Federal Court  Cour fédérale

Date: 20140328

Docket: T-1567-12

Citation: 2014 FC 299

Ottawa, Ontario, dated March 28, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE HONOURABLE LORI DOUGLAS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN JUDICIAL COUNCIL AND THE INDEPENDENT COUNSEL TO THE CANADIAN JUDICIAL COUNCIL AND THE CANADIAN SUPERIOR COURT JUDGES ASSOCIATION

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the *Federal Courts Act*). As initially filed, the application sought review of a July 27, 2012 ruling by an Inquiry Committee of the Canadian Judicial Council ("CJC") constituted to investigate the conduct of the Honourable Lori Douglas, Associate Chief Justice of the Court of Queen's Bench of Manitoba ("Douglas ACJ"). The Notice of Application was subsequently amended to additionally seek judicial review of the CJC's assertion of a solicitor-client relationship with the Independent Counsel appointed to present the case to the Inquiry Committee, on the basis that the assertion gave rise to a reasonable apprehension of institutional bias.

[2] The week prior to the hearing of this application, the Inquiry Committee resigned. As a result, the issues relating solely to the Inquiry Committee ruling became moot. The parties have not asked the Court to exercise its discretion to consider those issues, notwithstanding that they had become moot, applying the principles set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. What remains to be determined are the applicant's requests for declaratory relief with respect to the CJC's assertion of a solicitor-client relationship with the Independent Counsel, and for an Order of Prohibition against the CJC from continuing the proceedings in their current form. Preliminary questions have been raised by the CJC relating to the jurisdiction of this Court to consider the application and, should jurisdiction be established, as to whether the application is premature.

[3] For the reasons that follow, I find that the Court has jurisdiction to consider the application and that the application is not premature. However, I find that institutional bias is not made out and, accordingly, the application for judicial review is dismissed.

BACKGROUND

The Statutory Framework Governing the Removal of a Judge

[4] Section 99(1) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (the *Constitution Act, 1867*), provides that federally appointed judges shall be removable by the Governor General on address of the Senate and House of Commons.

[5] In 1971, Parliament established the CJC through amendments to the *Judges Act*, RSC 1985, c J-1 (the *Judges Act*). Among other things, the amendments empowered the Council to investigate complaints against federally appointed judges. Prior to the 1971 legislation, judicial discipline inquiries were directly in the hands of the Senate and House of Commons. The Parliamentary bodies were considered by many to be ill-equipped to conduct such investigations.

In particular, this presented challenges to ensuring procedural fairness. The creation of a federal statutory body (the CJC) was intended, in part, to cure the problem, as was discussed in *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 [*Cosgrove FCA*] at paras 44-45, 48:

> **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. Canada*, [1973] F.C. 1223 (*Landreville No. 1*); *Landreville v. Canada* [1977] 2 F.C. 726 (*Landreville No. 2*); *Landreville v. Canada* [1981] 1 F.C. 15 (*Landreville No. 3*); Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Toronto: 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*.
>
> **…**
>
> **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.

[6] The changes to the *Judges Act* were enacted in the year following passage of the *Federal Court Act*, RSC 1970, c 10 (2nd Supp) (the *Federal Court Act*), now the *Federal Courts Act*. The *Federal Court Act*, among other things, transferred responsibility for judicial review of federal administrative tribunals from the provincial superior courts to the Federal Court of Canada, as it was then styled. The *Federal Court Act* and the amended *Judges Act* were both brought into

effect on August 1, 1972. Thirty years later, the Federal Court, as a separate entity from the Federal Court of Appeal, was continued as a superior court of record having civil and criminal jurisdiction by the *Courts Administration Service Act*, SC 2002, c 8.

[7] The objects of the CJC are set out in subsection 60(1) of the *Judges Act*. They are to promote efficiency and uniformity, and to improve the quality of judicial services in the superior courts. Subsection 60(2) of the *Judges Act* sets out that in furtherance of these objects, the CJC may, among other things, make the inquiries and investigation of complaints or allegations concerning judges described in section 63 of the *Judges Act*.

[8] Section 63 of the *Judges Act* sets out two circumstances in which the CJC may make inquiries or investigations into the conduct of a federally appointed judge. First, under subsection 63(1), the Minister of Justice (the Minister) or the attorney general of a province can initiate an inquiry as to whether a judge of a superior court should be removed from office for the reasons set out in paragraphs 65(2)(a) to (d). These reasons include, as provided at paragraph 65(2)(d), a judge having been placed, due to their conduct, in a position incompatible with the due execution of the office. Second, under subsection 63(2), the CJC may investigate any complaint or allegation made in respect of a judge of a superior court. The investigation under subsection 63(2) is not limited to a consideration of whether the judge should be removed from office. However, it may lead to such consideration if it is determined that an Inquiry Committee should be constituted under subsection 63(3) of the *Judges Act*.

The CJC Inquiry and Investigation Process

[9] Pursuant to subsection 61(1) of the *Judges Act*, the Council may make by-laws respecting the conduct of inquiries and investigation described in section 63. It has done so in the form of the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371 (the "*By-laws*"). The *By-laws* have the status of a statutory instrument and, accordingly, also have the force of law.

[10] In addition, the CJC has promulgated policies and procedures regarding the conduct of investigations and inquiries. These are the Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges (the Complaints Procedures), and the CJC Policies Regarding Inquiries, which include the Policy on Inquiry Committees, the Policy on Independent Counsel, and the Policy on Council Review of Inquiry Committee Report. The procedures and policies are not statutory instruments and, therefore, are not legally binding but there is an expectation that they will be followed unless there is a justifiable reason to depart from them. An unjustifiable departure from a policy or procedure which adversely affects the interests of a party could amount to a breach of the legal principle of fairness: *Black v Advisory Council for the Order of Canada*, 2012 FC 1234, [2012] FCJ no 1309; aff'd 2013 FCA 267, [2013] FCJ no 1284.

[11] The relevant provisions of the *Judges Act*, the *By-laws*, Procedures and Policies are set out in the Annex to these Reasons for Judgment.

[12] Together, the *Judges Act*, the *By-laws*, and the related policies and procedures establish a multi-stage investigation process for matters initiated by a complaint about a judge's conduct. This process involves at least five distinct stages of consideration.

[13] First, the Executive Director of the CJC completes an initial screening of all complaints and determines whether any complaint warrants opening a file, as set out in section 2.2 of the Complaints Procedures. If no file is opened, the complainant is informed and the matter goes no further. This initial screening serves to avoid the Council devoting time to complaints that are without substance.

[14] Second, if a file is opened the Chair or Vice-Chair of the Judicial Conduct Committee reviews the complaint and may close the file, seek additional information from the complainant, or seek the judge's comments as well as those of their chief justice as prescribed by sections 3 to 8 of the Complaints Procedures.

[15] Third, if the file is not closed by the Chair or Vice-Chair of the Judicial Conduct Committee, a formal Review Panel, constituted of three to five superior court judges, considers the complaint and written submissions of the judge, and determines whether the complaint can be resolved at this stage or whether it is serious enough to warrant removal and should be referred to an Inquiry Committee, as set out in section 9 of the Complaints Procedures and section 1.1 of the *By-laws*. The Chair or Vice-Chair of the Judicial Conduct Committee appoints the members of the Review Panel pursuant to subsection 1.1(2) of the *By-laws*.

[16] Fourth, if the Review Panel considers the matter serious enough to be referred, an Inquiry Committee is formed, consisting of two or three members of the CJC appointed by the Chair or Vice-Chair of the Judicial Conduct Committee, and one or two members of a provincial Bar appointed by the Minister, pursuant to subsections 2(1) and 2(1.1) of the *By-laws* respectively, as well as subsection 63(3) of the *Judges Act*. The Review Panel members take no further part in the proceedings respecting the complaint against the judge. The Chair or Vice-Chair of the

Judicial Conduct Committee chooses the Chair of the Inquiry Committee from within the members appointed pursuant to subsection 2(2) of the *By-laws*. Subsection 63(4) of the *Judges Act* sets out the powers of the Inquiry Committee. The Inquiry Committee hears the evidence regarding the complaints or allegations and provides a report and an inquiry record to Council pursuant to section 8 of the *By-laws*. This report includes findings of fact and a recommendation as to whether the judge should be removed from office.

[17] At the fifth stage of the process, Council reviews the committee report and determines the merits of the complaint or the allegations. To fulfil this role, a panel of Council is constituted of at least 17 members of the CJC who have had no prior involvement in the inquiry process in accordance with section 10.1 of the *By-laws*. This panel considers whether the judge has become incapacitated or disabled from the due execution of their office.

[18] Having completed the investigation and inquiry process, pursuant to section 65 of the *Judges Act* and sections 10.1 and 13 of the *By-laws*, the Council shall report its conclusions and submit the record of the inquiry to the Minister. The record of the inquiry may include a recommendation that the judge be removed from office. As I will discuss below, this report may be considered a sixth and distinct stage of the process.

[19] I note that the Chair of the Council, the Chief Justice of Canada, takes no part in the Council's deliberative proceedings in judicial conduct matters. That, presumably, is because any judicial review decision with respect to the process may ultimately be appealed to the Supreme Court of Canada.

The Role of the Judicial Conduct Committee

[20] The Judicial Conduct Committee (the JCC) is a committee constituted by the CJC and defined at section 1 of the *By-laws*. The JCC consists of five members of the Council: one Chair and four Vice-Chairs.

[21] According to the evidence of Mr. Normand Sabourin, the Council's Executive Director and Senior General Counsel, the JCC is responsible for managing all judicial conduct matters brought to the attention of the CJC, and for overseeing the investigation and inquiry process pursuant to the Complaints Procedures. Where the Executive Director of the CJC opens a file in relation to a complaint, the Chair or a Vice-Chair of the JCC reviews the matter in accordance with paragraph 3.4(b) of the Complaints Procedures and may refer the matter to a Review Panel.

[22] Under section 9.2 of the Complaints Procedures, the Chair or Vice-Chair cannot participate in any further consideration by the CJC of the merits of the complaint after referring a file to a Review Panel. Rather, according to Mr. Sabourin's evidence, the Chair or Vice-Chair's role is thereafter confined to general oversight of the investigation process under the Complaints Procedures and *By-laws*; appointing the members of the Review Panel under subsection 1.1(1) of the *By-laws*; if needed, appointing the judicial members of an Inquiry Committee pursuant to subsection 2(1) of the *By-laws* and section 63(3) of the *Judges Act*; and again, if needed, appointing Independent Counsel to present the case to the Inquiry Committee. According to Mr. Sabourin, the role of the Chair or Vice-Chair includes instructing Independent Counsel with respect to their mandate, although that role is not expressly set out in the *By-laws*.

The Role of Independent Counsel

[23] Where an Inquiry Committee is constituted, Independent Counsel is appointed by the Chair or Vice-Chair of the Judicial Conduct Committee pursuant to subsection 3(1) of the *By-laws* and section 62 of the *Judges Act*. Subsection 3(1) of the *By-laws* provides that Independent Counsel "shall be a member of the bar of a province having at least ten years standing and who is recognized within the legal community for their ability and experience".

[24] The Policy on Independent Counsel sets out the "central purpose" for appointing Independent Counsel to act at "arm's length" from the CJC and the Inquiry Committee. This is to allow the evidence to be presented and tested forcefully, in a full and fair manner, and without reflecting any predetermined views of either body.

[25] The Policy states that the role of Independent Counsel is unique in that, once appointed, Independent Counsel do "not act pursuant to the instructions of any client" but rather in "accordance with the law and counsel's best judgment of what is required in the public interest". The Policy emphasizes that Independent Counsel is "impartial in the sense of not representing any client". Mr. Sabourin's evidence is that this Policy is intended to be confined to the presentation of the case to the Inquiry Committee.

[26] Independent Counsel must "present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings" and "perform their duties impartially and in accordance with the public interest" pursuant to subsections 3(2) and (3) of the *By-laws*, respectively. In his evidence, Mr. Sabourin stressed that

while Independent Counsel's view of the public interest will be given due consideration by the Inquiry Committee and the Council, these two bodies are ultimately responsible for determining what is required in the public interest.

[27] The Policy on Independent Counsel also provides that Independent Counsel lacks the authority to negotiate a "resolution" of the inquiry. This was added to the policy following an earlier inquiry in which the Independent Counsel sought to exercise such a role. There is no indication in the policy that Independent Counsel may or may not seek judicial review of any decision by the Inquiry Committee. In Mr. Sabourin's view, such action would be beyond the scope of the Independent Counsel's mandate.

The Relationship between the Chair or Vice-Chair of the JCC and Independent Counsel

[28] Mr. Sabourin's evidence is that Independent Counsel receive instructions with respect to their mandates from the Chair or Vice-Chair of the JCC who appoint them. These instructions, he says, are not case-specific with respect to the presentation of the case. Rather, they relate to questions or issues Independent Counsel may have relating to their role or the nature and scope of their mandate. Mr. Sabourin asserts that this duty has fallen to the Chair or Vice-Chair of the JCC given Independent Counsel's duty to present the case independently and impartially to the Inquiry Committee and Council, as well as the fact that the Chair or Vice-Chair of the JCC is barred from participating in any deliberation on the merits of the case by the Inquiry Committee or Council pursuant to section 9.2 of the Complaints Procedures.

[29] The Chair or Vice-Chair of the JCC do not act in their own personal interest in providing the Independent Counsel with instructions, according to Mr. Sabourin, but rather in the interest of the CJC as an institution.

[30] Mr. Sabourin asserted further that the public interest encompasses both ensuring a fair process for the judge, as well as maintaining confidence in the judiciary as an institution. The Chair or Vice-Chair of the JCC provides instructions to Independent Counsel in the interest of this institutional public interest perspective.

Background to the CJC Inquiry

[31] Prior to her judicial appointment, the applicant, Douglas ACJ, and her husband, Mr. Jack King, practiced law at Thompson, Dorfman, Sweatman LLP ("TDS") in Winnipeg. During the couple's private, lawful, consensual sexual activity, the applicant permitted Mr. King to take photographs for his private use. In 2002 and 2003, Mr. King posted some of these photographs on the Internet. In April 2003, Mr. King directed a client, Mr. Alexander Chapman, to photographs he had posted online, introduced Mr. Chapman to the applicant and later emailed photographs of the applicant to Mr. Chapman.

[32] In June 2003, Mr. Chapman threatened Mr. King and TDS with a lawsuit for sexual harassment. No complaint was made against the applicant at this time. In July 2003, Mr. King settled the matter by a financial payment to Mr. Chapman. The settlement terms required Mr.

Chapman to return or delete from his computer all material provided by King, provide a release of all claims, and abide by a confidentiality clause.

[33] In May 2005, the applicant was appointed as a judge of the Family Division of the Manitoba Court of Queen's Bench. In 2009, the applicant was appointed Associate Chief Justice of the Family Division.

