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Judicial Council
Conseil canadien
de la magistrature

Ottawa, Ontario K1A 0W8

8 February 2017

Mr Frank Addario
171 John Street, Suite 101
Toronto, ON M5T 1X3

Dear Mr Addario:

I am writing on behalf of Chief Justices Derek Green, David Jenkins, Laurence O'Neil, Eugene Rossiter and David Smith.

These five Council members participated in the deliberations regarding Justice Camp. They opposed the decision not to allow oral submissions and wished to express their rationale for so doing. Please find attached their reasons in this regard.

Yours sincerely,

Norman Sabourin
Executive Director and Senior General Counsel

Encl.

Dissenting Reasons of certain Members Respecting procedural Issues

[1] On November 29, 2016, an Inquiry Committee constituted under section 63(3) of the *Judges Act*, RSC 1985, c. J-1 to investigate and consider allegations against the Honourable Justice Robin Camp, a justice of the Federal Court of Canada, submitted a report pursuant to section 8(1) of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*, SOR/2015-203 in which the Committee unanimously expressed the view that "a recommendation by the [Canadian Judicial] Council for Justice Camp's removal [from office] is warranted."

[2] Section 9 of the *By-Laws* provides that "the judge may make a written submission to the Council regarding the report." By contrast, a former By-law provided that the judge could make a brief oral statement regarding an Inquiry Committee's report to the Council in addition to written submissions. In practice, the Council before deliberating whether to act on a inquiry committee report often heard not only from the affected judge but also from his counsel. The current By-Laws are silent as to whether an oral submission to the Council may be made by either the judge or his counsel or both.

[3] Upon receipt of the Inquiry Committee report, Justice Camp's counsel, wrote in a letter to the Council that "Justice Camp would like to make oral submissions" and indicated that his counsel would be available to appear on certain dates.

[4] Members of the Council who were eligible to deliberate on the question of removal of the judge from office were canvassed by email for their views as to whether the request to make oral submissions should be acceded to. After an exchange and sharing of views by individual members by email, the chair ("the senior member who is available to participate in deliberations," per 10(1) of the *By-laws*) declared that a majority of the members were in favour of denying the request to make oral submissions.

[5] In accordance with this decision, the Executive Director and Senior General Counsel of the Council wrote to Justice Camp's counsel and advised:

> Council is of the view that Justice Camp was provided with a fulsome opportunity to present evidence, cross-examine witnesses and make representations about all the allegations against him. While Council retains the flexibility to hold a hearing in exceptional circumstances, you have not convinced members it is required in this case. Justice Camp is not restricted in respect of the scope of issues he may raise in a written submission. For these reasons, Council declines Justice Camp's request to hold a hearing – which would have to be public – or the purpose of receiving oral submissions. ... The judge should feel free to address the issue of oral submissions in any written representations.

[6] In his subsequent written submissions, Justice Camp's counsel renewed his request "to make oral submissions through counsel" during the deliberations of the Council, and made written submissions in support of that position.

[7] At a meeting of the Council called to deliberate on the Inquiry Committee Report, the members present considered and debated whether Justice Camp or his counsel should be accorded an opportunity to make oral submissions. A motion was made that "the Council proceed without orally hearing from Justice Camp or his counsel." On division, the motion was passed by a majority.

[8] We voted against the motion. We would have been prepared to allow Justice Camp to make a personal oral statement to the Council and, further, to allow his counsel to make legal submissions orally. What follows are our dissenting reasons for this conclusion.

[9] We would first observe that although Justice Camp's initial request appeared to be a request for him to personally make oral submissions, whereas his counsel's written submissions asked for an opportunity to make oral submissions "through counsel." The question of oral submissions by both Justice Camp and his counsel was considered.

[10] The Council and an Inquiry Committee are "deemed to be a superior court" with respect to investigation of complaints or allegations: *Judges Act*, 63(4). When an Inquiry Committee report is delivered to the Council pursuant to section 8(1) of the *By-Laws*, the Council must then "deliberate" as to whether to recommend removal of the judge to the Minister of Justice: *By-Laws*, s. 10. In so doing, it must "consider the Inquiry Committee's report and any written submission made by the judge": *By-Laws*, s. 11(1). Following deliberation, it must "report its conclusions and submit the record of the inquiry or investigation to the Minister": *Judges Act*, s. 65(1).

