorney General to the contrary. There was no dispute in the Divisional Court that this was a discipline proceeding under s. 50 of the *Courts of Justice Act*, and not a public inquiry under the *Public Inquiries Act*. That opinion, with which I agree, leads me to conclude that the proceeding cannot be insulated from judicial review on questions of jurisdiction: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

Secondly, it is worth noting that in the 1995 amendments to the *Courts of Justice Act* (R.S.O. 1990, c. C.43, as amended by S.O. 1994, c. 12, s. 16), the *Statutory Powers Procedure Act* is specifically made applicable to the public hearing stage of complaints into judicial conduct.

The Statutory Scheme

The order-in-council dated February 3, 1993, sets out the relevant factual and statutory antecedents to the appointment of a judge of the General Division to inquire into whether Judge Hryciuk should be removed. It states:

> WHEREAS:
>
> A. A letter of complaint dated January 24, 1992 from Jerome F. Wiley, Regional Director of Crown Attorneys, Toronto Region, regarding certain conduct of His Honour Judge Walter P. Hryciuk, a judge of the Ontario Court (Provincial Division), was received by the Ontario Judicial Council;
>
> B. The investigation by counsel to the Judicial Council gave rise to further information regarding Judge Hryciuk;
>
> The Judicial Council, on notice to Judge Hryciuk, proceeded under subsection 49(1) of the *Courts of Justice Act* to investigate two matters of complaint;
>
> The Judicial Council held hearings on October 1 and 13, 1992, at which witnesses were examined and cross-examined in the presence

of Judge Hryciuk and his counsel, and submissions were made by counsel for Judge Hryciuk and the Judicial Council;

C. The Judicial Council came to the conclusion that by reason of the evidence adduced at the hearing before it, an inquiry should be held under section 50 of the *Courts of Justice Act* with respect to these complaints;

The Judicial Council recommended to the Attorney General, under subsection 49(7) of the *Courts of Justice Act*, in its report dated January 12, 1993, that the inquiry should be held;

D. ON THE RECOMMENDATION OF THE UNDERSIGNED, THE LIEUTENANT GOVERNOR, BY AND WITH THE ADVICE AND CONCURRENCE OF THE EXECUTIVE COUNCIL, ORDERS THAT:

the Honourable Madam Justice Jean L. MacFarland, a judge of the Ontario Court (General Division), is appointed under section 50 of the *Courts of Justice Act* to inquire into the question whether His Honour Judge Walter P. Hryciuk, a judge of the Ontario Court (Provincial Division), should be removed from office.

(I have lettered this document for ease of subsequent reference.)

From the order-in-council, it is clear that the process leading to the appointment of Justice MacFarland strictly follows the route laid out in ss. 46-50 of the *Courts of Justice Act*.

A. *"A letter of complaint dated January 24, 1992 from Jerome F. Wiley, Regional Director of Crown Attorneys, Toronto Region, regarding certain conduct of His Honour Judge Walter P. Hryciuk, a judge of the Ontario Court (Provincial Division), was received by the Ontario Judicial Council."*

A complaint was made on January 24, 1992 by the Regional Director of Crown Attorneys. This complies with s. 46 which requires that a complaint about a provincial court judge must be made to the Judicial Council:

> 46(1) A provincial judge may be removed from office before attaining retirement age *only if*,
>
> (a) a complaint regarding the judge has been made to the Judicial Council.

(Emphasis added)

B. *"The investigation by counsel to the Judicial Council gave rise to further information regarding Judge Hryciuk;*

The Judicial Council, on notice to Judge Hryciuk, proceeded under subsection 49(1) of the Courts of Justice Act to investigate two matters of complaint;

The Judicial Council held hearings on October 1 and 13, 1992, at which witnesses were examined and cross-examined

in the presence of Judge Hryciuk and his counsel, and submissions were made by counsel for Judge Hryciuk and the Judicial Council."

The Judicial Council is mandated to investigate complaints against provincial judges by virtue of ss. 48(1)(*b*) and 49(1) which state:

> 48(1) The functions of the Judicial Council are,
>
> . . . . .
>
> (*b*) to receive and investigate complaints against provincial judges.
>
> . . . . .
>
> 49(1) Where the Judicial Council receives a complaint against a provincial judge, it shall take such action to investigate *the* complaint as it considers advisable.

(Emphasis added)

The Judicial Council is authorized to engage counsel to assist in its investigations pursuant to s. 47(5).

