



Judges Act, R.S.C., 1985, c. J-1
Canadian Judicial Council
Inquiries and Investigations By-laws,
SOR/2015-203

**REPORT OF THE REVIEW PANEL
CONSTITUTED BY THE
CANADIAN JUDICIAL COUNCIL
REGARDING THE HONOURABLE KELLY A. GORMAN**

Introduction

[1] These two complaints arose following a jury trial in 2017, presided over by The Honourable Kelly Gorman of the Superior Court of Justice of Ontario. On June 1, 2022, the Ontario Court of Appeal ordered a new trial (*R. v. Cowan*, 2022 ONCA 432) based on many of the circumstances giving rise to these complaints. Both complaints were referred to this Judicial Conduct Review Panel by The Honourable Kenneth G. Nielsen, Vice-Chair of the Judicial Conduct Committee. The role of the Review Panel is set out in subsection 2(4) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015, which provides:

The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.

Background

[2] Andrew Cowan was charged with first degree murder of his friend Edward Witt after Mr. Witt's death in a car collision where Mr. Cowan was the driver and Mr. Witt was the passenger. Mr. Cowan suffered serious brain injuries. Following a trial by a judge and jury presided over by Justice Gorman, Mr. Cowan was convicted of second degree murder. Justice Gorman imposed a sentence of life imprisonment with a 10-year period of parole ineligibility.

[3] The complaints are from Mr. Cowan's aunts who are his primary caregivers and more recently from a lawyer who based his complaint on the Court of Appeal's decision. Both complaints stem from the same set of facts, grounded in Justice Gorman's friendship with the Crown prosecutor at the trial, who was Mr. Thomas Meehan. These facts include that Justice Gorman presided at the trial without the disclosure of the extent of Justice Gorman's friendship with Mr. Meehan including their agreement not to appear on the same case. These facts also include that shortly after the jury found Mr. Cowan guilty and before sentencing, Justice Gorman and Mr. Meehan attended a bar with an articling student who was assisting Mr. Meehan and an Ontario Provincial Police officer involved

in the case. After the bar, Justice Gorman and Mr. Meehan went for dinner together at a restaurant. The reason that Justice Gorman reached out to Mr. Meehan such that they attended the bar and then dinner together was because Mr. Meehan had suffered a personal loss.

[4] At the Panel's direction, counsel to the Review Panel interviewed Chief Justice Morawetz, Senior Regional Justice Thomas, Justice Pomerance, and Larren Ducharme who was the Crown articling student. As well, with Justice Gorman's consent, counsel to the Review Panel conducted a video recorded interview with Justice Gorman (with her own counsel present).

[5] Based on these interviews, the material provided to the Panel by Justice Nielsen in his referrals of complaints, the Court of Appeal decision, and the written submissions from counsel for Justice Gorman, the following are some salient events:

- 2007 – Justice Gorman met Mr. Meehan. Thereafter, they became close family friends. Mr. Meehan has attended social functions and stayed as a guest at Justice Gorman's home. Mr. Meehan remains a platonic friend to Justice Gorman and her husband.
- Around 2016 – Justice Gorman and Mr. Meehan agreed because of their friendship not to appear on the same cases.
- 2017 – Following the dismissal of a motion to stay the Cowan trial for delay, in the context of remaining concerns about delay and the somewhat exceptional scheduling of this jury trial in the court summer session, Justice Gorman became the trial judge. Justice Gorman did not know that Mr. Meehan would be the Crown Attorney.
- May 24, 2017 – A pre-trial management conference was held with Justice Gorman, Mr. Meehan, and Mr. Cowan's lawyer Patrick Ducharme. As discussed in more detail below, the relationship between Justice Gorman and Mr. Meehan was raised.
- July 31, 2017 - After jury selection, Mr. Meehan advised in court that he disclosed to Mr. Ducharme that he and Justice Gorman are friends. Mr. Ducharme did not

raise any objection to Justice Gorman being the trial judge. It was not known to Mr. Cowan or Mr. Ducharme that around 2016, Justice Gorman and Mr. Meehan agreed because of their friendship not to appear on the same cases.

