

Federal Court



Cour fédérale

**Date: 20211119**

**Docket: T-513-20**

**Citation: 2021 FC 1255**

**Ottawa, Ontario, November 19, 2021**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**MARTIN DUHAMEL**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] Mr. Duhamel [Applicant] applies for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of an April 15, 2020 decision [Decision] of the Acting Executive Director of the Canadian Judicial Council [CJC], dismissing the Applicant's complaint [Complaint] against Mr. Justice G. Bruce Butler [Justice Butler]. At the time of the Complaint,

Justice Butler was a judge of the British Columbia Supreme Court [BCSC] but is now at the British Columbia Court of Appeal.

[2] The Applicant submits that the Executive Director of the CJC did not have the authority to dispose of the Complaint and, in the alternative, that the Decision is unreasonable. The Applicant seeks an order in the nature of certiorari to have the Complaint considered or reconsidered by the CJC. The Attorney General of Canada [Respondent] submits that the Executive Director had the authority to dismiss the Complaint and that the Decision is reasonable.

[3] The application for judicial review is dismissed.

## II. Background

[4] The Applicant is a member of Coast Capital Savings Credit Union [Coast Capital]. He commenced two petitions [Petitions] for judicial review in the BCSC concerning Coast Capital's steps to become a federally regulated credit union. The Applicant named Coast Capital and the Financial Institutions Commission as respondents to the Petitions. The Applicant was self-represented. Justice Butler heard the Petitions in 2018 and dismissed them both (2018 BCSC 1309 (S-179553) and 2018 BCSC 1476 (S-177966)) and awarded costs against the Applicant in respect of both. The Applicant did not appeal Justice Butler's decisions.

[5] On February 18, 2020, the Applicant submitted the Complaint to the CJC online. The Complaint pertained to Justice Butler's handling and disposition of the Petitions:

Justice Butler exhibited a pattern of disregard towards me, the petitioner, in that he made decisions to my detriment without explanation. It is reasonable to perceive Justice Butler's conduct was biased against me, over the course of multiple decisions. In fact, the evidence shows that he was cognizant of his bias. This pattern of behaviour constitutes misconduct.

[6] The Complaint itemized six specific allegations about Justice Butler, all related to bias against the Applicant or the failure to provide reasons for decisions made in the course of hearing the Petitions. In particular, as summarized by the Respondent, the Complaint alleged that Justice Butler:

- a. Did not provide reasons in respect of:
  - i. what the Applicant calls a "lifetime gag order" issued against him;
  - ii. the case management schedule;
  - iii. all of the decisions to exclude evidence in the course of the case management;
  - iv. deciding not to give notice of the Petitions to parties the Applicant claims would have been affected by their outcome; and
  - v. concluding that the Petitions' grievances pertained to the actions of Coast Capital rather than [the Financial Institutions Commission].
- b. Exhibited bias against the Applicant in respect of the above-noted alleged failures to provide reasons, and in considering but declining to decide the issue of the Applicant's standing to bring the Petitions.

### III. Decision under Review

[7] By letter dated April 15, 2020, the Acting Executive Director of the CJC [Executive Director] explained that he reviewed the Complaint in the early screening process of complaints

pursuant to the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges [Review Procedures]*. The Executive Director found that the Complaint did not warrant consideration by the CJC because it did not raise a conduct issue concerning Justice Butler.

[8] In the letter, the Executive Director explained that the mandate of the CJC in matters of judicial conduct is to determine, based on reasons set out in the *Judges Act*, RSC 1985, c J-1 [*Judges Act*] and after a formal investigation, whether it should recommend to the Minister of Justice that a judge be removed from office by Parliament. He further explained that the CJC “is not a court and has no authority to review a judge’s decision to determine whether the judge rendered a decision that is congruent with the law and or the evidence.” The Executive Director also explained that allegations of bias and insufficiency or inadequacy of reasons must be argued before the courts since these are judicial matters, not conduct issues.