The Judicial Council's proceedings at this stage are not public. Its powers to investigate a complaint include those found in Part II of the *Public Inquiries Act*. These aspects of its function are found in ss. 49(3) and (5) respectively:

> 49(3) The proceedings of the Judicial Council shall not be public, but it may inform the Attorney General respecting matters that it has investigated and the Attorney General may make public the fact that an investigation has been undertaken.
>
> (5) The Judicial Council has all the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to the investigation as if it were an inquiry under that Act.

Pursuant to the above statutory authority, the Judicial Council held hearings over a two-day period with respect to two complaints. Judge Hryciuk was notified, was present with his counsel throughout the hearings, and was permitted to make submissions. These rights were afforded to Judge Hryciuk pursuant to s. 49(9) which precludes the Judicial Council from recommending an inquiry unless these protections have been made available.

> 49(9) The Judicial Council shall not make a report under subsection (7) unless the judge was notified of the investigation and given an opportunity to be heard and to produce evidence on his or her behalf.

C. *"The Judicial Council came to the conclusion that by reason of the evidence adduced at the hearing before it, an inquiry should be held under section 50 of the Courts of Justice Act with respect to these complaints;*

The Judicial Council recommended to the Attorney General, under subsection 49(7) of the Courts of Justice Act, in its report dated January 12, 1993, that the inquiry should be held."

As a result of its hearings, the Judicial Council, pursuant to s. 49(7), recommended to the Attorney General that an inquiry be held under s. 50 with respect to these two complaints only. Section 49(7) requires that any recommendation that an inquiry be held, is limited to a particular complaint. This must, of necessity, refer to a complaint submitted to the Judicial Council pursuant to s. 46(1)(*a*).

> 49(7) The Judicial Council may report its opinion *regarding the complaint* to the Attorney General and may recommend,
>
> (*a*) that an inquiry be held under section 50 . . .

(Emphasis added)

D. *"On the Recommendation of the Undersigned, the Lieutenant Governor, by and with the Advice and Concurrence of the Executive Council, Orders that:*

the Honourable Madam Justice Jean L. MacFarland, a judge of the Ontario Court (General Division), is appointed under section 50 of the Courts of Justice Act to inquire into the question whether His Honour Judge Walter P. Hryciuk, a judge of the Ontario Court (Provincial Division), should be removed from office."

The Lieutenant Governor in Council appointed Justice MacFarland to inquire whether Judge Hryciuk should be removed from office pursuant to s. 50:

> 50(1) The Lieutenant Governor in Council may appoint a judge of the General Division to inquire into the question whether a provincial judge should be removed from office.

Analysis

The test for determining whether a judge should be removed is found not in s. 50, but in s. 46:

> 46(1) A provincial judge may be removed from office before attaining retirement age *only if*,
>
> (a) a complaint regarding the judge has been made to the Judicial Council; *and*
>
> (b) the removal is recommended by an inquiry held under section 50 on the ground that the judge has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) infirmity.

(ii) conduct that is incompatible with the execution of his or her office, or

(iii) having failed to perform the duties of his or her office.

(2) An order removing a provincial judge from office under this section may be made by the Lieutenant Governor on the address of the Legislative Assembly.

(Emphasis added)

Pursuant to s. 46, there can be no removal of a provincial court judge unless two prior conditions have been met: that a complaint has been made to the Judicial Council *and* that the removal is recommended for any of the reasons set out in s. 46(1)(*b*) after an inquiry has been held pursuant to s. 50. The mandatory nature of these two conditions precedent is derived from the introductory language of s. 46(1) which states that a provincial court judge can be removed *only* if these conditions have been satisfied.

There are, therefore, two stages in this statutory scheme which must have taken place before a provincial court judge can be removed by order of the Lieutenant Governor. The first is that a complaint must be made to the Judicial Council for investigation by that body into whether the complaint should be proceeded with publicly. The second stage, if so recommended by the Judicial Council, is a public hearing presided over by a judge of the General Division.

The two-stage process represents a clear statutory intention that not all complaints about judges should be subjected to public disclosure. Any such disclosure, even if the complaint is subsequently found to be without merit, can cause irreversible damage to reputation and, more importantly, to a judge's ability to maintain public confidence in his or her judicial capacities. On the other hand, there is a significant public interest in having some complaints aired publicly for the same purpose, namely, to maintain public confidence in the judiciary. These are the competing interests the legislative scheme is designed to balance. The Judicial Council has, therefore, been charged with responsibility for screening allegations against provincial court judges, and to determine, after an investigation and/or a hearing, whether the complaint raises a genuine issue about the judge's capacity to continue to perform his or her judicial functions.