[34] In August 2010, Mr. Chapman submitted a complaint to the CJC alleging sexual harassment and discrimination by the applicant and Mr. King in 2003 (the Chapman complaint). When Mr. Chapman made his complaint to the CJC public in 2010, photographs of the applicant appeared on the Internet.

Initial Screening by the Vice-chair of the Judicial Conduct Committee (JCC)

[35] In accordance with the Complaints Procedures and the *By-laws*, and with the assistance of Mr. Sabourin, the Honourable Neil Wittmann, Chief Justice of the Court of Queen's Bench of Alberta, one of the Vice-Chairs of the JCC, reviewed the initial complaint against the applicant. The Vice-Chair found that the Chapman complaint warranted further consideration, and referred the complaint to a Review Panel of five judges, whom he appointed.

[36] Subsequent to Mr. Chapman's complaint, the Council received two discs of video and photographic material which were treated as a second complaint by the Executive Director acting under the direction of the Vice-Chair.

The Review Panel

[37] In July 2011, after considering the Chapman complaint and additional information collected by an outside counsel retained as a fact-finder, the Review Panel concluded that the Chapman complaint might be serious enough to warrant the applicant's removal from office. It determined that an Inquiry Committee should be constituted pursuant to subsection 63(3) of the *Judges Act*, and subsection 1.1(3) of the *By-laws*, to inquire into the applicant's conduct. The Review Panel referred the following two matters for the Inquiry Committee's consideration: whether the public availability of the photographs placed the applicant in a position incompatible with the execution of her office; and whether there had been appropriate disclosure of the King-Chapman situation in the course of her application for judicial appointment.

The Appointment of Independent Counsel

[38] In August 2011, Chief Justice Wittmann appointed Mr. Guy Pratte as Independent Counsel in the inquiry process pursuant to section 62 of the *Judges Act*, and subsection 3(1) of the *By-laws*. Mr. Pratte's appointment, following telephone conversations between Mr. Sabourin and Mr. Pratte, was confirmed by a letter from Mr. Sabourin dated August 29, 2011.

The Inquiry Committee Proceedings

[39] The Inquiry Committee members were appointed in the fall of 2011 by Chief Justice Wittmann. The Inquiry Committee appointed its own counsel, Mr. George McIntosh, to assist it with the proceedings. According to the Policy on Inquiry Committees, Committee Counsel was

not to participate actively in the hearings. His role, according to the policy, was to assist the Inquiry Committee with its rulings and with writing its report.

[40] The Committee sought and received submissions from the Independent Counsel and Douglas ACJ's counsel as to the manner in which to proceed with disclosure of the allegations and the role of Independent Counsel in the inquiry process. The Committee issued an extensive ruling on May 15, 2012 setting out its interpretation of the relevant provisions of the *Judges Act*, and the Councils' *By-laws*, policies and procedures. Among other things, the May 15, 2012 ruling stressed that the process was inquisitorial in nature, in contrast with adversarial proceedings, and that the Committee was "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".

[41] In the May 15, 2012 ruling, the Committee stated its opinion that Independent Counsel "does not act in the usual way of a solicitor receiving instructions from a client" and had no mandate beyond presenting the case against the judge and making related submissions on law and procedure. The Committee concluded that it had complete responsibility for its process and control of that process subject to the legislation, the Council's policies and the principle of fairness. On that basis, the Committee determined, after the hearing of evidence commenced, that it would be more efficient for its counsel, Mr. McIntosh, to ask follow-up questions of the witnesses rather than the Committee members themselves.

[42] Controversy arose thereafter over the manner in which Mr. McIntosh cross-examined Mr. King and the TDS Managing Partner at the relevant time, Mr. Sinclair. It was considered by

Independent Counsel and the applicant to be too aggressive, outside the scope of the role of the Committee Counsel and potentially unfair to the applicant.

[43] On July 26, 2012, the applicant brought a motion for the recusal of the Inquiry Committee. The applicant alleged that the fact and manner of Committee Counsel's questioning raised a reasonable apprehension of bias against her. Independent Counsel also formally objected to Committee Counsel questioning witnesses on the grounds that, among other things, it was contrary to the CJC's *By-laws* and Policies and that it created a risk of an appearance of bias. On July 27, 2012, the Inquiry Committee dismissed the motion for recusal with preliminary oral comments. The Inquiry Committee provided written reasons for its decision on August 20, 2012.

Proceedings before the Federal Court

[44] On August 20, 2012, the applicant filed a notice of application for judicial review of the Inquiry Committee's dismissal of her recusal motion. That same day, Independent Counsel filed a notice of application for judicial review of the Inquiry Committee's ruling that it was empowered to instruct Committee Counsel to cross-examine witnesses.

[45] On August 26, 2012, Mr. Pratte tendered his resignation as Independent Counsel to the CJC, effective immediately. This followed an exchange of correspondence between Mr. Pratte and Mr. Sabourin.

[46] On August 27, 2012, counsel for the applicant communicated with Messrs. Sabourin and Pratte by email, requesting a copy of the resignation letter and any related communications. She noted that since the CJC's Policy on Independent Counsel states that Independent Counsel has no client, there should be no issue of privilege. In a second email on August 27, 2012, counsel for

the applicant repeated her request that she be provided with Mr. Pratte's resignation letter and any related communications. She also asked that Mr. Sabourin advise who was giving him instructions so she could communicate directly with that person if Mr. Sabourin would not respond. That same day, Mr. Sabourin replied stating that he could not accede to the request, that the assertion that his communications with Mr. Pratte were not privileged was incorrect, and that any concerns about the process should be raised before the Inquiry Committee.

[47] In a letter to Mr. Sabourin dated August 28, 2012, counsel for the applicant made a formal request for the production of Mr. Pratte's resignation letter and any related communications in the possession of the CJC pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (the *Federal Courts Rules*).

[48] On September 17, 2012, Mr. Sabourin replied that all the communications requested were between himself, on behalf of the Vice-Chair, and Mr. Pratte, and that since they were not in the possession of the tribunal, whose order was subject to judicial review, and as they were irrelevant to the Inquiry Committee's decisions, Rules 317 and 318 of the *Federal Courts Rules* were not applicable. Moreover, Mr. Sabourin wrote, the communications were subject to solicitor-client privilege, as asserted by the Vice-Chair of the Judicial Conduct Committee on behalf of the CJC. On this basis, Mr. Sabourin refused to disclose the requested communications.

[49] On September 27, 2012, Chief Justice Wittman appointed Mme Suzanne Côté to replace Mr. Pratte as Independent Counsel to the Inquiry Committee. Mme Côté took no steps in furtherance of Mr. Pratte's application for judicial review and, as he was no longer in a position to maintain it, the application was ultimately dismissed for delay.

[50] The Attorney General of Canada was named as the respondent in both judicial review applications. Rule 303(2) of the *Federal Courts Rules* provides that the Attorney General shall be named respondent when there are no persons that are directly affected by the order sought in the application or who are required to be named as respondents. By motion under Rule 303(3), the Attorney General sought to be removed as respondent on each application because of a concern that his involvement would be inconsistent with his role as Minister of Justice should the inquiry result in a recommendation for removal. In reasons delivered on April 30, 2013, Prothonotary Tabib found that the Minister of Justice's role in the judicial discipline process was not incompatible with his role as a Rule 303(2) respondent because he has broad discretion in determining how he will participate in a judicial review proceeding. He was not required to defend the application and could limit his participation to making submissions to assist the Court: *Douglas v Canada (Attorney General)*, 2013 FC 451.

[51] In the same decision, Mr. Chapman's motion to be added as a necessary respondent was dismissed. Mr. Chapman had earlier filed an application for judicial review of the legality of the Independent Counsel's resignation and of the CJC's decision to accept the resignation. That application was subsequently abandoned.

[52] On May 21, 2013, Douglas ACJ filed a motion for leave to amend her application to add a new ground, namely that the CJC's assertion that a solicitor client relationship exists between Independent Counsel and Chief Justice Wittmann gave rise to a reasonable apprehension of institutional bias. The motion was granted on May 29, 2013. Douglas ACJ's Fresh as Amended Notice of Application was filed on June 10, 2013. Notice of the applicant's intent to bring such a motion had been given to the CJC in October 2012.

[53] The CJC's motion for leave to intervene in these proceedings was granted on June 11, 2013. It was limited to the issue of the nature and characterization of the relationship between the Independent Counsel and the CJC and/or the Vice-Chair of the Judicial Conduct Committee and whether that relationship and/or the assertion of a solicitor-client relationship between them gives rise to a reasonable apprehension of institutional bias against the applicant.

[54] The Inquiry Committee's motion for leave to intervene and that of the Canadian Superior Court Judges Association (the CSCJA) were denied. With respect to the CSCJA, Prothonotary Tabib was not persuaded that the association had anything to contribute that would differ from that put forward by the applicant. She determined that the Inquiry Committee's submissions could only go to the broad public interest in allowing the Committee to complete its work, a position that could be put forward by the Attorney General. Moreover, the Committee was the "Tribunal" whose decision and process was under review. Its impartiality was directly at issue and its intervention could be perceived as defending against or taking an adversarial position towards the applicant.

[55] The new Independent Counsel, Mme Côté, sought and was granted leave to intervene limited to the nature of the role of Independent Counsel and Independent Counsel's relationship to Committee Counsel, to the CJC and to the Vice-Chair of the Judicial Conduct Committee. Her appeal of that Order was dismissed.

[56] On July 12, 2013, Justice Snider granted the applicant's motion for a stay of the proceedings before the Inquiry Committee pending the determination of her application for judicial review. Justice Snider noted that while there might be a defence of prematurity:

> [15] […] there [we]re clear statements in the CJC Policies regarding the impartial role of Independent Counsel and the fact that Independent Counsel is "not representing any client". These statements, upon a preliminary examination, may also raise a serious issue with respect to the assertion of solicitor-client privilege by the CJC.

[57] The applicant brought a motion for directions pursuant to Rule 318 of the *Federal Courts Rules* in relation to its request for production of the Sabourin-Pratte correspondence. On September 13, 2013, Prothonotary Tabib dismissed the CJC's objections to the applicant's request for disclosure on the basis of a lack of relevance. She also found that the CJC's assertion of a solicitor-client relationship with the Independent Counsel was a "decision" within the meaning of Rule 317, that the communications respecting that decision constitute the record of the decision, and that they are therefore amenable to disclosure, subject to the question of privilege. Prothonotary Tabib further held that even if she was wrong, the communications were relevant to the issues raised in the judicial review and that the interest of justice required that the documents should form part of the record before the Court on the merits of the application, but would remain sealed and treated confidentially until further order of this Court. The CJC brought an appeal motion to set aside this decision. On November 5, 2013, the CJC abandoned its appeal.

[58] On October 11, 2013 Douglas ACJ filed an Amended Fresh as Amended Notice of Application, as authorized by the Order of Prothonotary Tabib dated October 10, 2013.

[59] Following the resignation of the Inquiry Committee, on November 20, 2013, the Independent Counsel sought and was granted further leave to intervene to address the issue of the prematurity of the relief sought by the applicant in relation to her allegation of institutional bias. The CSCJA renewed its motion for leave to intervene in light of the position taken by the CJC in its memorandum of argument that this Court lacked jurisdiction to hear the application.

The CSCJA was granted leave to file written submissions and make oral argument on that issue alone.

Decisions under Review

[60] As noted above, the decisions and rulings of the Inquiry Committee are no longer at issue in these proceedings. On a preliminary motion, Prothonotary Tabib found that the assertion of a solicitor-client relationship between the CJC and the Independent Counsel is, in itself, a decision capable of judicial review. In addition, she found, it is relevant to the issue of institutional bias. The assertion is evidenced by Mr. Sabourin's email of August 28, 2012 and letter of September 17, 2012 to the applicant's counsel.

[61] The Vice-Chair's role in the process, according to Mr. Sabourin in the September 17, 2012 letter, included the appointment of Mr. Pratte. In this role the Vice-chair had "instructed him [i.e., Mr. Pratte] with respect to his mandate". At that point, Mr. Sabourin asserted, "a solicitor-client relationship was created, and has continued throughout the course of Mr. Pratte's appointment." While Independent Counsel act at arm's length from the CJC deliberative bodies, he wrote, this "does not obviate the existence of a solicitor-client relationship between the Council – through the Vice-chair of the Judicial Conduct Committee – and Independent Counsel." The Vice-chair would instruct each Independent Counsel with respect to their mandate but would not provide any case-specific instructions throughout the inquiry.

[62] Mr. Sabourin's evidence is that all communications between "the Council" and Mr. Pratte were in fact communications between himself, Mr. Sabourin, on behalf of the Vice-Chair of the Judicial Conduct Committee, and Mr. Pratte.

[63] As this application currently stands, Chief Justice Wittmann's decision, in his capacity as the Vice-Chair of the Judicial Conduct Committee, to assert privilege over the communications between Mr Sabourin and Mr Pratte by reason of a solicitor-client relationship between the Council and Mr. Pratte is the decision under review and the basis of the allegation of institutional bias.

ISSUES

[64] Prior to the hearing and despite the resignation of the Inquiry Committee, the Court was advised that the question of its jurisdiction to judicially review the actions and decisions of the Council, or an Inquiry Committee, during an "inquiry or investigation" pursuant to section 63 of the *Judges Act* remained a live issue between the parties that could arise again upon the appointment of a new Inquiry Committee and resumption of the proceedings. For that reason, the parties were agreed that I should address that issue.

[65] At the hearing, the applicant argued that even if the broader issue of jurisdiction could be considered moot, the Court retained jurisdiction to review Chief Justice Wittmann's decision since it was not a decision made by the Council or the Inquiry Committee. This had been conceded by Mr. Sabourin on cross-examination. Notwithstanding this concession, the CJC submitted that I should address the jurisdictional issue even if I concluded that it was unnecessary to do so in considering whether institutional bias had been established. Considering that the parties and intervenors came prepared to argue the broader issue and that it is a matter that will inevitably be raised again, I concluded that it was appropriate to exercise my discretion to hear and determine the jurisdictional argument.

[66] Having considered the submissions of the parties and the intervenors, I would frame the issues as follows:

1. Are the Inquiry Committee and the Council, when conducting investigations and inquiries under the *Judges Act*, subject to judicial review as federal administrative tribunals?
2. Is the application for judicial review premature?
3. Does the CJC's assertion of a solicitor-client relationship with Independent Counsel give rise to a reasonable apprehension of institutional bias?

[67] The Attorney General has limited his participation in these proceedings to assisting the Court in reaching a decision which accords with the law. He did not take a position on the merits of the institutional bias issue. Counsel advised the Court during the case management proceedings that the Attorney General did not intend to argue that the application is premature. The position stated for the Attorney General at the hearing was that a full determination by this Court of the above issues, including institutional bias, would be in the public interest.

APPLICABLE LEGISLATION

[68] The relevant provisions of the *Judges Act*, the *Federal Courts Act*, and the *Constitution Act, 1867*, together with the CJC's *By-laws*, Complaints Procedures, and Policies are set out in the Annex. Specific references will be made to these instruments where necessary for convenience in these reasons.

