

Federal Court



Cour fédérale

Date: 20200908

Docket: T-877-19

Citation: 2020 FC 884

Ottawa, Ontario, September 8, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SAM COSENTINO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Sam Cosentino, [Mr. Cosentino] seeks Judicial Review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the decision of the Canadian Judicial Council [CJC or the Council] dated April 23, 2019. The CJC dismissed the complaint made by Mr. Cosentino and three other persons against the Honourable Peter A. Daley [Justice Daley] of the Ontario Superior Court of Justice. In this Application for Judicial Review [Application], Mr. Cosentino is the sole Applicant.

[2] For the reasons set out below, the Application is dismissed. The CJC's decision is lawful and reasonable. The Executive Director of the CJC has the authority to screen-out complaints, including those that are vexatious, made for an improper purpose, without substance, or an abuse of process. However, in this case, Mr. Cosentino's complaint was referred to and considered by the Chairperson of the Judicial Conduct Committee of Council, who directed the Executive Director to issue the decision. The CJC reasonably found that the matters complained of were not matters of judicial conduct falling within its mandate and could be addressed through the appeal process. The CJC also reasonably found that Mr. Cosentino's complaint appeared to be an abuse of the CJC's complaint process.

I. Background

[3] Mr. Cosentino is a member of the Ontario bar, but in this Application, he acts in his personal capacity. Mr. Cosentino is a party in several actions in the Ontario Superior Court of Justice involving contentious financial and estate matters among family members and family-based businesses. In October 2017, Justice Daley, as Regional Senior Judge, appointed himself to case manage seven of the related actions in accordance with rule 37.15 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194.

[4] Mr. Cosentino's complaint to the CJC regarding Justice Daley arises from the conduct and outcome of several case management conferences and motions that were held in early 2018.

A. *The Recusal Motion and Decision*

[5] Following several case management conferences to address, among other things, proposed amendments to Mr. Cosentino's pleadings and the scheduling of further motions, Mr. Cosentino suggested to Justice Daley that he should recuse himself, failing which Mr. Cosentino would bring a motion for Justice Daley's recusal and would file a complaint with the CJC alleging "demonstrated bias towards [Mr. Cosentino] and the other plaintiffs".

[6] Mr. Cosentino then brought the motion for the recusal of Justice Daley as case management judge. Justice Daley heard the motion on May 23, 2018, and issued Reasons for Decision dismissing the motion on June 28, 2018 (*Cosentino v Dominaco Developments Inc.*, 2018 ONSC 4092).

[7] Justice Daley noted that in the course of several case management conferences he had released endorsements and case management orders. Justice Daley provided a chronology of the case management conferences and other correspondence between October 2017 and April 2018 that led to the motion for recusal. Justice Daley addressed the allegations that arose from those events, including: his refusal to accept Mr. Cosentino's pleadings brief; whether another judge was seized of certain matters that Justice Daley subsequently addressed; and communications from Mr. Cosentino and other plaintiffs that did not comply with the applicable *Rules of Civil Procedure*.

[8] Justice Daley set out the guiding jurisprudence regarding allegations of bias, including the principles noted in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p 394, 1976 CanLII 2, and the subsequent jurisprudence that has applied these principles. Justice Daley emphasized, at paras 46-51, that Mr. Cosentino's allegations of bias were made in the context of case management.

[9] Justice Daley characterized the actions at issue as "high conflict" with a high degree of emotion and animosity between the parties (paras 4, 52). Justice Daley noted that Mr. Cosentino had stated that he had hired a private investigator to investigate Justice Daley and had threatened to make a complaint to the CJC if unsuccessful on the recusal motion (paras 63, 64).

[10] Justice Daley found that Mr. Cosentino's allegations about other parties' conduct and about his own refusal to disclose personal information were not supported by any evidence and were of no probative value (paras 72, 73). Justice Daley addressed Mr. Cosentino's several allegations relating to his demeanor and allegations of bias arising from the procedural decisions Justice Daley had made.

[11] Justice Daley found that, taking into account the more stringent test for finding bias or the reasonable apprehension of bias within the case management context and the role of case management judges to provide expeditious and cost effective ways to resolve disputes, a reasonably informed person would not conclude that he was biased or that there was a reasonable apprehension of bias (para 86).

[12] Justice Daley issued a separate Costs Ruling on Recusal Motion on August 27, 2018 (*Cosentino v Dominaco Developments Inc*, 2018 ONSC 5075).

[13] On February 12, 2019, the Ontario Divisional Court refused Mr. Cosentino's motion for leave to appeal Justice Daley's dismissal of the recusal motion with costs against Mr. Cosentino. On June 14, 2019, the Ontario Court of Appeal also refused leave to appeal with costs against Mr. Cosentino.

B. *Mr. Cosentino's Complaint to the CJC*

[14] On February 4, 2019, Mr. Cosentino and three other complainants (who were parties in the actions) filed a 955-page complaint with the CJC. Mr. Cosentino set out 34 incidents or "counts" in his complaint alleging that Justice Daley:

- lied to Mr. Cosentino;
- behaved in a rude and offensive manner toward Mr. Cosentino and the other complainants;
- demonstrated overt bias against Mr. Cosentino and the other complainants; and,
- acted without proper regard for the rule of law and code of judicial conduct.