[11] In performing its role in this regard, the Council is engaging in adjudicative functions. It is deciding whether to recommend Justice Camp's removal. The decision to recommend removal is not that of the Inquiry Committee: *Re Matlow*. The Council is a substantive decision-making body. The scheme of the *Act* and *By-Laws* and, indeed, the practice that has grown up is that the ultimate decision whether to recommend removal remains that of the Council, taking into consideration the report of the inquiry committee.

[12] Because the Council's decision affects the "rights, privileges or interests of an individual", it gives rise to a duty of procedural fairness: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 20. Indeed, in the letter previously referred to, the Council recognized that it was not precluded from holding a hearing to allow Justice Camp to make oral submissions (though it would have limited it to "exceptional circumstances"). We agree with Justice Camp's counsel in his written submission that "the Council is bound by the principles of fairness and individual justice like any tribunal

[and, we would add, court] governed by the rule of law." The right to procedural fairness has not been taken away either by the *Act* or the *By-Laws*.

[13] The question for consideration here is what the content of the duty of procedural fairness in this case should involve. Application of the factors mentioned in *Baker* suggests that Justice Camp is owed the highest level of procedural fairness:

Nature of the Decision

[14] As *Baker* emphasizes, the closer the process resembles judicial decision-making, the more likely that procedural protections closer to the trial model will be required by the duty of fairness (paragraph 23). The Council is deemed to be a superior court, i.e. a judicial body, not just a quasi-judicial one. While the Inquiry Committee's report contains initial fact-finding and conclusions, and the Council must consider the Committee's report in its deliberations, the Council retains the right to accept, reject or modify the conclusions the Committee reaches. The key decision whether to recommend removal is made by the Council. The Council is not an appellate body from an Inquiry Committee; instead, the Committee's report is one (indeed, a very significant) factor the Council considers in making an independent, first-instance decision.

Nature of the Statutory Scheme

[15] *Baker* also emphasizes that greater procedural protections will be required when no appeal procedure is provided within the statute (paragraph 24), Here, there is no appeal from the Council. While its recommendation to the Minister is not binding on her, it has always conclusive in fact, certainly in relation to the findings that were made. Further, the Minister's role is not that of an appellate body. As well, the Council is not regarded as an appellate body from an Inquiry Committee. The Council's decision can therefore be said to be a first instance decision, taking into account all relevant factors, though assisted in great measure by the report of the Inquiry Committee.

Importance of the Decision

[16] The more important the decision is to the lives of those affected and the greater its impact on those persons, the more stringent the procedural protections that will be mandated (*Baker*, paragraph 25). Here the decision to recommend removal of a judge is of the utmost importance both to the judge and society generally. It may have grave and permanent consequences for the judge's professional career and perhaps for other related careers.

Legitimate Expectations of the Person Challenging the Decision

[17] If a claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness (*Baker*, paragraph 26). Justice Camp had to be accorded procedural fairness in terms of active participation in the Inquiry in order to respond to the allegations against him. That does not mean that an active role for the judge ends once the Inquiry Committee process is ended. At the stage of the deliberations of the Council, the focus is different. Now Justice Camp has to respond to the analysis and conclusions of the Inquiry Committee, including significant negative inferences about his attitudes and life view. He would not have known what those inferences were going to be at the time of the hearing. An effective response to those inferences about whether he has achieved attitudinal reform requires significantly different submissions. The fact that Justice Camp was given a "fulsome" opportunity to make submissions before the Committee is beside the point. He now has legitimate expectations that he will have an opportunity to respond effectively to the report. The *By-Laws* give him the right to receive and digest the report. To what end? Presumably to respond thereto. The *By-Laws* give him a right to make written submissions. They do not say anything about oral submissions. Given that this is a judicial proceeding and the adjudicators are all judges familiar with the importance of orally hearing both sides and would normally do so as a matter of course in their courts, especially on a matter of first impression (i.e. whether to accept or reject the report) one would expect that an opportunity to appear before the Council would most likely be accorded in cases like the present. It is wrong in law for the Council to assert that it should only be exercised in "exceptional cases."