STANDARD OF REVIEW

[69] To the extent that a standard of review analysis is required for the first threshold question, the standard is correctness as the issue concerns a true issue of jurisdiction or *vires*: *Toronto*

(City) v Canadian Union of Public Employees (C.U.P.E.), Local 79, 2003 SCC 63, [2003] 3 SCR 77 at para 62. This is not a case of a tribunal solely interpreting its own statute or statutes closely related to its function: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 30. In this matter, the Council seeks to oust the supervisory jurisdiction of a superior court created under a different statute, the *Federal Courts Act;* a statute which it does not administer, is not closely related to the Council's function, and with which it has no particular familiarity.

[70] The question of prematurity is a mixed question of fact and law. At its essence, the question is whether the public interest requires that the Inquiry Committee and the Council be permitted to conclude their work before being subjected to judicial review. The Council's interpretation of its own policies and procedures related to its judicial conduct process, including the role of inquiry committees and Independent Counsel, attracts considerable deference. As stated by the Supreme Court of Canada in *Moreau-Berubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249 at paragraph 62 [*Moreau-Bérubé*], reviewing courts should not intervene unless the interpretation adopted by the Council is not one that it can reasonably bear.

[71] With respect to the third issue, the applicable standard of review is correctness. Where an applicant alleges a breach of the duty of procedural fairness (including apprehension of bias) by an administrative tribunal, the question for the court is whether or not the conduct of the tribunal amounts to such a breach. A tribunal that acts in the face of a breach of the duty of fairness loses jurisdiction: *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2008 FC 981, [2008] FCJ no 1220 at para 51; *Canadian College of Business and Computers Inc. v Ontario (Private Career Colleges Act, Superintendent)*, 2010 ONCA 856, [2010] OJ no 5435 at para 22.

ARGUMENTS AND ANALYSIS

1) Are the Inquiry Committee and Council, when conducting investigations and inquiries under the *Judges Act*, subject to judicial review as federal administrative tribunals?

[72] The CJC takes the position in these proceedings that Inquiry Committees and the Council itself are immune from judicial review by the Federal Court as they are deemed to be superior courts when engaged in judicial conduct matters. Douglas ACJ, the Attorney General of Canada and the CSCJA reject the assertion of immunity and contend that Parliament did not intend to shield the Council and Inquiry Committees from judicial review when it created the regime in the *Judges Act*.

[73] The CJC position rests almost exclusively on the deeming provision in subsection 63(4) of the *Judges Act*. The Council contends that this enactment, properly interpreted, reflects Parliament's intent that the Inquiry Committees and Council are not to be treated as administrative tribunals for judicial review purposes.

[74] The Attorney General's position, supported by the applicant and the CSCJA, is that the Court should first look to the statute from which it derives its powers. In this case, the jurisdiction-conferring statute is the *Federal Courts Act*. Only when the Court has determined whether it has jurisdiction pursuant to the *Federal Courts Act* should it turn its mind to the *Judges Act*. The Attorney General argues that the *Federal Courts Act* clearly grants the Federal Court jurisdiction. The secondary question then is whether that jurisdiction is ousted by the *Judges Act*. I agree that this is the correct approach to determining this issue.

The Federal Courts Act

[75] The *Federal Court Act*, which created the Federal Court of Canada, received Royal Assent on December 3, 1970 and came into effect on August 1, 1972. The Court was created pursuant to the power granted the Parliament of Canada under section 101 of the *Constitution Act, 1867* to establish "additional Courts for the better Administration of the Laws of Canada". At that time, through sections 18 and 28 of the *Federal Court Act*, supervisory judicial review jurisdiction over federal bodies was transferred from the provincial superior courts to the Federal Court. The Court was initially comprised of trial and appellate divisions.

[76] The *Federal Courts Act* came into effect in 2002, continuing the former Trial Division of the Federal Court as a superior court of record. Section 18 of the *Federal Courts Act*, continued from the predecessor legislation, grants the Federal Court exclusive judicial review jurisdiction over federal boards, commissions or tribunals other than that expressly reserved to the Federal Court of Appeal by section 28. Section 18.1 sets out the scope of the remedies available on an application for judicial review of a decision or an order of a federal board, commission or tribunal on an application made by the Attorney General of Canada, or by anyone directly affected by the matter in respect of which relief is sought.

"federal board, commission or other tribunal"

[77] Central to the exercise of the Court's jurisdiction is the definition of "federal board, commission or other tribunal", as it presently reads, in section 2 of the *Federal Courts Act*:

"federal board, commission or other tribunal" means any body, person or persons having, exercising or	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant,

purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under s. 96 of the *Constitution Act*, 1867;	exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[78] The definition of "federal board, commission or other tribunal" has been amended by Parliament on several occasions to expressly preclude its reach to bodies that would otherwise fall within the scope of the definition. For example, in 1990, a sub-paragraph was added to the definition to expressly exclude the Senate, House of Commons or any committee or member of either House: *Federal Court Act*, RSC 1985, c F-7, as amended by SC 1990, c 8, s 2. In the most recent version of the statute, the exemption was expanded to exclude the Commons and Senate ethics officers with respect to the exercise of their authority under the *Parliament of Canada Act*, RSC 1985, c P-1.

[79] The Attorney General argues that these amendments illustrate that when Parliament has wanted to limit the definition of "federal board, commission or other tribunal" and to exclude bodies from that definition, it has chosen to do so by including express language to that effect within the *Federal Courts Act*. One example is the reference to the Tax Court of Canada and its judges. This was added to the exclusions in the definition notwithstanding that the Tax Court is

expressly continued as a superior court of record in the *Tax Court of Canada Act*, RSC 1985, c T-2.

[80] The section 2 definition has been described by the Supreme Court of Canada as "sweeping" and going "well beyond what are usually thought of as "boards and commissions"": *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62, [2010] 3 SCR 585 at paras 3, 50. To fall within the scope of the definition, a body need only exercise or purport to exercise jurisdiction or powers conferred under an Act of Parliament or under an order made pursuant to a Crown prerogative.

[81] In *Anisman v Canada (Border Services Agency)*, 2010 FCA 52, [2010] FCJ no 221 [*Anisman*] at paras 29-30, the Federal Court of Appeal identified a two-step enquiry to determine whether a body or person is a "federal board, commission or other tribunal" for the purposes of section 2:

> **29** The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown...". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.
>
> **30** In *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:
>
> > In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. [...]

Are the CJC and Inquiry Committees excluded from the definition of "federal board, commission or other tribunal"?

[82] It is indisputable that the CJC and its Inquiry Committees are creatures of a federal statute, the *Judges Act*, and the source of their authority is clearly that federal legislation. Neither the CJC nor its Inquiry Committees are among the persons or bodies expressly excluded from the scope of the definition in section 2 of the *Federal Courts Act*. The individual members of those bodies do not carry out their assigned function as judges appointed under s 96 of the *Constitution Act, 1867* (s 96 judges) and do not therefore fall within the specific exclusion of s 96 judges in the definition. The fact that the CJC bodies are comprised of persons who are, for the most part, s 96 judges does not alter the status of these bodies. They exist as statutory entities solely because they were created by the *Judges Act* and not because of any inherent jurisdiction related to the judicial status of the members.

[83] Some members of Council who may be called upon to participate in this process are judges appointed to Courts established under s 101 of the *Constitution Act, 1867* (s 101 courts). The lawyers named by the Minister of Justice to Inquiry Committees are not judges appointed to either s 96 or s 101 courts. The statutory authority provided by the deeming provision in subsection 63(4) of the *Judges Act* is exercised by the Inquiry Committee to which these individuals are appointed, not by the individual judicial and non-judicial members.

[84] For that reason, I agree with the Attorney General that the decision of the Supreme Court of Canada in *Canada (Minister of Indian Affairs and Northern Development) v Ranville*, [1982] 2 SCR 518 [*Ranville*], is not helpful to the CJC's position. *Ranville* dealt with a statutory power conferred expressly upon a s 96 judge in his capacity as a s 96 judge. As I have noted above, in

the case of the CJC and Inquiry Committees, the power to investigate and inquire into federally appointed judges is not assigned to judges sitting as s 96 judges. It is assigned to the CJC and Inquiry Committees. The judicial members of these bodies who are s 96 judges do not act in their personal capacity as s 96 judges but carry out statutory functions assigned to the Council and its Committees.

[85] In this regard it is useful to refer to *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System – Krever Commission)*, [1997] 2 FC 36 (FCA) [*Krever Commission FCA*] at paras 16-17:

> **16** Lastly, before getting to the heart of the matter, I shall dispose of an argument made by one of the intervenors out of desperation: that the Federal Court does not have jurisdiction to dispose of an application for judicial review of a decision of the Commissioner, by virtue of the fact that he is a judge appointed by the federal government under section 96 of the Constitution Act, 1867[4] and thereby falls outside the definition of "federal board, commission or other tribunal" in subsection 2(1) of the Federal Court Act.[5]
>
> **17** This argument does not stand up under scrutiny. Mr. Krever is not named commissioner in his capacity as a judge; the words "a judge" in the Order in Council are intended to identify, and not to characterize. The argument would have had greater weight if the Order in Council had used the words "as a judge", or "in his capacity as a judge" ("en tant que juge", for example, in the French version). This question was decided by the Supreme Court of Canada in Minister of Indian Affairs and Northern Development v. Ranville et al.,[6] in which Mr. Justice Dickson, as he then was, concluded that a judge is not sitting as a judge when he is exercising an "exceptional jurisdiction unrelated to his ordinary capacity". Certainly Mr. Krever's capacity as a commissioner bears no relation to his capacity as a judge.

[86] Similarly, members of the CJC and its Inquiry Committees do not sit as judges when they are exercising the authorities vested upon the Council under Part II of the *Judges Act*. They are acting as members of administrative tribunals conducting “an investigation or inquiry” and exercising an exceptional jurisdiction unrelated to their ordinary capacities.

Being a "federal board, commission or other tribunal" does not make the CJC and Inquiry Committees part of the Executive.

[87] The CJC submits that its role in judicial conduct matters is inconsistent with being a "federal board, commission or other tribunal" subject to the judicial review jurisdiction of the Federal Courts as that would necessarily imply that it is part of the Executive, a relationship incompatible with judicial independence and separation from the other branches of government.

[88] As the primary determinant of whether a body is a "federal board, commission or other tribunal", as discussed in *Anisman*, above, is the source of the authority and not the nature of the body exercising the authority, inclusion within the scope of the definition does not thereby make the body part of the executive branch of government.

[89] Applying the two step test the Federal Court has been found to have jurisdiction to judicially review the decisions and actions of entities which are not part of the executive branch, for example, Indian band councils and non-governmental organizations: *Minde v Ermineskin First Nation*, 2008 FCA 52, [2008] FCJ no 203 at para 33; *Jock v Canada (Minister of Indian & Northern Affairs)*, [1991] 2 FC 355, [1991] FCJ no 204 (QL) at paras 13-18; *Onaschak v Canadian Society of Immigration*, 2009 FC 1135, [2009] FCJ no 1596 at paras 8, 23, 29.

[90] The judicial conduct process administered by the CJC under the authority of the *Judges Act* has been the subject of several judicial review proceedings in the Federal Courts: *Gratton v Canadian Judicial Council*, [1994] 2 FC 769, [1994] FCJ No 710; *Taylor v Canada (Attorney General)*, 2001 FCT 1247, [2001] FCJ no 1732, aff'd 2003 FCA 55, [2003] FCJ no 159, leave to appeal denied [2003] SCCA no 132; *Cosgrove v Canadian Judicial Council*, 2005 FC 1454, [2005] FCJ no 1748, rev'd 2007 FCA 103, [2007] FCJ no 352, leave to appeal denied [2007]

SCCA no 242; *Cosgrove v Canada (Attorney General)*, 2008 FC 941, [2008] FCJ no 1171; *Akladyous v Canadian Judicial Council*, 2008 FC 50, [2008] FCJ no 70; *Slansky v Canada (Attorney General)*, 2011 FC 1467, [2011] FCJ no 1775, aff'd 2013 FCA 199, [2013] FCJ no 996 [*Slansky FCA*], leave to appeal denied [2013] SCCA no 452. In none of these cases did the Council take the position that judicial review was incompatible with the independence of the judiciary and the status of the CJC and Inquiry Committees in the judicial conduct process.

[91] In this particular matter, the Council has been involved in the application since it was filed. The Council participated in the Attorney General's November 2012 motion to clarify his status as the respondent, as well as the case management conferences preceding that motion. In May 2013, the CJC sought leave to intervene in the application in order to participate fully, including to respond to the allegation of institutional bias arising from its decision. It chose not to seek leave to intervene in the stay motion, nor to appeal the Court's resulting order. The Council responded to the applicant's Rule 318 motion for production of its correspondence with Mr. Pratte and urged that it be deferred for argument on the hearing of the application.

[92] The CJC's inclusion in the definition of "federal board, commission or other tribunal" does not imply that it is part of the Executive and its role in judicial conduct matters is not inconsistent with being a "federal board, commission or other tribunal" subject to the judicial review jurisdiction of the Federal Courts.

The deeming provision in subsection 63(4) of the Judges Act.

[93] Subsection 63(4) of the *Judges Act* reads as follows:

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.

Pouvoirs d'enquête

(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.

The CJC's position on interpretation of the deeming provision.

[94] The CJC contends that Parliament used the phrase "deemed to be a superior court" in subsection 63(4) in order to preserve the constitutional principle of judicial independence, and to safeguard it against interference by the Executive and Legislature. Without the deeming provision, the CJC submits, the Inquiry Committee and Council would lack the necessary powers to examine the conduct of a superior court judge without undermining the principle of judicial independence. The deeming provision ensures that the Inquiry Committee and Council operate as part of the judiciary by treating the Inquiry Committee and Council as superior courts which form part of the judicial branch and which are, therefore, not subject to judicial review. In the CJC's view, the supervisory jurisdiction of the Federal Courts does not extend to a federal body "deemed to be a superior court".

[95] This, the CJC argues, is consistent with Parliament's intent to create a judicial conduct inquiry process that accords with the constitutional principles of judicial independence and separation of powers, and to ensure that any redress a judge may have from an adverse recommendation from the Council lies only with the Minister of Justice and Parliament.

[96] In support of its position, the Council cites *MacKeigan v Hickman*, [1989] 2 SCR 796 [*MacKeigan*]. At paragraph 66, Justice McLachlin, as she then was, commented on the importance of judicial independence and separation from the other branches of government:

> **66** The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v. The Queen*, *supra*; *Beauregard v. Canada*, *supra*. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in Beauregard v. Canada supports the conclusion that

> judicial immunity is central to the concept of judicial independence. As stated by Dickson C.J. in *Beauregard v. Canada*, the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation [page831] that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.

