Federal Court Cour fédérale

Date: 20171214

Docket: T-604-16

Citation: 2017 FC 1145

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DONALD BEST

Applicant

and

ATTORNEY GENERAL OF CANADA and THE HONOURABLE MR. JUSTICE J. BRYAN SHAUGHNESSY

Respondents

JUDGMENT AND REASONS

[1] In 2007, a corporation controlled by the Applicant, Nelson Barbados Group Ltd., commenced an action in the Ontario Superior Court of Justice against 62 defendants. After Nelson Barbados' action was stayed, a number of defendants sought and successfully obtained costs against the Applicant personally because of his obstructionist behaviour in the litigation. The Applicant's failure to satisfy the costs order ultimately resulted in him being found in civil contempt by the co-Respondent, the Honourable Mister Justice Bryan Shaughnessy, who issued

a warrant of committal for the Applicant's arrest and imprisonment. The Applicant filed a complaint about Justice Shaughnessy's conduct in issuing the warrant with the Canadian Judicial Council [CJC] on January 5, 2016, but in a letter dated January 28, 2016, the CJC's Executive Director dismissed the complaint. The Applicant has now applied under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, as amended, for judicial review of the Executive Director's decision.

I. Background

[2] The action initiated by Nelson Barbados in 2007 was case-managed by Justice Shaughnessy. After the action was stayed, a number of defendants sought costs against the Applicant personally on a full or substantial indemnity basis, citing the Applicant's alleged obstructionist behaviour. On November 2, 2009, Justice Shaughnessy ordered the Applicant to attend an examination on November 17, 2009, and to provide certain documentation pertaining to Nelson Barbados. Shortly before the examination was set to begin, the Applicant telephoned the examiner's office and was placed into a conference call with two of the defendants' counsel, Gerard Ranking and Lorne Silver. The Applicant said he did not plan to attend the examination and refused to commit to a future date. The Applicant also refused to say where he currently resided, citing concern for his safety. The Applicant did not provide the requested documentation.

[3] The defendants then initiated a contempt motion against the Applicant who failed to attend the hearing of the motion on December 2, 2009. Justice Shaughnessy granted an order authorizing substituted service on the Applicant and also issued an order directing him to attend

on January 15, 2010, to give oral evidence and produce the previously requested documentation. The Applicant did not attend on January 15, 2010, nor did he produce the requested documentation. Accordingly, on January 25, 2010, Justice Shaughnessy found the Applicant in contempt of the previous orders and issued a warrant of committal [the 2010 Warrant] sentencing the Applicant to three months' incarceration and a fine of $7,500.

[4] In 2012, the Applicant retained Brian Greenspan who, on August 9, 2012, appeared before Justice Shaughnessy seeking directions with respect to an application to purge the contempt order. Justice Shaughnessy temporarily suspended execution of the warrant against the Applicant to permit his return to Canada to retain counsel and attend for cross-examination. In the course of this hearing, Justice Shaughnessy advised Mr. Greenspan that the Applicant had filed a complaint with the CJC, who had closed its file without taking any action against Justice Shaughnessy. Mr. Greenspan advised that he was aware of this and had no objection to the matter being heard by Justice Shaughnessy. When Mr. Greenspan next appeared before Justice Shaughnessy on November 16, 2012, he sought to remove himself from the record on consent, citing unfamiliarity with civil matters. Justice Shaughnessy scheduled a further hearing on December 11, 2012, to monitor the Applicant's progress in retaining new counsel. The Applicant advised the court on December 11, 2012, that he wished to bring malpractice actions against Mr. Ranking and Mr. Silver, and that he had been unsuccessful in finding a lawyer with experience in that area. Accordingly, he filed a Notice of Intention to Act in Person and appeared unrepresented at the cross-examinations on the affidavits filed for purposes of the application to purge his contempt.

[5] The application to purge the Applicant's contempt was heard on April 30 and May 3, 2013. Justice Shaughnessy found that the Applicant remained in contempt and at the hearing on May 3, 2013, ordered the stay of the warrant lifted and directed that the Applicant be taken into custody to begin serving his three-month sentence. Justice Shaughnessy dispensed with approval of the order by the Applicant, and ordered that he was no longer seized of the matter. The text of the warrant of committal dated May 3, 2013 [the 2013 Warrant] was substantially the same as the 2010 Warrant, except for the addition of a direction that special security arrangements may be necessary due to the Applicant being a former police officer, and except for the added words: "No remission is ordered." The Applicant unsuccessfully appealed Justice Shaughnessy's finding of contempt to the Ontario Court of Appeal, and his application for leave to appeal to the Supreme Court of Canada was dismissed with costs on a solicitor-client basis.

[6] After the Applicant was incarcerated, he brought a *habeas corpus* application which was heard by Justice Molloy of the Ontario Superior Court of Justice. Justice Molloy ordered the Applicant's release pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The Attorney General consented to the terms of the release order, and in her endorsement Justice Molloy remarked that:

> It is unclear whether the warrant of committal stating "No remission is ordered" purports to deprive Mr. Best of statutory remission. This clause is ambiguous. It could simply mean that the trial judge was declining to make any order with respect to remission. However, if the clause does purport to deny remission, it is made without jurisdiction.

II. The Applicant's Complaint to the CJC

[7] In a letter to the CJC dated January 5, 2016, the Applicant complained that Justice Shaughnessy's conduct in respect of the hearing on May 3, 2013, constituted judicial misconduct, in that he: (i) secretly changed the warrant of committal to include the "no remission" order; (ii) excluded the Applicant from approval of the draft order; and (iii) ordered that the case never be brought before him again.

[8] The Applicant stated in his complaint that, because of the "egregious nature of the misconduct" and because the evidence was "irrefutable," there was no need for a preliminary screening of his complaint and that the matter should be immediately referred to a Stage 2 review for investigation by a member of the CJC's Judicial Conduct Committee [JCC]. Included in the Applicant's complaint were numerous exhibits consisting of various orders and transcripts of the proceedings leading up to issuance of the 2013 Warrant.

III. The CJC's Decision

[9] In a letter dated January 28, 2016, Norman Sabourin, the Executive Director and Senior General Counsel for the CJC, informed the Applicant that his complaint had been reviewed and no further action would be taken as the matter did not involve misconduct. Mr. Sabourin explained this decision as follows:

> The mandate of the Canadian Judicial Council (Council) was previously explained to you in a letter sent by the Council and which related to a complaint you had filed against the same judge and the same court matter.

> In your correspondence to the Council, you allege that Justice Shaughnessy secretly created and substituted a new and changed Warrant of Committal that illegally denied you statutory remission and secretly increased your jail time by a month, that Justice Shaughnessy ordered your exclusion from the normal court process and, that Justice Shaughnessy ordered that your case was never to be brought before him again.
>
> As also previously explained to you in previous correspondence, the Council is not a court. Given the principle of independence of the judiciary, the Council's complaints process is not concerned with judicial decision-making or the exercise of judicial discretion. Your allegations concern the judicial decision-making process and not conduct. In your correspondence, you make various demands related to how you want the complaint process to unfold. The early process of screening of complaints is governed by *the Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the "Review Procedures"). Under the Review Procedures, my duties as Executive Director include the initial review of complaints. Once I complete this review, I must decide whether or not the matter warrants further consideration by Council. This complaint process does not and will not vary on demand.
>
> I have carefully considered your complaint and conclude that it does not involve misconduct. Accordingly, I will be taking no further action.

IV. Procedural History

[10] Following receipt of the CJC's letter, the Applicant filed a Notice of Application for judicial review of the dismissal of his complaint, naming both the Attorney General of Canada and Justice Shaughnessy as respondents. Justice Shaughnessy brought a motion on November 9, 2016, for an order striking certain paragraphs of the Notice of Application which sought declaratory relief and certain paragraphs of the Applicant's Affidavit filed in support of his application. Justice Shaughnessy sought to be removed as a respondent on the ground that, if the impugned paragraphs were struck, he would no longer be a proper respondent to the application

In an order dated January 17, 2017, the Case Management Judge, Prothonotary Aylen, determined that since Justice Shaughnessy's reputational interests were engaged regardless of whether the impugned paragraphs were struck, he remained a proper respondent to the application, although it remained open to him not to participate in the proceeding, and that any findings regarding the impugned paragraphs should be decided by the judge hearing the judicial review application.

[11] In her reasons, Prothonotary Aylen characterized the issue before the Court as follows:

> [63] The issue before the Court on the application for judicial review is not to find whether Justice Shaughnessy engaged in misconduct, but rather whether the ED of the CJC made a reviewable error in holding that the CJC had no jurisdiction to deal with the complaint [see *Taylor v. Canada (Attorney General)*, [1997] F.C.J. No. 1748 at para. 18]. The Court will clearly be in no position to assess Justice Shaughnessy's conduct, as there is no evidentiary record before the Court upon which to do so. The Applicant acknowledges that the Court cannot make a finding of fact regarding Justice Shaughnessy's conduct and that he is not seeking any such findings of fact by way of the Impugned Declarations.

[12] A month or so before the hearing of this application, Prothonotary Aylen heard a motion on October 20, 2017, for intervener status brought by Julian Fantino, a former commissioner of the Ontario Provincial Police and Toronto Police Service and a former federal MP and cabinet minister. In an order issued on October 25, 2017, Prothonotary Aylen dismissed Mr. Fantino's motion for intervener status, finding that "Mr. Fantino is seeking to transform the application by raising issues that are not raised by the Applicant in the notice of application or in any of the written submissions filed by the parties." Mr. Fantino then filed a Notice of Motion for an appeal in respect of the order denying him status as an intervener. In view of the fact that the motion for

intervener status had been filed some four months after the order setting the hearing of this matter for November 20, 2017, I directed on November 16, 2017, that the appeal motion should be scheduled for General Sittings and would not be heard at the hearing of this Application on its merits. It is well-established that applications for judicial review are to be "determined without delay and in a summary way" (see subsection 18.4(1), *Federal Courts Act*), and without the delay attendant upon interlocutory motions or proceedings (see, e.g., *Kourtchenko v Canada (Minister of Citizenship & Immigration)*, [1998] FCJ No 159 at para 4, 146 FTR 23; *Chopra v Canada (Treasury Board)*, [1999] FCJ No 835 at para 6, 168 FTR 273; *Canada (Information Commissioner) v Canada (Minister of Environment)*, [2000] FCJ No 480 at para 17, 187 DLR (4th) 127; and *JP Morgan Asset Management (Canada) Inc v Minister of National Revenue*, 2013 FCA 250 at para 48, [2013] FCJ No 1155).

V. Issues

[13] This application for judicial review raises the following issues:

1. Is the CJC's process for the early screening of complaints alleging judicial misconduct unconstitutional or an unlawful delegation of the CJC's authority to investigate complaints?
2. What is the appropriate standard of review in respect of the Executive Director's decision?
3. Can judicial decision-making constitute judicial misconduct?
4. Was the Executive Director's determination that Justice Shaughnessy's conduct did not disclose judicial misconduct unreasonable?

VI. Analysis

A. *Is the CJC's process for the early screening of complaints alleging judicial misconduct unconstitutional or an unlawful delegation of the CJC's authority to investigate complaints?*

(1) The Applicant's Submissions

[14] The Applicant contends that the Stage 1 screening process by the Executive Director is unconstitutional. According to the Applicant, it was not constitutionally open to Parliament to create or allow a process by which complaints involving a violation of the constitutional principles of judicial independence, integrity, diligence, impartiality, and the rule of law could be screened out summarily. In the Applicant's view, such a system allows for an arbitrary exercise of discretion and is thus unconstitutional. The Applicant also contends that the early screening process is contrary to the *Judges Act*, RSC 1985, c J-1, referring in this regard to subsection 59(1), which stipulates that the CJC consists of chief justices and other senior judges from across Canada, and paragraph 61(3) (c), which empowers the CJC to make by-laws governing the conduct of inquiries and investigations. The Applicant submits that the delegation of authority to screen complaints to the Executive Director, who is not a judge, is an unlawful sub-delegation of authority and, in any event, the Executive Director dismissed his complaint pursuant to the Review Procedures, a policy of the CJC, rather than a by-law.

[15] The Applicant further contends that there is no provision for the summary dismissal of complaints in the *Judges Act*, and if summary dismissal were permissible it must be based on the statute or subordinate legislation rather than on a policy. In the Applicant's view, such dismissal

violates the constitutional principles of parliamentary supremacy, the rule of law, and constitutionalism. According to the Applicant, the terms "conduct" and "public interest" used in section 5 of the Review Procedures are unconstitutionally vague since they give no notice to potential complainants as to what such terms may or may or not encompass, and therefore gives rise to a "standardless sweep" not capable of reasonable legal debate. The Applicant says these terms are arbitrary, insofar as they do not include decision-making, and overbroad insofar as they allow sanctionable conduct to be summarily dismissed, neither of which advances the objects of the CJC. The Applicant further says section 1 of the *Charter* does not apply to a policy such as the Review Procedures, and even if it did, laws that are arbitrary or overbroad cannot be saved by section 1, and violations of section 7 of the *Charter* are rarely saved by section 1.

[16] Lastly, the Applicant contends that the Executive Director's decision was an unlawful exercise or fettering of discretion. The Applicant says, in view of *R v Mills*, [1986] 1 SCR 863, 29 DLR (4th) 161, *R v Gamble*, [1988] 2 SCR 595 at para 51, 89 NR 161, and *Doucet-Boudreau v Nova Scotia*, 2003 SCC 62, [2003] 3 SCR 3, that there must always be an effective remedy which addresses violations of the constitution, and that appellate review is insufficient to remedy damage to the repute of the legal system. Moreover, the Applicant says, because the summary dismissal of his complaint was ineffective to remedy the violation of his *Charter* rights and the damage to the repute of the legal system, the dismissal was an unconstitutional exercise of discretion.

(2) The Respondents' Submissions

[17] Justice Shaughnessy argues that the early screening process is consistent with both the *Judges Act* and the Constitution. Justice Shaughnessy says, in view of *Douglas v Canada (Attorney General)*, 2014 FC 299 at paras 9-10, [2015] 2 FCR 911, and *Slansky v Canada (Attorney General)*, 2013 FCA 199 at paras 30-36, [2015] 1 FCR 81 [*Slansky*], the CJC's early screening procedures have been recognized and affirmed as necessary by the Federal Courts. Justice Shaughnessy points to section 62 of the *Judges Act* which provides that the CJC "may engage the services of such persons as it deems necessary for carrying out its objects and duties." According to Justice Shaughnessy, it is settled law that administrative bodies may, as a matter of practical necessity, delegate decision-making to senior officials within the body absent explicit statutory authorization to do so. Justice Shaughnessy says the Applicant cannot rely on *Slansky* for the proposition that only a judge can perform initial screening because the Federal Court of Appeal in *Slansky* endorsed the Review Procedures governing early screening which, at the time, allocated the screening responsibility to the Chairperson of the JCC (a judge) but now delegate that responsibility to the Executive Director.