[18] Furthermore, Justice Camp's legitimate expectation of an oral hearing is particularly strong if Council considers modifying the Inquiry Committee's analysis. An oral hearing is the conventional place for a tribunal to raise alternative theories with counsel. For example, if the Council were to conclude that removal was not warranted on the basis of a failure to achieve attitudinal reform (a significant part of the Inquiry Committee's reasoning) but were to consider, nevertheless, to recommend removal for some other reason, he will have no opportunity to respond to any alternative theory of removal unless he and has an opportunity to respond to questions from Council members.

Procedural Choices by the Council

[19] While not determinative, *Baker* indicates that the procedural choices made by the body making the decision and the body's institutional constraints are a relevant consideration (paragraph 27). Application of this factor is essentially neutral. There are no institutional or legislative constraints preventing the Council from according Justice

Camp an opportunity to make oral submissions, the By-Laws are silent and given their recent enactment there is no established practice yet developed.

[20] As noted in *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at paragraph 75, the scope of the right to be heard should be "generously construed" where the judicial council proceedings are similar to a regular judicial process, there is no appeal from the council's decision and the implications for the judge are very serious.

[21] A consideration and balancing of the forgoing factors clearly favour giving Justice Camp the opportunity to make oral submissions. In our respectful view, there are no substantial arguments that support not doing so.

[22] As noted previously, the fact that Justice Camp may have had a "fulsome opportunity to present evidence, cross-examine witnesses and make representations about all the allegations against him" at the Inquiry Committee hearing does not justify refusing to accord him the opportunity to speak to the effect of, analysis contained in and the inferences drawn in the Inquiry Committee Report before the Council. The *By-Laws* clearly recognize the importance of giving the judge an opportunity to respond to the report. A response to the report is not the same as a response to the raw allegations. Limiting Justice Camp's right to respond to respond downplays the importance of oral argument in judicial proceedings. This is not the standard used in other contexts. Furthermore, an opportunity to respond orally is especially important to the judge in light of the fact that the major conclusions drawn by the Inquiry Committee as to Justice Camp's current attitudes and as to whether he has achieved attitudinal remediation are based on inferences drawn, at least in part, from how Justice Camp expressed himself at the hearing. This is an area which is particularly susceptible to misunderstanding and misinterpretation. There may well be other inferences that could be drawn. Justice Camp should have the opportunity to speak to this issue, to give alternative explanations, if any, and to respond to any questions the members of Council may have.

[23] It is inappropriate to conclude that oral submissions would be pointless because nothing could be said that has not already been said. We do not have the gift of clairvoyance. Until the Council deliberates, our duty as judges is to preserve an open mind about the issues and the result. We cannot presume that to accurately anticipate any and all arguments by counsel or explanations given by Justice Camp himself, either in response to the report or any alternative theory of removal. Oral argument is too valuable an advocacy tool in this context, given the issues at stake.

[24] We also do not place any stock in a distinction between a "hearing" before the Inquiry Committee and "deliberations" of Council, as if that justifies attenuating the scope of procedural fairness before the Council. Council's duty to deliberate and come to a decision on the question of whether to advise the Minister that the judge should be removed in fact makes the decision-making process of Council all the more important. Council is the ultimate

decision-maker. Its decision will affect Justice Camp's rights, privileges and interests and the process clearly contemplates an opportunity to respond to the Inquiry Committee report. In effect and as a matter of natural justice Justice Camp is to receive a "hearing" from Council whether it is called such or described as a "deliberation."

[25] In approaching its deliberations, the Council must be presumed to have an open mind. With the extent of Justice Camp's attitudinal reformation a major issue for the Inquiry Committee - and its conclusion that reformation had not been achieved - Council could not conclude, in our respectful submission, that an oral hearing could not make a difference. Given the stakes and the high degree of fairness owed, the Council should have allowed Justice Camp and his counsel to make oral submissions.

Signed:

The Honourable Derek Green
The Honourable David Jenkins
The Honourable Laurence O'Neil
The Honourable Eugene Rossiter
The Honourable David Smith