[15] The allegation that Justice Daley lied relates to the scheduling of Mr. Cosentino's motion to amend his pleadings.

[16] The allegation of rude and offensive behaviour relates to incidents where Justice Daley allegedly raised his voice and behaved in a condescending manner.

[17] The allegations of bias refer to over 30 alleged incidents, endorsements or determinations; for example, that Justice Daley refused to read Mr. Cosentino's pleadings brief, overruled an order of another judge, had undisclosed communications with a lawyer for one of the defendants, berated Mr. Cosentino and other plaintiffs for communicating with his administrative assistant, set an unfair timetable for the recusal motion and made unreasonable cost orders against Mr. Cosentino and other plaintiffs.

[18] Mr. Cosentino also requested that the CJC disclose every communication between Justice Daley and any public official in relation to the complaint, as well as the communications of Justice Daley's friends, relatives, employees, counsel, etc.

II. The Decision under Review

[19] On April 23, 2019, the Executive Director of the CJC, Mr. Norman Sabourin [Mr. Sabourin], sent the decision of the CJC by letter to Mr. Cosentino advising him that the complaint had been closed.

[20] Mr. Sabourin noted that the complaint had been referred to the Chairperson of the Judicial Conduct Committee of Council, Senior Associate Chief Justice of the Superior Court of Quebec, Robert Pidgeon [Chief Justice Pidgeon], who found that the alleged bias and other complaints did not constitute judicial misconduct and, therefore, the matters complained of fell outside the CJC's mandate.

[21] The decision noted the mandate of the CJC in matters of misconduct with reference to the *Judges Act*, RSC 1985, c J-1.

[22] The CJC explained that decisions on a motion for recusal, the assessment of evidence and the law, and findings of fact and law by a judge are matters of judicial decision-making, not judicial conduct. The CJC concluded that Mr. Cosentino's complaints should be addressed through the normal court process by way of an appeal.

[23] The CJC noted that a judge is presumed to have acted in good faith unless the contrary is demonstrated. The CJC found that Mr. Cosentino's allegations of bias relied "largely on speculation and conjecture, or as stated by Justice Daley, on unsupported bald assertions".

[24] The CJC also noted that Mr. Cosentino had sought personal information about Justice Daley from Courthouse personnel and hired a private investigator to investigate Justice Daley. The CJC found that this conduct raised serious concerns about the reasons for the complaint and Mr. Cosentino's credibility.

[25] Mr. Sabourin stated that Chief Justice Pidgeon had taken note of Mr. Cosentino's comments at the recusal motion and of Justice Daley's decision, including that Mr. Cosentino threatened to bring a complaint to the CJC if Justice Daley did not recuse himself. Mr. Sabourin added that in light of the intimidating comments and the speculative nature of the allegations, the complaint "appears to have been made for an improper purpose and to be an abuse of the complaint process".

[26] The CJC concluded that Mr. Cosentino's complaints relating to rude and offensive behaviour and bias were about judicial decision-making, the exercise of judicial discretion and control of the proceedings. The CJC explained that these complaints did not warrant further consideration as they were not within the CJC's mandate. The CJC noted that the proper recourse is to appeal where that is allowed. The CJC further found the allegations of bias were speculative and without substance.

[27] The CJC declined Mr. Cosentino's request for disclosure of information, including personal information about its members and other officials, noting that the information was confidential or not available.

[28] On May 13, 2019, Mr. Cosentino wrote to the CJC rejecting the findings, demanding a decision personally authored and signed by Chief Justice Pidgeon and advising that he would seek judicial review.

[29] On June 25, 2019, Mr. Cosentino wrote again to the CJC arguing that Mr. Sabourin made the findings in the Decision without authority, that the CJC improperly delegated its powers, and that the CJC breached its obligation to investigate his complaint. Mr. Cosentino asked to be advised of each member of the CJC involved in the complaint, to be informed of each finding by each member who considered the complaint, to be sent copies of all documents received in relation to the complaint, and to receive information on all oral and telephone communications in relation to the complaint involving the CJC and Justice Daley.

III. The Issues

[30] Mr. Cosentino raises ten issues in this Application, including that: Mr. Sabourin acted without jurisdiction in closing the complaint on behalf of the CJC; the CJC made errors of law and unreasonable findings of fact; and, the CJC failed to investigate several specific complaints.

[31] The role of the Court is not to address the merits of Mr. Cosentino's 34-count complaint against Justice Daley to the CJC, but to determine if the CJC's decision to dismiss that complaint is reasonable. There are only three issues to address:

- whether Mr. Cosentino's affidavit should be struck in whole or in part because it does not comply with Rule 81 of the *Federal Courts Rules*, SOR/98-106 and seeks to place material before this Court that was not in the record before the CJC;
- whether the decision signed by the Executive Director of the CJC is a lawful decision of the CJC; i.e., whether the Executive Director acted within his authority to issue the decision; and,
- whether the CJC's decision is reasonable.

IV. Standard of Review

[32] Mr. Cosentino and the Respondent agree that the CJC's findings of fact and mixed fact and law are reviewed on the reasonableness standard (*Singh v Canada (Attorney General)*, 2015

FC 93 at paras 32-36 [*Singh*]; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at paras 37-60 [*Moreau-Bérubé*].

