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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 F.J.C. NEWBOULD**

8 February 2017

In the Matter of the Honourable Mr. Justice Frank J. C. Newbould
of the Ontario Superior Court of Justice

Reasons of the CJC Judicial Conduct Review Panel
for the Referral of the Complaints against Mr. Justice Newbould
to an Inquiry Committee – 8 February 2017

Introduction

[1] Mr. Justice Newbould was appointed a judge of the Ontario Superior Court of Justice on October 26, 2006, and sits in the Toronto Region. He was the subject of 7 complaints as a result of his actions respecting a boundary dispute concerning land at Sauble Beach, Ontario. As per the *Complaints Procedures* approved by the Canadian Judicial Council, the matter was referred to Chief Justice Michael MacDonald, the Chairperson of the Canadian Judicial Council's Judicial Conduct Committee.

[2] The complaints and the resolution of them by Chief Justice MacDonald can be summarized, as they were by Associate Chief Justice Pidgeon in his Reasons for the Referral of a Complaint to a Panel in the Matter of the Hon. F. J. C. Newbould of the Ontario Superior Court of Justice:

- Complaints 14-0229 by Ron James, 14-0233 by Mary-Ann Wilhelm, 14-0234 by Jacqueline Farr, 14-0235 by Brian Death and 14-0248 by Ross C. McLean are about Justice Newbould's public involvement into a matter in litigation. After obtaining comments from Justice Newbould, Chief Justice MacDonald closed these complaints by letters dated 13 November 2014. A letter of concern was forwarded to Justice Newbould.
- Two new complaints followed, each with new documents. First, 14-0369 which was from the Indigenous Lawyers' Association complaining that Justice Newbould "participated in a political process by vigorously speaking in a widely attended public meeting against a yet to be settled Land Claim" and by providing the Town with a "legal opinion outlining the weaknesses of the Saugeen's outstanding Land Claim." The complainant, Ms. Lighting-Earle added that, since Justice Newbould owns a cottage within the area of the Land Claim, he used his judicial office "to influence a public political process, where the outcome may affect his direct pecuniary interest." The complainant quotes various news reports in support of her complaint. She points out that Justice Newbould "argued against Native peoples getting the 'upper hand' in negotiations with

governments.” She is of the view that this statement demonstrates a lack of sensitivity to the experience of Aboriginal people in Canada. Chief Justice MacDonald decided not to proceed further (letter dated 6 January 2015).

- In complaint 14-0417, the complainant Mr. John Close (former Mayor) complained that Justice Newbould used his position to protect his financial interest; interfered with an ongoing mediation and with an ongoing court case; became involved in a political decision and indirectly supported candidates in the municipal election; caused harm to the Town’s lawyer, to the past Council, and; was in a conflict of interest. Chief Justice MacDonald decided that this complaint did not warrant further consideration (letter dated 6 January 2015).

[3] In a letter dated June 16, 2016, Ms. Lightning-Earle requested a reconsideration of the disposition of her complaint. She stated that the parties had reached an agreement on key land and treaty matters when, “[w]ithout invitation, Justice Newbould publicly inserted his opinions against the agreement as a representative of the judiciary...” As a result, the agreement unravelled “leaving the parties to resolve their matter in the court where Justice Newbould serves...” She further suggested that Justice Newbould’s conduct evidenced bias.

[4] In the result, Chief Justice MacDonald decided to recuse himself from the matter, and directed that the Honourable Robert Pidgeon, Senior Associate Chief Justice of the Superior Court of Quebec, and a Vice-Chairman of the Canadian Judicial Council’s Judicial Conduct Committee, review Ms. Lightning-Earle’s request. Associate Chief Justice Pidgeon did so, and concluded that Mr. Justice Newbould’s conduct might be serious enough to warrant his removal from office, and established this Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with s. 63(3) of the *Judges Act*, R.S.C. 1985, c. J-1.

Jurisdiction

[5] Following our initial deliberations, we were provided with correspondence from Mr. Paliare, counsel for Mr. Justice Newbould, which referred to correspondence from Chief Justice Heather Smith of the Ontario Superior Court of Justice to Mr. Sabourin,

the Executive Director and Senior General Counsel of the Canadian Judicial Council dated September 19, 2016. In her letter, Chief Justice Smith raised what she described as serious concerns with the reconsideration process that led to the appointment of our Review Panel. Mr. Paliare requested that Chief Justice Smith's letter be brought to our attention, and considered by us.