- On August 23, 2017, after two days of deliberation, the jury returned a verdict of guilty of second degree murder.
- During the trial, there was no contact between Justice Gorman and Mr. Meehan.
- Almost immediately after the verdict and jury recommendations on sentence were completed, Justice Gorman contacted Mr. Meehan to go for a drink. The reason that Justice Gorman reached out to Mr. Meehan was because he had suffered a personal loss. Mr. Meehan advised Justice Gorman that he was taking the articling student for a drink and he offered that Justice Gorman could also come.
- Upon arriving at the bar, Justice Gorman saw the OPP officer was also part of the group. Justice Gorman suggested they move to a table away from the window. Justice Gorman commented that she hoped Mr. Ducharme did not come in. In her interview, Justice Gorman explained that she did not say this because she did not want to see Mr. Ducharme but because she knew Mr. Ducharme was familiar with the bar and was devastated with the result of the trial. Drinks lasted about an hour. They did not discuss the trial other than Justice Gorman and Mr. Meehan agreed the jury was thoughtful and Justice Gorman could have teased Mr. Meehan for not being able to control his facial expression in court.
- In her interview, the articling student explained that she felt uncomfortable they were joined at the bar by Justice Gorman and felt even more uneasy because it was clear to her that Justice Gorman did not want them to be seen by Mr. Ducharme. A few days later, the articling student expressed to her principal her discomfort about having drinks at the bar with Justice Gorman.
- Following drinks at the bar, Justice Gorman and Mr. Meehan went for dinner together at a restaurant.
- On December 10, 2017, Justice Gorman dismissed an application by defence for a mistrial.

- On December 11, 2017, Justice Gorman accepted a joint submission from counsel and sentenced Mr. Cowan to life imprisonment with no parole for 10 years.
- Mr. Cowan appealed his conviction.
- Given the issues raised on appeal, the Canadian Judicial Council put the complaint from Mr. Cowan's aunts in abeyance pending the outcome of the appeal from the trial decision.
- On June 1, 2022, the Ontario Court of Appeal ordered a new trial having found a reasonable apprehension of bias regarding Justice Gorman.

Issue

[6] Is an Inquiry Committee to be constituted as the matter might be serious enough to warrant the removal of Justice Gorman from office?

Justice Gorman's Position

[7] Justice Gorman acknowledges the determination by the Court of Appeal of her conduct giving rise to a reasonable apprehension of bias such that, in hindsight, her recusal would have been appropriate. Justice Gorman also admits that on the evening of the salient events she was misguided, in error, and showed a lapse in judgment. However, it is Justice Gorman's position that none of this detracts from her assertion that she was always acting in good faith. Justice Gorman explains that when she contacted Mr. Meehan to go for a drink, she had effectively discharged her judicial function because she was required to impose a sentence of life imprisonment and there was no possibility she would order anything other than the minimum 10-year parole ineligibility period recommended by 10 of the 12 jurors. Justice Gorman's counsel points out in her 14 years on the bench, this is the first time her integrity has been challenged. Her counsel also points to the many letters of strong support from her judicial colleagues, all of which focus on her fairness, integrity, and top skills as a judge. Justice Gorman has apologized, expresses regret, acknowledges the seriousness of her error in judgment, undertakes that it will never happen again, and commits to self-improvement.

Ethical Principles for Judges

[8] Particularly pertinent to these complaints are the following principles from the Canadian Judicial Council's publication *Ethical Principles for Judges*, applicable at the relevant time (pp. 27, 29):

Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.

Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.

The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

...

Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

Analysis

[9] The standard for recommendation for removal of a judge from office is known as the Marshall test:

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

(Report of The Canadian Judicial Council to The Minister of Justice Pursuant to s. 65 of the Judges Act in Relation to the Inquiry into the Conduct of The Honourable Gérard Dugré, December 19, 2022, para. 9)

Review Panel's Concerns

[10] Justice Gorman's conduct raises the following concerns grounded in the obligation of judges to ensure their conduct both in and out of court maintains and enhances confidence in their impartiality.

[11] A first concern relates to the circumstances surrounding Mr. Ducharme's indication that he had no objection to Justice Gorman continuing to preside. Underlying this issue is the finding by the Court of Appeal that a miscarriage of justice occurred because of the non-disclosure of the extent of the friendship between Justice Gorman and Mr. Meehan especially considered against their agreement not to appear on the same case.