[33] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada provided extensive guidance on what constitutes a reasonable decision and on the conduct of a reasonableness review. A hallmark of a reasonable decision remains that the decision is justified, transparent and intelligible (*Vavilov* at paras 99, 100).

[34] A reviewing court begins its inquiry by examining the reasons for the decision with respectful attention, seeking to understand the reasoning process followed by the decision-maker to arrive at a conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105-110).

[35] The Respondent suggests that the Supreme Court of Canada's comments in *Moreau-Bérubé*, which noted that a high degree of deference is owed to decisions of the CJC, continue to apply, while acknowledging that in *Vavilov* the Supreme Court of Canada did not attribute differing degrees of deference to different decision-makers.

[36] In the present case, the Court need not determine whether a higher degree of deference is owed to the CJC. This is not a borderline case. As explained below, the CJC's decision is reasonable in accordance with the guidance in *Vavilov*.

V. The Applicant's Submissions

[37] Mr. Cosentino submits that the CJC erred in law in finding that judicial bias is not a matter of judicial conduct and failed in its duty to address his specific complaints.

[38] Mr. Cosentino argues that his 955-page complaint, which included many exhibits and transcripts, provides “uncontroverted” evidence to support his allegations. He submits that the CJC ignored this evidence.

[39] Mr. Cosentino first submits that the decision was not made by the CJC in accordance with the *Judges Act*; rather, Mr. Sabourin, the Executive Director, made the decision without lawful authority. Mr. Cosentino argues that although there is a reference to Chief Justice Pidgeon directing Mr. Sabourin to send the response, it is not clear who made the decision. Mr. Cosentino notes that the CJC failed to respond to his request to indicate which findings were made by Mr. Sabourin and which findings were made by Chief Justice Pidgeon and to provide a decision signed by Chief Justice Pidgeon. He argues that the CJC's failure to respond supports his argument that Mr. Sabourin made the decision.

[40] Second, Mr. Cosentino argues that the CJC ignored his complaint that Justice Daley lied. Mr. Cosentino points to a case management conference on February 26, 2018 when Justice Daley stated that he could not schedule a motion within four weeks because he would not be available during the last two weeks in March. Mr. Cosentino states that the motion was in fact scheduled for March 28 and Justice Daley heard it on that date. Mr. Cosentino also points to an

exchange at the hearing of the recusal motion on May 23, 2018, when Justice Daley denied that he had been present on March 28, 2018. Mr. Cosentino submits that the transcripts of the case management conferences provide evidence of this false statement, which he characterizes as a lie.

[41] Third, Mr. Cosentino argues that the CJC ignored his complaints about Justice Daley's rude and offensive behaviour. He points to affidavits submitted which describe specific incidents. Mr. Cosentino notes that the CJC's *Ethical Principles for Judges* [*Ethical Principles*] require judges to act with appropriate courtesy.

[42] Fourth, Mr. Cosentino argues that the CJC erred in finding that the allegations of bias were not matters of judicial conduct. He notes that the *Ethical Principles* require that judges act impartially.

[43] Mr. Cosentino points to particular exchanges and endorsements by Justice Daley as evidence of bias, including: Justice Daley's refusal to accept his pleadings' brief; Justice Daley's decision to assume control of a matter that was previously before another judge; Justice Daley's undisclosed communication with Counsel for a defendant; Justice Daley's advice to the parties to schedule motions via his administrative assistant, and Justice Daley's reprimand of Mr. Cosentino when he did so; and, Justice Daley's direction that a motion rather than an application would be sufficient for the removal of an estate trustee.

[44] Mr. Cosentino also points to excerpts of transcripts in support of other specific allegations, including that Justice Daley demanded that he establish why his motion was urgent and the applicable limitation period he faced, which Mr. Cosentino argues caused him prejudice, and that Justice Daley established an unfair time limit for his submission of material on the recusal motion.

[45] Fifth, Mr. Cosentino argues that the CJC erred in finding that his allegations of overt bias were “bald” and based on speculation. He points to the over 175 documents he filed in support of his complaint as evidence of overt bias.

VI. The Respondent’s Submissions

[46] The Respondent submits that Mr. Cosentino’s affidavit does not comply with Rule 81 and does not fall into any of the recognized exceptions for admitting the exhibits that were not before the decision-maker. The Respondent submits that the affidavit should be struck or disregarded and the Court should consider only the record that was before the CJC.

[47] The Respondent notes that the CJC’s *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges* [Review Procedures] provide that the Executive Director screen complaints upon receipt. If the Executive Director is of the view that further investigation is required, the Chair or Vice-Chair may review the file and either close it or seek additional information.

[48] The Respondent submits that Mr. Sabourin did not exceed his authority in issuing the decision of the CJC. The Respondent notes that a decision to screen out a complaint falls within the Executive Director's role. Moreover, the decision to screen out Mr. Cosentino's complaint was reviewed by a member of the CJC.