[9] Accordingly, the Executive Director dismissed the Complaint because “it [did] not raise any issue of conduct on the part of Justice Butler.” On the allegation of pattern of conduct indicating bias, he noted that it was “incumbent on [the Applicant] to seek the judge’s recusal at the appropriate time, or to appeal” and that “[n]othing in [the Applicant’s] complaint raises any issue of conduct of the part of Justice Butler.” As per the allegation of lack of reasons, he noted that “[w]hether Justice Butler provided sufficient or adequate reasons for his rulings and decisions is a judicial matter.”

#### IV. Procedural History

[10] In the course of this proceeding, and prior to filing his record, the Applicant brought a motion seeking a preliminary disposition of the Application in his favour or, in the alternative, an order compelling the Respondent to file an affidavit [Disposition Motion]. The thrust of the Disposition Motion was that the Respondent did not file an affidavit in this proceeding. By Order dated August 14, 2020, Justice McVeigh dismissed the Disposition Motion in its entirety with costs of \$500 payable forthwith to the Respondent.

[11] The Applicant also appealed the Orders of Prothonotary Ring made on November 30, 2020 [Reconsideration Order] and that of November 4, 2020 to which the reconsideration motion related. Prothonotary Ring's November 4, 2020 Order dismissed the Applicant's motion for an order striking the *Review Procedures* from the Respondent's Book of Authorities and an order striking the statements from the Respondent's memorandum of argument that depend on this document.

[12] By Order dated January 12, 2021 Justice Diner dismissed the appeals with costs of \$500 payable forthwith to the Respondent. Justice Diner noted that Prothonotary Ring's reasons point out that the *Review Procedures* should have been filed in the Respondent's Responding Record and not in their Book of Authorities. She nevertheless correctly exercised her discretion under Rule 55 of the Federal Courts Rules to accept the irregular filing of the Review Procedures because it did not prejudice the Applicant, the document was relevant to the application, and the

document was mentioned in the CJC's Decision. Justice Diner found that the Review Procedures already formed part of the Court record. The Applicant did not appeal Justice Diner's Order.

V. Issues

[13] The application raises the following issues:

1. Did the Executive Director have the authority to dismiss the Complaint?
2. Is the Decision reasonable?

VI. Standard of Review

[14] Decisions of the CJC are subject to judicial review. In *Cosentino v Attorney General of Canada*, 2020 FC 884 at paras 32-36 [*Cosentino*], this Court ruled that the Executive Director's decision to dismiss a complaint is reviewable on a standard of reasonableness. Both parties agree that the standard of review is reasonableness.

[15] The reasonableness standard is a deferential form of review meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]). To be reasonable, a decision must be based on internally coherent reasoning and be justified in light of the relevant legal and factual constraints (*Vavilov* at para 101). A reviewing court must determine whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99).

[16] The Respondent submits that decisions of judicial councils are to be reviewed “with a great deal of deference.” In *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, Justice Arbour stated that “[j]udicial councils may be viewed as unique not only amongst administrative tribunals but even amongst professional disciplinary bodies” (at para 44).

## VII. Analysis

A. Did the Executive Director have the authority to dismiss the Complaint?

### (1) *Applicant’s Submissions*

[17] Basing his submissions on the remedy of certiorari and Rule 317 of the *Federal Courts Rules*, the Applicant takes issue with the nature and scope of the record before the Court. He submits that it did not include his Complaint nor the basis for the Executive Director to make the impugned Decision.

[18] The Applicant submits that the Executive Director, as a “staff member,” did not have the statutory authority to dispose of the Complaint because complaints must be reviewed by judges. He also submits that the CJC impermissibly sub-delegated its legislative authority to dispose of his Complaint.

