Federal Court

CANADA

Cour fédérale

Date: 20080811

Docket: T-914-08

Citation: 2008 FC 941

Ottawa, Ontario, August 11, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE HONOURABLE MR. JUSTICE PAUL COSGROVE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] The Honourable Mr. Justice Paul Cosgrove (Justice Cosgrove), since 1989, is a judge of the Ontario Court (General Division) renamed the Superior Court of Justice of Ontario. In this expedited judicial review application, Justice Cosgrove seeks to set aside the following May 9, 2008 ruling of an Inquiry Committee of the Canadian Judicial Council (the Inquiry Committee and the CJC):

> The Inquiry Committee has considered your submissions made earlier today, and determined that Mr. Paliare's motion will be heard at the time of the hearing in September.

[2] Mr. Paliare represents Justice Cosgrove at the inquiry established by the CJC upon the complaint of the Attorney General for Ontario made pursuant to subsection 63(1) of the *Judges Act* (the *Act*), to determine whether in its report to the CJC it should make a recommendation for his removal from the office of Judge for any of the reasons set out in paragraphs 65(2)(b) to (d) of that *Act* within the framework of subsection 99(1) of the *Constitution Act 1967* which reads in its relevant part:

> 99(1) [...] The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and the House of Commons.

[3] In the appendix to these reasons, I set out in both official languages sections 63 to 65 of the *Judges Act.*

[4] The motion referred to in the Inquiry Committee's ruling is a motion based on the *Boilard* rule which will be explained later in these reasons and the reference to the hearing in September is the Inquiry Committee's hearing into the matter affecting Justice Cosgrove scheduled to commence on September 2, 2008.

[5] In accordance with the CJC Inquiries and Investigation By-laws (the By-laws), Earl Cherniak, Q.C. was appointed as Independent Counsel to present the case to the Inquiry Committee and is required under subsection 5(2) of the Bylaws to give to Justice Cosgrove sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable him to

respond fully to them. The applicant's record indicates that on February 29, 2008, Justice Cosgrove was provided with the notice of allegations.

[6] The Attorney General for Ontario, in his complaint letter to the CJC dated April 2004, pinpointed, as the basis for the complaint, to Justice Cosgrove's decision in *Regina v. Yvonne Elliott*, [1999] O.J. No. 3265 in which he ordered a stay of proceedings in a murder trial; that order was subsequently overturned by the Ontario Court of Appeal on December 4, 2003 cited 179 O.A.C. 219.

[7] The Attorney General for Ontario suggested in his complaint letter the judicial incapacity test to be applied for recommending Justice Cosgrove's removal, was one derived from the 1990 decision of the Inquiry Committee into the conduct of the Royal Commission on the Donald Marshall Jr. Prosecution :

> Is the conduct alleged so manifestly and profoundly destructive of the concept of 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.

[8] Counsel agree the CJC under the *Act* has no power to screen a complaint made by an Attorney General as to whether the complaint has any merit, i.e. determine whether an inquiry is warranted, unlike its ability to do so when a complaint has been made against a superior court judge by any person pursuant to subsection 63(2) of the *Act*.

[9] Justice Cosgrove challenged the constitutional validity of subsection 63(1) of the *Act*. A judge of this Court found this subsection to be unconstitutional insofar as it gives a legal power to

provincial Attorneys General to compel the CJC to commence an inquiry into the conduct of a superior court judge without the screening procedure applied to complaints submitted under subsection 63(2). That decision, reported at 2005 FC 1454, was set aside by the Federal Court of Appeal in the Attorney General of Canada and the Honourable Mr. Justice Paul Cosgrove et al, 2007 FCA 103, leave to appeal denied by that Court on November 29, 2007. Madam Justice Sharlow wrote the reasons for the Federal Court of Appeal which were concurred in by Justices Sexton and Evans.

[10] In her reasons, Justice Sharlow reviewed the limits on the discretion of an Attorney General to exercise the power in subsection 63(1) to compel the commencement of an inquiry. The first constraint identified was the traditional constitutional role of Attorneys General as guardians of the public interest in the administration of justice. She then referred to subsection 63(1) writing at paragraphs 52 and 53 as the second constraint:

> **52** A second constraint is found within subsection 63(1) itself. As I read that provision, an Attorney General is entitled to request the commencement of an inquiry under subsection 63(1) only in relation to judicial conduct that is sufficiently serious to warrant removal of the judge from office for one of the reasons specified in paragraphs 65(2)(a) to (d). The Council, in *the 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 Québec (2003)*, said (at page 3) that it may decline to commence an inquiry on the basis of a request under subsection 63(1), or the Inquiry Committee may decline to continue an inquiry, if the letter of request from an Attorney General does not allege bad faith or abuse of office, and does not on its face disclose an arguable case for removal. In my view, this principle (which I will refer to as the "*Boilard* rule") is a valid expression of the general principle that a tribunal, as master of its own procedure, may decline to proceed in any case that is outside its mandate or is an abuse of its process.
>
> **53** It is true that an Attorney General, while acting in good faith, may submit a request that is not well founded. That is demonstrated by the fact that not every inquiry requested by an Attorney General results in a recommendation for removal and that, in at least one instance, the request did not disclose even a *prima facie* case.

> However, the question of whether judicial conduct in a particular case warrants removal is a matter on which reasonable and knowledgeable people may disagree. The possibility that an Attorney General may misjudge the seriousness of particular judicial conduct bears little weight in determining the constitutionality of subsection 63(1). [Emphasis mine.]

[11] Beginning at paragraph 66 of her reasons Justice Sharlow outlined the screening procedure for section 63(2) complaints which she described as "ordinary complaints" stating that "ordinary complaints are subject to multi-tiered procedure to determine whether an inquiry is warranted."

- Level 1 - where the complaint is reviewed by the Executive Director of the Council to determine whether a complaint warrants opening a file. No file is opened where a complaint is clearly irrational or an obvious abuse of the complaint process.

- Level 2 - the complaint is referred to the Chairperson (or the Vice-Chairperson) of the Judicial Conduct Committee of the CJC and may be disposed summarily if it is outside the mandate of the Council, or if it is trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration. If the complaint is not dismissed summarily, the Chairperson may seek additional information from the complainant, the judge or the judge's chief justice. The complaint may be dismissed, resolved on the basis of remedial measures, or referred to a panel.

- Level 3 - consideration by a panel of three to five judges. The judge complained about is given an opportunity to respond to the complaint. If the complaint is considered not serious enough to warrant an inquiry, it may be resolved at that stage

by a letter of concern or a recommendation of remedial measures. If it is serious enough, the panel makes a recommendation to the CJC that an Inquiry Committee be established.

- Level four - the Council considers the panel's recommendation and decides whether or not an inquiry is warranted. The affected judge is invited to make submissions on the issue.

[12] Justice Sharlow identified the advantages of the screening process in place for "ordinary complaints":

> **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. [Emphasis mine.]

[13] She wrote the following about summary dismissal and remedial measures and concluded:

> **80** Summary dismissal. Part of the function of the screening procedure for ordinary complaints is to facilitate the summary dismissal of complaints that on their face are unmeritorious. In the case of an Attorney General's request for an inquiry under subsection 63(1), that function is served by the *Boilard* rule, which effectively permits the summary dismissal of a complaint by an Attorney General if it is obviously unmeritorious or does not disclose judicial conduct warranting removal from office. The difference is that an ordinary unmeritorious complaint may be dismissed before an Inquiry Committee is established, while under the *Boilard* rule an Attorney General's complaint may be dismissed at an early stage by the Inquiry Committee itself, either before or after its work is commenced, or it may be dismissed later by the Council. Those differences are trivial, in my view. [Emphasis mine.]

> **81** Remedial measures. It seems to me that the possibility of a resolution with remedial measures is unlikely to be a factor in cases involving judicial conduct that would warrant removal of the judge from office. If an Attorney General makes a request for an inquiry under subsection 63(1) on the basis of conduct that would not warrant removal from office, the *Boilard* rule would come into play and there would be no recommendation for removal. If the conduct would warrant removal, there can be no valid objection to the establishment of an Inquiry Committee on the basis that an ordinary complainant might be satisfied with a lesser remedy.
>
> **82** 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.

[14] As a matter of interest what Justice Sharlow coined as the *Boilard* rule is taken from the December 23, 2003 Report of the CJC to the Minister of Justice of Canada (the Minister) concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec. The Inquiry Committee in that case in its report to the CJC concluded that Justice Boilard in recusing himself from continuation of the trial known as *R. v. Beauchamp et al* had not become incapacitated or disabled from the due execution of his office within the meaning of subsection 65(2) of the *Judges Act* and therefore did not recommend Justice Boilard's removal from office. The Inquiry Committee made a finding of impropriety against Justice Boilard which the CJC disagreed with. The CJC concurred with the Inquiry Committee that there be no recommendation for his removal.

[15] The CJC in its report to the Minister in the Justice Boilard matter said "Except where a judge has been guilty of bad faith or abuse of office, a discretionary judicial decision cannot be the basis for any of the kinds of misconduct, or failure or incompatibility in the due execution of office

contemplated by clauses 65(2)(b), (c) or (d) of the *Judges Act* nor can the circumstances leading up to such a decision do so. Exercise of judicial discretion is at the heart of judicial independence."

[16] The *Boilard* rule and its purpose is set out in the following paragraph of the CJC's December 2003 report to the Minister:

> Where the Minister of Justice or an Attorney General of a province questions a judicial decision and requests an inquiry under s. 63(1) of the *Act*, but makes no allegation of bad faith or abuse of office and where, on its face, the judicial decision itself discloses no indication of bad faith or abuse of office, then, the Council would be justified in considering, or an Inquiry Committee appointed under s. 63 should consider, as a preliminary matter, whether there is anything to rebut the presumptions of good faith and due and proper consideration of the issues. Although the circumstances may vary from case to case, if there is nothing of that nature, the Council or an Inquiry Committee should, as a general rule, decline to deal with the matter further on the basis that 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. [Emphasis mine.]

The context of the Inquiry Committee's May 9, 2008 ruling

[17] For convenience, I reproduce again the contested ruling challenged in this judicial review proceeding:

> The Inquiry Committee has considered your [those of Independent Counsel and Mr. Paliare] submissions made earlier today, and determined that Mr. Paliare's motion will be heard at the time of the hearing in September.

[18] Mr. Paliare inquired whether the Inquiry Committee was intending to issue reasons for decision and, if not, he requested it do so. He was advised by Inquiry Committee Counsel, George Macintosh, Q.C. (the Inquiry Committee Counsel) "that it will not be issuing reasons for the decision it rendered on May 9, 2008".

[19] What led to the Inquiry Committee ruling made after it heard submissions via teleconference was the following.

[20] After considering the notice of allegation sent to Justice Cosgrove by Independent Counsel in late February 2008, Mr. Paliare wrote to him on April 10, 2008 stating he had been instructed "to make a motion to the Inquiry Committee in the nature of a *Boilard* motion". He added:

> Specifically, we will be submitting that the impugned conduct set out in your notice to Justice Cosgrove dated February 29, 2008 is not capable of supporting a finding of judicial misconduct within the meaning of the *Judges Act*. As a result, as in the *Boilard* matter, the Committee should decline to proceed with the inquiry. [Emphasis mine.]

[21] He enclosed a draft notice of motion and cited Mr. Cherniak's agreement that it would be appropriate for the motion to be scheduled prior to the scheduled September date for the hearing. He added the following comment:

> I recall you indicated during our discussion that, in the event we were to bring a motion such as this, it would be your intention to rely upon parts of the transcript of the proceedings for Justice Cosgrove. With respect, it is our view that it is both unnecessary and inappropriate to do so. In our view, our motion is in the nature of a pleadings motion. Its success or failure depends upon the adequacy of the allegations pleaded against Justice Cosgrove.

[22] The relevant portions of Mr. Paliare's *Boilard* motion are annexed to Appendix B to these reasons.

[23] Mr. Cherniak answered Mr. Paliare's April 10th letter on April 14th stating: "Upon further consideration, it is my view the draft motion should be heard at the outset of the inquiry to be

decided after the evidence has been put forward" expressing the view "the Inquiry is not an adversarial process. The function of the Inquiry Committee is to make a recommendation to the Canadian Judicial Council which itself makes a recommendation, not a decision". He explained his position: "that the Committee will not be in a position to evaluate the issues raised in your draft notice in the absence of that [...] evidence" citing the Inquiry Committee's decision in the Inquiry concerning Justice Matlow. Mr. Cherniak concluded by saying if Mr. Paliare did not agree with his position, steps should be taken to set up a conference call with the Inquiry Committee to discuss the applicant's proposed motion.

[24] Steps were then taken to schedule a conference call. In a letter dated April 17, 2008 to the Inquiry Committee Counsel, Mr. Macintosh, Mr. Paliare requested the conference call stating:

> In particular, it is his position that our motion should be heard and determined by the Inquiry Committee together with the hearing of all the evidence in the matter in September, 2008. Needless to say, we disagree.

Mr. Cherniak in an April 18, 2008 letter to the counsel to the Inquiry Committee supported the request to arrange a conference call.

[25] By e-mail dated April 28, 2008, Chief Justice Finch of the British Columbia Court of Appeal who is the Chairperson of the Inquiry Committee concerning Justice Cosgrove instructed Inquiry Committee counsel as follows:

> Dear Mr. Macintosh:
>
> Members of the committee have considered how best to address Mr. Paliare's motion.

> We have agreed to hear Mr. Paliare and Mr. Cherniak by telephone conference on the sole question of the procedure to follow in dealing with Mr. Paliare's motion. If we are persuaded on the basis of those submissions that we should address the substance of Mr. Paliare's motion in advance of our September hearing date, the committee may direct either a further telephone conference, or alternatively written submissions, for that purpose.
>
> If the committee is not persuaded that we should hear submissions on the substance of Mr. Paliare's motion before September, we may direct that it be heard at that time, and ruled on after hearing the evidence to be presented.
>
> All committee members are available for the initial telephone conference to discuss the procedure to be followed on two dates: May 9th and May 21st. The suggested time for this initial hearing is 7:30 a.m. Pacific Daylight Time.
>
> Would you please arrange the date for this telephone conference that is convenient to both counsel, on one of the days suggested.

[26] A copy of Chief Justice Finch's e-mail was forwarded to Messrs. Cherniak and Paliare.

The Arguments

a) Counsel for Justice Cosgrove

[27] The fundamental premise underlying Justice Cosgrove's judicial review application is that his counsel asked the Inquiry Committee: "to give him an opportunity to demonstrate, on a preliminary basis, that the "notice of misconduct" (previously referred in these reasons as the notice of allegations dated February 29, 2008) and evidence is so lacking in proof of misconduct that there is no reason to continue the Inquiry (the *Boilard* rule). The Inquiry Committee refused" [Emphasis mine, see paragraph 2 of the applicant's memorandum of fact and law.]

[28] Justice Cosgrove's counsel wrote the following at paragraphs 3 and 4 of his memorandum:

> 3. The Inquiry Committee decided that it would decide the *Boilard* motion only after all the evidence at the Inquiry was heard. At that time, the entire purpose of the *Boilard* motion will have been defeated; it will protect neither the independence of the judiciary, nor natural justice. The Inquiry Committee cannot continue its Inquiry if there is no possibility that Justice Cosgrove could be found to have acted in bad faith or to have abused the office. Similarly, Justice Cosgrove cannot testify about his judicial decision making unless this Inquiry fits within the narrow bad faith exception to the judicial immunity from testifying. It is essential that the Inquiry Committee determine the *Boilard* motion before Justice Cosgrove is called upon for his evidence. The breach of natural justice and the infringement of judicial independence created by the Inquiry Committee's proposed procedure cannot be remedied after the fact.
>
> 4. Justice Cosgrove asks the Federal Court to require the Inquiry Committee to hear and decide Justice Cosgrove's motion before he is required to call evidence. [Emphasis mine.]

[29] Further in the applicant's memorandum, Justice Cosgrove's counsel writes "if the inquiry proceeds, in order to defend himself, it may be necessary for Justice Cosgrove to testify how and why he reached his decision in *R. v. Elliott*. This is precisely the sort of jeopardy that the *Boilard* rule was designed to address."

[30] As a result, counsel for Justice Cosgrove frames the first issue on this application as:

> "Did the Inquiry Committee violate natural justice and judicial independence by refusing to determine the *Boilard* motion on a preliminary basis."

[31] Counsel frames the second issue as "is this application premature?" He says Justice Cosgrove is challenging an interlocutory decision of the Inquiry Committee and that usually a judicial review of an interlocutory decision of a tribunal will be premature until the tribunal completes its work. He argues, in the circumstances of this case, the application is not premature because it will not unduly fragment the inquiry and, in order for judicial review to provide a meaningful remedy, it must be addressed on an interlocutory basis before the Inquiry Committee

commences the inquiry hearing. He relies upon the decision of my colleague Tremblay-Lamer in *Minister of Public Safety and Emergency Preparedness v. Kahlon*, 2005 FC 1000 for the proposition a judicial review of an interlocutory decision is appropriate where the impugned decision is "finally dispositive of a substantive right of a party", the determining factor being whether the damage done by the interlocutory decision can later be corrected. He also points to my colleague Justice Layden-Stevenson's order expediting this judicial review application where she mentioned as a consideration raised by the applicant for such order that unless the application is expedited the judicial review application will be moot. He submits for the same reasons the *Boilard* motion must be determined at this time before the inquiry starts. He concludes if the inquiry is permitted to proceed without considering the application of the *Boilard* rule, it will damage judicial independence in a manner that cannot be corrected in a subsequent procedure and it is imperative the Inquiry Committee be required to determine the *Boilard* rule on a preliminary basis.

b) Counsel for the Attorney General for Canada

[32] The Attorney for Canada's (AGC) first line of defence is that Justice Cosgrove is seeking to set aside the Inquiry Committee's interlocutory procedural ruling that directed that the motion (Justice Cosgrove's *Boilard* motion) be heard at the hearing which is set to begin on September 2, 2008. He argues it is a fundamental principle of administrative law interlocutory rulings are not subject to immediate judicial review absent exceptional circumstances. He relies upon the Federal Court of Appeal's decisions in *Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 and *Szczecka v. Canada (Minister of Employment and Immigration)*, 1993 116 D.L.R. (4th) 333 as well as other cases.

[33] He submits there are no exceptional circumstances to warrant the decision being reviewed at this stage of the process; the harm Justice Cosgrove suggests might occur if the Inquiry hearing takes places is only speculative at this stage; there is no evidence on this application Justice Cosgrove will be required to testify at the hearing about his deliberative thought process in connection with his 1999 trial and stay decision. He points to the fact four and one half years have passed since the complaint was filed and the hearing be allowed to proceed and not be interrupted by judicial intervention at this early stage of the inquiry process.

[34] In response to the applicant's argument his substantive rights had been affected by the Inquiry Committee's May 9, 2008 ruling and judicial independence would be irreparably damaged if his motion is not decided before the commencement of the hearing, Counsel for the AGC made the following points.

[35] First, he stated the Inquiry Committee "did not decide the merits of his motion for summary dismissal of the complaint. It merely directed the motion be brought at the hearing itself".

[36] Second, the AGC wrote at paragraphs 39 and 40 of his responding memorandum:

> It is important to keep in mind that the Inquiry Committee has not ruled on the motion Justice Cosgrove has indicated he wishes to bring. It will be open to Justice Cosgrove to bring the motion at the outset of the hearing, or at any other time during the hearing. The Inquiry Committee will then decide, in accordance with the discretion conferred upon it by Parliament to govern its own process, whether the motion should be decided at the time the motion is brought or at a later point in the proceedings. The issue falls entirely within the mandate and the specialized capacity of the Inquiry Committee which will consider the submissions of both Justice Cosgrove and Independent Counsel in determining how the important interests reflected in the *Boilard* report will be balanced.

> In any event, this question need not be decided on this application. The prematurity of the question is a sufficient basis in and of itself for this application for judicial review to be dismissed.

Analysis and Conclusion

[37] I agree with the submission of the AGC, this judicial review application should be dismissed on grounds of prematurity since the Inquiry Committee did not, in its May 9, 2008 ruling, decide in any manner the substance of Justice Cosgrove's motion.

[38] As I read the record surrounding the context of the Inquiry Committee's decision reached by its members in discussion after hearing the counsel for the applicant and Independent Counsel by telephone, I find the only issue which the Inquiry Committee decided was to hear Justice Cosgrove's *Boilard* motion "at the time of the hearing in September".

[39] As I see it, the Inquiry Committee retained complete discretion when it would hear the motion i.e. prior to the opening of the case to be presented by Independent Counsel and when it would rule on Justice Cosgrove's *Boilard* motion i.e. before the opening of Independent Counsel case or before or after the opening of Justice Cosgrove's case. The Inquiry Committee will make those rulings after hearing the counsel for the parties in person in early September 2008 at the time of the hearing. Simply put, the Inquiry Committee did not endorse or reject the positions urged upon it by counsel for the parties during the teleconference of May 9, 2008.

[40] The view I take is obvious from what was communicated to Messrs. Cherniak and Paliare as to be the purpose of the May 9, 2008 telephone conference call. The Inquiry Committee's Chairperson, Chief Justice Finch made this clear in his April 28, 2008 directive. Its purpose was

solely one of procedure as to when Justice Cosgrove's *Boilard* motion should be addressed. Two options were identified:

- Option one was to address the substance of the motion in advance of the September hearing date in which case "the committee may either direct a further telephone conference, or alternatively written submissions for that purpose"; or

- Option two triggered if the Inquiry Committee was not persuaded as to option one in which case "we may direct that it be heard at that time and ruled on after hearing the evidence to be presented".

[41] It is evident option one was not selected by the Inquiry Committee. As to option two, the Inquiry Committee ruled that it would hear the substance of Justice Cosgrove's motion at the September hearing but did not rule when that motion would be heard and did not direct that it would be ruled upon after hearing the evidence to be presented.

[42] In summary, nothing was decided by the Inquiry Committee on May 9, 2008 except to hear Justice Cosgrove's motion "at the time of the hearing" in September 2008.

[43] The Inquiry Committee may decide to hear the *Boilard* motion at the outset and may rule in Justice Cosgrove's favour before the opening of his case which is the fear he identified. On this basis, my view is this judicial review application is clearly premature.

[44] Counsel for Mr. Justice Cosgrove, in argument, submitted the Inquiry Committee may not deal with the *Boilard* motion in a manner which would fulfill its constitutional purpose namely to operate as a screening mechanism for the summary dismissal of an unmeritorious subsection 63(1) complaint by an Attorney General. He suggested because the decision was ambiguous or incomplete, it would be appropriate for this Court to issue a directive to the Inquiry Committee on when it should hear his motion and when it should decide it. Alternatively, he suggested this Court adjourn this judicial review application in order to ensure review of the Inquiry Committee's ruling (presumably if it was adverse to Justice Cosgrove).

[45] I agree with counsel for the Attorney General, the Inquiry Committee's May 9, 2008 decision is not ambiguous. The Inquiry Committee is also the master of its own procedure and it is at the heart of its mandate to decide, after hearing submission and on the particular facts of this case, how best to structure its procedure to accomplish the purposes of Justice Cosgrove's *Boilard* motion.

[46] In the circumstances, this Court declines to issue any directives to the Inquiry Committee, assuring it had jurisdiction to do so after having decided this judicial review application is premature.

[47] Finally, this Court cannot, as suggested by Mr. Paliare, adjourn this judicial review application in order to resurrect it after the Inquiry Committee rules on the *Boilard* motion in this case. As counsel for the Attorney General pointed out, the Court would be dealing with a different decision, on different facts and in different circumstances.

[48] For these reasons, this judicial review application is dismissed without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed without costs.

"François Lemieux"

Judge

APPENDIX A

Inquiries

63. (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Investigations

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

Inquiry Committee

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

Powers of Council or Inquiry Committee

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the

Enquêtes obligatoires

63. (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)a) à d).

Enquêtes facultatives

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

Constitution d'un comité d'enquête

(3) Le Conseil peut constituer un comité d'enquête formé d'un ou plusieurs de ses membres, auxquels le ministre peut adjoindre des avocats ayant été membres du barreau d'une province pendant au moins dix ans.