[49] The Respondent submits that the CJC's decision is reasonable. The CJC's decision is based on the finding that the specific complaints of misconduct and bias can be dealt with through the normal appeal process, i.e. by way of an appeal of Justice Daley's refusal to recuse himself. The Respondent points to *Moreau-Bérubé*, where the Supreme Court of Canada noted that the expertise of judicial councils lie in part in their appreciation of the distinction between impugned judicial actions that can be dealt with through appeal and those that threaten the integrity of the judiciary as a whole. The latter requires intervention of the CJC.

[50] The Respondent submits that all of Mr. Cosentino's complaints relate to specific exchanges in the context of case management of the litigation before Justice Daley. The Respondent adds that all these matters could be addressed on appeal.

[51] The Respondent further submits that alleged bias in this case does not constitute judicial misconduct. The Respondent notes the distinction between bias in the context of decision-making and bias that goes beyond the proceedings or the parties, for example, discrimination or discriminatory comments. Bias in judicial decision-making can be addressed on appeal and the outcome has an impact on the particular case or parties. Bias in the form of

discrimination could be investigated as judicial misconduct and would lead to a different type of outcome, directed only at the particular judge.

VII. The CJC's Process with Respect to Complaints

[52] The relevant provisions of the *Judges Act* and the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371 [*By-laws*] and *Review Procedures* of the CJC are set out in Annex A.

[53] The objects of the CJC as set out in subsection 60(1) of the *Judges Act* are to promote efficiency and uniformity, and to improve the quality of judicial services in the superior courts. In furtherance of these objects, subsection 60(2) of the *Judges Act* provides that the CJC may, among other things, make inquiries and investigate complaints or allegations concerning judges as described in section 63 of that Act.

[54] The *Judges Act* provides that the CJC “shall” commence an inquiry into a complaint if the Minister of Justice of Canada or the Attorney General of a province so asks (subsection 63(1)).

[55] In other cases, where a person other than the Minister of Justice of Canada or the Attorney General of a province makes the complaint, the CJC “may” investigate a complaint (subsection 63(2)).

[56] The *Judges Act* also provides, in paragraph 61(3)(c), that the CJC may make by-laws respecting the conduct of inquiries and investigations described in section 63. The *By-laws* are binding statutory instruments.

[57] The CJC has also established and published policies and procedures regarding investigations and inquiries, including the *Review Procedures*.

[58] The *By-laws* and *Review Procedures* together set out a multi-stage process.

[59] At the first stage, the Executive Director of the CJC reviews the complaint and decides whether the matter warrants consideration. Early screening criteria are set out in the *Review Procedures*. If the Executive Director determines that a matter warrants consideration, the Executive Director will refer it to the Chairperson (or Vice-Chairperson) of the Judicial Conduct Committee for review. The Chairperson may dismiss the matter, with reference to the same early screening criteria, or seek additional information. Where additional information is sought, including submissions from the judge, the Chairperson will review the information.

[60] If the complaint proceeds, the next stages provide for a Review Panel and possibly an Inquiry Committee. Where an Inquiry Committee is established, it would report to the CJC. The CJC would then make a recommendation to the Minister of Justice.

VIII. Mr. Cosentino's Affidavit and the Record for this Application

A. *Mr. Cosentino's Affidavit*

[61] In his affidavit, Mr. Cosentino states that he is acting in his personal capacity. He describes his allegations against Justice Daley with reference to several exchanges over a period of approximately three months in 2018.

[62] Mr. Cosentino makes several assertions including that: Justice Daley failed to address specific arguments made at the recusal motion; the Ontario Divisional Court and Ontario Court of Appeal refused him leave to appeal Justice Daley's decision to protect Justice Daley (but also notes that no reasons were provided); Mr. Sabourin made the decision for the CJC without lawful authority; and, the CJC breached its duty to properly investigate his complaint, ignored evidence and rejected his allegations of bias as speculative despite his submission of 955 pages of evidence.

[63] Mr. Cosentino also attests that his co-complainants support this Application but declined to take part because they expect that other members of the judiciary will excuse a judge's misconduct.

[64] Mr. Cosentino attaches as exhibits to his affidavit the full complaint record of 955 pages and an additional 3000 pages that were not on the record before the CJC.

B. *Parts of the Affidavit are Disregarded*

[65] Rule 81 of the *Federal Courts Rules* provides that an affidavit shall be confined to facts within the deponent's personal knowledge. As noted in *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18 [*Quadrini*], "... the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation". Allegations in an affidavit that are abusive or irrelevant or that contain opinions, arguments or conclusions of law may be struck or disregarded (*Quadrini*), at para 18; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116 at para 37).

[66] In his affidavit, Mr. Cosentino puts a gloss on the facts, reiterates the matters complained of and makes speculative, unwarranted and irrelevant comments about the Ontario Divisional Court's and Ontario Court of Appeal's refusals to grant leave. He also includes arguments cast as his belief in matters that were set out in his Memorandum of Fact and Law and raised in his oral submissions.

[67] I have disregarded the statements in Mr. Cosentino's affidavit that are argumentative, put a gloss on the facts and set out his opinions.

C. *The Record*

[68] As a general rule, the record in an application for judicial review is restricted to the evidentiary record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at

para 19). There are currently three recognized exceptions: background information to assist in understanding the relevant issues; evidence to fill a gap where the record does not provide any evidence; or, evidence relating to a procedural defect in the decision-making process (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98).

