



CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INVESTIGATION PURSUANT TO SECTION 63(2) OF THE *JUDGES ACT* REGARDING THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

DATE: NOVEMBER 4, 2014 (Corrected)

RULING OF THE INQUIRY COMMITTEE ON PRELIMINARY MOTIONS OF ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

I. INTRODUCTION

- [1] This Inquiry Committee (“**Committee**”) was established and its members appointed on March 13, 2014, to inquire into and report its findings to the Canadian Judicial Council (“**CJC**”) in relation to complaints and allegations made against Associate Chief Justice Lori Douglas (“**ACJ Douglas**”). The Committee was appointed after the members of a previous Inquiry Committee (the “**former Inquiry Committee**”), which had been established in relation to this matter, have resigned. The Committee has determined that it would undertake a fresh inquiry and start anew.
- [2] The allegations at issue in this inquiry are set out in a Notice to Associate Chief Justice Lori Douglas (“**Notice of allegations**”) dated August 20, 2014, provided to ACJ Douglas by Independent Counsel.
- [3] The Notice of allegations presents the three following allegations and it is stressed that such allegations have yet to be established:

(1) Alleged Failure to Disclose in the Application Process

4. On December 17, 2004, Ms. Douglas, as she then was, completed a Personal History Form ("Form") in connection with an application for judicial appointment. One of the questions on the Form was: "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?". Ms. Douglas answered "No".

5. At the time of completing the Form, Ms. Douglas knew or ought to have known that:

- a) In 2002 and 2003, graphic photos of a sexual nature of her (some of which could be seen as demeaning to women) (the "Photos") were available on the [REDACTED] website (the "Website"), having been uploaded onto the Website by Ms. Douglas' husband, Mr. King;
- b) In April and May of 2003, Mr. King had tried to entice one of his clients, Mr. Chapman, into a sexual relationship with Ms. Douglas, in part by referring him to the Photos on the Website and by sending him certain of the Photos by email;
- c) Ms. Douglas had met with Mr. Chapman on May 16, 2003 and May 30, 2003;
- d) On June 9, 2003, Mr. Chapman had complained to Thompson Dorfman Sweatman LLP (the "Firm"), where Ms. Douglas and Mr. King were practicing family law as partners, of Mr. King's conduct, had threatened legal action against Mr. King and the Firm and had provided the Firm with copies of the Photos;
- e) As a result of being made aware of Mr. King's conduct, the Firm had required Mr. King to leave the Firm;
- f) In June and July, 2003, the Photos had been removed from the Website at Mr. King's request, Mr. Chapman had represented having returned all of the Photos in his possession and having not engaged in their distribution, and Mr. King and Ms. Douglas had destroyed all the Photos in their possession, both in electronic and paper form;
- g) Mr. Chapman had returned the photos pursuant to the terms of a settlement agreement concluded between him and Mr. King, Mr. King having paid \$25,000.00 to Mr. Chapman, which sum had been loaned by Ms. Douglas to Mr. King; and,
- h) The facts referred to above were or could be relevant to the assessment of her application for judicial appointment and should have been disclosed.

6. This allegation, if accepted by the Committee, is: 1) capable of supporting a finding that ACJ Douglas is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the Judges Act, and, 2) capable of supporting a recommendation for removal.

(2) Alleged Incapacity as a Result of the Public Availability of the Photos

7. Since 2002, the Photos (including alterations thereof) have been (and continue to be) available on the internet from time to time. The Photos could be seen as inherently contrary to the image and concept of integrity of the judiciary, such that the confidence of individuals appearing before the judge, or of the public in its justice system, could be undermined.

8. This allegation, if accepted by the Committee, is: 1) capable of supporting a finding that ACJ Douglas is “incapacitated or disabled from the due execution of the office of judge” within the meaning of subsection 65(2) of the Judges Act, and, 2) capable of supporting a recommendation for removal.

(3) Alleged Failure to Fully Disclose Facts to former Independent Counsel

9. Upon being advised of the complaint by Mr. Chapman and the initiation of an investigation by the Canadian Judicial Council, ACJ Douglas modified a personal diary that described an encounter with Mr. Chapman which she knew or ought to have known was relevant to the CJC’s investigation. ACJ Douglas subsequently made incorrect representations to former Independent Counsel about that modification.

10. This allegation, if accepted by the Committee, is: 1) capable of supporting a finding that ACJ Douglas is “incapacitated or disabled from the due execution of the office of judge” within the meaning of subsection 65(2) of the Judges Act, and, 2) capable of supporting a recommendation for removal.

- [4] On October 1, 2014, ACJ Douglas filed a Notice of Motion which seeks the following orders:

THE MOTION IS FOR an order:

- (a) summarily dismissing Allegations #1 and #2 from the Notice of Allegations;
 - (b) striking Allegation #3 from the Notice of Allegations for a lack of jurisdiction, or in the alternative summarily dismissing Allegation #3;
 - (c) returning Douglas ACJ’s photographs, and if necessary, declaring that the photographs are inadmissible;
 - (d) sealing the confidential private medical evidence filed by Douglas ACJ in support of this motion;
 - (e) that the hearing of the motions take place outside of Manitoba;
- or such other relief as this Inquiry Committee may deem just.*

- [5] The Committee has already confirmed, through counsel to the Committee, that it had granted on its own motion the relief sought in paragraph (d) above.

- [6] The Committee also issued a ruling on October 13, 2014, denying the relief sought in paragraph (e) above. The hearing relating to the remaining orders sought in paragraphs (a), (b) and (c) of the preliminary motion took place in Winnipeg on October 27 and 28, 2014 (the “**Preliminary motions**”).
- [7] At the outset of the hearing of the Preliminary motions, the Committee denied the reliefs sought in paragraphs (a) and (c), with reasons to follow, and reserved judgment in relation to the relief sought in paragraph (b). For the reasons set out below, the Committee also denies the relief sought in paragraph (b).