Pouvoirs d'enquête

(4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :

a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment — ou de l'affirmation solennelle dans les cas où elle est autorisée en matière civile — et à produire les documents et éléments de preuve qu'il estime nécessaires à une

full investigation of the matter into which it is inquiring; and

enquête approfondie;

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

Prohibition of information relating to inquiry, etc.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

Protection des renseignements

(5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci.

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

Publicité de l'enquête

(6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à huis clos.

R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27; 2002, c. 8, s. 106.

L.R. (1985), ch. J-1, art. 63; 1992, ch. 51, art. 27; 2002, ch. 8, art. 106.

Notice of hearing

64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

Avis de l'audition

64. Le juge en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

R.S., 1985, c. J-1, s. 64; 2002, c. 8, s. 111(E).

L.R. (1985), ch. J-1, art. 64; 2002, ch. 8, art. 111(A).

Report of Council

65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Rapport du Conseil

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

Recommendation to Minister

(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

Recommandation au ministre

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :

(a) age or infirmity,

a) âge ou invalidité;

(b) having been guilty of misconduct,

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

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

c) manquement aux devoirs de sa charge;

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

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

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

R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5; 2002, c. 8, s. 111(E).

L.R. (1985), ch. J-1, art. 65; L.R. (1985), ch. 27 (2e suppl.), art. 5; 2002, ch. 8, art. 111(A).

APPENDIX B

Draft Boilard Motion

THE MOTION IS FOR:

1. An Order determining that there is no basis to proceed with any inquiry into the allegations contained in the Notice to Justice Cosgrove dated February 29, 2008 (the "Notice") in this matter.

THE GROUNDS FOR THE MOTION ARE:

2 ...

3 ...

4 ...

5. Every allegation in the Notice concerns the conduct of Justice Cosgrove in the courtroom, while he presided over the trial before him, and the discretionary judicial decisions he made in the course of those proceedings.

6. When exercising judicial duties, a judge is presumed, unless the contrary is demonstrated, to have acted in good faith and with due and proper consideration of the issues before him or her.

7. The Notice does not allege that Justice Cosgrove committed the alleged errors in bad faith, or for an improper motive.

8. The allegations contained in the Notice fall into one of two categories:

   a. allegations that Justice Cosgrove committed errors of law; and/or

   b. allegations that Justice Cosgrove exhibited a bias against the Crown, either by:

      i. making findings against the Crown that were without basis; or

      ii. conducting the court's proceedings in a manner that was unfair to the Crown.

9. Neither category of allegation is capable of sustaining a finding of judicial misconduct. In particular:

   a. errors of law, however serious, are the exclusive domain of appellate courts and not the Canadian Judicial Council; and

   b. conduct which might give rise to an apprehension of bias, will not constitute judicial misconduct, unless it is established that the conduct was undertaken with the knowledge that it was being done in bad faith, or for an improper motive.

10. In accordance with the rule in *Boilard*, the Council will not proceed with inquiries that lack the required foundation:

> Except where a judge has been guilty of bad faith or abuse of office, a discretionary judicial decision cannot form the basis for any of the kinds of misconduct, or failure or incompatibility in due execution of office, contemplated by clauses 65(2)(b), (c) or (d) of the *Judges Act* nor can the circumstances leading up to such a decision do so.

11. In the absence of any allegation that Mr. Justice Cosgrove engaged in any conduct that was undertaken by him with the knowledge that it was being done in bad faith, or for an improper motive this Inquiry Committee should decline to deal with the matter further, on the grounds that the Notice contains no basis to establish misconduct. As a result, there is no reason to continue the inquiry.

THE FOLLOWING MATERIALS ARE REQUIRED FOR THE HEARING OF THE MOTION:

12. The following materials are required for the hearing of this motion:

    a. This Notice of Motion;

    b. The decision of the Court of Appeal in *R. v. Elliott*;

    c. The letter dated April **, 2003 from Attorney General Michael Bryant to the Chief Justice Beverley McLachlin; and

    d. The Notice to Justice Cosgrove dated February 29, 2008 in this matter.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-914-08
STYLE OF CAUSE:	THE HONOURABLE MR. JUSTICE PAUL COSGROVE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 7, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	August 11, 2008

APPEARANCES:

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