[69] Contrary to Mr. Cosentino's assertion that the additional documents on the record before this Court fall within the exceptions to the general rule and that the Court should take "judicial notice" of these documents, Mr. Cosentino did not identify any particular document that would fall within a recognized exception.

[70] The Court cannot be expected to review the additional 3000 pages in a treasure hunt for something that might fall within a recognized exception to the principle that the Court reviews the decision based on the record that was before the decision-maker. The Court notes that the exhibits Mr. Cosentino seeks to submit on this Application include correspondence which post-dates the CJC decision, statements of claim and defence in several of the actions at issue that Justice Daley is case managing, and material which was filed in the context of those actions. This material is not relevant to the Court's determination whether the CJC erred in dismissing the complaint. Some of the additional documents also appear to duplicate documents on the record before the CJC. The record before the CJC is more than sufficient to determine whether the CJC's decision is reasonable.

[71] With very few exceptions, I have conducted the review of the reasonableness of the CJC's decision based on the 955-page record that was before the CJC. I have taken note of the

decisions of the Ontario Divisional Court and Ontario Court of Appeal, which refused to grant Mr. Cosentino leave to appeal Justice Daley's dismissal of the recusal motion (and which post-date the CJC decision), and some of the transcripts of Mr. Cosentino's exchanges with Justice Daley (some of which may have also been on the record before the CJC).

IX. The Decision is Reasonable

[72] The CJC reasonably found that the specific complaints were matters of judicial decision-making, not judicial conduct. The CJC addressed some of the complaints collectively and others individually. The CJC did not err in law in finding that the allegations of bias – many of which had also been raised in the recusal motion – are matters of judicial decision-making that could be appealed.

A. *No Unlawful Delegation of Authority*

[73] Mr. Sabourin did not exceed his authority as Executive Director in issuing the decision. Mr. Sabourin had the authority to conduct the preliminary screening and could have determined that Mr. Cosentino's complaint did not warrant further consideration.

[74] The *Review Procedures*, at section 4, provide that the Executive Director must review all correspondence that raises a complaint to determine if the complaint warrants consideration. The early screening criteria, at section 5, identify matters that do not warrant consideration, including complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process.

[75] In *Best v Canada (Attorney General)*, 2017 FC 1145 at paras 21-26 [*Best*], the Court addressed a similar argument and found that it was open to the CJC to delegate the screening of complaints to its Executive Director. Justice Boswell explained at para 22:

[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).

[76] In the present case, Mr. Sabourin did not screen-out Mr. Cosentino's complaint at the first stage. He referred the complaint to Chief Justice Pidgeon who considered the complaint, made the findings and directed Mr. Sabourin to issue the decision accordingly. This approach complies with subsection 63(3) of the *Judges Act*, subsection 2(1) of the *By-laws* and the *Review Procedures*.

[77] Mr. Cosentino's argument that he does not know who made which findings ignores the clear wording of the decision. At the outset of the decision, Mr. Sabourin stated, "I referred your letter to the Honourable Robert Pidgeon. . . . After carefully reviewing your complaint, Chief Justice Pidgeon has directed me to provide you with this response" [my emphasis]. This clearly indicates that the decision as a whole is that of Chief Justice Pidgeon and the CJC.

[78] Other specific references in the decision emphasize Chief Justice Pidgeon’s view. For example, Mr. Sabourin stated, “Chief Justice Pidgeon is of the view that your complaint is without substance and an abuse of the complaint process and does not warrant further consideration”. Mr. Sabourin also stated, “Chief Justice Pidgeon took note of comments you made at the hearing that amounted to threats. . . . Chief Justice Pidgeon is of the view that the comments you made in the context of this judicial hearing are a strong indication of your view of the role of Council and of the complaint process”.

B. *The Decision is Reasonable*

[79] The *Judges Act* gives discretion to the CJC to decide whether to investigate a complaint that does not arise from the Minister of Justice of Canada or the Attorney General of a province.

Justice Arbour explained in *Moreau-Bérubé* at para 55:

55 While the Canadian Judicial Council and provincial judicial councils receive many complaints against judges, in most cases these are matters properly dealt with through the normal appeal process. There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council. [...]

[80] A disciplinary process must only be launched when the conduct of an individual judge “has threatened the integrity of the judiciary as a whole” and when “[t]he harm alleged is not curable by the appeal process” (*Moreau-Bérubé* at para 58).

[81] In *Singh*, Justice Heneghan considered the mandate and objectives of the CJC as set out in subsection 60(1) of the *Judges Act*, which include the promotion of efficiency and uniformity

and improvement of the quality of judicial service. Justice Heneghan noted, at para 51, the reasons for which a judge could be removed from office, as set out at subsection 65(2) of the

Judges Act:

[51] In my opinion, this section makes it clear that the Council's mandate is limited to reviewing improper judicial conduct that affects the ability of judges to execute his or her duties as a judge. It does not include broad jurisdictional power to review the decisions and judgments of judges.

[82] Mr. Cosentino challenges the CJC's conclusion that his complaints are about judicial decision-making rather than the judicial conduct of Justice Daley. In the present case, it is not difficult to draw the distinction between matters of judicial decision-making and matters of judicial conduct. As the CJC reasonably found, all the complaints relate to judicial decision-making.