[18] According to Justice Shaughnessy, the Applicant's alleged statutory right to complain does not include a right to have that complaint heard because subsection 63(2) of the *Judges Act* provides that the CJC "may investigate any complaint or allegation made in respect of a judge of a superior court", thus granting the CJC discretion as to whether to consider a complaint. Moreover, Justice Shaughnessy says the complaints process adjudicates judges' rights, not complainants' rights, and there is no constitutional right to a particular CJC complaint process. In

Justice Shaughnessy's view, the CJC complaints process does not determine or otherwise impact the constitutional rights of complainants, but protects the integrity of the judiciary.

[19] Justice Shaughnessy disputes the Applicant's argument that litigants have a constitutional right to have a judge sanctioned if the judge commits misconduct, stating that no such right flows from the principle of judicial independence. Instead, according to Justice Shaughnessy, the proper remedy to a lack of judicial independence is appellate review. In Justice Shaughnessy's view, even if there was a constitutional requirement for the CJC to establish some procedure for complaints, the Review Procedures as they now exist are sufficient in this regard, in that they strike the appropriate balance between judicial independence and ensuring the integrity of the judicial system. Moreover, Justice Shaughnessy says section 7 of the *Charter* is not engaged in the complaints process since there is no deprivation of a complainant's life, liberty, security of the person, or any other right of a complainant.

[20] The Attorney General generally endorsed and adopted Justice Shaughnessy's submissions at the hearing of this application. In the Attorney General's view, the Applicant's position on the constitutionality of Justice Shaughnessy's decision and the complaints process are without merit. If the CJC intervened when a judge has made an error of law or failed to follow precedent, the Attorney General says judicial independence would be compromised.

(3) Analysis

[21] On this issue, I agree with the Respondents' arguments and submissions; those of the Applicant are not persuasive for several reasons. First, subsection 63(2) of the *Judges Act* clearly

states that the CJC "may investigate any complaint or allegation made in respect of a judge of a superior court" (emphasis added). Section 11 of the *Interpretation Act*, RSC 1985, c I-21, dictates that: "The expression "shall" is to be construed as imperative and the expression "may" as permissive." The CJC is not obligated to investigate every complaint; although a complainant is at liberty to make a complaint, it may or may not be investigated by the CJC. Second, the CJC is not a court or adjudicative tribunal tasked with adjudicating complainants' rights. Rather, the CJC is a federal tribunal, and when superior court judges sit as members of the CJC and as members of its inquiry committees "they are not acting in their judicial capacity …they are serving as members of an administrative tribunal" (*Singh v Canada (Attorney General)*, 2015 FC 93 at para 39, 474 FTR 164 [*Singh*]). Third, it is contradictory for the Applicant to rely upon the CJC's *Ethical Principles for Judges*, a policy document, for purposes of his arguments below as to what constitutes judicial misconduct, and then to impugn the Review Procedures, another policy document of the CJC, as being unconstitutional and embodying an unlawful delegation of authority.

[22] Fourth, and lastly, in my view the CJC's Review Procedures which currently impart the preliminary screening of complaints to the Executive Director is far from an unlawful or improper delegation of authority by the CJC. The seminal formulation of an implied authority to delegate is found in *R v Harrison*, [1977] 1 SCR 238, 8 NR 47 [*Harrison*], where the Supreme Court of Canada stated that: "Although there is a general rule of construction in law that a person endowed with a discretionary power should exercise it personally (*delegatus non potest delegare*) that rule can be displaced by the language, scope or object of a particular

administrative scheme. A power to delegate is often implicit in a scheme empowering a minister to act" (para 13).

[23] Jurisprudence since *Harrison* shows that courts are generally permissive of sub-delegation of administrative functions, as opposed to a delegation of legislative, judicial or quasi-judicial functions, and the early screening of complaints is an administrative function (see: e.g., *Peralta v Ontario*, [1985] OJ No 2304 at para 70, 29 ACWS (2d) 415; *Dene Nation v R*, [1984] 2 FC 942 at para 18, 25 ACWS (2d) 406; *Joncas v R*, [1993] FCJ No 973 at para 15, 75 FTR 277; and *Connolly v Law Society (Newfoundland & Labrador)*, 2011 NLTD(G) 152 at para 12, 315 Nfld & PEIR 281). In *Harrison v LSBC*, 2015 BCSC 211, 252 ACWS (3d) 160, the British Columbia Supreme Court characterized the BC Law Society's complaint screening procedures as "a discretionary administrative winnowing function that did not decide any legal rights, duties or liabilities" (para 51). In my view, the same can be said about the screening procedures in the CJC's Review Procedures.

[24] Moreover, courts have taken a broad view of legislation allowing administrative tribunals to appoint personnel to assist in fulfilling their statutory duties and purposes. For example, in *Gill v British Columbia (Workers' Compensation Board)*, [1983] BCWLD 1925, 149 DLR (3d) 678 [*Gill*], an employer who had been investigated by the Assistant Director of the Assessment Department of the British Columbia Worker's Compensation Board sought judicial review of a Board decision denying his appeal from the Assistant Director's determination that his employees were subject to the *Workers Compensation Act*. The employer argued that because the Assistant Director's determination was an unauthorized delegation of a judicial or quasi-judicial

function which only the Board could perform, its decision on the appeal was a nullity. Justice Toy of the British Columbia Supreme Court found as follows:

> 10 The board consists of up to five members called Commissioners who are appointed by the Lieutenant Governor in Council. Bearing in mind that the vast majority of workers in British Columbia are covered by workers' compensation, and the myriad of responsibilities reposed in the board, one is not suprised [sic] to find that by virtue of s.86(1) that:
>
> > The board may appoint the officers and employees it considers necessary to carry out the business and operations of the board and may prescribe their duties...
>
> 11 I am prepared to give that power of the board's the widest possible interpretation as it appears to me to be the only realistic manner in which the board can perform its numerous statutory duties.

[25] In this case, the applicable statutory provisions are the following provisions of the *Judges Act*:

61 (2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.	**61 (2)** Sous réserve des autres dispositions de la présente loi, le Conseil détermine la conduite de ses travaux.
[...]	[...]
62 The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.	**62** Le Conseil peut employer le personnel nécessaire à l'exécution de sa mission et engager des conseillers juridiques pour l'assister dans la tenue des enquêtes visées à l'article 63.
[...]	[...]
63 (2) The Council may	**63 (2)** Le Conseil peut en outre

investigate any complaint or allegation made in respect of a judge of a superior court.	enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.

[26] In view of the foregoing highly permissive and discretionary language in the *Judges Act*, it was (and is) clearly open to the CJC to delegate the administrative responsibility for the early screening of complaints to its Executive Director. As in *Gill*, the CJC's authority under section 62 of the *Judges Act* to engage the services of such persons as it deems necessary for carrying out its objects and duties should be given the widest possible interpretation. The Applicant's focus on the fact that the initial screening of complaints is no longer performed by a judge is misguided. This change from the former screening process is, in my view, a distinction without a difference.

B. *Standard of Review*

[27] The Applicant concedes that the standard of reasonableness applies to a decision of the CJC, but only insofar as it is made by a member of the CJC who is a judge. According to the Applicant, the appropriate standard of review is correctness because the decision under review raises issues involving constitutionality, a jurisdictional error and an error of law. The Applicant contends that the standard of review is correctness because (i) there is no privative clause in the *Judges Act*, (ii) the CJC's purpose is to protect the repute of the judiciary and the rule of law, (iii) the issue of judicial misconduct is central to the legal system, and (iv) the Executive Director has no specialized expertise.

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B. *Standard of Review*

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[28] The Attorney General states that it has long been established that CJC decisions attract a high degree of deference, and notes that prior to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the standard of review for judicial council decisions was patent unreasonableness. The Attorney General says, in view of *Singh* at paras 33-35, that the initial screening of complaints is a question of mixed fact and law which attracts a standard of reasonableness.

[29] Justice Shaughnessy also maintains that the standard of review is reasonableness. Justice Shaughnessy notes that, while the complaint in *Singh* was screened out for not involving improper judicial conduct by the Chairperson of the JCC (a judge), this distinction is not sufficient to differentiate this case from *Singh* when analysing the appropriate standard of review. According to Justice Shaughnessy, the standard of review is reasonableness for questions of mixed fact and law. Moreover, Justice Shaughnessy says, the Executive Director was interpreting his home statute, he had expertise, and he was exercising a specialized role (and in fact is the only individual who currently exercises the function of initially screening complaints).

[30] Counsel for the parties have provided no case law concerning an early screening decision by the Executive Director and, apparently, the appropriate standard of review in respect of such a decision is an issue that has not previously been assessed by the Court. The CJC's most recent Review Procedures became effective on July 29, 2015. Prior to then, it was the Chairperson or one of the Vice-Chairpersons of the JCC who performed the early screening function and made the initial screening decision. Under the current Review Procedures, the Executive Director (who is defined in the Review Procedures as the CJC's Chief Administrator) is empowered to review

all correspondence to the CJC that appears to make a complaint to determine whether it warrants consideration. If the Executive Director determines that a matter warrants consideration, the Executive Director must refer it to the Chairperson or one of the Vice-Chairpersons, other than one who is a member of the same court as the judge who is the subject of a complaint. Section 5 of the Review Procedures provides the criteria for early screening, stating that the following matters do not warrant consideration:

> (a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;
>
> (b) complaints that do not involve conduct; and
>
> (c) any other complaints that are not in the public interest and the due administration of justice to consider.

[31] In *Dunsmuir*, the Supreme Court of Canada instructed that where the jurisprudence has not already satisfactorily determined the degree of deference to be accorded with regard to a particular category of question, the Court must proceed to an analysis of the factors making it possible to identify the proper standard of review. Accordingly, the Supreme Court stated that:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[32] I begin this analysis by noting that the Executive Director's decision does not fall within one of the four types of questions identified in *Dunsmuir* as attracting review on a standard of correctness: namely, (i) "constitutional questions regarding the division of powers between

Parliament and the provinces…as well as other constitutional issues" (para 58); (ii) true questions of jurisdiction or *vires* "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para 59); (iii) "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the [decision-maker]'s specialized area of expertise'" (para 60); and (iv) "Questions regarding the jurisdictional lines between two or more competing specialized tribunals" (para 61).

[33] The Applicant's arguments that the appropriate standard of review is one of correctness are not persuasive. The issue before the Executive Director in this case was a question of mixed fact and law - that is, whether Justice Shaughnessy's conduct was judicial misconduct that should be referred to the Chairperson, or to one of the Vice-Chairpersons of the JCC, who under section 6 of the Review Procedures may in turn (a) seek additional information from the complainant, (b) seek the judge's comments and those of their chief justice, or (c) dismiss the matter if it does not warrant further consideration. The Executive Director's conclusion that Justice Shaughnessy's conduct did not involve judicial misconduct was one of mixed fact and law. As noted by the Court in *Singh*:

> [35] Questions of mixed fact and law are entitled to deference and have been previously determined to be subject to review on the reasonableness standard; see the decisions in *Taylor v. Canada (Attorney General)* (2001), 212 F.T.R. 246 at paragraphs 32 and 38, aff'd [2003] 3 F.C. 3, leave to appeal to the Supreme Court of Canada refused, (2004), 321 N.R. 399 (Note); *Cosgrove v. Canadian Judicial Council* (2007), 361 N.R. 201 at paragraph 25 (F.C.A.) and *Akladyous*, *supra* [*Akladyous v. Canadian Judicial Council* (2008), 325 F.T.R. 240], at paragraphs 40-43.

[34] On this issue, therefore, I conclude that the appropriate standard of review of the Executive Director's decision is reasonableness. The Executive Director was interpreting his home statute as to whether Justice Shaughnessy's conduct involved misconduct within the purview of the *Judges Act*, he had expertise in the area, and he was exercising a specialized role; indeed, the Executive Director is the only individual who currently exercises the initial screening function and has done so for more than two years now.

[35] Accordingly, under the reasonableness standard, the Court is tasked with reviewing the Executive Director's decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

C. *Can judicial decision-making constitute judicial misconduct?*

[36] According to the Applicant, judicial misconduct can occur in the course of judicial decision-making. The Applicant references the *Ethical Principles for Judges* published by the CJC, noting that these include the principles of judicial independence, integrity, diligence, and impartiality, to delineate the boundaries of ethical judicial conduct. In the Applicant's view, judicial misconduct cannot be defined in a way that excludes violation of his constitutional rights, and to the extent that the Executive Director's decision is based on a determination that

judicial conduct cannot include misconduct in the course of judicial decision-making, that determination is an error of law and is unreasonable.

[37] The Attorney General does not address the question of whether judicial misconduct can occur in the course of judicial decision-making. The Attorney General does, however, maintain that the Executive Director reasonably determined that each aspect of the Applicant's complaint engaged judicial decision-making rather than conduct.

[38] According to Justice Shaughnessy, judicial decision-making only becomes conduct subject to CJC sanction in exceptional circumstances involving abuse of office, bad faith, or analogous conduct, and it must be substantiated. Justice Shaughnessy contends that most errors in judicial decision-making can be properly cured on appeal, as occurred in this case, and instances where an appeal is insufficient are rare. In order to meet the high threshold where judicial decision-making becomes conduct subject to review by the CJC, Justice Shaughnessy says a complainant must provide a substantiated allegation that the decision was tainted by an improper motive. Justice Shaughnessy observes that the Applicant does not articulate any alternative standard for when judicial decision-making becomes sanctionable conduct, noting that the *Ethical Principles for Judges* cited by the Applicant includes a disclaimer which explicitly states that the principles "do not set out standards defining judicial misconduct."

[39] I agree with the Applicant that a judge's conduct in the course of judicial decision-making can, in some limited and exceptional types of cases, constitute sanctionable conduct. For example, in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR

249, [*Moreau-Bérubé*], the Judicial Council of New Brunswick had recommended that a Provincial Court judge be removed from office because her derogatory comments about residents of the Acadian Peninsula, made while presiding over a sentencing hearing, created a reasonable apprehension of bias and a loss of public trust. The Supreme Court of Canada restored the Council's removal recommendation which had been set aside in the courts below, observing that:

> 58 Even within the appeal process, which is designed to correct errors in the original decision and set the course for the proper development of legal principles, the judge whose decision is under review is not called to account for it. He or she is not asked to explain, endorse or repudiate the decision or the statement which is called into question by the appeal, and the result of the appeal process suffices to deliver justice to those aggrieved by the error made by the judge of first instance. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.
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> 59 The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole....

[40] I disagree, however, with the Applicant's assertion that, in view of the record, it can be inferred Justice Shaughnessy knowingly and deliberately changed the 2010 Warrant to his detriment, and that this evidences bad faith amounting to judicial misconduct. The issue before the Court on this application for judicial review is not to determine whether Justice Shaughnessy engaged in misconduct but, rather, to determine whether the Executive Director made a

reviewable error in finding that, because the complaint did not involve judicial misconduct, no further action would be taken with respect to the complaint. This issue does require though, that the Court review Justice Shaughnessy's conduct in order to determine whether the Executive Director's determination - that the complaint did not involve judicial misconduct - was reasonable.

D. *Was the Executive Director's determination that Justice Shaughnessy's conduct did not disclose judicial misconduct unreasonable?*

[41] The Applicant contends that Justice Shaughnessy changed his sentence in the 2013 Warrant, contrary to the 2010 Warrant. According to the Applicant, this was not an exercise of judicial discretion but a violation of his constitutional rights, an abuse of office, and an act of bad faith. In the Applicant's view, the *Ethical Principles for Judges* mandate that judges know and respect the law, and they must act to ensure public confidence in the judiciary. According to the Applicant, Justice Shaughnessy either knew or ought to have known that the "no remission" provision of the 2013 Warrant would lengthen his sentence, and that this change to his sentence without notice was precluded by law and contrary to the Applicant's *Charter*-protected rights. Because Justice Shaughnessy knowingly violated his legal and *Charter* rights, the Applicant says it was unreasonable for the Executive Director to conclude that such action is not sanctionable conduct.

[42] The Applicant further contends that Justice Shaughnessy's actions undermine public confidence in the judiciary and are reminiscent of totalitarian judicial fiat or the Star Chamber. According to the Applicant, failure to condemn such conduct would bring the administration of

justice into disrepute, and that in disregarding the proper application of the law Justice Shaughnessy violated the principles of judicial independence, integrity, diligence, and impartiality. In the Applicant's view, because civil contempt is quasi-criminal in nature, he had the right under section 7 and paragraph 11(d) of the *Charter* to make a full answer and defence, especially since he was self-represented at the time, and Justice Shaughnessy's order dispensing with his approval of the draft order amounted to an intentional violation of his constitutional rights.

[43] The Attorney General maintains that the Executive Director's decision was reasonable based on the record before him. In the Attorney General's view, the Applicant's allegations against Justice Shaughnessy are not supported by the record, and while the Applicant may not be pleased about the sentence, the "no remission" order, Justice Shaughnessy dispensing with the Applicant's approval of the draft order, and ordering that he was no longer seized of the matter, the appropriate remedy for each was appellate review. The Attorney General says, in view of *Taylor v Canada (Attorney General)*, 2003 FCA 55 at paras 64–66, [2003] 3 FC 3, that it is a central principle of judicial independence that judicial errors are corrected through appellate review. According to the Attorney General, Justice Shaughnessy's oral reasons always showed a sentence of three months, with no oral orders made regarding remission, and therefore the 2013 Warrant and all other orders are consistent with the oral reasons.

[44] Justice Shaughnessy maintains that the Executive Director is empowered to reject a complaint if it (i) does not involve abuse of office, bad faith, or analogous conduct, (ii) is manifestly without substance and fails to substantiate a claim of sanctionable conduct, and (iii) is

made without any evidentiary foundation and therefore is an abuse of process. According to Justice Shaughnessy, there is no authority to support the proposition advanced by the Applicant that the Executive Director must take the facts alleged by a complainant as true, and even if there is such an obligation, unsupported allegations concerning a person's state of mind are impermissible. In Justice Shaughnessy's view, the Applicant attempts to impute bad faith into a decision he disagrees with so as to define it as sanctionable conduct, and any violation of the Applicant's constitutional rights is properly cured on appellate review.

[45] With respect to the Applicant's argument that Justice Shaughnessy must have known he was acting contrary to law and therefore intentionally violated the Applicant's rights, Justice Shaughnessy argues that the Applicant is asking the Court to infer bad faith from the mere existence of a legal error, an inference which would potentially turn all legal errors into sanctionable conduct. Justice Shaughnessy notes that the transcripts of the court proceedings demonstrate that he attempted to assist the Applicant as a self-represented litigant on numerous occasions, and the 2013 Warrant addressed the Applicant's concerns about his security while incarcerated due to being a former police officer. Justice Shaughnessy says the Executive Director's decision to dismiss the Applicant's complaint as not relating to judicial misconduct was reasonable, and the Court should defer to the decision on the grounds that it could have been dismissed as manifestly without substance or an abuse of process even though the Executive Director's letter does not refer to these grounds for screening out the complaint.

[46] In my view, the Executive Director's determination that the Applicant's complaint did not involve judicial misconduct, and implicitly was conduct within the realm of judicial decision-

making, was reasonable, especially in view of the Ontario Court of Appeal's decision in *Chiang (Trustee) v Chiang*, 2009 ONCA 3, 257 OAC 64 [*Chiang*]. The judge's conduct in *Chiang* was similar to that of Justice Shaughnessy vis-a-vis the Applicant's contempt. In July 2003, Justice Farley found Mr. and Mrs. Chiang in contempt of six previous orders of the Ontario Superior Court of Justice relating to an unsatisfied judgment debt. Under the terms of the consent order for contempt, they were given an opportunity to purge their contempt by complying with undertakings which required disclosure of financial information. Failing compliance, they were each to be incarcerated for seven days, and faced the prospect of further sanctions for continued non-compliance. In 2005, Justice Farley found that the Chiangs had complied with some but not all of the undertakings, and afforded them a further 90 days to answer their undertakings and warned them of severe consequences if they did not comply. In 2007, after a seven day trial, the trial judge, Justice Lax, found that the Chiangs had not complied with all of the undertakings given by them in 2003. Justice Lax found that she was not limited by the July 2003 order sentencing the Chiangs to seven days' imprisonment, as Justice Farley had effectively varied that order in 2005, thereby reopening the remedy the court could grant in a future hearing. Justice Lax sentenced Mr. Chiang to one year's incarceration and Mrs. Chiang to eight months' incarceration. On the appeal of this 2007 contempt order, the Court of Appeal stated that:

> [118] The statutory regimes, which leave jurisdiction over a civil contemnor with the court, dovetail with the wide discretion given the court under rule 60.11 of the *Rules of Civil Procedure*. Under rule 60.11(5) (a), "where a finding of contempt is made, the judge may order the person in contempt, (a) be imprisoned for such period and on such terms as are just". And under rule 60.11(8), "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5)". These rules give to the court an ongoing supervisory role over a civil contemnor together with the discretion to vary or even discharge a contempt order if the contemnor purges the contempt.
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> ...

> [123] The issuance of a warrant is an administrative act. The issuing judge can amend the warrant after it has been issued to ensure that it reflects the judge's original intention: see *Ewing v. Mission Institution*, 1994 CanLII 2390 (BC CA), [1994] B.C.J. No. 1989, 92 C.C.C. (3d) 484 (C.A.) and *R. v. Malicia* (2006), 2006 CanLII 31804 (ON CA), 82 O.R. (3d) 772, [2006] O.J. No. 3676 (C.A.), per MacPherson J.A. That is all that happened here.

[47] In view of *Chiang*, it was clearly open to Justice Shaughnessy to amend the warrant in 2013. Although the 2010 Warrant was silent on the issue of remission, the 2013 Warrant can either be interpreted as a change in the Applicant's sentence or as an amendment reflecting Justice Shaughnessy's original intention. Additionally, as suggested in Justice Molloy's endorsement (quoted above), the statement "No remission is ordered" in the 2013 Warrant could simply mean that Justice Shaughnessy declined to make an order concerning remission. The Executive Director's determination - that the Applicant's complaint about the 2010 Warrant being amended did not involve judicial misconduct - was reasonable because the amendment was something which occurred in the course of judicial decision-making.

[48] Moreover, even if Justice Shaughnessy may have changed the Applicant's sentence without notice, *Chiang* confirms that the proper remedy is, as occurred in this case, appellate review and not the filing of a complaint with the CJC. In *Chiang*, the Court of Appeal restored the original seven-day sentence imposed by Justice Farley, finding that the Chiangs had not had fair notice that they faced a term of imprisonment greater than seven days for their continued contempt (see paras 93-103). Significantly, there was no suggestion by the Court of Appeal in *Chiang* that the change in sentence made by Justice Lax after the trial amounted to misconduct on her part. Similarly, even if the Applicant in this case may have faced an increased sentence

without fair notice, the proper remedy was appellate review and not the filing of a complaint with the CJC.

[49] As for the Applicant's arguments that *his* legal and *Charter*-protected rights were violated by the Executive Director's decision to screen out his complaint, I find these to be wholly without merit and completely answered by *Taylor v Canada (Attorney General)*, [2002] 3 FC 91 at paras 40-44, 2001 FCT 1247, aff'd *Taylor v Canada (Attorney General)*, 2003 FCA 55 at para 114, [2003] 3 FC 3. The decision under review is that of the Executive Director and not Justice Shaughnessy's exercise of discretion or conduct in the context of judicial decision-making. The Applicant's arguments in this regard are premised upon an assumption which presupposes that Justice Shaughnessy's conduct amounted to judicial misconduct. The only rights affected by the complaint were those of Justice Shaughnessy, not those of the Applicant.

VII. Conclusion

[50] For the reasons stated above, the Applicant's application for judicial review is dismissed. In view of this conclusion, I find it unnecessary to address in detail the impugned paragraphs of the Applicant's Affidavit and those in the Notice of Application, other than to note that little weight has been assigned to those paragraphs of the Applicant's Affidavit challenged by Justice Shaughnessy, and also that the two impugned paragraphs in the Notice of Application seeking declaratory relief need not be struck since the Applicant's application is being dismissed in its entirety.

[51] The Respondents have requested their costs of this application. Since the application has been dismissed, the Respondents should receive costs. In view of the circumstances of this matter and the various factors noted in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, as amended, as well as the parties' written submissions as to costs which were filed subsequent to the hearing of this application, the Applicant shall pay to each of the Respondents costs in the fixed, lump sum amount of $15,000.00 (inclusive of all disbursements and any applicable taxes), being a total award of costs in the amount of $30,000.00 (inclusive of all disbursements and any applicable taxes). These costs shall be paid forthwith and, in any event, within 30 days from the date of this judgment.

JUDGMENT in T-604-16

THIS COURT'S JUDGMENT is that: the Applicant's application for judicial review is dismissed; and the Applicant shall pay costs in the fixed, lump sum amount of $15,000.00 (inclusive of all disbursements and any applicable taxes) to each Respondent, forthwith and, in any event, within 30 days from the date of this judgment.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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