[6] The issue raised by Chief Justice Smith can conveniently be described as one of jurisdiction; whether the steps taken prior to our appointment were such as to render the Canadian Judicial Council *functus officio*, and thus deprive us of jurisdiction to consider and determine the issues identified by Associate Chief Justice Pidgeon.

[7] On November 12, 2014, after considering five complaints against Mr. Justice Newbould, Chief Justice MacDonald, the Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council closed the file with respect to the complaints without constituting a Review Panel. A further complaint was received by Chief Justice MacDonald who similarly determined on January 26, 2015 that the complaint file should be closed. .

[8] On June 15, 2015, one of the complainants asked that the matter be reconsidered. As discussed above, Chief Justice MacDonald recused himself from further involvement in the matter and referred the matter to the Vice-Chairperson of the Judicial Conduct Committee, Associate Chief Justice Pidgeon. Associate Chief Justice Pidgeon sought further comments from Mr. Justice Newbould, and then decided to constitute a Review Panel in respect of the complaints against Justice Newbould, providing written reasons to Justice Newbould for the referral to a Review Panel.

[9] Chief Justice Smith then wrote to Mr. Sabourin as discussed above.

[10] We have had the opportunity to carefully consider the matter of our jurisdiction to consider and determine the issues identified by Associate Chief Justice Pidgeon, and have concluded that we have the jurisdiction to do so.

[11] The Canadian Judicial Council is constituted under the *Judges Act*, R.S.C. 1985, c. J-1, among its other duties, to investigate and inquire into the conduct of federally

appointed judges. It is not the Council's responsibility to remove a judge. Following a hearing into the conduct of a judge, the Council is required to report its conclusions and submit the record of the inquiry or investigation to the Minister. The Council may also recommend to the Minister of Justice that the judge be removed from office where, in the Council's opinion, 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.

[12] Justice Newbould challenges the decision of the Vice-Chairperson of the Judicial Conduct Committee, Associate Chief Justice Pidgeon, to reconsider the complaints against Justice Newbould and refer the complaints to a Review Panel. This referral decision was taken on or about September 24, 2016, and therefore under the 2015 By-laws. The 2015 By-laws provide:

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

[13] Associate Chief Justice Pidgeon's decision to reconsider the complaints and refer them to the Review Panel were made under the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, effective July 29, 2016 (the "2015 Complaints Procedures").

[14] Chief Justice MacDonald's decision to close the files on complaints were made under the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, effective April 3, 2014 (the "2014 Complaints Procedures"). The relevant portions provided:

The Chairperson shall review the file and may

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

(i) trivial, vexatious, made for an improper purpose, are 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.

[15] Justice Newbould relies primarily on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 in his contention that the *functus officio* principle applies to a decision of the Council to reopen a file for further investigation. We disagree.

[16] In *Chandler*, Justice Sopinka, for the majority of the Supreme Court of Canada, considered whether the *functus officio* principle — which had been developed in the context of courts — applied to final adjudications by administrative tribunals. He held that the principle applied to final decisions by administrative tribunals, subject to certain exceptions.

[17] Subsequent decisions by lower courts have held that the principle of *functus officio* does not apply to all administrative decision-makers, particularly where the decision was not adjudicative in nature. See, for example *Greet v. Ethers*, [2006] OJ 477 (Ont. Div. Ct.), *Holder v. Manitoba (College of Physicians and Surgeons)*, 2002 MBCA 135, *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No. 1159 (Fed. C.A.), and *Baker (c.o.b. New Scotland Soccer Academy) v. Nova Scotia (Labour Standards Tribunal)* [2012] NSJ No. 199 (N.S.C.A.).

[18] The Federal Court and Federal Court of Appeal have repeatedly characterized the Council's mandate as investigative in nature: *Slansky v. Canada (Attorney General)*, 2013 FCA 199; *Douglas v. Canada (Attorney General)*, 2014 FC 299.

[19] We have concluded that Chief Justice MacDonald's decision to close the complaint file without constituting a Review Panel was a non-dispositive decision taken in the context of a screening process which is administrative in nature, resulting, at

most, in a further consideration by a Review Panel whether an Inquiry Committee should be convened.