[83] The CJC noted specific instances complained of by Mr. Cosentino and explained that these matters had been addressed in the recusal motion and/or related to the proceedings under case management, which involved the exercise of judicial discretion and the control of the proceedings in the courtroom, all of which are clearly matters of judicial decision-making. The role of the CJC is not to review judicial decisions of judges. That is the role of appellate courts. The CJC reasonably found that the matters complained of were not matters of judicial misconduct and not within its mandate.

[84] The CJC referred to the *Ethical Principles*, which require a judge to listen fairly, but also assert firm control over the proceedings "to maintain an atmosphere of dignity, equality and order". The CJC noted several examples of matters of judicial discretion in this context,

including: questioning litigants or counsel on their arguments or material; seeking clarification or asking for support for submissions; and, pointing out the existence of contrary evidence or law.

The CJC reasonably found that the aspects of Mr. Cosentino's complaint that concern the exercise of judicial discretion in controlling the process in the courtroom are not matters of judicial conduct. This finding addresses several of Mr. Cosentino's complaints, for example, that Justice Daley asked him to explain why his motion was urgent and what limitation period applied, berated him for communicating with his administrative assistant, and limited his submissions on the recusal motion to one hour.

[85] Contrary to Mr. Cosentino's argument that the CJC failed to investigate his allegation that Justice Daley "lied" to him for the purpose of delaying his motion and prejudicing him due to the possible expiry of a limitation period, the CJC addressed this in two ways.

[86] First, as noted above, the CJC found that the matters complained of arose in the context of decisions made in the judicial process, including on the recusal motion, and involved the need to control the process – matters of judicial decision-making.

[87] Second, the CJC noted that Mr. Cosentino saw mischief where none existed, stating, "Justice Daley provided some information about an alleged conflict but you took the view that he lied and hid information from you, again without any evidence in support." The CJC reasonably concluded that there was no evidence to support that Justice Daley "lied".

[88] Mr. Cosentino's allegation is based on Justice Daley's comments about his availability to hear a motion that Mr. Cosentino argued was urgent and had to be heard within four weeks. The motion was in fact set down and heard within four weeks and two days, on March 28, 2018. The transcript that Mr. Cosentino relies on does not support the allegation that Justice Daley "lied" to him. The record demonstrates that, at a case management hearing on February 26, 2018, Justice Daley stated that he would be out of town for "the last two weeks of March". Justice Daley gratuitously offered information about his availability in response to Mr. Cosentino's request. There are different ways to interpret "the last two weeks of March" and there are many matters for a judge to keep track of in their schedule. As the CJC reasonably found, Mr. Cosentino finds mischief where none exists. Moreover, Mr. Cosentino appears to have achieved what he wanted – a motion heard within four weeks.

[89] With respect to Mr. Cosentino's reliance on the transcript from the recusal motion on May 23, 2018, to prop up his allegation that Justice Daley "lied", the record demonstrates that Justice Daley cautioned Mr. Cosentino that his allegations crossed the line. The exchange also suggests that Justice Daley's comment that another judge had presided in March was due to confusion about which motion Mr. Cosentino was referring to. The evidence does not support any other interpretation. As the CJC reasonably found, Justice Daley's exercise of discretion to control matters in his courtroom is not within the CJC's mandate.

[90] The CJC did not ignore Mr. Cosentino's complaints about rude or offensive behaviour. The CJC reasonably found that the incidents complained of arose in the context of case management, including the determination of motions and communication between parties, and

were matters of judicial decision-making. This finding addresses Mr. Cosentino's allegation that Justice Daley raised his voice and berated Mr. Cosentino and other plaintiffs for communicating with Justice Daley's administrative assistant to schedule motions. The CJC noted that communication between the judge and parties must be made in accordance with the applicable rules, unless the judge, in his discretion, provides otherwise.

[91] Mr. Cosentino's reliance on the *Ethical Principles* to argue that the CJC erred in finding that the complaint did not relate to judicial misconduct, is based on isolated passages that ignore the other guidance provided.

[92] The *Ethical Principles* note at the outset "[t]he Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or list of prohibited behaviours. They do not set out standards defining judicial misconduct."

[93] With respect to impartiality, the relevant principle states, "[j]udges must be and should appear to be impartial with respect to their decisions and decision making." The principle refers to impartiality in the decision and decision-making process which, in this case, and as the CJC found, are issues that can and should be addressed on appeal.

[94] The *Ethical Principles* do not support Mr. Cosentino's argument that the CJC erred in finding that his complaints of rudeness and offensive behaviour are not matters of judicial

conduct. The relevant principle states, “[w]hile acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.” The principle conveys that there is a need to balance control of the process and courtesy. A review of the transcripts relied on by Mr. Cosentino demonstrates that Justice Daley was required to exercise firm control over emotionally charged issues. The CJC reasonably found that the complaints were based on Justice Daley’s control of the process – again a matter of judicial decision-making.

[95] The CJC also reasonably found that Mr. Cosentino’s allegations of bias were not matters of judicial conduct. The CJC explained that a judge may question a litigant or counsel on the argument made or the material advanced and may seek support for what is suggested, and that all such decisions fall within the exercise of judicial discretion, which are not issues of conduct.