[97] This passage highlights the importance of judicial independence. It does not, however, support the very broad interpretation given it by the CJC. The case stands for the proposition that a superior court judge cannot be summoned by Parliament or the executive to account for his or her judgment. It does not state that judicial review of inquiries into the conduct of a superior court judge is incompatible with judicial independence.

[98] The CJC also references comments by Justice La Forest at paragraph 20 of his concurring reasons in *MacKeigan*. In obiter remarks Justice La Forest expressed the view that what Parliament had done when it established the CJC in 1971 was to create an additional court. This was explained by the Inquiry Committee in the *Flahiff* matter. The Committee concluded:

> […] it is in no way possible to infer from that passage that the Canadian Judicial Council is a superior court. The sole purpose of La Forest J's comments was to indicate that only a body created by Parliament could exercise the function of inquiring into complaints and allegations against judges appointed by the federal government.

[99] It would have been open to Parliament to have created an additional court under s 101 of the *Constitution Act, 1867*, much as it has done with the Court Martial Appeal Court of Canada. That court is comprised of judges who are members of other s 96 and s 101 courts. Parliament did not choose to do that in this instance. It did not use language such as "the Canadian Judicial

Council and the Inquiry Committees thereof are Superior Courts created for the better administration of the laws of Canada".

Evidence from the Parliamentary record.

[100] The CJC relies upon a handful of excerpts from the Parliamentary record during the passage of the 1971 legislation to support its argument regarding the intent of s 63(4). It is well-established that the Court may have recourse to parliamentary history to assist in the interpretation of a statute, but should proceed with caution and rely on such sources only where the meaning of an enactment is ambiguous: *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 8. Isolated comments by Ministers and MPs in the House of Commons or in committee proceedings, as in this case, may or may not reflect the parliamentary intent to be inferred from the words used in the legislation: *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42 at para 12.

[101] In this instance, the excerpts have not been particularly helpful. They do not clearly support the interpretation of subsection 63(4) relied upon by the CJC. Nor do they address the impact of the deeming provision on the Federal Court's jurisdiction. References to the lack of an appeal from the Council do not support the inference that Parliament intended to exclude judicial review. There is no express statement that the intent of the enactment was to oust the jurisdiction of the Federal Court that had been created by Parliament just months earlier.

[102] In my view, there is no ambiguity with respect to whether the Council or Inquiry Committee are "federal boards, commissions or tribunals" for the purposes of section 18 of the *Federal Courts Act* when the terms of s 63(4) are read in the broader legislative context. The provision "deems" these bodies to be superior courts in making inquiries or investigations but

does not create them as superior courts under section 101 of the *Constitution Act, 1867*, as sections 3 and 4 of the *Federal Courts Act* do for this Court and the Federal Court of Appeal. Nor does the provision expressly oust the jurisdiction of this Court.

[103] The deeming provision was introduced by an amendment during proceedings of the Standing Committee on Justice and Legal Affairs in 1971 to "give the judges in the case of hearing an inquiry or making an investigation the usual judicial protection that they would need" (House of Commons, Standing Committee on Justice and Legal Affairs, (16 June 1971). I read this explanation by an official as going to the question of immunity for decisions or statements made in the course of the judicial conduct proceedings. This was the type of fine-tuning that commonly occurs during the legislative process. Further, contrary to the CJC's submissions, the presumption that amendments are intended to be purposive does not arise in this context. This was not an amendment brought before Parliament to change existing legislation because of the need to clarify its meaning, correct a mistake in an Act, or change a law adopted earlier.

Position of the applicant, respondent and CSCJA on the deeming provision.

[104] The applicant, respondent and CSCJA argue that the scope of the deeming provision is expressly narrow and limited to a specific purpose: that of making an inquiry or investigation into the conduct of a judge. For that purpose, the Inquiry Committee and Council are *vested* with the powers of a superior court: *Slansky FCA* at para 139. Further, they submit that immunity from judicial review is not necessary to achieve the purposes identified for the Council and Inquiry Committees in the deeming provision. There is no language in the provision extending the scope of the vested powers to the purposes of any other statute. Nor is there any privative

clause precluding the availability of judicial review, such as is found in section 58 of the *Canada Labour Code*, RSC 1985, c L-2. That provision precludes judicial review, prohibits the use of prerogative writs and expressly exempts arbitrators and arbitration boards operating under the statute from the definition of "federal board, commission or other tribunal".

[105] The applicant notes that the key decision at issue in these proceedings, that of Chief Justice Wittmann's assertion of privilege, remains within the jurisdiction of the Federal Court, whether or not the deeming provision operates to oust the Court's jurisdiction for decisions and actions of the Inquiry Committee and Council sitting as a review panel. This was, as noted above, conceded by Mr. Sabourin on cross-examination and confirmed by counsel for the CJC at the hearing.

Conclusions on the scope of subsection 63(4) and its effect on s 18 of the Federal Courts Act.

[106] I agree with the submissions of the applicant, respondent and CSCJA. The scope of subsection 63(4) and its effect, if any, on section 18 of the *Federal Courts Act*, must be determined with reference to Parliament's intent in both the *Judges Act* and the *Federal Courts Act*. In determining Parliament's intent, the Court must look to the words of the provision in their statutory context. In reproducing the subsection above I have included the marginal notes to subsection 63(4), "*Powers of Council or Inquiry Committee / Pouvoirs d'enquête*", as I consider them to be relevant to the consideration of the context of the legislation as a whole: *Corbett v Canada*, [1997] 1 FC 386 at para 13. The notes do not support the broader interpretation urged by the Council.

[107] The location of the deeming clause also indicates that it was intended to have a limited scope. The clause does not appear as a general stand-alone statement about the Council or its Committees, but is contained in the fourth subsection of the enactment that deals specifically with inquiries and investigations into the conduct of judges. It forms the "chapeau" of the provision that enumerates the specific powers, duties and functions with which the Council and the Committees have been provided to facilitate their inquiries and investigations.

[108] On its face, subsection 63(4) does not apply to the final stage of the judicial conduct process where the CJC exercises its power to make a report and recommendation to the Minister of Justice pursuant to section 65 of the *Judges Act*. Section 65 applies "after an inquiry or investigation under section 63 has been completed…" ("[à] l'issue de l'enquête…").

[109] On a plain reading of the statute, the implication of the CJC's interpretation is that the Council's report and recommendation would remain subject to review but not the process that led to them. Similarly, the preliminary screening stages are not conducted by bodies deemed under subsection 63(4) to be superior courts. If the CJC's interpretation of s 63(4) is correct, the anomalous situation would result that neither the beginning nor the end of the process would be excluded from review but only those parts where procedural fairness is of greatest concern.

[110] The inclusion of one or two members of the Bar, in addition to the judicial members, also appears to undermine the CJC's position that Parliament's intent was to make the Committees operate as part of the judiciary. The non-judicial members must be lawyers of at least ten years standing at the Bar, the same minimum qualification as for appointment to the federal bench, and they have security of tenure for the duration of the inquiry. However, these members are appointed for each inquiry by the Minister of Justice. As stated in *MacKeigan*, above, at

paragraphs 71 and 91, the selection of judges for a particular case by the executive would be an unacceptable interference with the independence of the judiciary. The inclusion of representatives of the Bar provides an opportunity for participation by the public, albeit a specialized public, in the discipline process but it is difficult to see how this supports the view that it is a judicial function. As the Attorney General suggests, the less the Inquiry Committee looks like an actual superior court, the less persuasive is the argument that the deeming provision should be interpreted broadly.

[111] That is not to say that Inquiry Committees comprised of judicial and non-judicial members have lacked independence from the executive and legislature in carrying out their functions in the past. Rather, they have carried out their duties independently as administrative tribunals, not as superior courts. In that respect, I see no difficulty in having members of the Bar serve on the committees to ensure that there is another, non-judicial perspective, brought to bear on each case in the public interest.

[112] The use of a deeming provision in legislation was described by the Supreme Court in *R v Verrette*, [1978] 2 SCR 838 at p 7:

> […] A deeming provision is a statutory fiction; **as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing** although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word "includes" in certain definitions; however, "includes" would be logically inappropriate and would sound unreal because of the fictional aspect of the provision. [Emphasis added]

[113] The key question in considering a deeming provision, as discussed by Professor Sullivan in Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007), is: what is the scope of the fiction? The presumption is that Parliament intended to give such power as is necessary for carrying out the objects of the Act and not any unnecessary powers: *Re Diamond and the Ontario Municipal Board*, [1962] OR 328-336 (ONCA).

[114] Assuming that deeming the Inquiry Committee and Council to be superior courts assists in the limited purpose of preventing interference by the legislature and executive in respect of judicial conduct proceedings, it is an unfounded leap of logic, as the applicant argues, to assert that the "necessary consequence" of the deeming provision is that the supervisory jurisdiction of this Court is ousted. It does not follow that ensuring independence requires that Committee and Council decisions be immune from judicial review.

[115] Had Parliament intended to make the Inquiry Committee or the Council a superior court, it would have said so directly without using the word "deemed". Parliament would not "deem" the Council to be a superior court for the purposes of making inquiries if it intended to create or continue it "as a superior court of record" under its s 101 authority as it did in creating the Tax Court of Canada. Instead, it chose to "vest" the CJC with the powers of a superior court without transforming it into a court: *Slansky FCA*, above, at para 139.

[116] On two occasions since the CJC judicial conduct process was established, Inquiry Committees have rejected the argument that they function as superior courts. *Gratton* (February 1994) involved a constitutional challenge to subsection 63(4) on the basis that Parliament had not respected the constitutional requirements necessary for the appointment of a superior court judge to the Inquiry Committee. The Committee ruled that Parliament did not say that an inquiry

committee *is* a court, nor can the deeming provision "transform an inquiry committee into a court". While it may be deemed to be a superior court for certain purposes, an Inquiry Committee did not have the essential characteristics of a superior court. Further, the Committee found that had Parliament intended to make an inquiry committee a superior court, it would not have listed the Committee's specific powers to summons witnesses and compel evidence since "[a] superior court has all these powers." The *Flahiff* Committee (April 1999) adopted the reasons of the *Gratton* Inquiry Committee and found that the clear purpose of subsection 63(4) is to give an Inquiry Committee or the Council, when conducting an investigation or inquiry only, the powers exercised by superior courts.

[117] In this instance, the Inquiry Committee stressed in its May 15, 2012 ruling that its purpose and function were fundamentally different from those of a trial court, and that a judge facing a conduct inquiry is not entitled to, and cannot expect the same procedural safeguards as a litigant in a trial court. The process is not that of an adversarial judicial proceeding but inquisitorial in nature, the Committee found. This approach appears to have been consistently taken by each of the Inquiry Committees since the CJC was established. It is also consistent with that stated by the Court in *Taylor v Canada (Attorney General)*, [2002] 3 FC 91, at paragraph 49: "[…] Sections 63 and 65 of the *Judges Act* do not confer an adjudicative function on the Council or its committees."

[118] The purpose and operation of a superior court, including those created under s 101 of the *Constitution Act, 1867*, are distinct from those of an inquisitorial body. If the CJC is correct, as argued by the CSCJA, Parliament would have created a superior court that operates like no other. Its purpose and operation would be that of a superior court, while its process would be inquisitorial in nature. Parliament cannot have intended that an Inquiry Committee be excused of

its obligations to provide procedural fairness, as would be found in a court, on the ground that it is not a court, and simultaneously seek to insulate itself from judicial review on the basis that it is deemed to be a superior court.

[119] Immunizing the Council's decisions from review offends the principle that all holders of public power should be accountable for their exercises of power: per Stratas JA in *Slansky FCA*, above, at paras 313-314. As mentioned above, where the issue arising from an impugned decision goes to a breach of procedural fairness, the decision-making body may be deprived of jurisdiction. Statutory tribunals cannot be immunized from review of such errors: *Crevier v Quebec (Attorney General)* (1981), 127 DLR (3d) 1 at para 20 (SCC) [*Crevier*]; *Shubenacadie Indian Band v Canada (Canadian Human Rights Commission) (re MacNutt)* (1997), 154 DLR (4^{th}) 344(FC) at para 40.

[120] The clear parliamentary intent reflected in the *Federal Courts Act* is that all persons and bodies empowered by federal statutes are subject to judicial review by a court familiar with the federal legal context, unless expressly exempted by law. The purpose and function of judicial review was described by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28:

> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[121] Before a judge can be removed from office, he or she is entitled to a fair hearing: *Valente v The Queen*, [1985] 2 SCR 673 at p 696. This fair hearing is essential not only as a matter of administrative law, but as a component of the constitutional requirement for judicial security of tenure. The supervisory jurisdiction of this Court over the Council and its Inquiry Committee serves an important function in the public interest of ensuring that the judicial conduct proceedings have been fair and in accordance with the law. That function is entirely consistent with Parliament's intent as reflected in the legislation.

[122] As submitted by the Attorney General, the efficacy of the design created by Parliament in 1971 would be compromised if judicial review were unavailable. The outcome of the Council and Inquiry Committee's work is a report with recommendations to the Minister of Justice. Absent the availability of judicial review, the Minister, and ultimately Parliament, would be required to assess whether the process that had led to the report was conducted within the Council's statutory authority, and was procedurally fair and free of errors of law. These questions are distinct from the merits of any recommendation that a judge be removed from office, which is the role that is reserved to the Governor General and Parliament under s 99 of the *Constitution Act, 1867*, with respect to s 96 judges, and is enshrined as well as in the *Supreme Court Act*, RSC 1985, c S-26, the *Federal Courts Act*, RSC 1985, c F-7 and the *Tax Court of Canada Act*, RSC 1985, c T-2 for judges appointed under s 101.

[123] The CJC's position is that, if judicial review is not available, the judge will have an avenue of appeal to the Minister and Parliament. While this is true with respect to the merits of any recommendation to remove the judge, the Minister and Parliament are wholly ill-equipped to adjudicate the potentially wide array of legal arguments that may be raised in respect of the judicial conduct proceedings. A judge who is subject to the CJC and Inquiry Committee's

investigation or inquiry would be deprived of the opportunity to test the fairness and legality of the proceedings in a court of law. That the judge may "appeal" the outcome to the Minister of Justice and, ultimately, to Parliament is not an answer if those bodies lack the capacity to assess those issues.

[124] I agree with the parties opposed to the CJC's position that Parliament cannot be understood as having intended to remove all recourse to the courts from the person most directly affected through a "deeming" provision such as subsection 63(4). Such a fundamental departure from the principle that bodies exercising statutory powers are subject to judicial review should only be done deliberately and through an explicit legislative statement. The availability of judicial review is consistent with Parliament's objective in creating the CJC and the judicial conduct process – to devolve the inquiry and review process to the judicial branch without removing Parliament's ultimate power to remove a judge.

[125] For these reasons, I am unable to find that this Court lacks the jurisdiction under section 18 of the *Federal Courts Act* to review the application.