[19] He claims that in creating the CJC, Parliament has delegated the authority to investigate complaints against any superior court judge to an administrative body with special qualifications (i.e. a group of chief justices). He claims that the authority of the CJC to sub-delegate is limited by the *Judges Act* to the *conduct* of investigations, which suggests that the disposal of a

complaint cannot be sub-delegated via a by-law. He further claims that the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015* (SOR/2015-203) [*CJC By-Laws*] state that the Chairperson or Vice-Chairperson has the duty of disposing of non-serious complaints (ss 2(1), 2(5)). Furthermore, he states that the “Council declined to include any option for a staff member to perform preliminary screening of a complaint.”

[20] The Applicant submits that section 62 of the *Judges Act* “undoubtedly... confers the authority to delegate workaday [*sic*] tasks, but that’s all.” He claims that the words ‘to aid and assist the Council’ “indicate that the Council can hire lawyers for workaday [*sic*] legal tasks, but that they cannot delegate their greatest section 63 responsibility: to decide the ultimate disposition of a complaint.”

(2) *Respondent’s Submissions*

[21] The Respondent submits that there is no basis for compelling it to establish the Executive Director’s authority to make the Decision, based on the statutory framework and the jurisprudence. Rule 317 states that “[a] party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party...” The Applicant already possessed the Complaint. Justice Diner’s January 12, 2021 Order also addressed any issues with the Court record. Therefore, the Court has all it needs to adjudicate this matter.

[22] Concerning the merits of the application, the Respondent submits that the Executive Director has the jurisdiction and authority to preliminarily dismiss complaints submitted to the



CJC. In *Best v Canada (Attorney General)*, 2017 FC 1145 at paragraph 26 [*Best*], this Court concluded that the early screening of complaints alleging judicial misconduct is constitutional and a lawful delegation of the CJC’s authority. In *Cosentino*, at paragraph 2, this Court ruled that “[t]he 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.”

[23] The Respondent submits that the *Judges Act* includes “highly permissive and discretionary language” in respect of the CJC executing its legislative mandate (*Best* at para 26). Section 61(2) of the *Judges Act* allows the CJC to carry out its work in any such manner as the CJC may direct and to engage individuals as it deems necessary to carry out its duties (ss 62, 63(2)). The *Judges Act* also provides the CJC with the discretion to decide whether to investigate a complaint about a judge (s 63(2); *Best* at para 21).

[24] The Respondent further submits that the CJC’s *Review Procedures*, established pursuant to these legislative provisions, allow the Executive Director to preliminarily dismiss complaints, and that this procedure is constitutional and a lawful delegation of the CJC’s authority (*Best* at paras 22-23, 26).

[25] Given the above, the Respondent submits that there is no basis to suggest that the initial screening of complaints should be performed by a judge.

(3) *Analysis*

[26] I find that Justice Diner's January 12, 2021 Order addresses the Applicant's concerns related to the content of the record before the Court. At paragraph 10 of the Order Justice Diner states:

Indeed, while other documents were requested from the CJC, it appears that this document was not requested to form part of the Certified Tribunal Record under Rule 317, but it should have been. Indeed, rather than any prejudice resulting from its inclusion, its absence would create an evidentiary gap in the judicial review. Recent cases have found this document to [form] part of the CJC's legislative apparatus: see *Cosentino v Canada*, 2020 FC 884 at paras 52, 57-58, and *Best v Canada (AG)*, 2017 FC 1145 at para 34.

[27] Accordingly, I find that the Court has already addressed any issues that the Applicant has with the record. The Court has everything it needs to address the matter before it.

[28] Turning now to the merits of the application, I do not agree with the Applicant that section 62 of the *Judges Act* does not allow the CJC to delegate their section 63 responsibility to the Executive Director to render a decision on a complaint. I find that the statutory regime and the jurisprudence clearly provide the Executive Director with the authority to screen complaints. The relevant sections of the *Judges Act* state:

61(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

...

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.

...

63(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

[Emphasis added.]