[96] The CJC noted that Justice Daley addressed the allegations of bias on the recusal motion. The CJC explained that if Mr. Cosentino disagreed with the decision, the proper recourse is an appeal. As noted above, Mr. Cosentino subsequently sought leave to appeal, which was refused by both the Ontario Divisional Court and Ontario Court of Appeal.

[97] The record clearly demonstrates that Mr. Cosentino’s evidence of bias relates to matters of judicial decision-making. For example, Mr. Cosentino complains that Justice Daley assumed control of a matter of which another judge was seized. The record tells a different story. Mr. Cosentino brought a motion in 2015, which resulted in an Order made by another judge that clearly states that it remains in force pending another order of the “Court” and that if matters

were “urgent” they “may” be returned to that judge. Justice Daley’s decision – to deal with the matters three years later and in the context of his role as case management judge of seven related matters – is a judicial decision, as the CJC reasonably found.

[98] Mr. Cosentino also alleges bias related to Justice Daley’s determination that a motion was the appropriate procedure to remove an estate trustee (which could not be appealed without leave) rather than an application. The record demonstrates that whatever the appropriate procedure is, neither a motion nor an application has yet been filed.

[99] Mr. Cosentino’s argument that it is improper for judges to sit on a motion for their own recusal because they would be biased is without merit. Any concerns about a judge’s impartiality on a recusal motion could be addressed on an appeal of that decision.

[100] The CJC also noted that a judge is presumed to have acted in good faith unless the contrary is demonstrated. The CJC found that Mr. Cosentino’s allegations of bias rely “largely on speculation and conjecture, or as stated by Justice Daley, on unsupported bald assertions”. The CJC elaborated, noting, for example, that Justice Daley provided an explanation about a clerical error, yet Mr. Cosentino viewed it as mischief, conspiracy and obfuscation, without any evidence in support of these allegations.

[101] Mr. Cosentino did not pursue his argument that the CJC erred in refusing to provide him with confidential documents as he requested, including information about members of the CJC and their deliberations. The Court notes that Mr. Cosentino did not pursue a motion under Rule

318(2). Moreover, the jurisprudence has established that deliberative documents of the CJC are subject to public interest privilege (*Slansky v Canada (Attorney General)*, 2013 FCA 199 at paras 9, 159).

[102] In conclusion, the CJC's decision is transparent, justified by the facts on the record and the law and is intelligible. The CJC's decision explains its statutory mandate and role, the nature of Mr. Cosentino's complaints and their context, and the distinction between matters of judicial decision-making and matters of judicial conduct. The CJC considered the complaints and the evidence filed in support and reasonably concluded that the complaints were not related to judicial conduct and, therefore, not within the mandate of the CJC, and that the complaint was an abuse of the CJC's complaint process.

X. Costs

[103] Generally, costs are awarded to the successful party.

[104] Rule 400 of the *Federal Courts Rules* provides that the Court has discretion to determine whether costs should be awarded and in what amount. The non-exhaustive factors set out in Rule 400(3) provide guidance to the Court in making this determination (*Francosteel Canada Inc v African Cape (The)*, 2003 FCA 119). The factors apply to all cost awards.

[105] In *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25, Justice Rennie emphasized that the Court has full discretion to award costs and determine the amount. Justice Rennie noted,

at para 15, that a lump sum cost award must be justified in relation to the circumstances of the case and the objectives underlying costs. He further explained at para 19:

[19] While, as noted above, a judge fixing costs on a lump sum basis has a wide discretion, the discretion is not unfettered. As noted, it is not a matter of plucking a number out of the air. The discretion must be exercised prudently. The criteria set forth in Rule 400(3), the case law and the objectives that underlie awards of costs are all relevant considerations. Efficiency in the administration of justice is one value that underlies lump sum awards, but costs must also be predictable and consistent so that counsel can properly advise and clients can make informed decisions about litigation risks. The ability to forecast cost consequences also bears both on the ability of parties to settle and on the question of access to the courts.

[106] This Court's Practice Direction dated April 30, 2010 provides that parties should be prepared to inform the Court as to whether they have agreed on the disposition and/or quantum of costs and if this has not occurred, should be prepared to make submissions on costs before the end of the hearing

[107] The Respondent submits only that a lump sum should be awarded, without any indication of the amount sought or evidence in support of that amount.

[108] Given the absence of submissions by the Respondent on costs, I have considered the relevant factors set out in Rule 400(3), in particular that the Respondent was successful, and that although the issues were not complex, the record was extensive and would have required significant time to review.

[109] Although I am reluctant to resort to “plucking a number out of the air”, I will exercise my discretion to award \$3000 in costs to the Respondent as a contribution to the costs incurred in responding to this Application.

JUDGMENT in file T-877-19

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is dismissed.
2. The Applicant shall pay the Respondent costs in the amount of \$3000.

"Catherine M. Kane"

Judge

ANNEX A

Judges Act, RSC 1985, c J-1 *Loi sur les juges, LRC 1985, c J-1*

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

(a) establish conferences of chief justices and associate chief justices;

(b) establish seminars for the continuing education of judges;

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

(d) make the inquiries described in section 69.