In this way, judges are protected from routine vulnerability to public opprobrium when the complaints are spurious; but neither are they immune from public scrutiny when the complaint has

sufficient merit that the Judicial Council recommends that an inquiry take place.

The three new complaints heard by the inquiry judge after Judge Hryciuk had concluded his defence were not first made to, or investigated by, the Judicial Council. These complaints could not, therefore, be entertained by her. The language of the statute is unambiguous, and leaves no discretion to a judge conducting a s. 50 inquiry to hear new complaints not previously screened by the Judicial Council. Circumventing the statutory requirement that there be a prior vetting by the Judicial Council defeats the whole purpose of the legislative scheme, and violates the mandatory nature of the two-stage process set out in s. 46 of the *Courts of Justice Act*.

Admittedly, the order-in-council, in its last paragraph, refers to the question "whether His Honour Judge Walter P. Hryciuk . . . should be removed from office". But this paragraph, which mirrors the language in s. 50, must be read as part of a sequence of paragraphs which follows the sequence and language in ss. 46-49 of the *Courts of Justice Act*. Section 49(1) directs the Judicial Council to investigate *the* complaint; s. 49(7) directs the Judicial Council to report its opinion on the need for an inquiry with respect to *the* complaint. The Lieutenant Governor's discretion in s. 50, therefore, to order an inquiry into whether a judge should be removed, is limited to *the* complaints investigated by the Judicial Council. Read in this way, the removal from office referred to in the concluding paragraph of the order-in-council is a potential *outcome* of the inquiry's examination into the authorized complaints, not a general mandate.

The inquiry judge had a specific, narrow mandate under the legislation: to conduct an inquiry, not into the general question of whether Judge Hryciuk should be removed, but into whether he should be removed *because of those complaints referred to her by the Judicial Council*, namely, the two complaints referred to in the order-in-council. By hearing three additional complaints not so referred, she exceeded her jurisdiction.

The discipline process under the *Courts of Justice Act* is mandatory. By requiring that there be two stages of review, the legislature has balanced the public and judicial interests in a way which attempts to protect both and compromise neither. The fact that the subject of the process is a judge ought not, and does not, yield particular procedural advantages to that judge. But neither should his or her judicial office be a reason to deny procedural safeguards provided by law.

The inquiry judge based her recommendation on all the complaints she heard, including the ones she had no authority to

hear. The evidence of those three complaints formed an integral part of her recommendation that Judge Hryciuk be removed. It is, therefore, impossible to say what her recommendation would have been if her finding had been based only on the two complaints she had jurisdiction to hear.

Accordingly, there is no alternative but to allow the appeal, set aside the order of the Divisional Court, and quash the recommendation of the inquiry judge that Judge Hryciuk be removed from office.

Appeal allowed.

Republic National Bank of New York (Canada) v. Normart Management Limited

Normart Management Limited v. Republic National Bank of New York (Canada) et al.

[Indexed as: Republic National Bank of New York (Canada) v. Normart Management Ltd.]

Ontario Court (General Division), Dambrot J. September 30, 1996

Civil procedure — Appeal — Appeal from master's decision about the refusal to answer questions on an examination for discovery — Ruling on relevance of questions a question of law — Appellate court will interfere if master erred about relevance of questions — Ruling on propriety of questions a matter of discretion — Appellate court will interfere only if master's exercise of discretion plainly wrong.

On an interlocutory motion to review a party's refusal to answer questions on an examination for discovery, a master must consider both whether the question is relevant, which is a matter of law, and also whether the question is proper, which is a discretionary consideration of such matters as whether the question is vexatious or prolix. On an appeal from a master's decision about the refusal to answer questions, the court will interfere about the relevance of a question if the master errs, but will only interfere about the propriety of a question if the master was plainly wrong.

Cases referred to

Air Canada v. McDonnell Douglas Corp. (1995), 22 O.R. (3d) 382 (Gen. Div.); *Canada Life Assurance Co. v. Spago Ristorante Inc.* (1990), 46 C.P.C. (2d) 166 (Ont. Gen. Div.); *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (H.C.J.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 30.02(1), 31.06(1)