[126] In closing on this issue, I wish to note that I am cognizant of the point made by counsel for the CJC at the end of their written representations. They remarked that it would be anomalous for a single judge of the Federal Court to review the rulings of the Inquiry Committee, comprised of three chief justices and two experienced members of a provincial bar, and the Council, consisting of a minimum of seventeen chief justices, as though they were the rulings of an inferior administrative tribunal. I recognize that the knowledge and experience that Council brings to bear on judicial conduct inquiries is formidable and greatly exceeds that of any single member of this Court. However, this Court was established by Parliament to review the actions

and decisions of any "federal board, commission or tribunal". That jurisdiction extends to the highest public offices with the exception of those expressly excluded. This Court cannot relinquish jurisdiction imposed by Parliament. If it errs, it can and will be corrected by the Federal Court of Appeal and, ultimately if leave to appeal is granted, by the Supreme Court of Canada.

2) Is the application for judicial review premature?

General principles

[127] The issue, as it presently stands, relates only to the remaining challenge to the assertion of a solicitor-client relationship between the CJC and Independent Counsel.

[128] The general rule is that parties may proceed to the courts to seek judicial review of a decision only after they have pursued all adequate remedies available to them in the administrative law process. The general rule applies notwithstanding that there may be important and pressing legal or constitutional issues between the parties in the underlying proceedings: *C.B. Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 [*Powell*] at paras 30-31. There must be exceptional circumstances to justify the exercise of discretion to allow the judicial review to proceed: *Powell*, at para 33. This principle extends to concerns about procedural fairness or bias. As stated in *Sztern v Canada (Superintendent of Bankruptcy)*, 2008 FC 285, [2008] FCJ no 351 at para 20 "…a determination of bias at the interlocutory stage runs the risk of proliferating litigation unduly."

[129] In *Lorenz v Air Canada*, [2000] 1 FC 494, [1999] FCJ no 1383 (TD) [*Lorenz*] at paras 18-35, Justice Evans identified six factors to be considered in determining whether a Court should exercise its discretion to judicially review an interlocutory matter: (a) hardship to the

applicant; (b) waste; (c) delay; (d) fragmentation; (e) strength of the case; and (f) the statutory context. He noted, at paragraph 50:

> A non-frivolous allegation of bias that falls short of a cast-iron case does not per se constitute "exceptional circumstances", even when the hearing before the tribunal is still some way from completion, and there is no broad right of appeal from the tribunal

Positions of the parties.

[130] There is no suggestion in these proceedings that the allegation of institutional bias is frivolous even if it falls short of a cast-iron case. The question is whether the Court should deal with it prior to the completion of the inquiry proceedings which may yet find in favour of the applicant. The CJC and Independent Counsel say that the issue is premature and should be raised first with the Vice-Chair of the JCC or the Inquiry Committee which is to be appointed. The applicant submits that the issue is ripe for determination now. The CSCJA was not granted leave to intervene on this question. The Attorney General takes the position that the issue is not premature but made no other submissions on the question.

[131] The issue of prematurity was initially raised by the CJC on three grounds: (1) the failure of the applicant to exhaust alternative remedies within the CJC process; (2) the applicant's challenges to interlocutory rulings of the Inquiry Committee were brought before the proceedings were completed; and (3) the applicant raised issues for the first time on judicial review, without first raising the issue with the decision-maker and obtaining reasons thereon. Any of these grounds would have been sufficient for the Court to decline to exercise its jurisdiction to decide the matter. With the resignation of the Inquiry Committee, the CJC

continues to assert the third ground: the failure of the applicant to raise the question of institutional bias with the decision maker, in this instance Chief Justice Wittmann.

[132] The CJC argues that the question of interference with Independent Counsel was never properly presented to Chief Justice Wittmann. The correspondence from counsel for the applicant to Mr. Sabourin, including the email exchanges and letters of August 28, 2012, does not, the CJC submits, constitute raising the issue of institutional bias with the administrative decision maker for determination. The allegation of institutional bias was not brought to the Council's attention, the CJC submits, until October 2012, after Mr. Sabourin's September 17th response. The application should not have been made for the first time to this Court but to the tribunal, Chief Justice Wittmann, so that a decision with reasons could have been made and a proper record for judicial review formed.

[133] The CJC submits that going forward, issues relating to the solicitor-client relationship and Independent Counsel's role can now be dealt with by the new Inquiry Committee. Further, there is also an equivalent to an appeal in the form of the second stage review before Council during which the judge could raise any procedural fairness issues that he or she feels are warranted. Thus, the Counsel submits, adequate alternative remedies are available to the applicant which should be exhausted before attempting to seek relief from this Court.

[134] The Independent Counsel, Mme Côté, submits that the resignation of the Inquiry Committee undermines any argument that there are exceptional circumstances justifying the non-application of the doctrine of prematurity to consideration of the issue of institutional bias in the present circumstances. That argument was premised on the potential of irreparable harm to

Douglas ACJ in having an allegedly biased Inquiry Committee examine the sensitive issues raised by this case. This was the basis, she submits, on which Justice Snider issued the stay.

[135] At paragraph 18 of her Reasons for Order in July 2013 Justice Snider made the following observation in discussing the timing of the application:

> However, judicial review of certain allegations of bias may be appropriate at an interlocutory stage if continuing the administrative proceedings leads to harm that cannot be corrected, or where evidence of hardship or prejudice supports the hearing of the matter at the present time.

[136] Justice Snider concluded, at paragraph 20 of her reasons, that she would not refuse to find a serious issue on the basis that the application may ultimately be shown to be premature. The Independent Counsel argues that the stay was therefore not issued because of the allegation of institutional bias. Justice Snider's reasons for granting the stay focused on the potential harm related to the continuation of the Inquiry Committee. That is no longer a consideration.

[137] The applicant contends that the principles of administrative law permit the Court to adjudicate the claim of institutional bias before the Inquiry is complete so as to prevent further harm to herself and the administration of justice. She denies that she had an adequate alternative remedy to raise her concerns about interference with Independent Counsel with either the Inquiry Committee or Chief Justice Wittmann. In her view, the Inquiry Committee had demonstrated bias in its procedural rulings on evidence, and she had no opportunity to seek a decision from the Vice-Chair of the JCC on the question of the alleged interference with Independent Counsel.

[138] The applicant says she was "stonewalled" by the Council, in the person of Mr. Sabourin, in her efforts to determine who was giving him instructions and to find out what had caused Mr. Pratte to resign. At no time, she says, was she told to take her concerns to Chief Justice

Wittmann. She did not learn that Mr. Sabourin was writing on behalf of Chief Justice Wittmann until the cross-examination of Mr. Sabourin in October 2013. Throughout the proceedings she had been told to communicate with the Council only through Mr. Sabourin.

[139] It makes no sense to the applicant that she would be expected to ask the new Inquiry Committee, a delegate of the Council, to rule on the nature of the relationship between the Council's Judicial Conduct Committee and Independent Counsel. The problem, from her perspective, is systemic and unfair if the Independent Counsel can be prevented from doing his or her job by any member of the CJC.

[140] The applicant submits that three of the *Lorenz* factors – wastefulness, delay and fragmentation - support her case that the application is not premature. It would be wasteful to proceed with a flawed process. That would inevitably lead to further delays. If the fundamental safeguard of Independent Counsel is capable of being interfered with and needs to be fixed, it should be done now, she contends. Justice Snider's ruling on the stay motion constitutes an affirmative statement from this Court that the application is not premature and is *res judicata*, the applicant submits.

Conclusion on the prematurity issue

[141] I am persuaded that the application is not premature but not on the ground advanced by the applicant that the issue is *res judicata* by reason of the grant of the stay by Justice Snider. As argued by the present Independent Counsel, Justice Snider was dealing with three separate allegations of bias by the applicant, two of which related solely to the actions of the Inquiry Committee. She made no express finding that the assertion of solicitor client privilege by the

CJC would, in itself, cause the applicant irreparable harm or that the matter had to be heard on the merits before the completion of the administrative proceedings.

[142] Had the controversy over the resignation of Mr. Pratte not erupted, I would have concluded that the application initially filed by the applicant was premature applying the factors set out in *Lorenz*, above. It seems to me that the harm allegedly caused to the applicant by the instructions given to Committee Counsel and his vigorous cross-examination of two key witnesses would not have justified interfering with the inquiry before it had concluded its work. Had the committee ultimately found in the applicant's favour there would have been no need for judicial review. I am not persuaded that the risk of any further harm to the applicant's interests by the continuation of the inquiry would have been irreparable or that the actions taken by the Committee up to the point of the recusal motion amounted to a breach of procedural fairness vitiating the Committee's jurisdiction.

[143] Given Mr. Pratte's resignation shortly after he had filed a separate application for judicial review, however, the applicant was correct to pursue her efforts to determine what had occurred. In doing so, I am satisfied that she exhausted all available administrative remedies before bringing the issue of institutional bias before the Court.

[144] I note that in her August 28, 2012 correspondence to Mr. Sabourin, counsel for the applicant conveyed her concern that "the role of Independent Counsel was extremely important to ensure fairness to the judge" and that since Independent Counsel had no client, the applicant was entitled to a full account of what had caused Mr. Pratte's resignation. Counsel asked that Mr. Sabourin advise her who was providing him with instructions. In her further correspondence on the same day, counsel wrote that the involvement by the CJC in the communications that caused

Mr. Pratte to resign "would constitute a serious interference with a public officer obliged to act in the public interest". The CJC was thus put on notice that its involvement in the matter of Mr. Pratte severing his role with the Inquiry Committee had escalated the applicant's concerns about the fairness of the proceedings to the point that it was being accused of interference.

[145] The response of the CJC, through Mr. Sabourin, was to assert a solicitor-client relationship, claim privilege and withhold its communications with Mr. Pratte. It is difficult to understand how the applicant could then have obtained a ruling on the issue from Chief Justice Wittmann, particularly as she did not know until October 11, 2013 that he had issued the instructions under which Mr. Sabourin dealt with Mr. Pratte. Nor would it have been appropriate for the applicant to seek a ruling on the issue from the Inquiry Committee as that body had no authority to rule on decisions made by the Vice-Chair, and was a delegate of the Council with a limited and specific purpose. The Council itself, or rather that part of it which ultimately is to consider the report of the Inquiry Committee, plays no role in the process until the report is delivered.

[146] There are other exceptional circumstances that warrant a determination on the application before the inquiry is completed. The proceedings of the Inquiry Committee and before this Court have resulted in lengthy delays during which the applicant has been suspended from the active performance of her duties as a superior court judge and the applicant is at risk of losing that constitutionally protected status. The considerable judicial resources that have been expended in dealing with the application and related motions will have been wasted if the matter does not proceed to a conclusion. Further, while this is not a major consideration, the parties came to the hearing prepared to argue the merits of the institutional bias claim. They wish to resolve the

controversy resulting from the assertion of a solicitor-client relationship with Independent Counsel before proceeding with the continuation of the inquiry.

[147] For those reasons I will address the third issue.

3) Does the CJC's assertion of a solicitor-client relationship with Independent Counsel give rise to a reasonable apprehension of institutional bias?

[148] Following Mr. Pratte's resignation, as discussed above, the applicant brought a motion under Rule 317 of the *Federal Courts Rules* for production of any communications between Mr. Pratte and the CJC related to his resignation. She then sought directions from the Court under Rule 318 when Mr. Sabourin, on behalf of the CJC, asserted solicitor client privilege and declined to produce the communications. Prothonotary Tabib found that the assertion of a solicitor client relationship constituted a decision subject to judicial review and that the communications between Messrs. Sabourin and Pratte constituted the record of that decision. As a result, the communications were produced by the CJC and filed as sealed, pending a determination in these proceedings as to whether there was a solicitor-client relationship and if so, whether the communications were therefore privileged. In order to make that determination I considered it necessary to open the sealed packet and read the communications.

The test for a reasonable apprehension of institutional bias.

[149] "Bias" was defined by Mr. Justice Cory in *R. v. S. (R.D.),* [1997] 3 SCR 484, [1997] SCJ no 84 at para 105 as denoting "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues". As discussed by the Supreme Court in

Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623 at para 22, the state of mind of an administrative decision-maker may be difficult to discern. To ensure fairness, the conduct complained of is measured against the standard of a reasonable apprehension of bias.

[150] The test for a reasonable apprehension of bias and the proper manner of its application is that set out in the dissenting judgment of de Grandpré J. in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394 and later adopted by the Supreme Court as a whole in *R v S(R.D.)*, [1997] 3 SCR 484:

> the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[151] The question is whether a reasonably informed bystander could reasonably perceive bias on the part of the decision-maker. It is an objective test and essentially fact-based. The notional observer must be presumed to have two characteristics - full knowledge of the material facts and fair-mindedness. Ultimately it is a matter of impression and assessment whether the test is satisfied on the facts of any particular case: *Belize Bank Limited v AG* [2011] UKPC 36 at para 72.

[152] The presumption is that a decision maker will act impartially: *Zundel v Citron*, [2000] 4 FC 225 (FCA), leave to appeal to SCC refused, [2000] SCCA no 332. The burden of proof lies with the person making the claim. The threshold is high and requires more than an allegation: *Gagliano v Canada (Ex-Commissioner of Inquiry into the Sponsorship Program & Advertising Activities)*, 2008 FC 981 at para 66.

[153] Where institutional bias is alleged, the same factors apply but the test requires that the well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases. The Court must also give special attention to the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics: *2747-3174 Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 [*Régie*] at para 44.

[154] The applicant has both the evidentiary and persuasive burden to establish that a reasonable apprehension of bias would result in a substantial number of cases from the assertion of a solicitor-client relationship by the CJC with Independent Counsel.

Positions of the parties.

[155] The applicant challenges the CJC's declaration of a solicitor client relationship with the former Independent Counsel and the claim of privilege over the communications between Messrs. Pratte and Sabourin relating to any instructions given to Mr. Pratte that may have led to his resignation. She contends that the assertion of a solicitor client relationship between the CJC and Independent Counsel vitiates the duty of fairness the CJC owes to judges subject to the disciplinary process.

[156] In particular, the applicant submits that in light of the CJC's statutory and policy framework and the high level of procedural fairness owed to judges subject to complaints, the mere assertion of a solicitor client relationship gives rise to a reasonable apprehension of institutional bias as it undermines the legislative objective of the role of Independent Counsel, and deprives the respondent judge of a critical procedural fairness safeguard. This applies

whether or not an actual solicitor client relationship is found to exist. The claim of such a relationship alone, even if wrongly asserted, is directly contrary to the words of the Policy on Independent Counsel, which states: "Independent Counsel is impartial in the sense of not representing any client". A reasonable person would apprehend bias on the part of the CJC as an institution because the existence of a solicitor client relationship was asserted by the Vice-Chair of the Council's judicial conduct committee on behalf of the CJC.