[29] Sections 62 and 63(2) expressly state that the CJC may engage the services of counsel to aid and assist in the conduct of any inquiry or investigation of complaint or allegation made in respect of a judge of a superior court. The CJC's *Review Procedures* also allow the Executive Director to screen complaints. In *Best*, this Court stated that this procedure is a lawful delegation of authority by the CJC:

[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*, 1976 CanLII 3 (SCC), [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 CanLII 3125 (ON CA), [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.

...

[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...

[Emphasis added.]

[30] The Applicant asks this Court to part ways with Justice Boswell's decision in *Best* because he did not consider the issue of sub-delegation of administrative responsibility in the context of an administrative body with special qualifications where the statute does not explicitly confer the authority to delegate. I am not persuaded by the Applicant's argument. As set out above, the *Judges Act* expressly confers the CJC the authority to sub-delegate *to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.* *Best* also confirmed that the preliminary screening responsibility of the Executive Director is "far from an unlawful or improper delegation of authority by the CJC" (at para 22). The Applicant's submission on this point fails.

B. Is the Decision reasonable?

(1) *Applicant's Submissions*

[31] The Applicant submits that the Executive Director made two errors in law that render the Decision unreasonable. First, he alleges that the Executive Director erred in concluding that bias is a judicial matter that must be alleged before the courts, as opposed to a conduct issue that can

be brought up to the CJC. Second, the Applicant claims that the Executive Director erred in focusing on Justice Butler's decisions in isolation rather than analyzing his pattern of behaviour, namely, his failure to consider relevant evidence.

(2) *Respondent's Submissions*

[32] The Respondent submits that the Decision is reasonable and that the Executive Director properly concluded that the Complaint did not raise any conduct issue that could merit further inquiry by the CJC. He alleges that the Decision is justified, transparent, and intelligible and is owed a high degree of deference.

(3) *Analysis*

[33] As stated above, this Court's role is to determine whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether the decision is justified in light of the relevant legal and factual constraints. The party challenging the decision bears the onus of demonstrating that it is unreasonable (*Vavilov* at para 100).

[34] With respect, the Applicant's arguments fail for two reasons. First, as the Executive Director notes in his Decision, the Supreme Court of Canada held that there is a presumption of judicial integrity and impartiality (i.e. that judges are not biased). A party seeking to displace this presumption must present cogent evidence (*Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 18). I find that the Applicant has not provided any evidence that Justice Butler was biased.

[35] The Applicant's allegation of bias is based on his view that Justice Butler "made decisions to [his] detriment without explanation." In the Complaint, the Applicant states that the judge must "conduct himself properly in communicating with the parties during the course of the proceeding", which "includes providing a suitable explanation for his actions, commensurate with the circumstances." The sufficiency or adequacy of reasons is a judicial matter and the CJC does not have the authority to review a judge's decision. The Executive Director made this clear in the Decision. I find that that it was reasonable for the Executive Director to decide that allegations of bias or apprehensions of bias are judicial issues that must be argued before the courts.

[36] Second, I find that the Executive Director did not focus on the Petitions in isolation. In fact, in his references to the Applicant's allegation, the Executive Director referred to the alleged "pattern" of disregard, behaviour, or conduct several times in the Decision. This indicates that the Executive Director considered the alleged pattern of behaviour on the part of Justice Butler in arriving at the Decision.

[37] Accordingly, I find that the Applicant has not met his onus to demonstrate that the Decision is unreasonable.

#### VIII. Conclusion

[38] The application for judicial review is dismissed. The Decision is based on internally coherent reasoning and it is justified in relation to the legal and factual constraints. It is justified, transparent, and intelligible.

[39] The Respondent is awarded costs.

**JUDGMENT in T-513-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. The Respondent is awarded costs.

"Paul Favel"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-513-20

**STYLE OF CAUSE:** MARTIN DUHAMEL v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** MAY 26, 2021

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** NOVEMBER 19, 2021

**APPEARANCES:**

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