[20] The nature of a decision to close a file has received extensive consideration by the Federal Court of Appeal, in *Taylor v. Canada (Attorney General)*, 2003 FCA 55. There, a complainant sought judicial review of the Canadian Judicial Council's decision to close a file. Justice Evans, for the Court, held that the decision to close a file was subject to judicial review and that the complainant was entitled to procedural fairness. At para. 83, Justice Evans further held that a complainant's only opportunity to be heard again is by requesting a reconsideration. Importantly, at para. 94, Justice Evans held that the decision of the Council to close a file is investigative and ongoing, and may be revisited.

[21] Mr. Justice Newbould contends that express statutory authority is required before the Council can reconsider its decision to refer a matter to a Review Panel. With respect, we are unable to accept this as an accurate statement of the law with respect to non-adjudicative decisions.

[22] As the Federal Court has observed in *Chopra v. Canada (Attorney General)*, 2013 FCJ No. 721 at para. 66, "legislative silence on the jurisdiction to reopen a non-adjudicative decision does not necessarily reflect Parliament's intention to prevent it".

[23] Moreover, Justice Sopinka in *Chandler* held that the principle of *functus officio* "should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation".

[24] Mr. Justice Newbould contends that were were no new facts before the Judicial Conduct Committee when Associate Chief Justice Pidgeon reconsidered the decision to close the file and referred the complaints to the Review Panel. In fact, Associate Chief Justice Pidgeon did express his view that new information had been provided.

[25] In any event, it is our view that the Judicial Conduct Committee may reopen a file to ensure that the issues in the original complaint are completely addressed, or to

ensure that the Council has otherwise fully discharged its statutory mandate to investigate: *Chopra, supra* at para. 68; and *Chandler, supra* at p. 862.

[26] Finally, with respect to jurisdiction, it is contended that it would be an abuse of process to “reopen” the complaint. We have concluded that there is no basis upon which to suggest that the complaints process that has been followed in this case is “tainted to such a degree that it amounts to one of the clearest of cases” warranting a stay for abuse of process as discussed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para. 120.

[27] Insofar as Chief Justice MacDonald, as the original decision-maker, not being the one to reconsider the decision, as discussed above, he recused himself, without issuing reasons for his recusal. In our view, it was open to him to recuse himself based on a reasonable apprehension of bias: *Taylor, supra*. The decision on reconsideration then properly fell to Associate Chief Justice Pidgeon as Vice-Chairperson of the Judicial Conduct Committee.

[28] In the result, we have determined that we have jurisdiction to review this matter in accordance with the 2015 By-laws and now do so.

Background

[29] Mr. Justice Newbould has an interest in a family cottage near Sauble Beach, Ontario. Sauble Beach is near the Town of South Bruce Peninsula and the Town, and the Newbould family cottage, are located in proximity to the Saugeen First Nation.

[30] The Federal Government, the Provincial Government and the Town were involved in a boundary dispute with the Saugeen First Nation involving some 10 acres of Sauble Beach. The Saugeen First Nation filed a claim over the disputed boundary in the Ontario Superior Court of Justice. The action was initially case managed by Mr. Justice Warren Winkler, of the Ontario Superior Court of Justice, as he then was, sitting in the Toronto Region. Subsequently, the management of the case was assigned to Mr. Justice Edward P. Belobaba of the Ontario Superior Court of Justice, who sits in the Toronto Region.

[31] A judicial mediation was initially undertaken by Mr. Justice Warren Winkler.

[32] When he was subsequently assigned as the case management judge, Mr. Justice Belobaba recommended a further mediation of the dispute which was conducted by the Honourable Ian Binnie. This mediation resulted in a proposed settlement of the claim supported by the Saugeen First Nation and the Federal Government, which was unopposed by the Provincial Government.

Discussion

[33] A Review Panel does not hear evidence. Accordingly, it does not make findings of fact. Its role is to review the available information relating to the matter and to decide whether an Inquiry Committee should be constituted under subsection 63(3) of the *Judges Act*.

[34] Subsection 2(4) and 2(7) of the *Canadian Judicial Council Inquiries and Investigations By-laws* provide:

(4) 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.

...

(7) The Judicial Conduct Review Panel must prepare written reasons and a statement of issues to be considered by the Inquiry Committee. The Council's Executive Director must send a copy of the Judicial Conduct Review Panel's decision, reasons and statement of issues to

- (a) the judge and their Chief Justice;
- (b) the Minister; and
- (c) the Inquiry Committee, once it is constituted.