[157] The position of the CJC is that the Vice-Chair of the JCC asserts solicitor client privilege with Independent Counsel with respect to a limited scope of professional services that includes the formation and ending of the retainer, billing expectations, and the scope of Independent Counsel's mandate. This is a necessary and practical feature of the unique role of Independent Counsel, according to the CJC, and does not breach the applicant's right to procedural fairness before the Inquiry Committee or Council in a manner that would constitute institutional bias. The CJC asserts that it does not give instructions to Independent Counsel on the presentation of the evidence to the Inquiry Committee, but declines to disclose what instructions it has given to Independent Counsel. It submits that the speculative possibility of instructions inconsistent with the public duty of the Independent Counsel does not give rise to an actual breach of procedural fairness.

[158] The Independent Counsel submits that the issuance by the CJC of what she describes as uniform and public instructions as to how she is to perform her role ensures that she is to act impartially and in accordance with the public interest. The key elements of the Policy on Independent Counsel are the arm's length relationship with the CJC and the Inquiry Committee, and the restriction on the CJC providing instructions on the carrying out of the Independent Counsel's mandate. If there is a solicitor client relationship, she submits, it is to a very limited

extent and would not support a finding of institutional bias because the duties of the Independent Counsel under the framework established by the *By-laws* and policies would not change. The existence of such a relationship would not alter the Independent Counsel's responsibility to act impartially. For that reason, she argues, it is a false debate.

[159] The Attorney General of Canada took no position on the merits of the allegation of institutional bias. This is because, the Court was advised, the Attorney General is not privy to the content of the communications over which the CJC has claimed solicitor client privilege, has no independent knowledge of the rationale for raising that claim, and no independent knowledge of the relationship between Independent Counsel and the CJC, including the Vice Chair of the JCC.

> *Was a solicitor-client relationship created between the Vice-Chair of the Judicial Conduct Committee and Mr. Pratte?*

[160] Independent Counsel is appointed under the authority granted the CJC by s 62 of the *Judges Act*.

Employment of counsel and assistants	**Nomination du personnel**
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.	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.

[161] The objects of the Council, as set out in s 60 of the *Judges Act*, are to promote efficiency and uniformity and to improve the quality of judicial service in superior courts. To meet those objects, under s 60(2) the Council is afforded the power, among other things, to make the inquiries and investigate complaints or allegations described in s 63.

[162] The opening words of s 62 provide authority to hire anyone the Council deems necessary to carry out its objects and duties. That would encompass persons such as Mr. Sabourin who, while lawyers, serve primarily in an administrative capacity. The specific reference to counsel - "to aid and assist the Council in the conduct of any inquiry or investigation described in section 63" – authorizes the hiring of lawyers for that specific purpose. This would include Independent Counsel, such as Mr. Pratte, and Committee Counsel, such as Mr. McIntosh.

[163] In establishing the Policy on Independent Counsel, the CJC described the "central purpose for establishing the position":

> 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.

[164] The role of Independent Counsel is described as 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. [Emphasis added]

[165] The Policy describes the role of Independent Counsel in terms of the presentation of the evidence before the Inquiry Committee in a fair, objective and complete manner, as the public

interest requires. It stresses that "Independent Counsel is impartial in the sense of not representing any client" [emphasis added].

[166] It is clear from the record that Mr. Pratte accepted the mandate to serve as Independent Counsel before the Inquiry Committee not as a lawyer for the Vice-Chair of the JCC, but under the terms set out in the CJC *By-laws* and Policy.

[167] The content of the CJC *By-laws* and Policy statements that relate to the role of the Independent Counsel reflects the intent to carve out a position at arms-length from both the CJC and the Inquiry Committee to ensure fairness in the presentation of the evidence to the Committee. In that role, Independent Counsel has no client. That role is inconsistent with the creation of a solicitor-client relationship if the letter and spirit of the *By-laws* and Policies are to have any real meaning.

[168] As noted above, I have read the correspondence between Messrs Sabourin and Pratte for which privilege is claimed. I am satisfied that the letter from Mr. Sabourin to Mr. Pratte dated August 29, 2011 confirming the latter's appointment as Independent Counsel does not support a conclusion that a solicitor-client relationship was being created. Apart from an undertaking by Mr. Sabourin to keep the agreed upon financial arrangements confidential, there is nothing in the letter that indicates that Mr. Pratte was being retained as a lawyer to provide legal advice to the Council. The letter, rather, stresses the independence of the role Mr. Pratte had agreed to take on.

[169] The undertaking of financial confidentiality was consistent with requirements under the *Professional Code*, RSQ, c C-26 regarding personal information held by Quebec lawyers such as Messrs Pratte and Sabourin. Confidentiality under that regime is not equivalent to solicitor-client

privilege. See for example *Foster Wheeler Power Co. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc*., 2004 SCC 18 at para 28.

[170] Also included in the sealed packet are several periodic accounts submitted by Mr. Pratte's law firm. While accounts of this nature may serve as evidence of a solicitor-client relationship, in this context they merely reflect the practical reality that Mr. Pratte and his team had to be reimbursed for the time and expenses incurred. A complete record was required as public funds were being expended. If a solicitor client relationship existed for the purpose of obtaining or giving legal advice, such accounts would be considered privileged communications: *Maranda v Richer*, 232 DLR (4^{th}) 14 (SCC) at p 335.

[171] The first indication in the documents contained in the sealed packet that privilege is being asserted over communications between the CJC and Mr. Pratte appears in a letter from Mr. Sabourin dated August 24, 2012. This was, of course, several days after Mr. Pratte had filed his application for judicial review. In his resignation letter dated August 26, 2012, Mr. Pratte sets out his understanding of the nature of the role of Independent Counsel and the relationship between that position and the CJC. In my view, the correspondence read as a whole does not support the CJC's contention that a solicitor-client relationship was established from the point at which Mr. Pratte was appointed or at any time thereafter.

[172] In correspondence to the Federal Court of Appeal in the *Cosgrove* matter in 2005, counsel for the CJC stressed that "…the Independent Counsel is a person distinct and separate from, and independent of, the CJC." The letter dated December 19, 2005, goes on to say:

> The sole function of the CJC in relation to the Independent Counsel is to appoint a person to fulfill that role in accordance with the criteria in s. 3 of the *CJC Inquiries and Investigations By-*

> *Laws*. The independent counsel acts independently, impartially and in the public interest.
>
> As a consequence, the CJC does not give instructions to, or take advice from, an Independent Counsel, nor does an Independent Counsel report to the CJC. […]
>
> Counsel for the appellant, in his written submissions, characterizes the reference to the CJC in the style of cause in this proceeding as encompassing the Independent Counsel. Given the position of the CJC as to the distinct and independent status of Independent Counsel, the CJC would not characterize the status of the Independent Counsel in that manner.

[173] Mr. Earl Cherniak, Q.C., served as Independent Counsel in the Cosgrove matter. In his affidavit sworn July 5, 2013 Mr. Cherniak attached excerpts from his submissions to the Inquiry Committee, the CJC and the Federal Court describing the independence of his role as Independent Counsel. At no time, Mr. Cherniak states, did he ask for or receive instructions from the CJC, and at no time did the CJC correct his understanding that he had no client. Mr. Cherniak was among the very senior counsel who had performed this role in the past that Mr. Pratte consulted upon assuming the mandate to confirm his understanding of its nature. The fact that the present Independent Counsel asserts a solicitor-client relationship with the CJC is, in my view, irrelevant as the parameters of her appointment, not disclosed to the Court, may be significantly different from those which pertained to Mr. Pratte's appointment.

[174] I note that the CJC denied Mr. Pratte access to information gathered by an investigator for the Review Panel on the ground that it was privileged. This is inconsistent with the position now taken by the CJC that it had a solicitor-client relationship with Mr. Pratte from the outset as that information would have presumably been covered by the communication privilege

stemming from the relationship, and no question of waiver would have arisen from disclosure to Mr. Pratte.

[175] In my view, no solicitor-client relationship was established between the CJC and Mr. Pratte in the course of his appointment as Independent Counsel. However, even if such a relationship was created for the limited purposes described by Mr. Sabourin, I am not satisfied that the communications pertaining to Mr. Pratte's appointment and resignation are privileged.

> *If a solicitor-client relationship existed, were the communications between Messrs. Sabourin and Pratte privileged?*

[176] Solicitor-client privilege has two branches: litigation and legal advice privilege. As explained by the Supreme Court in *Blank v Canada (Minister of Justice)*, 2006 SCC 39, litigation privilege attaches to documents created for the dominant purpose of litigation and constitutes a limited exception to the principle of full disclosure linked to the duration of the litigation. That is not what is asserted here by the CJC.

[177] Legal advice privilege attaches to communications between solicitors and clients for the purpose of obtaining or giving legal advice. The rationale is that individuals who require the assistance of a lawyer must be able to disclose fully and frankly to the lawyer all the information that the lawyer requires in order to provide sound advice in a legal context: *Slansky FCA*, above, at paragraph 66.

[178] In *Slansky FCA*, above, Justice Evans upheld the claim of the CJC that portions of an investigation report prepared by a lawyer fell within the legal advice branch of solicitor-client privilege. Mainville J.A. concurred in that finding but also upheld the claim against disclosure on the ground of a common law public interest privilege relating to judicial independence: *Slansky FCA*, above, at para 131. I note that the public interest in question concerned the non-disclosure of information obtained in confidence by the lawyer-investigator for the Council. Public interest privilege of a similar nature is not asserted in this proceeding.

[179] Until recently, the four elements of the test for determining whether a communication qualifies for legal advice privilege were well established. As discussed by Evans J.A. in *Slansky FCA*, at para 74, these were: (1) the communication must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct.

[180] This long-standing understanding of the nature of legal advice privilege has been called into question by comments made by Justice Binnie in the introduction to *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574 [*Blood Tribe*] at para 10 where he stated that solicitor-client privilege is:

> … applicable to all interactions between a client and his or her lawyer <u>when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer</u> rather than as a business counsellor or in some other non-legal capacity: … [emphasis added by Evans J.A.]

[181] In *Slansky FCA* the letter of engagement did not expressly include the provision of legal advice. The lawyer (Professor Emeritus Martin Friedland) was specifically instructed not to provide advice on the decision to be made regarding the complaint in question. However, he chose to include some recommendations in his report. In considering whether that information was privileged, Justice Evans had this to say about the effect of *Blood Tribe*:

> **89** […] However, *Blood Tribe* has somewhat modified the law as formulated in these cases in that a lawyer and client relationship will be established if the lawyer had been engaged to provide services in a legal context for which a lawyer's skills and knowledge are necessary, even if the services might not be regarded as the provision of legal advice in the ordinary sense, because, for example, the lawyer neither informs the client about their legal rights or duties, nor expressly advises on action to be taken by the client given the client's legal position.

[182] In the result, those portions of the Friedland report that contained advice were held to be privileged by the majority. The expanded view of the privilege arising from *Blood Tribe* was not, in my view, determinative of that outcome.

[183] In dissent, Justice Stratas rejected the claim of privilege over the disputed portions of the Friedland report. He conducted an extensive review of the general principles set out in the jurisprudence. Among other matters, he noted at paras 191-194 that the content of a retainer letter, should one exist, is of primary importance in assessing a claim of privilege. It defines the nature of the relationship, the purpose of the retainer, whether advice is to be given and the nature of that advice. It is the best evidence of the matters that *R v Campbell*, [1999] SCJ no 16, [1999] 1 SCR 565 [*Campbell*] states must be examined, and is written and agreed upon at the outset of the relationship before any controversy over solicitor-client privilege has arisen. Affidavit evidence that "seeks to add a gloss upon, modify, or supplant matters addressed in the

retainer letter must be approached with caution, perhaps even with suspicion": *Slansky FCA*, above, at para 193.

[184] I note that in *Campbell*, at para 50, Justice Binnie, for the Court, had observed that not everything lawyers do in the context of a solicitor-client relationship attracts privilege:

> [50] […] Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. […]

[185] Regarding the principle that legal advice is the gist of the privilege, Justice Stratas stresses that the focus must be on the nature of the work:

> [223] Instead, the documents or information said to be privileged must themselves be for the dominant purpose of giving or receiving legal advice or closely and directly related to the seeking, formulating or giving of legal advice: *Pritchard*, *supra*, at paragraph 15; *R. v. McClure*, 2001 SCC 14 (CanLII), 2001 SCC 14, [2001] 1 S.C.R. 445 at paragraph 36; *Campbell*, *supra*, at paragraph 49; *Descôteaux et al.*, *supra*, at page 872-873; *Solosky*, *supra*, at page 835; *Thompson v. Canada (Minister of National Revenue)*, 2013 FCA 197 (CanLII), 2013 FCA 197 at paragraph 40.

[186] In discussing whether "all interactions between a client and his or her lawyer when the lawyer is… otherwise acting as a lawyer" are now encompassed, Justice Stratas concludes that the Supreme Court could not have had the intent to expand the scope of the privilege by way of introductory remarks in a case in which the fact of the solicitor-client relationship was not in issue:

> [242] The precise issue in *Blood Tribe* was whether the Privacy Commissioner could access documents that were covered by solicitor-client privilege. Whether the documents were privileged was not in issue. Therefore, this introductory comment is surplusage.
>
> [243] Further, in adding the comment, "otherwise acting as a lawyer," I query whether the Supreme Court might have been alluding, infelicitously, to a different privilege, litigation privilege. Under that privilege, lawyers acting as a lawyer under a litigation retainer enjoy a zone of privacy. Of

> note, some of the cases cited in the same paragraph deal mainly with litigation privilege or, indeed, a different concept, professional secrecy under Quebec civil law. None of the cases cited support the proposition that solicitor-client privilege includes situations where a lawyer is "otherwise acting as a lawyer."
>
> [244] Outside of this infelicitously worded introduction in *Blood Tribe*, the Supreme Court has never considered "otherwise acting as a lawyer" to be enough for solicitor-client privilege to apply. Indeed, that would be contrary to its own authorities that the privilege is not triggered just because a lawyer is involved, and many other authorities to the effect that the activities of lawyers doing things typically done by lawyers are not necessarily privileged: *Pritchard*, *supra* at paragraphs 19-20; *Campbell*, *supra* at paragraph 50; authorities cited above at paragraphs 224-232.
>
> [245] Have decades of well-accepted jurisprudence in the law of solicitor-client privilege suddenly been swept aside by a sidewind – a fleeting, introductory comment in *Blood Tribe*? I think not.

[187] I have quoted at length from Justice Stratas' reasons in *Slansky FCA* as I think they are pertinent to the issue before me and correctly state the law. In this matter, the CJC claims privilege over communications between the Vice-Chair of the JCC, through Mr. Sabourin, and Mr. Pratte that have nothing to do with providing legal advice to the CJC but pertain entirely to the terms of Mr. Pratte's appointment as Independent Counsel to the Inquiry Committee and his resignation from that position.

[188] As discussed above, the August 29, 2011 letter from Mr. Sabourin to Mr. Pratte is the best evidence of the nature of the relationship between the Council and Mr. Pratte. There is no indication in the letter that Mr. Pratte is to provide legal advice to the CJC, to the Vice-Chair of the JCC or to Mr. Sabourin. The purpose of the appointment and the role of Independent Counsel are defined solely in the letter with respect to the presentation of evidence and submissions to the

Inquiry Committee. This role is presented to Mr. Pratte as a duty undertaken in the public interest.