II. THE RELEVANT STATUTORY FRAMEWORK

- [8] The statutory criteria for a recommendation that a Judge be removed from office reside in s. 65(2) of the *Judges Act*¹, which reads as follows:

65. (1) ...

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

(a) age or infirmity,

(b) having been guilty of misconduct,

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

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

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

- [9] The underlying statutory framework for a recommendation under s. 65(2) of the *Judges Act* is set forth in s. 63 which provides for either an inquiry or an investigation in respect of a judge of a superior court. Under s. 65(3)(1) of the *Judges Act*, the Council is mandated to commence an inquiry as to whether a judge should be removed from office for any of the reasons set out in sections 65(2) (a) to (d) on the request of the Minister of Justice (the “**Minister**”) or the Attorney General of a province.

¹ R.S.C., 1985, c. J-1.

- [10] Under s. 63(2) of the *Judges Act*, the Council is empowered to investigate any complaint or allegation made in respect of a judge.
- [11] Under s. 63(3) of the *Judges Act*, the Council is empowered to constitute an Inquiry Committee “for the purpose of conducting an inquiry or investigation” under s. 63.
- [12] Section 64 of the *Judges Act* requires the Council to give “reasonable notice of the subject matter of the inquiry or investigation ...”. Section 65(1) provides that after the inquiry or investigation is finished, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.
- [13] Section 61 of the *Judges Act* provides that Council may make by-laws respecting the conduct of inquiries and investigations described in s. 63.
- [14] The *Canadian Judicial Council Inquiry and Investigations By-Laws*² (the “**By-Laws**”) were adopted by Council pursuant to s. 61(3) of the *Judges Act*. Those By-Laws provide for the processing of complaints or allegations made under s. 63(2) of the *Judges Act*. The provisions of the By-Laws respecting that process are set out, in part, in ss. 1.1 (1), (2) and (3):
 - 1.1 (1) *The Chairperson or Vice-Chairperson of the Judicial Conduct Committee who considers a complaint or allegation made in respect of a judge of a superior court may, if they determine that the matter warrants further consideration, constitute a Review Panel to decide whether an Inquiry Committee 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 Chairperson or Vice-Chairperson of the Judicial Conduct Committee.*
 - (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.*
- [15] Subsection 5(1) of the By-Laws provides as follows:

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

² SOR/2002-371.

- [16] Subsection 5(2) of the By-Laws also requires Independent Counsel to give the judge “sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.”
- [17] In the “CJC Policies regarding Inquiries”, the “Policy on Inquiry Committees” reads in part as follows:

Prior to the hearings, Independent Counsel should advise the Committee and the Judge of the “case” Counsel intends to present, including the evidence and witnesses to be called. There may be additional allegations about the Judge’s conduct that were not contained in the initial complaint or a request under s. 63(1) of the Act. For example these could come to light as a result of publicity giving to the forthcoming hearings or in the course of Counsel’s preparation for them. Subject to the Committee’s direction and subject to fair and proper notice to the Judge, such additional allegations could be included in the scope of the inquiry. The Committee may also direct the Independent Counsel to explore additional issues and present additional evidence. The Committee may also act on its own to explore additional issues.

- [18] Under the “Policy on Independent Counsel”, the following is noted:

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.

- [19] The CJC has also approved a policy titled “Procedures for Dealing with Complaints Made to the Canadian Judicial Council about Federally Appointed Judges” (the **“Complaints Procedures”**).
- [20] In a ruling of the Committee on Independent Counsel’s motion to seek directions dated September 30, 2014, the different steps of the investigation and inquiry process established by the *Judges Act*, regulations, and policies were set out in paragraph 8 as follows:

[8] Typically, this process tracks the following steps, commonly referred to as being the “screening process” prior to the constitution of an Inquiry Committee:

- a) *Receipt of a complaint and file opening: Upon receipt of a complaint in writing, the Executive Director of the Council opens a file, unless the complaint is clearly irrational or an obvious abuse of the complaints process.*

b) *Review by the Chairperson or Vice-Chairpersons of the Judicial Conduct Committee: The Executive Director may refer a complaint to the Chairperson or Vice-Chairpersons of the Judicial Conduct Committee for review.*

At this stage, the Chairperson may: i) close the file; ii) seek additional information from the complainant; or iii) seek the judge's comments and those of their Chief justice.

c) *Consideration of Response of the Judge by the Chairperson or Vice-Chairpersons of the Judicial Conduct Committee: After reviewing the response of the judge and their Chief justice, together with any other information received, the Chairperson may: i) close the file; ii) hold the file in abeyance until counselling or remedial measures have been completed; iii) ask an outside counsel to make further inquiries and prepare a report, or iv) refer the file to a Panel.*

d) *Consideration of Outside Counsel's Report: If the Chairperson has retained outside counsel, he must review the latter's report and may: i) close the file; ii) hold the file in abeyance until counselling or remedial measures have been completed; iii) refer the file to a Panel.*

e) *Consideration by a Panel: If a file is referred to a Panel, then after reviewing the file and any written submissions, the Panel may: i) direct that further inquiries be made by Outside Counsel; ii) close the file; iii) hold the file in abeyance until counselling or remedial measures have been completed; or iv) decide that an Inquiry Committee be constituted under section 63(3) of the Judges Act provided the matter is potentially serious enough to warrant removal.*

f) *Consideration by an Inquiry Committee: An Inquiry Committee investigates any complaint or allegations made in respect of a judge of a superior court. After an inquiry, the Council shall report its conclusion to the Minister of Justice, and may recommend that the judge be removed from office.*

III. THE REQUEST TO SUMMARILY DISMISS ALLEGATIONS #1 AND #2

- [21] Counsel for ACJ Douglas notably argues that since the time of the Review Panel's report in this matter, legislative, social, and academic changes have contributed to a growing awareness of the harms occasioned to victims of the non-consensual distribution of intimate images and the need to punish the perpetrators and protect the victims. She notes that Parliament has introduced proposed legislation to criminalize the non-consensual distribution of intimate images through amendments to the *Criminal Code* in *Bill C-13*, that public opinion has developed to recognize that victims of the non-consensual distribution of intimate images should not be punished or blamed and that it is the perpetrators who have committed morally reprehensible invasions of privacy that ought to be punished; and that academic research has been conducted into the

debilitating harms suffered by victims of the non-consensual distribution of intimate images.

- [22] Relying on evidence which had been adduced before the former Inquiry Committee and which is not before this Committee, as well as on extensive fresh expert evidence filed in support of the Preliminary motions, Counsel for ACJ Douglas concludes that there is no basis to support either of Allegations #1 or #2 and, specifically that the alleged conduct is not capable of supporting a recommendation for removal pursuant to s. 65 of the *Judges Act*.
- [23] Counsel for ACJ Douglas adds that the conduct of an inquiry hearing into Allegations #1 and #2 would notably be a waste of judicial and public resources and that it would threaten judicial independence while causing serious irreparable harm to ACJ Douglas and the public interest.
- [24] The Committee disagrees. As noted by Counsel for ACJ Douglas in her written submissions, the Committee is the master of its own procedure and while there may be circumstances where an Inquiry Committee can dispense with a formal hearing as recognized by what is now commonly referred to as the “Boilard Rule”³, this is not such a case.
- [25] As aptly put by Independent Counsel, in the Report of the Canadian Judicial Council regarding Mr. Justice Jean-Guy Boilard, summary dismissal is described as being warranted where “the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry”. Also, in that matter, Independent Counsel, the late Mr. Raynold Langlois, was proposing to dispose of the inquiry on a preliminary basis “on the basis of the unchallengeable and unchallenged documents”.
- [26] Here, Allegations #1 and #2 were considered by the Review Panel established under s. 1.1(2) of the By-Laws as meeting the test to constitute an Inquiry Committee under s. 1.1(3) and this Committee is precisely charged with that mandate. Furthermore, the heavy reliance of Counsel for ACJ Douglas on evidence to support her contention as

³ Report of the Canadian Judicial Council to the Minister of Justice under ss. 65(1) of the *Judges Act* concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec (Ottawa: Canadian Judicial Council, December 19, 2003).

well as the scope of that evidence is, in itself, ample demonstration that an evidentiary hearing is warranted and in the public interest, notwithstanding the outcome of this inquiry. In addition, Independent Counsel has indicated her willingness to file evidence in the context of this Inquiry to supplement and challenge, as the case may be, the evidence relied upon by Counsel for ACJ Douglas.

- [27] Counsel for ACJ Douglas also invokes the landmark decision of the Supreme Court of Canada in *Hryniak v. Mauldin*⁴, which encourages resort to summary judgment procedures as a means to increase access to justice. Citing the Supreme Court of Canada, she argues that “the best forum for resolving a dispute is not always that with the most painstaking procedure.”
- [28] The Committee does not agree that the matters herein would meet the test for summary disposition based on the teachings of the Supreme Court of Canada. Indeed, the instructive passages of *Hryniak v. Mauldin*, which describe the “genuine issue requiring a trial” threshold, read as follows:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination. [Our emphasis]

⁴ 2014 SCC 7.

- [29] In this matter, the Committee is convinced that given the nature of the issues and the evidence required, it cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination on a summary basis.

IV. THE REQUEST TO STRIKE ALLEGATION #3 FOR A LACK OF JURISDICTION, OR IN THE ALTERNATIVE TO SUMMARILY DISMISS ALLEGATION #3

A. Introduction

- [30] Contrary to Allegations #1 and #2, which were considered by the Review Panel established under s. 1.1(2) of the By-Laws as meeting the test to constitute an Inquiry Committee under s. 1.1(3), the third allegation came to light after the Review Panel had discharged its mandate, while Independent Counsel to the former Inquiry Committee was in the process of gathering and marshalling the evidence.
- [31] Indeed, according to the submissions of Independent Counsel, former Independent Counsel discovered while gathering evidence that ACJ Douglas had modified a personal diary that described an encounter with Mr. Chapman which, according to Independent Counsel, she knew or ought to have known was relevant to the CJC's investigation. Independent Counsel further submits that ACJ Douglas subsequently made incorrect representations to former Independent Counsel about that modification.
- [32] As stated above, Allegation #3 reads as follows:

(3) Alleged Failure to Fully Disclose Facts to former Independent Counsel

9. Upon being advised of the complaint by Mr. Chapman and the initiation of an investigation by the Canadian Judicial Council, ACJ Douglas modified a personal diary that described an encounter with Mr. Chapman which she knew or ought to have known was relevant to the CJC's investigation. ACJ Douglas subsequently made incorrect representations to former Independent Counsel about that modification.

10. This allegation, if accepted by the Committee, is: 1) capable of supporting a finding that ACJ Douglas is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the Judges Act, and, 2) capable of supporting a recommendation for removal.

- [33] The reference to the complaint of Mr. Chapman was a complaint by him to the effect that ACJ Douglas was complicit in a scheme of her husband to sexually harass him by attempting to lure Mr. Chapman to have sexual relations with her. That complaint has

not been found to have any evidentiary foundation before this Committee, but it relates to the events comprising the unfolding of the narrative in relation to both Allegations #1 and #2.

- [34] ACJ Douglas' argument with respect to Allegation #3 is two-fold. Essentially, she first argues that the Committee has no jurisdiction to consider this allegation. Second, in the alternative, she submits that the facts alleged in Allegation #3 are irrelevant and, in any event, could not support a recommendation for removal on any of the grounds set out in s. 65(2) of the *Judges Act* on the evidence relied upon on her Preliminary motions.

B. ACJ Douglas' Arguments in Support of Dismissal of Allegation #3 for Lack of Jurisdiction

- [35] ACJ Douglas argues that this Committee lacks jurisdiction to consider Allegation #3 as it is neither a complaint by an Attorney General under s. 63(1) of the *Judges Act*, nor a complaint that has proceeded through the multi-tiered screening process, and, in fact, was not the result of a complaint to the Canadian Judicial Council at all. Counsel for ACJ Douglas notes that there has been no review of the allegation by the Executive Director of the CJC, the Chair of the Judicial Conduct Committee, or by a Review Panel.
- [36] In short, Counsel for ACJ Douglas submits there was never a threshold determination that the matter may be serious enough to warrant removal of ACJ Douglas as provided for in s. 1.1(3) of the By-Laws as a precondition to consideration of an Inquiry Committee. Counsel for ACJ Douglas contends that including Allegation #3 in the Notice of Allegations "circumvents the legislative process and the institutional structure created by the CJC" and "would ignore the distinction between complaints submitted by Attorneys General under s. 63(1) of the *Judges Act* and complaints submitted under s. 63(3) of the *Judges Act*."
- [37] Counsel for ACJ Douglas contends that s. 5(1) of the By-Laws can only refer to those complaints or allegations "that have worked their way through the multi-tiered process set out in subsection 1.1 (1) to (3) of the By-Laws" including:
- a) receipt of a complaint in writing and file opening by the Executive Director of the CJC;
 - b) review by the Chairperson or Vice-Chair of the Judicial Conduct Committee;

- c) consideration by the Judicial Conduct Committee of the response of the judge;
 - d) comments from the Chief Justice and any other information received such as a report from Outside Counsel, and consideration by a Review Panel, prior to any decision that an Inquiry Committee be constituted on the basis that the matter is potentially serious enough to warrant removal.
- [38] Counsel for ACJ Douglas argues that the subject matter of an investigation under s. 63(2) of the *Judges Act* “is the complaint or allegation, not the Judge herself” and that therefore an Inquiry Committee constituted under s. 63(3) has no general warrant to investigate the judge about whom a complaint was made. Counsel for ACJ Douglas further submits that the CJC may only constitute an Inquiry Committee for the purpose of looking into specific complaints or allegations and therefore the jurisdiction of the Committee is limited to the allegations that have been sent forward through the screening process to the inquiry stage.
- [39] Counsel for ACJ Douglas also submits that although the By-Laws (as Regulations under the *Judges Act*) respecting the conduct of investigations and inquiries have statutory force (unlike policies), they must be read in a way that creates coherence between the statute and the regulation. If there is an unavoidable conflict, then the statute prevails. Counsel for ACJ Douglas also contends that CJC policy cannot contradict the statutory scheme, limiting the Inquiry Committee to consider only the complaints or allegations for which it was constituted. There is no authority for Independent Counsel to bypass the screening processes established by the *Judges Act* and By-Laws and any policy which contemplates such a departure cannot stand.
- [40] Counsel for ACJ Douglas says that reading the statute and By-Laws consistently and coherently requires the imposition of a screening process involving the Judicial Conduct Committee and the Review Panel and it does not admit any attenuated method of bringing allegations or complaints before an Inquiry Committee. According to Counsel for ACJ Douglas the screening process “is essential to maintaining public confidence in the administration of justice and to protecting [her] rights of procedural fairness.”
- [41] Counsel for ACJ Douglas contends that for s. 5(1) of the By-Laws, to be read harmoniously with the statute, must be taken to mean that, of the complaints or allegations brought to its attention under s. 63(1) or 63(2) of the *Judges Act*, an Inquiry Committee may consider, in effect, any or all of them. In other words, s. 5(1) of the

By-Laws permits an Inquiry Committee to choose not to consider all of the complaints or allegations for which it was constituted, and does not permit adding to the Notice of Allegations, without reference to the screening process. Counsel for ACJ Douglas relies notably on the decision of *Hryciuk v. Ontario (Lieutenant Governor)*⁵.

- [42] In support of her interpretation of the statutory scheme, ACJ Douglas adds that further investigation of Allegation #3 would violate her procedural fairness rights. Although she also appears to rely on that argument in support of her alternative request to summarily dismiss Allegation #3, we will deal with the procedural fairness argument in the context of the discussion on the jurisdictional argument.
- [43] In this respect, in essence, her counsel submits that it is inappropriate to interpret the *Judges Act* and the By-Laws in the context of the guiding principles of judicial independence and public confidence in the justice system as opening the flood gates to unvetted complaints, once there is one complaint serious enough to warrant the removal of the judge if approved. Counsel for ACJ Douglas argues that such an approach enables “disgruntled litigants” to abuse the process to air their grievances and that if the Committee is the arbiter of what comes before it, it “truly is the judge in its own cause”. Counsel for ACJ Douglas submits there is no guideline as to what standard of review applies to the inclusion of an allegation under s. 5(1) of the By-Laws and questions whether the Committee could maintain its impartiality, having already decided to include the allegation in the scope of the inquiry. Counsel submits that departing from the established screening process would represent a breach of the Committee’s duty of fairness under s. 7 of the By-Laws.
- [44] Counsel for ACJ Douglas further submits including Allegation #3 appears to mirror the previous Inquiry Committee’s approach to have Independent Counsel present “the strongest case possible” to support the allegation against the Judge and would therefore “raise serious procedural fairness concerns”.
- [45] Counsel for ACJ Douglas submits that the multi-tiered screening process ensures that unmeritorious complaints are resolved early without subjecting the Judge to unnecessary reputational harm.

⁵ (1996), 31 O.R. (3d) 1 (C.A.).

C. Discussion and Conclusion on the Issue of Jurisdiction

- [46] In our view, Counsel for ACJ Douglas' submissions are at odds with the letter and intent of the applicable statutory framework. The modern approach to the interpretation of statutes and regulations requires that “[t]hey are to be read in their entire context, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” See: *Bell Expressvu Limited Partnership v. Rex*⁶; *Amaratunga v. Northwest Atlantic Fisheries Organization*⁷.
- [47] The critical meaning of s. 5(1) of the By-Laws lies in the word “relevant”. It is clear that this section contemplates that the Committee may consider any “relevant” complaint or allegation that is brought to its attention. The screening process is not necessary to determine whether a complaint or allegation is relevant to the matter for which the Committee has already been constituted, that is, the matter arising out or relating to complaint or allegation that has proceeded through the screening process to the constitution of an Inquiry Committee.
- [48] It would be both unduly cumbersome and contrary to reason to subject a new complaint or allegation to a screening process to determine its relevance to an issue already in the hands of an Inquiry Committee. The Inquiry Committee and Independent Counsel are clearly in the best position to determine the issue of relevance. We do not accept that s. 5(1) of the By-Laws addresses the authority of the Committee not to proceed with matters referred to it by the Review Panel as contended by Counsel for ACJ Douglas. If that were so, the use of the word “relevant” would be superfluous. Moreover, if that was what was intended by s. 5(1) of the By-Laws, it would have been stated much more clearly and directly.
- [49] The clear effect of s. 5(1) of the By-Laws is to enable an Inquiry Committee to consider allegations or complaints that may cast light on, or add to the understanding or weight of allegations or complaints, which a Review Panel has concluded may be serious enough to justify removal.

⁶ 2002 SCC 42 at para. 26.

⁷ 2013 SCC 66 at para. 36.

- [50] In our view, there is nothing in the applicable statutory provisions of the *Judges Act* that contradicts such an interpretation.
- [51] We have considered the argument advanced by Counsel for ACJ Douglas based on the decision of the Ontario Court of Appeal in *Hryciuk v. Ontario, supra*. In addition to the fact that this case originates from a complaint brought against a provincially appointed Judge in Ontario and was thus governed by a statutory framework which differs from the one applicable herein, we conclude that it is distinguishable from the present case in that it relies on different legislative provisions employing different language.
- [52] There was no equivalent provision to s. 5(1) of the By-Laws in the Ontario *Courts of Justice Act*⁸ expressly contemplating allegations or complaints arising after the constitution of an Inquiry Committee and relevant to the matters under investigation.
- [53] Moreover, s. 63(2) of the *Judges Act* does not impose the same restrictions on investigating complaints or allegations as did the *Courts of Justice Act* in *Hryciuk*. The *Courts of Justice Act*, s. 46(1) then read:

A provincial judge may be removed from office before attaining retirement age only if,

(a) a complaint regarding the judge has been made to the Judicial Council. [Emphasis added.]

- [54] By contrast, s. 63(2) of the *Judges Act* reads:

The Council may investigate any complaint or allegation made in respect of a judge of a superior court. [Emphasis added.]

- [55] The broader language of s. 63(2) of the *Judges Act* when read with s. 5(1) of the By-Laws renders the decision in *Hryciuk v. Ontario* distinguishable on the issue of our jurisdiction to consider Allegation #3.
- [56] We agree with the submission of Counsel for ACJ Douglas that s. 63(3) of the *Judges Act* does not provide an Inquiry Committee with “a general warrant to investigate a judge about whom a complaint was made”, and that an Inquiry Committee is constituted for the purpose of looking into specific complaints or allegations. However, that does not prevent a committee from considering allegations that have come to light during its

⁸ R.S.O. 1990, c. C.43.

investigation so long as those allegations are relevant to the matter or matters for which it has been constituted.

- [57] Section 63(2) of the *Judges Act* and s. 5(1) of the By-Laws open the door for the Committee to consider complaints or allegations of relevance to the Committee's mandated investigation. It does not open the door widely enough to admit complaints or allegations, however facially serious, that are not relevant to the subject matter of the investigation. As such, complaints or allegations that are remote in time and in substance from those matters, which are the subject of the Committee's investigation may not, depending on the circumstances, fit through the s. 5(1) doorway.
- [58] Insofar as procedural fairness is concerned, the Committee is satisfied that there has been no breach of ACJ Douglas' right to have this investigation conducted in accordance with the principle of fairness arising out of the inclusion of Allegation #3 in the Notice of Allegations.
- [59] In the first place, the Judge has received adequate notice of the allegation and an opportunity to fully respond to it.
- [60] The fact that Allegation #3 did not go through the screening process established by the Complaints Procedures does not render it procedurally unfair. In *Cosgrove v. The Canadian Judicial Council*⁹, the Federal Court of Appeal ruled on the constitutionality of s. 63(1) of the *Judges Act* which does not engage any screening process. In dismissing the constitutional challenge to s. 63(1) of the *Judges Act*, Justice Sharlow, for the Court, described the advantages of the screening process engaged by a complaint under s. 63(2) as follows at para. 77:

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

- [61] After reviewing those advantages in the context of the circumstances involved in the Cosgrove case, Justice Sharlow held as follows at para. 82:

⁹ 2007 FCA 103.

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

- [62] Although this is not a case in which the role and obligations of an attorney general are implicated, it is one where not only one, but two Independent Counsel having regard to his and her respective obligation under s. 7 of the By-Laws to conduct an investigation in accordance with the principles of fairness have separately considered the relevance and probative value of Allegation #3, and it is a case where the other substantive and procedural safeguards referred to by Justice Sharlow afford ACJ Douglas substantial protection.
- [63] Moreover, in the present case, the advantages of the screening process, which were identified by Justice Sharlow in Cosgrove, are not engaged. This is a case, like Cosgrove, in which there has been considerable publicity apart from and unconnected to the inclusion of Allegation #3 in the Notice of Allegations. As well, the prospect of summary dismissal of an unmeritorious complaint is less of a factor where Allegation #3 is part of a larger matter which has gone through the screening process and has not been summarily dismissed. Finally, this is not a case where early resolution by remedial measures “without the establishment of an Inquiry Committee” is a prospect, given that the Review Panel has already constituted an Inquiry Committee for Allegations #1 and #2.
- [64] In sum, none or few of the advantages of the screening process are at play in this case and accordingly it cannot be said that the inclusion of Allegation #3 through the mechanism of s. 5(1) of the By-Laws represents any meaningful breach of procedural fairness or is inconsistent with the obligation to conduct this inquiry in accordance with the principle of fairness.
- [65] Accordingly, we conclude that ACJ Douglas's motion to strike Allegation #3 for lack of jurisdiction must fail.

D. ACJ Douglas' Additional Arguments in Support of Summary Dismissal of Allegation #3

1. Relevance

- [66] In the alternative, ACJ Douglas rests her opposition to the inclusion of Allegation #3 on the assertion that it is not relevant to the matters which have been screened, that is, Allegations #1 and #2. Counsel for ACJ Douglas notably submits that the alleged fact to the effect that she modified her diary with respect to her interaction with Mr. Chapman and the subsequent incorrect representations she made to former Independent Counsel about that modification are remote both in time and substance from the subject matter of Allegations #1 and #2.
- [67] As noted earlier, it is the Committee's view that Counsel for ACJ Douglas has misconstrued the nature and effect of s. 5(1) of the By-Laws. The threshold for the inclusion of an allegation or complaint in a Notice of allegations under that section has to do with its relevance to the matters for which the Committee was convened to consider.
- [68] We agree that s. 5(1) of the By-Laws is not a freestanding invitation to "pile on" other unrelated or irrelevant complaints without the intervention of the screening process, even if those complaints are serious in nature. Similarly, s. 5(1) of the By-Laws is not an invitation to Independent Counsel to abandon her duty of fairness under s. 7 of the By-Laws.
- [69] Nevertheless, in the exercise of its discretion, the Committee is satisfied that Allegation #3 meets the test of threshold relevance. Allegation #1 relates to the matter of the Judge's candour, that is, her willingness to disclose a series of events (including the Judge's contact with Mr. Chapman) in the course of which "graphic photos of a sexual nature of her (some of which could be seen as demeaning to women)" were placed onto an Internet website and distributed to Mr. Chapman by her husband.
- [70] Although the Committee has not yet seen or heard any evidence about the diary modification, or the incorrect representations to former Independent Counsel, from Counsel's submissions on the preliminary motion, we do not understand that there is any contest that these things happened.
- [71] As we understand it, both Allegation #1 and Allegation #3 deal with aspects of the same issue: ACJ Douglas's candour in making full and frank disclosure of the presence of the

photographs in the public domain and of the underlying circumstances. On its face, Allegation #3 is relevant to the matter under investigation. The ultimate weight or probative value of Allegation #3 is yet to be established or addressed by evidence before the Committee.

2. Sufficiency

- [72] The final basis for ACJ Douglas' resistance to the inclusion of Allegation #3 is that it is not sufficient to support a recommendation for removal. Counsel for ACJ Douglas submits the Committee is "master of its own procedure" and is not obliged to conduct a formal evidentiary hearing before it prepares a report to Council if the matter is "obviously unmeritorious or does not disclose judicial conduct warranting removal from office".
- [73] Counsel for ACJ Douglas notably makes the following argument in her written submissions:

198 [...] In exercising its discretion to decline to consider allegation #3, the Inquiry Committee should consider whether it would be consistent with the best interests of justice and its sound administration to subject Douglas ACJ to an evidentiary hearing about a diary entry unrelated to the matters referred by the Review Panel and a telephone conversation in the previous proceeding that cannot support a finding of misconduct.

- [74] As to the question of the sufficiency of Allegation #3 to establish that it "may be serious enough to warrant removal", contrary to the Judge's submission, that is not a precondition to its inclusion in the Notice of Allegations under s. 5(1) of the By-Laws. The threshold for inclusion in the Committee's consideration under s. 5(1) is relevance. Accordingly, the Committee does not make any prior determination akin to that which a Review Panel might make, that the matter may be serious enough to warrant removal. Indeed, in this case, it would not be possible to do so as we have not yet seen or heard the evidence which comprises the detail of Allegation #3.
- [75] In the result, it cannot be said that apart from determining threshold relevance, the Committee has done anything to "truly make it a Judge in its own cause." Of course, judges are called upon to routinely make rulings on relevance.
- [76] Accordingly, we conclude that ACJ Douglas' motion to summarily dismiss Allegation #3 must also fail.