[12] There is no dispute that this agreement was not disclosed to Mr. Ducharme prior to the trial. There is some disagreement regarding when, and to what extent, it was disclosed to Mr. Ducharme that Justice Gorman and Mr. Meehan were close friends.

[13] Justice Gorman recalls that Mr. Meehan advised Mr. Ducharme of the friendship during every pre-trial teleconference and Mr. Meehan's evidence on appeal to the Ontario Court of Appeal was that he advised Mr. Ducharme of the friendship "no fewer than four times" including that he attended parties at her house and family events.

[14] Mr. Ducharme says that the only thing he ever heard about the friendship was during one of the pre-trial discussions wherein Mr. Meehan advised "Justice Gorman and myself know each other". Then, after jury selection, in the absence of the jury, Mr. Meehan advised in court (before Justice Gorman) to the effect "I have disclosed to Mr. Ducharme that you and I are friends" and Mr. Ducharme was asked that Mr. Cowan make it clear or state that he had no objection to Justice Gorman being the trial judge. Mr. Ducharme indicates that there was no indication by Justice Gorman about the closeness of the friendship.

[15] Mr. Ducharme also notes that in the circumstances when he was asked in court about Justice Gorman continuing as the trial judge, he was put in a difficult and very uncomfortable position. He states that he did not want to start the trial making a complaint about the judge. He was also asked to ask Mr. Cowan, who had a catastrophic brain injury, to get instructions on the spot. Given these circumstances, Mr. Ducharme knew that Mr. Cowan was going to rely on him because of his trouble understanding the proceedings. Mr. Ducharme opted to not offend Justice Gorman and risk starting the trial on a very bad foot.

[16] It is because of this very kind of scenario and the issues that arise when a judge attempts to cure a concern about disqualification by consent of the parties that the ***Ethical Principles for Judges*** provides:

E.13 **Consent of the Parties**

Commentaries on Judicial Conduct acknowledges the practical difficulty of attempting to cure a concern about disqualification by disclosure to and consent of the parties. **The main concern is that such an approach puts counsel in an unfair position — as one respondent put it, to either consent or to risk being seen as a trouble maker.**

E.14 It is not suggested that consent of the parties would justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. The issue of consent, therefore, arises only in those cases in which the judge believes that there is an arguable point about disqualification but in which the judge believes, at the end of the day, a reasonable person would not apprehend a lack of impartiality. Putting the matter this way perhaps highlights the difficult position in which counsel is placed. **By disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to consent, counsel (or their clients) may appear to be taking an unreasonable position.** A partial answer to this concern may be to adopt the English practice in which the judge is told that an objection was made by one of the parties without being told which side objected.

E.15 **The better approach is for the judge to make the decision without inviting consent,** perhaps in consultation with his or her chief justice or other colleague. If the judge concludes that no reasonable, fair minded and informed person, considering the matter, would have a reasoned suspicion of a lack of impartiality, the matter should proceed before the judge. If the conclusion is the opposite, the judge should not sit.

E.16 **The judge should make disclosure on the record and invite submissions from the parties in two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.**

E.17... Extraordinary circumstances may require departure from the approaches discussed above. The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.

[Emphasis added]

[17] These provisions recognize the issue of consent can arise when the judge believes there is an arguable point about disqualification but in which the judge believes, at the end of the day, a reasonable person would not apprehend a lack of impartiality. In this situation, the judge should make disclosure on the record and invite submissions from the parties. However, even in this situation, the judge should emphasize that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.

[18] As commented by the Court of Appeal, with which the Review Panel agrees, the explicit agreement between Justice Gorman and Mr. Meehan not to appear on the same cases suggested a real threat of bias (see Court of Appeal decision, para. 23). That is, this was not a situation where there should have been any doubt by Justice Gorman about whether there were grounds for disqualification. Justice Gorman should have made the decision to disqualify herself. For completeness, this was also not a situation where an unexpected issue arose shortly before or during the trial or there is evidence that no other judge was reasonably available (which are recognized as possible bases for a judge who is otherwise disqualified for a reasoned suspicion of a lack of impartiality continuing following input from counsel). Justice Gorman had learned that Mr. Meehan was Crown counsel about two months before trial. There is no indication that Justice Gorman inquired whether there was another judge available to hear the trial and indicated she does not recall doing so. Justice Gorman also indicated that she knows she did not ask any of her colleagues. As noted, Justice Gorman has since acknowledged that in hindsight, recusal would have been appropriate.