[189] Mr. Sabourin's evidence is to the effect that there was a solicitor-client relationship with Mr. Pratte from the outset with respect to the formation and ending of the retainer, billing expectations, and the scope of Independent Counsel's mandate. As discussed above, the Court must consider with caution any evidence that attempts to "add a gloss on, modify or supplant" the terms of appointment. In this instance, the focus on the nature of the relationship arose only when Mr. Pratte claimed the right, as Independent Counsel, to seek judicial review of the Inquiry Committee's decisions.

[190] As discussed in *Slansky FCA*, by Justice Evans at paras 65-66 and Justice Stratas at paras 247-252, solicitor-client privilege exists to allow full and frank disclosure of information necessary for the provision of legal advice. It requires that all communications "made with a view to obtaining legal advice" be kept confidential, and is dependent on the existence of a solicitor-client relationship created with a view to obtaining legal advice. The mere fact that a lawyer is appointed to perform a legal function is not sufficient to establish either of these requirements. I therefore find that the communications between Messrs. Sabourin and Pratte relating to his appointment and resignation are not subject to solicitor-client privilege.

[191] I will accordingly direct, under Rule 318 of the *Federal Courts Rules*, that the correspondence between Messrs. Sabourin and Pratte in the sealed packet be released to the parties and be placed on the public file. In view of the undertaking by Mr. Sabourin that the financial arrangements agreed to by Mr. Pratte would not be disclosed, that part of the appointment letter and the statements of accounts will not be released.

Conclusions on the issue of institutional bias.

[192] It is undisputed that the subject of a judicial conduct proceeding is deserving of a high degree of fairness. As discussed by the Supreme Court in *Moreau-Bérubé*, above, at para 75, the duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority. The nature and extent of that duty is to be decided in the specific context of each case. In *Moreau-Bérubé*, the implications of the hearing for the respondent, the lack of an appeal and the similarity of the proceedings to a regular judicial process called for a generous construction of the right to be heard. The Federal Court of Appeal recognized in *Taylor*, above, at paras 92-93, that the duty of fairness requires that the CJC avoid creating a reasonable apprehension of bias against the respondent Judge.

[193] *Moreau-Bérubé* and *Taylor* dealt with the issue of fairness in the context of determinations by decision-makers that directly affected the interests of the individuals concerned: a provincially-appointed judge in *Moreau-Bérubé* and a complainant in *Taylor*. In both cases, the allegation of bias was directed at the body that had made the decision complained of. In this instance, the allegation relates to the institution as a whole but primarily to a participant in the process who will take no part in the actual decision-making: the Vice-Chair of the JCC.

[194] In the leading case on institutional bias, *Régie*, above, the involvement of staff lawyers at every level of the license revocation process from investigation to adjudication gave rise to a reasonable apprehension of bias of a systemic nature. Moreover, the Act and Regulations governing the *Régie* authorized the Chair to initiate an investigation, to decide to hold a hearing, to constitute the panel that was to hear the case, and to include himself or herself thereon if he or

she so desired. Other directors could similarly initiate an investigation and participate in the adjudication of the complaint.

[195] The structure of the CJC process, in contrast, was very carefully designed to avoid conflicts of the nature identified in *Régie*. In particular, it provides that decision-makers at each stage play no role in the ultimate determination of the merits. Specifically, the members of the JCC take no part in the Inquiry Committee or Council deliberations leading to the recommendation to the Minister of Justice. As discussed in *Régie*, concerns about institutional bias go to its possible influence on the minds of the decision-makers: see also *Lim v Association of Professional Engineers (Ontario)*, 2011 ONSC 106, (2011) 274 OAC 292 (Div Ct) at para 108.

[196] Here, even if there has been a wrongful assertion of a solicitor-client relationship between the Vice-Chair of the JCC and the Independent Counsel, the decision maker with regards to the merits of the complaints against the applicant is not the Vice-Chair of the JCC but the Inquiry Committee. The fact that the Vice-Chair of the JCC appointed the members of the Committee does not reasonably lead to a conclusion that the decision-makers would be thereby influenced by any assertion of a solicitor-client relationship by the Vice-Chair with the Independent Counsel: *Van Rassel v Canada (Superintendent of the Royal Canadian Mounted Police)*, [1987] 1 FC 47, [1986] FCJ no 740.

[197] Taking the applicant's allegations at their highest, what they believe occurred in this instance was an attempt to dissuade Independent Counsel from proceeding with an application for judicial review with respect to the Inquiry Committee's procedural rulings. Even if that allegation is true and can be substantiated by the correspondence between Messrs Sabourin and

Pratte, it would not establish a reasonable apprehension of bias on the part of the decision-maker unless there was evidence of an attempt to interfere with the impartial presentation of the evidence to the Inquiry Committee.

[198] I think it necessary to comment further on the scope of the Independent Counsel's role as the applicant's position rests largely on the assumption that the fairness of the inquiry process is dependent on the ability of the holder of that mandate to bring interlocutory challenges to decisions of the Inquiry Committee. The scope of the Independent Counsel's appointment is not without limits. It is made for a narrow purpose. That purpose is to "aid and assist in the conduct of an inquiry or investigation". The responsibility to conduct a fair investigation and inquiry rests with the CJC and the Inquiry Committee not the Independent Counsel. The role of Independent Counsel is to support the Inquiry Committee in that effort. It is not that of a free-standing public office. It is tied to the Inquiry Committee proceedings and functions solely to support those proceedings by presenting evidence and making submissions. Indeed, the policy expressly states that the Independent Counsel is subject to the rulings of the Inquiry Committee.

[199] Where Independent Counsel believes that the Committee has erred in the procedures it has adopted or in its rulings on evidentiary matters, his or her responsibility is to place those concerns on the inquiry record. It would then be open to the judge who is the subject of the inquiry, or any other person affected, to seek judicial review if they considered it necessary to address the concerns. The concerns may also be considered by the Council when it receives the Committee's report. The duty of fairness in this context does not require that Independent Counsel be recognized as having standing, in his or her own right, to challenge interlocutory decisions of the Inquiry Committee so long as the judge or other person affected is not precluded

from doing so in appropriate circumstances. Such circumstances may include a decision or conduct by the Committee that is believed to be *ultra vires* its jurisdiction.

[200] There is no suggestion in these proceedings that the Vice-Chair of the JCC, or anyone else from the CJC interfered with Mr. Pratte's presentation of evidence and submissions to the Inquiry Committee. At best, there is only vague and unsubstantiated speculation that the assertion of a solicitor-client relationship could lead to the issuance of "secret instructions" incompatible with the Independent Counsel's duty to act impartially and in the public interest. This speculation cannot support a finding of a reasonable apprehension of bias.

CONCLUSION:

[201] In the result, I find that the CJC's objection to the jurisdiction of this Court to adjudicate applications for judicial review relating to investigations or inquiries conducted by the Council under s 63 of the *Judges Act* does not succeed and that the application herein is not premature. But I also find that the assertion of a solicitor-client relationship between the Vice-Chair of the JCC, on behalf of the CJC, and the Independent Counsel, incorrect in my view, does not give rise to a reasonable apprehension of institutional bias.

[202] The applicant has not established that a well-informed person viewing the matter realistically and practically, and having thought the matter through, would conclude that the Vice-Chair of the JCC had demonstrated bias in asserting a solicitor-client relationship or would do so in a substantial number of cases.

[203] Judgment will therefore go in favour of the applicant on the jurisdiction and prematurity issues and against her on the third issue, institutional bias. The applicant has requested costs on a substantial indemnity basis. In light of that request I assume that her costs in respect of this application are not being paid by the Commissioner for Federal Judicial Affairs as in the inquiry proceedings. The intervenors and the respondent have not requested costs. It would appear that the CJC and present Independent Counsel will have their costs met through the Council's budget. Counsel may advise the Court if these assumptions are incorrect.

[204] The Court has the discretion in appropriate cases to award costs to an unsuccessful party: *M v H*, [1996] OJ no 2597 (QL) (Ct J (Gen Div)) at paras 17, 30; *Re Lavigne and Ontario Public Service Employees Union et al (No. 2)*, [1987] OJ no 653 (QL) (HCJ) [*Lavigne*] at para 106, rev'd but aff'd as to costs [1989] OJ no 95 (CA) (QL) at paras 100-107, appeal judgment aff'd [1991] 2 SCR 211.

[205] While the applicant was not successful on the issue of institutional bias, I am satisfied that in light of the circumstances in which the application was brought, the applicant should have her costs against the CJC on the normal scale.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion for directions under Rule 318 of the *Federal Courts Rules* is granted and the contents of the sealed packet filed by the Canadian Judicial Council shall be released to the parties and placed on the public file subject to instructions to be issued to the Registry regarding information to be kept confidential;

2. Implementation of the Direction in paragraph 1 above shall be suspended for thirty (30) days pending any notice of appeal and motion for a stay that may be filed with respect to this judgment;

3. The application for an Order declaring that the Canadian Judicial Council's assertion of a solicitor-client relationship with Independent Counsel gives rise to a reasonable apprehension of institutional bias is dismissed;

4. The application for an Order prohibiting the Canadian Judicial Council from continuing the proceedings against the applicant is dismissed; and

5. The applicant shall have her costs against the Canadian Judicial Council on the normal scale.

"Richard G. Mosley"

Judge

ANNEX

[206] The relevant provisions of the *Judges Act*, the *Federal Courts Act*, and the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (the *Constitution Act, 1867*) are set out in the Annex. The CJC's By-laws, Complaints Procedures, and Policies are also set out in the Annex.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 99, reprinted in RSC 1985, App II, No 5.	**Loi constitutionnelle de 1867 (R-U), 30 & 31 Vict, c 3, art 99, reproduit dans LRC 1985, ann II, n° 5.**
VII. JUDICATURE	**VII. JUDICATURE**
[…]	**[…]**
Tenure of office of Judges	**Durée des fonctions des juges**
99. (1) Subject to subsection (2) of this section, 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.	99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.
Federal Courts Act, RSC 1985 c F-7, ss 2, 18.1.	**Loi sur les Cours fédérales, LRC 1985, c F-7, arts 2, 18.1.**
[…]	**[…]**
INTERPRETATION	**DÉFINITIONS**
Definitions 2. (1) In this Act,	**Définitions** 2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[…]

"federal board, commission or other tribunal"
« office fédéral »

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 ;

[…]

Senate and House of Commons

(2) For greater certainty, the expression "federal board, commission or other tribunal", as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer or the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the Parliament of Canada Act.

[…]

« office fédéral »
"federal board, commission or other tribunal"

« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.

[…]

Sénat et Chambre des communes

(2) Il est entendu que sont également exclus de la définition de « office fédéral » le Sénat, la Chambre des communes, tout comité ou membre de l'une ou l'autre chambre, le conseiller sénatorial en éthique et le commissaire aux conflits d'intérêts et à l'éthique à l'égard de l'exercice de sa compétence et de ses attributions visées aux articles 41.1 à 41.5 et 86 de la Loi sur le Parlement du Canada.

[…]

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Federal Courts Rules, SOR/98-106, rr 317-318.

[…]

Material in the Possession of a Tribunal

Material from tribunal

[…]

Recours extraordinaires : offices fédéraux

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Règles des Cours fédérales, DORS/98-106, rr 317-318.

[…]

Obtention de documents en la possession d'un office fédéral

Matériel en la possession de l'office fédéral

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[…]

[…]

Material to be transmitted

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Documents à transmettre

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Opposition de l'office federal

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directions as to procedure

(3) The Court may give

Directives de la Cour

(3) La Cour peut donner aux

directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Judges Act, RSC 1985, c J-1.

Loi sur les juges, LRC 1985, c J-1.

[…[

[…]

PART II

PARTIE II

CANADIAN JUDICIAL COUNCIL

CONSEIL CANADIEN DE LA MAGISTRATURE

Interpretation

Définition

Definition of "Minister"

Définition de « ministre »

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

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

Constitution of the Council

Constitution et fonctionnement du Conseil

[…]

[…]

Objects of Council

Mission du Conseil

60. (1) The objects of the

60. (1) Le Conseil a pour

Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

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.

Powers of Council

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

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

(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.

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) 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.

[…]

[…]

By-laws

(3) The Council may make by-laws

[…]

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

Règlements administratifs

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

[…]

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

Employment of counsel and assistants

Nomination du personnel

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.

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.

Inquiries concerning Judges

Enquêtes sur les juges

Inquiries

Enquêtes obligatoires

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).

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

Enquêtes facultatives

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

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

Inquiry Committee

Constitution d'un comité d'enquête

(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.

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

Pouvoirs d'enquête

(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.

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

Avis de l'audition

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

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.

les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

Report and Recommendations

Rapports et recommandations

Report of Council

Rapport du Conseil

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
.

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

Recommendation to Minister

Recommandation au 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

(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) age or infirmity,

a) âge ou invalidité;

(b) having been guilty of misconduct,

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

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

c) manquement aux devoirs de sa charge;

(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),

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.
[No translation]

may recommend that the judge be removed from office.

[…]

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.

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.

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

[…]

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.

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.

Règlement administratif du Conseil canadien de la magistrature sur les enquêtes,

DORS/2002-371.

INTERPRETATION

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

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

"Judicial Conduct Committee"
"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 Chair or Vice-Chair 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 shall be constituted under subsection 63(3) of the Act.

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

DÉFINITIONS

1. Les définitions qui suivent s'appliquent au présent règlement administratif.

« Loi »
« Loi » La Loi sur les juges. (Act)

« comité sur la conduite des juges »
« comité sur la conduite des juges » Comité du Conseil constitué par celui-ci et désigné comme tel. (Judicial Conduct Committee)

CONSTITUTION ET POUVOIRS DU COMITÉ D'EXAMEN

1.1 (1) Le président ou le vice-président du comité sur la conduite des juges qui examine une plainte ou une accusation relative à un juge d'une juridiction supérieure peut, s'il décide que l'affaire nécessite un examen plus poussé, constituer un comité d'examen chargé de décider s'il y a lieu de constituer un comité d'enquête en vertu du paragraphe 63(3) de la Loi.

(2) Le comité d'examen se compose de trois ou cinq juges, dont la majorité sont des membres du Conseil, nommés par le président ou le vice-président du comité sur la conduite des juges.

(3) The Review Panel may decide that an Inquiry Committee shall be constituted only in a case where the matter might be serious enough to warrant removal of a judge.

(3) Le comité d'examen ne peut décider qu'un comité d'enquête doit être constitué que si l'affaire en cause pourrait s'avérer suffisamment grave pour justifier la révocation d'un juge.

(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.

(4) Le cas échéant, il envoie sans délai au ministre une copie de sa décision de constituer le comité d'enquête, accompagnée d'un avis l'invitant à adjoindre, en application du paragraphe 63(3) de la Loi, des avocats au comité.