[Emphasis added.]

[35] This Committee has reviewed the following documents:

- a. Summary of Major Elements of Presentation at Public Meetings on August 6, 2014;
- b. G. Vandergrift email to Mayor and Council dated August 6, 2014;

- c. J. Farrow-Lawrence email to Mayor and Council dated August 7, 2014;
- d. P. Fair email to Mayor, Council etc. dated August 7, 2014;
- e. T & G Neves email to Mayor and Council dated August 7, 2014;
- f. J & B Bowman email to Mayor dated August 8, 2014;
- g. Owen Sound Sun Times article (with comments) dated August 8, 2014;
- h. R. McLean letter to Mayor and Council of S. Bruce Peninsula dated August 8, 2014;
- i. Newbould J. letter to Mayor and Council of S. Bruce Peninsula dated August 8, 2014;
- j. T. Reid email to Mayor and Council dated August 8, 2014;
- k. Pine Grove Park (Strachan's) email w/ Newbould J.'s Aug. 8'14 letter to Mayor (J. Close) dated August 11, 2014;
- l. K & R Gee email to Mayor and Council dated August 11, 2014;
- m. J. Jackson email to Mayor and Council dated August 11, 2014;
- n. K. Brownlee email to Mayor and Council dated August 12, 2014;
- o. R. Meyer email to Mayor and Council dated August 12, 2014;
- p. S. Gee email string to/from Mayor and Council dated August 12, 2014;
- q. A & S Laberge email to Mayor and Council dated August 13, 2014;
- r. Pine Grove Park (Strachan's) email w/their Aug. 17'14 letter to Mayor (J. Close) dated August 17, 2014;
- s. B. Howell email to Mayor and Council dated August 18, 2014;
- t. L. Burton email to Mayor and Council dated August 20, 2014;
- u. S. Merry email to Mayor and Council dated August 20, 2014;
- v. C. Boyes/S. Merry email (w/C. Boyes' Aug 20'14 letter) to Mayor and Council dated August 20, 2014;
- w. N. Nolan email (w/Nolan and Deegan Aug. 19'14 letter) to Mayor and Council dated August 20, 2014;
- x. D. Montgomery email/letter to Mayor and Council dated August 20, 2014;
- y. B. Howell email (w/Aug. 30'14 letter) to Mayor and Council dated August 20, 2014;
- z. B. Hergott email to Mayor and Council dated August 20, 2014;
- aa. P. Venton email to Mayor and Council dated August 20, 2014;

- bb. J. Paterson email to and from Mayor and Council dated August 19-20, 2014;
- cc. Newbould J. letter to Mayor and Council of S. Bruce Peninsula dated August 23, 2014;
- dd. Newbould J. emails to Mayor and Council dated August 25, 2014 w/August 25'14 letter (8-page) attached;
- ee. Bayshore Broadcasting article dated August 27, 2014;
- ff. R. James email to J. Gauthier dated August 27, 2014;
- gg. Owen Sound Sun Times article (with comments) dated August 28, 2014;
- hh. Newbould J. letter to South Bruce Peninsula Mayor and Council dated August 28, 2014;
- ii. Bayshore Broadcasting article dated August 29, 2014;
- jj. M. Wilhelm email to J. Gauthier dated August 29, 2014;
- kk. J. Farr email to J. Gauthier dated August 29, 2014;
- ll. B. Death email to J. Gauthier dated August 29, 2014;
- mm. R. McLean letter to CJC dated August 29, 2014 (with attachments);
- nn. R. McLean letter to CJC dated August 30, 2014;
- oo. Pages 1, 3 and 4 of the Warton Echo article (with comments) dated September 2, 2014;
- pp. M. Bowman emails to/from Mayor and Council from Aug. 12-Sept. 2, 2014;
- qq. P. McKenzie email to Mayor and Council dated September 1'14 (attaching Newbould J. emails w/Aug. 25th letter);
- rr. Newbould J. letter to Chief Justice MacDonald dated October 14, 2014;
- ss. Chief Justice MacDonald letter to Newbould J. dated November 12, 2014;
- tt. N. Sabourin letter to M. Wilhelm dated November 13, 2014;
- uu. N. Sabourin letter to J. Farr dated November 13, 2014;
- vv. N. Sabourin letter to R. James dated November 13, 2014;
- ww. N. Sabourin letter to B. Death dated November 13, 2014;
- xx. N. Sabourin letter to R. McLean dated November 13, 2014;
- yy. Lightning-Earle email (w/Oct. 28'14 letter) to CJC dated November 19, 2014;
- zz. D. McLaren "Under Siege" (pp. 30-31) dated December 5, 2014;