V. THE REQUEST TO RETURN THE PHOTOGRAPHS AND DECLARE THAT THEY ARE INADMISSIBLE

- [77] As stated above, ACJ Douglas seeks an order “returning Douglas ACJ’s photographs, and if necessary, declaring that the photographs are inadmissible”.
- [78] Counsel for ACJ Douglas essentially argues (i) that the photographs are not relevant or probative of any issue before the Committee, (ii) that, in any event, any probative value the photographs may have is significantly outweighed by their highly prejudicial effects and, (iii) that viewing the photographs would cause ACJ Douglas irreparable harm.
- [79] ACJ Douglas does not specify which photographs exactly should be returned nor which photographs would be inadmissible. At this time, the Committee also has not been provided with the impugned photographs by Independent Counsel or Counsel for ACJ Douglas.
- [80] It can nevertheless be inferred that the order sought would relate to any and all photographs in the possession of the CJC and/or Independent Counsel, as well as any and all photographs that Independent Counsel could seek to introduce into evidence to support Allegations #1 or #2.
- [81] At the outset, the Committee notes that the former Inquiry Committee into this matter had issued a ruling on June 22, 2012 (the “**June 22, 2012 Ruling**”) with respect to the validity of then Complaint 2 and the admissibility of certain computer discs. Complaint 2 in the context of the former inquiry was described as follows by the former Inquiry Committee:

[1] On September 29, 2010, the Canadian Judicial Council received two discs labelled “Lori Douglas Webb Photos”, from an anonymous source, containing intimate sexual photographs of Associate Chief Justice Douglas (Judge), as well as intimate photographs of other women. These discs were treated by the Executive Director, and Vice-Chairperson of the Judicial Conduct Committee to whom the matter was referred, as an anonymous second complaint against the Judge (Complaint 2) in addition to the previous complaint against her from Alex Chapman (Complaint 1). This Inquiry Committee has not yet seen the material which comprises Complaint 2.

- [82] Although this is a fresh inquiry and there are certain differences as between the issues which lead to the June 22, 2012 Ruling and those relating to the instant matter, the June 22, 2012 Ruling and the reasoning of the former Inquiry Committee relating to the

admissibility of the photographs are instructive. Indeed, Counsel for ACJ Douglas had submitted to the former Inquiry Committee that “even if Complaint 2 is ruled a valid complaint, it should be ruled inadmissible and excluded from the record of this inquiry”.

- [83] The former Inquiry Committee rejected that submission and ruled that in order to properly discharge its statutory obligations, it could view the photographs at issue. Although this Committee is not bound by any decisions or ruling made by the former Inquiry Committee, we agree and adopt as ours the core of the reasons set out in the June 22, 2012 Ruling as they relate to the relevancy and the admissibility of the photographs.
- [84] First, the Committee finds that the photographs are relevant to Allegations #1 and #2. Allegations #1 and #2 are replete with references to the photographs and their specific nature. In the Committee’s view, it is difficult, if not impossible, to consider these Allegations without a concrete first-hand appreciation of their nature and what they depict as such characteristics are precisely at the core of the allegations which we are charged to investigate.
- [85] In any event, the Committee finds that the photographs are clearly relevant to the subject matter of this inquiry and that it would not be advisable not to view the photographs in the discharge of its mandate. Contrary to the submissions of Counsel for ACJ Douglas, the Committee finds that the specific content of the photographs has a relevant bearing on the question of whether or not ACJ Douglas has become incapacitated or disabled from the due execution of her office.
- [86] As indicated by the former Inquiry Committee:

“They [the photographs] raise questions: [...] as to whether the degree of disclosure by the Judge on her judicial appointment application was adequate; and as to whether pre-judicial conduct, once disclosed publicly, may affect her continuing ability to sit as a judge.”¹⁰

- [87] The issue is not, as argued by Counsel for ACJ Douglas, about an inquiry into what forms of sexual expression are permissible or not, but rather about whether once disclosed publicly, such expression may or may not have an impact on the disclosure obligations of a candidate for judicial appointment or on a judge’s ability to sit as a judge.

¹⁰ June 22, 2012 Ruling, para. 28.

- [88] As set out in the June 22, 2012 Ruling with reference to s. 8(1) of the By-Laws, the role of an Inquiry Committee is to submit a report to the CJC 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.¹¹
- [89] This mandate cannot be accomplished if the Committee does not take full responsibility for fact-finding or closes its eyes to the most relevant evidence which is at the very core of the allegations at issue. The failure to take this responsibility and to examine this evidence would raise serious issues about the credibility of the inquiry process and the value of the report to be made to the CJC.
- [90] Second, Counsel for ACJ Douglas pleads that notwithstanding their relevance or probative value, any probative value would be outweighed by their prejudicial nature and should also be excluded on that basis.
- [91] In this respect, this Committee also adopts the view of the former Inquiry Committee and finds that the probative value of the photographs outweighs any alleged prejudicial effects. The former Inquiry Committee notably held the following in the June 22, 2012 Ruling:

[46] The argument by Judge's Counsel about prejudice is based on the incorrect premise that "prejudicial" in this context means hurtful to the Judge. Its proper usage means circumstances that could prevent a fair hearing. [...] However, where the photographs are "necessary to understand other evidence" (Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 3'd ed. (Markham, Ont: LexisNexis, 2009), p. 1251) or are "necessary to establish a link" between two events or things and therefore have probative value (R. v. Wildman (1981), 55 N.R. 54 (Ont.C.A.); rev'd on other grounds [1984]2 S.C.R. 331), they will generally be admissible. Here, the photographs in Complaint 2 are even more relevant as direct evidence on central issues in this inquiry.