CONSTITUTING AN INQUIRY COMMITTEE

CONSTITUTION DU COMITÉ D'ENQUÊTE

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 Chair or Vice-Chair of the Judicial Conduct Committee.

2. (1) Le comité d'enquête constitué aux termes du paragraphe 63(3) de la Loi se compose d'un nombre impair de membres dont la majorité sont des membres du Conseil nommés par le président ou le vice-président du comité sur la conduite des juges.

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

(1.1) Si, dans les soixante jours suivant la réception de l'avis visé au paragraphe 1.1(4), le ministre n'adjoint aucun avocat au comité d'enquête, le président ou le vice-président du comité sur la conduite des juges peut nommer d'autres membres du Conseil pour compléter la composition du comité.

(2) The Chair or Vice-Chair of

(2) Le président ou le vice-

the Judicial Conduct Committee shall choose one of the members of the Inquiry Committee to be the Chair of the Inquiry Committee.

président du comité sur la conduite des juges désigne le président du comité d'enquête parmi les membres de celui-ci.

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

(3) Ne peuvent être membres du comité d'enquête :

(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

a) ceux qui sont membres de la cour dont le juge en cause fait partie;

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

b) ceux qui ont participé aux délibérations du comité d'examen sur la nécessité de constituer un comité d'enquête.

INDEPENDENT COUNSEL

AVOCAT INDÉPENDANT

3. (1) The Chair or Vice-Chair 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.

3. (1) Le président ou le vice-président du comité sur la conduite des juges nomme à titre d'avocat indépendant un avocat qui est membre du barreau d'une province depuis au moins dix ans et dont la compétence et l'expérience sont reconnues au sein de la communauté juridique.

(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.

(2) L'avocat indépendant présente l'affaire au comité d'enquête, notamment en présentant des observations sur les questions de procédure ou de droit qui sont soulevées lors de l'audience.

(3) The Independent Counsel shall perform their duties impartially and in accordance

(3) L'avocat indépendant agit avec impartialité et conformément à l'intérêt public.

with the public interest.

[…]

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.

[…]

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

[…]

DÉROULEMENT DE L'ENQUÊTE

5. (1) Le comité d'enquête peut examiner toute plainte ou accusation pertinente formulée contre le juge qui est portée à son attention.

(2) L'avocat indépendant donne au juge, à l'égard des plaintes ou accusations que le comité d'enquête entend examiner, un préavis suffisamment long pour lui permettre d'offrir une réponse complète.

[…]

7. Le comité d'enquête mène l'enquête conformément au principe de l'équité.

RAPPORT DU COMITÉ D'ENQUÊTE

8. (1) Le comité d'enquête remet au Conseil un rapport dans lequel il consigne les résultats de l'enquête et ses conclusions quant à savoir si la révocation du juge devrait être recommandée.

(2) Une fois le rapport remis au Conseil, le directeur exécutif du Conseil en remet une copie au juge, à l'avocat indépendant et à toute autre personne ou entité ayant obtenu qualité pour agir à l'audience.

standing in the hearing.

[…]

[…]

JUDGE'S RESPONSE TO THE INQUIRY COMMITTEE REPORT

RÉPONSE DU JUGE AU RAPPORT

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.

9. (1) Le juge peut, dans les trente jours suivant la réception du rapport, présenter des observations écrites au Conseil au sujet de celui-ci.

[…]

[…]

10. (1) 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.

10. (1) Si le juge présente des observations écrites au sujet du rapport d'enquête, le directeur exécutif du Conseil en remet une copie à l'avocat indépendant. Celui-ci peut, dans les quinze jours suivant la réception de la copie, envoyer au Conseil une réponse écrite.

MEETINGS OF COUNCIL CONCERNING THE REMOVAL OF JUDGES FROM OFFICE

RÉUNIONS DU CONSEIL CONCERNANT LA RÉVOCATION DES JUGES

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

[…]

10.1 (1) Le plus ancien membre du comité sur la conduite des juges qui est admis à participer aux délibérations concernant la révocation d'un juge d'une juridiction supérieure et est disponible à cette fin préside les réunions du Conseil portant sur ces délibérations.

[…]

(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.

(3) Le quorum pour toute réunion délibératoire du Conseil concernant la révocation d'un juge d'une juridiction supérieure est de dix-sept membres.

[…]

[…]

CONSIDERATION OF THE INQUIRY COMMITTEE REPORT BY THE COUNCIL

EXAMEN DU RAPPORT DU COMITÉ D'ENQUÊTE PAR LE CONSEIL

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

11. (1) Le Conseil examine le rapport du comité d'enquête et toute observation écrite du juge ou de l'avocat indépendant.

(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.

(2) Les personnes visées à l'alinéa 2(3)b) et les membres du comité d'enquête ne peuvent participer à l'examen du rapport par le Conseil ou à toute autre délibération du Conseil portant sur l'affaire.

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.

12. Si le Conseil estime que le rapport d'enquête n'est pas clair ou est incomplet et que des éclaircissements ou qu'un complément d'enquête sont nécessaires, il renvoie tout ou partie de l'affaire au comité d'enquête en lui communiquant ses directives.

REPORT OF COUNCIL

RAPPORT DU CONSEIL

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.

13. Le directeur exécutif du Conseil remet au juge une copie du rapport des conclusions du Conseil présenté au ministre.

Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges, Complaints Procedures"	**Procédures à l'examen des plaintes déposées au Conseil canadien de la magistrature au sujet de juges de nomination fédérale, « Procédures relatives aux plaintes »**
[…]	[…]
3. Review by the Chair or Vice-Chairs of the Judicial Conduct Committee	3. Examen de la plainte par le président ou par un vice-président du comité sur la conduite des juges
3.1 The Chair of the Council does not participate in the consideration of any complaint by the Council.	3.1 Le président du Conseil ne peut participer à l'examen d'une plainte par le Conseil.
3.2 The Executive Director shall refer a file to either the Chair or a Vice-Chair of the Judicial Conduct Committee in accordance with the directions of the Chair of the Committee. The Chair or a Vice-Chair shall not deal with a file involving a judge of their court.	3.2 Le directeur exécutif transmet un dossier au président ou à un viceprésident du comité sur la conduite des juges conformément aux directives du président du comité. Ni le président non plus que les viceprésidents ne doivent examiner un dossier mettant en cause un juge qui est membre de la même cour qu'eux.
3.3 Throughout the remainder of these procedures "Chair" refers to either the Chair or one of the Vice-Chairs of the Judicial Conduct Committee established by the Council.	3.3 Pour l'application des dispositions qui suivent, le terme « président » désigne le président ou l'un des viceprésidents du comité sur la conduite des juges constitué par le Conseil.
[…]	[…]

3.5 The Chair 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 a n 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.

3.5 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.

[…]

[…]

9. Consideration by a Panel

9. Comité d'examen

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

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 After referring a file to a

9.2 Après avoir renvoyé un

Panel, the Chair shall not participate in any further consideration of the merits of the complaint by the Council.	dossier à un comité d'examen, le président ne peut participer à aucun autre examen du bien-fondé de la plainte par le Conseil.
[…]	[…]
9.6 After reviewing the file and considering any written submissions from the judge, the Panel may:	9.6 Après avoir examiné le dossier et les observations écrites du juge, le comité d'examen peut :
[…]	[…]
(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.	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.

CJC Policies regarding Inquiries / Politiques du CCM à l'égard des enquêtes

CJC 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.
[…]

*****

Politique sur les comités d'enquête
Un comité d'enquête a la responsabilité entière et le contrôle du champ et de la portée de son enquête sur la conduite d'un juge. Dès le début et tout au long des audiences, le comité d'enquête compte grandement sur l'avocat indépendant pour s'assurer que tous les éléments de preuve pertinents soient recueillis, organisés, présentés et testés lors des audiences. Cependant, le comité d'enquête ne cède pas sa propre responsabilité à l'avocat indépendant, puisque le Conseil canadien de la magistrature compte sur le comité d'enquête pour obtenir un rapport complet. L'une des principales fonctions du comité d'enquête est de tirer des conclusions de fait.
[…]

CJC 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.

*****

Politique sur l'avocat indépendant

La raison d'être de la création du poste d'avocat indépendant est de permettre à cet avocat d'agir sans lien de dépendance avec le Conseil canadien de la magistrature et le comité d'enquête. Cela permet à l'avocat indépendant de présenter et de tester les éléments de preuve avec vigueur, abstraction faite des vues préalables du comité d'enquête ou du Conseil. Le comité d'enquête

compte sur l'avocat indépendant pour qu'il présente de façon complète et impartiale les éléments de preuve pertinents concernant les allégations faites contre le juge.

Le rôle de l'avocat indépendant est exceptionnel. Une fois qu'il est nommé, l'avocat indépendant n'agit pas selon les instructions d'un client quelconque, mais en conformité avec le droit et d'après son avis professionnel de ce qu'exige l'intérêt public. Il s'agit d'une importante responsabilité publique qui nécessite les services d'un avocat dont la compétence et l'expérience sont reconnues dans le monde juridique.

Bien entendu, l'avocat indépendant doit se conformer aux décisions du comité d'enquête, mais il est censé prendre l'initiative de recueillir, d'organiser et de présenter les éléments de preuve au comité d'enquête. Au préalable, il faut considérer la pertinence de toute autre plainte ou allégation faite contre le juge, au-delà de la portée de la plainte initiale ou de la requête en vertu du paragraphe 63(1) de la Loi sur les juges. Il peut être nécessaire d'interroger d'autres témoins et d'obtenir des documents additionnels.

L'intérêt public exige que toute la preuve soit présentée, qu'elle soit favorable ou défavorable au juge. L'intérêt public peut aussi exiger que la preuve, y compris celle du juge, soit testée au moyen d'un contre-interrogatoire, d'un témoignage contradictoire, ou les deux. Cela doit se faire avec impartialité et objectivité et de façon complète.

L'avocat indépendant est impartial en ce sens qu'il ne représente aucun client, mais il doit être rigoureux, si nécessaire, et examiner pleinement toutes les questions, y compris tout point litigieux qui peut survenir. Lorsque c'est nécessaire, l'avocat indépendant peut devoir adopter une position ferme à l'égard des questions en cause. Il faut cependant se rappeler qu'il se peut que le juge continue d'exercer ses fonctions judiciaires dans l'avenir, de telle sorte que toute observation concernant la crédibilité ou les motifs du juge doit être soigneusement considérée.

À la différence d'autres instances, comme un procès civil, l'avocat indépendant n'a aucun pouvoir de négocier le « règlement » des questions devant le comité d'enquête. Cependant, les observations de l'avocat indépendant seront considérées par le comité d'enquête.

CJC Policy on Council Review of Inquiry Committee Report

At the Inquiry Committee stage, the judge has been given a full opportunity to participate in the proceedings, present evidence, make submissions. A full review of the issues has taken place. As a result, Council accords considerable deference to the report of the Inquiry Committee, particularly in relation to its findings of fact and especially in its assessment of credibility. The Council will give serious consideration to the recommendations of the Inquiry Committee but ultimately must report its own conclusions to the Minister pursuant to section 65(1) of the Act.

The review by the Council is based on the record and report of the Inquiry Committee and on written submissions by the judge and by Independent Counsel. These are limited to thirty pages each.

No grounds are specified for the Council's review of the report of the Inquiry Committee. The Judge is free to make any submissions deemed advisable as to why the Council should depart from the report of the Inquiry Committee. Such submissions may include reasons why the Council should not recommend removal, even on the facts as found by the Inquiry Committee.

Subject to the provisions of the Judges Act and Council's by-laws, Council remains master of its own procedure and may depart from this policy in the public interest, where it finds that such departure will assist it in discharging its duties. For example, Council may invite the judge to appear and make a brief personal statement regarding the effect of the judge's conduct on public confidence in the judiciary.

*****

Politique sur l'examen du rapport du comité d'enquête par le Conseil
À l'étape du comité d'enquête, le juge a pleinement l'occasion de participer aux audiences, de présenter sa preuve et de faire des observations. Les questions en cause font l'objet d'un examen complet. En conséquence, le Conseil donne beaucoup de poids au rapport du comité d'enquête, en particulier à ses conclusions de fait et surtout à son évaluation de la crédibilité. Le Conseil donne également du poids aux conclusions du comité d'enquête, mais, en définitive, il doit présenter au ministre un rapport sur ses propres conclusions en vertu du paragraphe 65(1) de la Loi sur les juges.

L'examen du Conseil est fondé sur le dossier et le rapport du comité d'enquête. Aucunes soumissions orales sont entendues. Les observations écrites du juge et de l'avocat indépendant ne doivent pas avoir plus de trente pages.

Aucun motif n'est spécifié en ce qui concerne l'examen du rapport du comité d'enquête par le Conseil. Le juge est libre de faire toute observation qu'il estime utile à savoir pourquoi le Conseil ne devrait pas tenir compte du rapport du comité d'enquête. Dans ses observations, le juge peut notamment indiquer pourquoi le Conseil ne devrait pas recommander sa révocation, même selon les faits constatés par le comité d'enquête.

Sous réserve des dispositions de la Loi sur les juges et de celles de son règlement administratif, le Conseil demeure maître de sa procédure et peut écarter la présente politique s'il estime que cela lui permettra de remplir ses obligations. Par exemple, le Conseil peut inviter le juge à se présenter devant lui pour faire une brève déclaration personnelle concernant les conséquences de la conduite du juge à l'égard de la confiance du public.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1567-12
STYLE OF CAUSE:	THE HONOURABLE LORI DOUGLAS v THE ATTORNEY GENERAL OF CANADA AND THE CANADIAN JUDICIAL COUNCIL, AND THE INDEPENDENT COUNSEL TO THE CANADIAN JUDICIAL COUNCIL AND THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 27-28-29, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	MARCH 28, 2014

APPEARANCES:

Sheila Block Molly Reynolds	FOR THE APPLICANT
Catherine A. Lawrence Zoe Oxaal	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
Suzanne Côté Alexandre Fallon	FOR THE INTERVENERS INDEPENDENT COUNSEL TO THE CANADIAN JUDICIAL COUNCIL
Paul Cavalluzzo Freya Kristjanson Adrienne Telford	FOR THE INTERVENERS THE CANADIAN JUDICIAL COUNCIL

Chris Piliare Richard Stephenson	FOR THE INTERVENERS THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

SOLICITORS OF RECORD:

Sheila Block Molly Reynolds Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
Suzanne Côté Alexandre Fallon Barristers and Solicitors Montreal, Quebec	FOR THE INTERVENERS INDEPENDENT COUNSEL TO THE CANADIAN JUDICIAL COUNCIL
Paul Cavalluzzo Freya Kristjanson Adrienne Telford Barristers and Solicitors Ottawa, Ontario	FOR THE INTERVENERS THE CANADIAN JUDICIAL COUNCIL
Chris Paliare Richard Stephenson Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENERS THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION