

**Report
of the Canadian Judicial Council to the Minister of
Justice of Canada
under ss. 65(1) of the *Judges Act*
concerning Mr. Justice Jean-Guy Boilard
of the Superior Court of Quebec**

December 19, 2003

In accordance with the *Judges Act* and *Inquiries and Investigations By-laws* adopted by the Canadian Judicial Council pursuant to the *Act*, Council members considered the report of the Inquiry Committee established as a result of a request from the Attorney General of Quebec to inquire into the conduct of Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec.

The Inquiry Committee, by report dated August 5, 2003, concluded that Mr. 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 s. 65(2) of the *Judges Act*” and therefore did not recommend his removal from office. The Inquiry Committee also concluded, however, that Mr. Justice Boilard’s conduct was “improper” and the reason given by him for his action “was not a valid reason for withdrawal from the case”. Accordingly, it expressed the opinion that the judge “failed in the due execution of his office within the meaning of s.65(2)(c) of the *Judges Act*”.

The Canadian Judicial Council agrees that there should be no recommendation for removal of Mr. Justice Boilard from office. However, it does so for reasons different from those expressed by the Inquiry Committee. In addition, the Council disagrees with the finding of impropriety by the Inquiry Committee.

The Inquiry was initiated by a letter dated October 28, 2002 from the Deputy Attorney General for the Province of Quebec. That letter did not allege judicial misconduct or bad faith on the part of Justice Boilard. Rather, it set out some of the facts relating to his recusal and asked that an inquiry be conducted to determine if Mr. Justice Boilard’s decision “to abandon the conduct of the trial” was “capable of constituting misconduct” within the meaning of s. 65(2)(b) or (c) or of “placing him in a position incompatible with the due execution of his office” within the meaning of s. 65(2)(d) of the *Judges Act*.

Under s. 63(1) of the *Judges Act*, the Council was required to commence an inquiry. It established an Inquiry Committee as permitted by s. 63(3) of the *Act*. Pursuant to the *Canadian Judicial Council Inquiries and Investigations By-laws*, Mr. Raynold Langlois, Q.C. was appointed as an independent counsel. Under s. 3 of the *By-laws*, the independent counsel’s role is to present the case to the Committee, including making

submissions on questions of procedure and the applicable law. The By-laws specifically direct the independent counsel to perform his or her duties impartially and in accordance with the public interest.

Mr. Langlois investigated and assembled the essential background facts and documents relevant to Justice Boilard's decision to recuse himself. He asked the Deputy Attorney General to provide him with any additional information in support of the complaint. The Attorney General indicated that he did not intend to "make any allegation or argument or to submit any conclusion regarding the various facts underlying the request for an inquiry" [Translation] Instead, he submitted a number of questions for consideration, including questions as to whether Mr. Justice Boilard was guilty of negligence or of making his recusal decision on the basis of personal considerations rather than considerations affecting the administration of justice. It is significant that the Attorney General did not suggest that the language used by Justice Boilard in the reasons for his decision in itself constituted misconduct. In essence, the Attorney General was expressing disagreement with, or at least concern about, the rationale for the decision itself.

On February 3, 2003, Mr. Langlois recommended to the Committee that they divide the Inquiry into two phases. In his view, the first phase would allow the inquiry, on the basis of the unchallengeable and unchallenged documents, to dispose of the request for an inquiry "on a preliminary basis". The Committee did not accept Mr. Langlois' recommendation and declined to divide the inquiry into phases. Mr. Langlois was of the view - expressed at the end of the hearings - that the inquiry should have been declared closed without any conclusion regarding Mr. Justice Boilard. In his view, Justice Boilard's decision concerned the capacity of a judge to preside over a trial with complete independence and impartiality, a decision which "is a matter for the exercise of the judge's judicial discretion". In addition, he noted that the request of the Attorney General contained no allegation that the decision was due to illegitimate, improper or non-judicial reasons.

The Council is in general agreement with the approach taken, and views expressed, by the Independent Counsel.

In the view of the Council, the decision by Mr. Justice Boilard to recuse himself was made by him in his capacity as a judge sitting in a judicial proceeding and is a "discretionary judicial decision". When acting in the course of 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.

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. Exercise of a judicial discretion is at the heart of judicial independence. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, McLachlin J., writing for the majority at p. 830, said:

The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence ... The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. ... [J]udicial immunity is central to the concept of judicial independence.

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.