[19] Another concern is how Justice Gorman's decision to meet Mr. Meehan at a bar for drinks minutes after the verdict and before sentencing undermined confidence in Justice Gorman's impartiality. The description of this attendance at the bar and the dinner that followed were the basis for the Court of Appeal's view that "...*res ipsa loquitur*: the reasonable apprehension of bias speaks for itself" (para. 27). The Review Panel agrees with the Court of Appeal's view.

[20] As noted, Justice Gorman has clearly and unequivocally acknowledged to the Review Panel that this conduct by her was wrong. However, the Review Panel is particularly troubled by the indication that from the outset Justice Gorman appreciated that attending at the bar was inappropriate but chose to nevertheless attend and remain at the bar. Justice Gorman indicated that her initial reaction to Mr. Meehan's invitation to join him and the articling student for a drink was not to do so. It was clear to the articling student that Justice Gorman did not want to be seen by Mr. Ducharme at the bar. Upon arriving at the bar, Justice Gorman suggested that they move to a table that was not by the window. Justice Gorman commented that she hoped that Mr. Ducharme did not walk in. Drinks with Justice Gorman made the articling student so uncomfortable that she reported it to a senior Crown attorney. That is, it was apparent to the articling student, who had only started work months earlier, that Justice Gorman's attendance at the bar raised concerns.

[21] The Review Panel notes as another concern that Justice Gorman's conduct put the articling student in an awkward, difficult and unfortunate position. There is no doubt that the articling student would have struggled with the decision to raise her concerns with the senior Crown attorney and would have experienced all sorts of related worries and anxieties about how this may adversely affect her. Nevertheless, she did so, and, in the Review Panel's view, she was perfectly justified in her concerns and is commended for raising them as she did.

Should an Inquiry Committee be Constituted?

[22] A Review Panel does not make findings of fact. Rather, the Review Panel will weigh the available evidence to determine whether the conduct meets the "might be serious enough to warrant the removal of the judge" threshold in subsection 2(4) of the ***By-law***. This threshold is higher than "slim to none" but short of "on a balance of probabilities" (***National Council of Canadian Muslims v. Canada (Attorney General)***, 2022 FC 1087, para. 38).

[23] The threshold in determining whether an Inquiry Committee is to be constituted must reflect the very significant seriousness of the remedy of removal. Removal of a judge from office addresses prospective harm. It is to be resorted to only in circumstances where the judge's ability to discharge the duties of office is irreparably compromised due to conduct that significantly undermines confidence in the justice system such that they are incapable of executing the judicial role. Its appropriateness is assessed on an objective standard considered from the perspective of a reasonable and well informed person, knowledgeable of all of the relevant background facts.

[24] It is important to stress that the issue of judicial disqualification is a legal question and not necessarily one of conduct. As such, in the present case, the fact that the Court of Appeal concluded that Justice Gorman ought to have recused herself is not dispositive of these complaints. Rather, a decision that a judge not recuse will only warrant a sanction if the judge's conduct involves an abuse of office, bad faith or analogous conduct.

[25] While Justice Gorman's conduct in continuing to preside when she became aware of Mr. Meehan's involvement and later when she met him at the bar for drinks and then dinner raises the serious concerns discussed above, the following mitigating factors pertain.

[26] Justice Gorman accepted to sit on this trial in light of objective concerns that the trial take place within a reasonable time. When she did so, she did not know of Mr. Meehan's involvement. Her decision to continue to preside after becoming aware of Mr. Meehan's involvement is consistent with Justice Gorman's reputation as reflected in her reference letters for readily stepping in to assist. Justice Gorman indicated that she was so focussed on seeing the matter through to a trial on the merits, she ignored the perception it created. This is consistent with the fact that there were already concerns about delay with a motion to dismiss for delay having already been adjudicated. It is also consistent with the weight she wrongly gave (for the reasons discussed above) to Mr. Ducharme's acquiescence that she could continue to preside at trial.