[47] The main objection to the Committee's viewing the photographs contained in Complaint 2 appears to be that doing so will exacerbate the pain that the Judge is experiencing from the knowledge that others and, particularly, some of her colleagues on the Council, have viewed these photographs in discharging their role in the investigatory process. The submissions of Judge's Counsel refer to the threat of the Judge's "physical deterioration based on fear, panic, humiliation and further isolation from her colleagues". She warns that to rule that the discs are admissible into evidence would "re-victimize" the Judge "since each instance of the photographs being viewed amounts to a horrific violation of her privacy, a stripping away of her dignity and integrity and what feels like a 'rape'."

¹¹ June 22, 2012 Ruling, para. 37-38.

[48] These descriptions of the potential reaction of the Judge to this matter illustrate the difficult task faced by the Committee in carrying out its responsibilities. It is the kind of burden all judges experience in fulfilling their duties. The anxiety, embarrassment and humiliation felt by parties and witnesses when matters of a relevant but highly sensitive and personal nature are disclosed in the course of litigation are often a regrettable by-product of a judicial system that operates under public scrutiny. While steps may be taken to minimize adverse effects by, in appropriate cases, making sealing orders, publication bans and holding in camera hearings, rarely will a litigant's privacy interests justify rejecting otherwise relevant and admissible evidence outright. Privacy interests must give way to the public interest in conducting an open and transparent hearing process.

[49] We have already discussed above the significant probative value of the subject photographs on the discs. Further, it would be unreasonable if the body expressly charged with the responsibility of determining the facts relating to whether a recommendation should be made for removal from the bench was the only body in the whole process that did not view those photographs. Accordingly, having regard to all the circumstances, the Committee sees no reasonable alternative but to rule that the two discs must be introduced into evidence before the inquiry. This does not mean that the evidence will be released publicly. Whether the photographs should be made public in the course of the hearings is a separate issue.

- [92] The Supreme Court of Canada's recent decision in the matter of *Imperial Oil v. Jacques*¹² also provides useful guidance. In that case, the Supreme Court of Canada granted private litigants pursuing a class action access to wiretap recording obtained in the course of a criminal investigation conducted by the Competition Bureau of Canada. In the context of the discovery phase of the class action, class counsel requested access to the recordings and transcripts of the conversations which the Competition Bureau had obtained through its wiretapping operation. One of the defendants, Imperial Oil, objected invoking notably the rights of innocent third parties. In majority reasons by LeBel and Wagner JJ., the majority of the Supreme Court held that the argument was without merit:

[76] *In our opinion, it must be borne in mind that, although Imperial Oil is a third party in the parallel criminal proceedings, it has become a party to the civil proceedings. It therefore has the same rights and is subject to the same procedural rules as all the parties. As we mentioned above, the court must encourage the fullest possible disclosure of evidence at the exploratory stage unless a specific exception applies. It is only if there are reasons why he or she should not do so that the judge may refuse to order the disclosure.*

¹² 2014 SCC 66.

[77] From this perspective, Imperial Oil asserts that the public interest in protecting the privacy of innocent persons is sufficiently important to constitute a cause why it should not disclose the evidence contained in the recordings even though that evidence has been found to be relevant. In support of this assertion, it cites, *inter alia*, Michaud, Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, and R. v. Durette, [1994] 1 S.C.R. 469. According to the appellant, those cases show that the protection of the innocent must take precedence over the search for truth. It adds that the disclosure of recordings involving an innocent third party must therefore be denied.

[78] We agree with the appellant that the impact of disclosure on the rights of innocent persons requires that care be taken in considering motions for disclosure. However, this rule of caution cannot constitute a cause why evidence should not be disclosed in all circumstances.

[79] First, although we will not discuss the cases relied on by Imperial Oil, we must point out that, in the circumstances of the case at bar, the harm allegedly faced by Imperial Oil differs from the harm faced by the persons concerned in the cases it cites. In most of those cases, the contents of the communications could have been made public, but that is not a factor here. Bélanger J.'s order limits disclosure to the professionals participating in the proceedings. Second, it should not be forgotten that the protection of the innocent, and more specifically of their right to privacy, is not absolute. The scope of this protection depends on the specific circumstances of each case and must always be assessed in light of the various interests at stake (MacIntyre, at pp. 186-87; Vickery v. Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671; Durette, at p. 495; Phillips v. Vancouver Sun, 2004 BCCA 14, 27 B.C.L.R. (4th) 27). In the instant case, since, as we will see, the potential harm has been considerably reduced by the measures taken by the judge to control the disclosure process and the scope of the disclosure, the search for truth must prevail. [Our emphasis]

- [93] The Committee is mindful of the argument made by ACJ Douglas concerning the impact that this investigation and prospect of the photographs being adduced into evidence may have on her. However, the Committee cannot unfortunately abdicate its statutory role and functions. In light of the nature of the photographs, the Committee reiterates, however, that upon the photographs being adduced into evidence, it will issue the necessary confidentiality, sealing and non-disclosure orders in accordance with s. 63(5) of *Judges Act* in relation thereto. This will ensure that this Committee will have access to the relevant information, while limiting the scope of the disclosure so as to protect any right to privacy of ACJ Douglas.

VI. ORDER

- [94] For the reasons set out above, the Committee denies the orders sought in paragraphs (a), (b) and (c) of the Notice of Motion of ACJ Douglas dated October 1, 2014.

signed by:

Chief Justice François Rolland (Chair)

signed by:

Associate Chief Justice Austin F. Cullen

signed by:

Ms. Christa M. Brothers, QC

Ms. Suzanne Côté and Mr. Alexandre Fallon

Independent Counsel

Ms. Sheila Block, Molly Reynolds & Sara Whitmore

Counsel to Associate Chief Justice Lori Douglas

Ms. Chantal Chatelain

Counsel to Inquiry Committee