- aaa. J.D. Close letter to CJC dated December 12, 2014;
- bbb. N. Sabourin letter to Ms. Lightning-Earle dated January 6, 2015;
- ccc. N. Sabourin letter to J.D. Close dated January 26, 2015;
- ddd. Ms. Lightning-Earle letter to CJC dated June 16, 2015;
- eee. Newbould J. letter to Sr. ACJ Pidgeon dated November 5, 2015;
- fff. Chief Justice H. Smith letter to N. Sabourin dated November 9, 2015;
- ggg. Ms. Lightning-Earle letter to N. Sabourin dated March 9, 2016;
- hhh. Newbould J. letter to Sr. ACJ Pidgeon dated April 20, 2016;
- iii. The Reasons for the Referral of a Complaint to a Panel by the Honourable Robert Pidgeon, Senior Associate Chief Justice of the Superior Court of Quebec, dated May 5, 2016.

Analysis and Conclusions

[36] In *Re Therrien*, [2001] 2 S.C.R. 3, the Supreme Court of Canada described the type of conduct that might warrant the removal of a judge from judicial office as conduct that “is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.”

[37] We agree with Associate Chief Justice Pidgeon that, if Mr. Justice Newbould identified himself as a Justice of the Superior Court of Ontario and, offered to sit down with the lawyers for the Town of South Bruce Peninsula and the Federal and Provincial governments, to review evidence and form a view of the strength and weaknesses of the opposing parties’ cases, and to provide his own views on a matter, that was before a colleague in his Court in the same Judicial Region; his conduct might be viewed as misconduct, as contemplated by s. 65(2) (b) of the *Judges Act* or, that his conduct might be seen to have placed him in a position incompatible with the due execution of his office, contrary to the provisions of s. 65(2) (d) of that *Act*.

[38] We have reached the unanimous decision that the matters complained of, if proven, might be serious enough to warrant Mr. Justice Newbould's removal from judicial office, pursuant to s. 65(2) of the *Judges Act*.

Issues

[39] We find that an Inquiry Committee should be appointed to inquire into the following issues:

General Issues

1. Did Justice Newbould have an interest regarding the settlement proposal of the Sauble Beach Land Claim?
2. Was it unethical for Justice Newbould to participate in the public debate as he is alleged to have done?
3. Did Justice Newbould refer to his judicial office in the public debate as he is alleged?
4. If so, was it unethical for Justice Newbould to refer to his judicial office in the public debate as is alleged?
5. Was it unethical for Justice Newbould to write letters to a public body stating his opinion on a matter before his court?
6. Was it unethical for Justice Newbould to comment on the merits of the litigation?
7. Was it unethical for Justice Newbould to oppose a proposed settlement of a case in his court?
8. Was it unethical for Justice Newbould to contact a previous mediator in the case?

9. Was it unethical for Justice Newbould to attempt to contact the lawyers in a case in his court under case management by another judge?
10. If he did so, was it unethical for Justice Newbould to write the letters he is alleged to have written dated August 8, and August 25, 2014 to the Mayor and Council?
11. If he did so, was it unethical for Justice Newbould to make reference to the First Nation and its motives in paragraphs (b), (c), (e) and (g) of his letter dated August 25, 2014?
12. Was the conduct of Justice Newbould an unjustified interference with the course of justice in a case in his own court?
13. Has the intervention of Justice Newbould in the context of the court case, if it did occur, been so manifestly and profoundly destructive of the concept of impartiality and integrity and independence of the judicial role that public confidence is undermined so as to render the judge incapable of executing Judicial Office?

Signed

The Honourable Chief Justice Hinkson

Signed

The Honourable Senior Judge Veale

Signed

The Honourable Associate Chief
Justice Rooke

Signed

The Honourable Mr. Justice Mainville

Signed

Maureen O'Neil