[27] Justice Gorman concedes that hearing the Cowan case and meeting with Mr. Meehan after the verdict but before determination of parole ineligibility was a serious error in judgment. She explained that she only wanted to meet Mr. Meehan to provide comfort and express sympathy to him as a friend who went through a significant personal loss. The Review Panel notes that there is no evidence on which an Inquiry Committee could find that Justice Gorman was not sincere in her motivation to comfort Mr. Meehan in a perceived time of loss. The Review Panel also notes there is no evidence that would refute Justice Gorman's rationale, albeit ill-conceived, for meeting with Mr. Meehan prior to the conclusion of sentencing. Justice Gorman reasoned that because of the majority recommendation of the jury that Mr. Cowan should be sentenced to the minimum period of parole ineligibility, this was the sentence she was going to impose. As such, when she met with Mr. Meehan after the verdict, she considered the issue of sentence, although not yet imposed, as a "fait accompli". While the Review Panel appreciates that it may appear apparent to most people and that it should have been clear to Justice Gorman at the time that it was wrong for her to meet with Mr. Meehan, a mitigating consideration is that Justice Gorman had just completed this aspect of the trial, which was indisputably a taxing experience in light of the nature of the case.

[28] Justice Gorman has expressed that she is truly sorry for the perception created by her conduct and she would never compromise her integrity. Justice Gorman has also apologized to Mr. Cowan and his family. She has undertaken that a similar situation will never happen again. Justice Gorman's expression of remorse and her related undertaking are particularly credible in light of the glowing comments from her fellow judges regarding her work as a judge. These references from her judicial colleagues emphasize that Justice Gorman is a highly respected and respectful judge who is skilled, dedicated, fair, diligent, and treats people with dignity. One of her references stated that Justice Gorman has always demonstrated the highest ethical standards, such that the conduct presently under review is entirely out of character.

[29] In the Review Panel's view, the sincerity of Justice Gorman's expression of remorse and contrition and the reliability of her related commitment that a similar situation will

not occur again are also underscored by her expressed understanding of the rationale for why her conduct was wrong in light of the ***Ethical Principles for Judges***. Further substantiation of the sincerity of Justice Gorman's remorse and the reliability of her related commitment is that from the fall of 2017, until the release of the Court of Appeal decision in June 2022, Justice Gorman has sat as a judge without any incidents of concern.

[30] The Review Panel is satisfied that there is no evidence on which an Inquiry Committee could find other than, in the unique circumstances of this case, Justice Gorman exercised a lapse in judgment that was out of character. The Review Panel is also satisfied that there is no basis for an Inquiry Committee to conclude other than the ensuing events that followed these complaints (including the related public attention and restrictions on her judicial assignments after the release of the Court of Appeal decision in June 2022) have had such a profound effect on Justice Gorman that she will be sure not to engage in any further ethical transgression. In light of this and Justice Gorman's otherwise unblemished and distinguished lengthy judicial career, underscoring her recognition of her error and public commitment to improvement, the Review Panel is of the view that there is a slim to none chance that an Inquiry Committee could conclude that Justice Gorman's ability to discharge her duties of office is irreparably compromised. The foregoing all supports that Justice Gorman can continue to preside with the confidence of individuals appearing before her while also maintaining public confidence in the justice system.

Conclusion

[31] Accordingly, the Review Panel has decided that no Inquiry Committee is to be constituted. In making this decision, the Review Panel appreciates that some members of the public may disagree – perhaps strongly – with this conclusion. However, for the reasons discussed and in light of the applicable law, when considered on an objective standard from the perspective of a reasonable and well informed person, knowledgeable

of all of the relevant background facts, the Review Panel is satisfied that the public should have confidence in Justice Gorman's continued execution of her judicial office.

[32] The matter is being sent back to Justice Nielsen in order to make a decision on the most appropriate way to resolve these complaints. In so doing, in light of the particularly public aspect of this case, the Review Panel recommends that these reasons for decision be publicized.

Dated this 3rd day of May, 2023.

Original signed

The Honourable Shane I. Perlmutter, Associate Chief Justice of the Court of King's Bench for Manitoba (Panel Chairperson)

Original signed

The Honourable Robert J. Bauman, Chief Justice of British Columbia

Original signed

The Honourable Tracey K. DeWare, Chief Justice of the Court of King's Bench for New Brunswick

Original signed

The Honourable Pierre L. Muise, Supreme Court of Nova Scotia

Original signed

Mr. Pierre Riopel