On the facts of this case, nothing has been put before the Council capable of rebutting the presumptions of good faith and due and proper consideration of the issues. On the contrary, the evidence points away from bad faith and improper considerations. When Justice Boilard was in the middle of an extremely difficult and highly-publicized jury trial, the Canadian Judicial Council sent him a strongly-worded letter criticizing him for the way he had treated one of the counsel in a related case. Before receiving his copy, Mr. Justice Boilard became aware that a copy of the letter was in the hands of a journalist. After considering the matter for four days, Justice Boilard determined that he no longer had the “moral authority and perhaps also the necessary capacity to continue my function as a judge in this trial” and that the parties, counsel and others, presumably including the jurors, might “question the propriety of my decisions or of any actions I may take.”

As a result of his concerns, and, in his words, “after careful thought” and “with full awareness of the problems caused by such a decision”, Justice Boilard recused himself but, significantly, he did not declare a mistrial. Rather, he directed that the case be adjourned so that the alternative of having another judge continue the case under s. 669.2 of the *Criminal Code* would be available.

While some may disagree with Justice Boilard’s decision to step aside, it was his decision to make. It is the individual responsibility of every judge to determine, in good faith, when there are circumstances that render him or her unable to hear or to continue to hear a particular case. He or she is not required to consult with any other person, including his or her Chief Justice. In the end, it was Justice Boilard, acting in good faith,

who was required to decide his capacity to continue.

The suggestion has been made that Justice Boilard acted impetuously and out of pique after receiving the critical letter from the Judicial Council and without considering the financial and other consequences of his decision. Justice Boilard's reasons for withdrawing refute those suggestions. In his reasons, he points out that he considered the matter carefully and that he was aware of the consequences of his decision. There is no reason to doubt that he genuinely believed that he must withdraw or that he gave proper consideration to appropriate factors.

The fact that Mr. Justice Beliveau, who heard the subsequent application for continuation of the trial under s. 669.2 of the *Criminal Code*, ultimately decided that he would not continue the trial, with the resulting impact on the overall cost of completion, is not evidence that Justice Boilard made the decision to remove himself in bad faith or by abuse of office. Furthermore, the fact that Justice Boilard subsequently decided to resume sitting on unrelated cases some months later - in possible contradiction of his earlier indication that he might retire - does not detract from the bona fides of the specific reasons he gave in support of his original decision to remove himself from the *Beauchamp* trial.

In summary, the Canadian Judicial Council concludes that the Inquiry Committee ought to have acceded to the advice of the Independent Counsel to deal with the issues as a preliminary matter which should then have led, on the facts disclosed, to a decision to decline to deal further with the Attorney General's request. Accordingly, there is no basis for any finding that the decision of Mr. Justice Boilard to recuse himself constituted failure in the due execution of his office.

The Council agrees with the Inquiry Committee that there should be no recommendation for removal of Mr. Justice Boilard from office. Further, the Council is of the view that there is no basis for concluding that the conduct of Justice Boilard was improper under any of the clauses of s. 65(2) (b), (c) or (d) of the *Judges Act*.

All of which is respectfully herewith reported to the Minister of Justice in accordance with s. 65 (1) of the *Act*.

Members of Council who participated in this decision:

Chief Justice Bayda (Saskatchewan), Chief Justice Brenner (British Columbia), Madam Justice Browne (Nunavut), Associate Chief Justice Cunningham (Ontario), Associate Chief Justice Deslongchamps (Quebec), Associate Chief Justice Dohm (British Columbia), Chief Justice Drapeau (New Brunswick), Associate Chief Justice Ferguson (Nova Scotia), Chief Justice Finch (British Columbia), Chief Justice Gerein (Saskatchewan), Chief Justice Glube (Nova Scotia), Chief Justice Green (Newfoundland and Labrador), Chief Justice Kennedy (Nova Scotia), Chief Justice Lemieux (Quebec), Associate Chief Justice MacDonald (Nova Scotia), Chief Justice

McMurtry (Ontario), Associate Chief Justice Mercier (Manitoba), Chief Justice Mitchell (Prince Edward Island), Associate Chief Justice O'Connor (Ontario), Senior Associate Chief Justice Pidgeon (Quebec), Mr. Justice Richard (Northwest Territories), Chief Justice Smith (New Brunswick), Chief Justice Smith (Ontario), Mr. Justice Veale (Yukon Territory), Chief Justice Wachowich (Alberta) and Chief Justice Wells (Newfoundland and Labrador).