Meetings of Council

61 (1) The Council shall meet at least once a year.

Work of Council**Mission du Conseil**

60 (1) Le Conseil a pour mission d'améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l'uniformité dans l'administration de la justice devant ces tribunaux.

Pouvoirs

(2) Dans le cadre de sa mission, le Conseil a le pouvoir :

a) d'organiser des conférences des juges en chef et juges en chef adjoints;

b) d'organiser des colloques en vue du perfectionnement des juges;

c) de procéder aux enquêtes visées à l'article 63;

d) de tenir les enquêtes visées à l'article 69.

Réunions du Conseil

61 (1) Le Conseil se réunit au moins une fois par an.

Travaux

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

(2) Sous réserve des autres dispositions de la présente loi, le Conseil détermine la conduite de ses travaux.

By-laws

Règlements administratifs

(3) The Council may make by-laws

(3) Le Conseil peut, par règlement administratif, régir:

(a) respecting the calling of meetings of the Council;

a) la convocation de ses réunions;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

b) le déroulement de ses réunions, la fixation du quorum, la constitution de comités, ainsi que la délégation de pouvoirs à ceux-ci;

(c) respecting the conduct of inquiries and investigations described in section 63.

c) la procédure relative aux enquêtes visées à l'article 63.

Employment of counsel and assistants

Nomination du personnel

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.

Inquiries

Enquêtes obligatoires

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

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

of the reasons set out in paragraphs 65(2)(a) to (d).

alinéas 65(2)a) à d).

Investigations

Enquêtes facultatives

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

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

Inquiry Committee

Constitution d'un comité d'enquête

(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.

(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.

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203

Règlement administratif du conseil canadien de la magistrature sur les enquêtes (2015), DORS/2015-203

Establishment of Judicial Conduct Review Panel

Constitution du comité d'examen de la conduite judiciaire

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial

2 (1) Le président ou le vice-président du comité sur la conduite des juges constitué par le Conseil afin d'examiner les plaintes ou accusations relatives à des juges de juridiction supérieure peut, s'il décide qu'à première vue une plainte ou une accusation pourrait s'avérer suffisamment grave pour justifier la révocation d'un juge,

Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

constituer un comité d'examen de la conduite judiciaire qui sera chargé de décider s'il y a lieu de constituer un comité d'enquête en vertu du paragraphe 63(3) de la Loi.

**Canadian Judicial Council
Procedures for Dealing with
Complaints made to the
Canadian Judicial Council
about Federally Appointed
Judges**

**Procédures du
Conseil canadien de la
magistrature pour l'examen
de plaintes ou d'allégations
au sujet de juges de
nomination fédérale**

Effective
29 July 2015

en vigueur le
29 Juillet 2015

**2. Administration of
Complaints Process**

**2. Administration des
procédures relatives aux
plaintes**

2.1 The Executive Director is responsible for the administration of the judicial complaints process, including the receipt of complaints.

2.1 Le directeur exécutif est chargé de l'administration du processus concernant les plaintes à l'égard des juges, notamment la réception de celles-ci.

**4. Early Screening by
Executive Director**

**4. Examen préalable par le
directeur exécutif**

4.1 The Executive Director must review all correspondence to the Council that appears intended to make a complaint to determine whether it warrants consideration.

4.1 Le directeur exécutif doit réviser toute la correspondance adressée au Conseil qui paraît l'être dans l'intention de déposer une plainte, afin de décider si elle justifie un examen.

4.2 The Executive Director may also review any other matter involving the conduct of a superior court judge that comes to the attention of the Executive Director and appears to warrant consideration.

4.2 Le directeur exécutif doit aussi réviser toute autre affaire impliquant la conduite d'un juge d'une cour supérieure qui vient à son attention et paraît justifier un examen.

5. Early Screening Criteria

For the purposes of these Procedures, 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.

6. Screening by Chairperson

The Chairperson must review a matter referred by the Executive Director and may:

(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 the Chairperson considers that it does not warrant further consideration.

5. Critères d'examen préalable

Aux fins de ces procédures, les affaires suivantes ne justifient pas un examen :

(a) les plaintes qui sont futiles, vexatoires, faites dans un but inapproprié, sont manifestement sans fondement ou constituent un abus de la procédure des plaintes.

(b) Les plaintes qui n'impliquent pas la conduite d'un juge; et

(c) Toutes autres plaintes qu'il n'est pas dans l'intérêt public et la juste administration de la justice de considérer.

6. Examen par le président

Le président doit réviser une affaire déferée par le directeur exécutif et peut, selon le cas :

a) demander toute information additionnelle du plaignant;

b) demander les observations du juge et celles de son juge en chef ; ou

c) rejeter la plainte s'il juge qu'elle ne justifie pas d'examen additionnel.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-877-19

STYLE OF CAUSE: SAM COSENTINO v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 17, 2020

JUDGMENT AND REASONS: KANE J.

DATED: SEPTEMBER 8, 2020

APPEARANCES:

Sam Cosentino FOR THE APPLICANT

Eric Peterson FOR THE RESPONDENT

SOLICITORS OF RECORD:

None FOR THE APPLICANT

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