Federal Court  Cour fédérale

Date: 20221104

Docket: T-1423-22

Citation: 2022 FC 1506

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 4, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE HONOURABLE GÉRARD DUGRÉ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN JUDICIAL COUNCIL

Mis en cause

JUDGMENT AND REASONS

[1] The Honourable Gérard Dugré, a judge of the Quebec Superior Court, is the subject of proceedings before the Canadian Judicial Council (CJC). He is asking for judicial review of the Report prepared by an inquiry committee. The Attorney General of Canada requests that the Court strike out the application for judicial review on the grounds of prematurity.

I. How did we get here

[2] In these proceedings before the CJC, the applicant has already tried three times to make applications for judicial review before this Court. The applications for judicial review were struck out as premature. Two applications to stay hearings that were to be held before the Inquiry Committee were also dismissed. These decisions of this Court have been upheld by the Federal Court of Appeal. The list is as follows:

- 2019 FC 1604 (J. Martineau)

  Two applications for judicial review were struck on the grounds of prematurity.

- 2020 FC 602 (J. Roy)

  Application to stay the hearings to be held by the CJC Inquiry Committee: dismissed.

- 2020 FC 789 (J. Roy)

  Three applications for judicial review were struck out on the grounds of prematurity. One of the applications was to refer a complaint by the Vice-Chair of the Judicial Conduct Committee to the Inquiry Committee already responsible for examining other complaints. A second application involved four complaints referred to the Inquiry Committee by the Executive Director of the CJC. The third application concerned a notice informing Justice Dugré of the allegations against him.

- 2021 FCA 8

  Judgment of the Federal Court of Appeal summarily dismissing the applicant’s appeals against two decisions of this Court striking out applications for judicial review on the grounds of prematurity (2019 FC 1604 and 2020 FC 789).

- 2021 FCA 40

  Judgment dismissing the appeal relating to the refusal to stay the hearings to be held by the Inquiry Committee (2020 FC 602).

- 2021 FC 448 (J. McHaffie)

  The Inquiry Committee disposed of five preliminary applications in the course of its inquiry into the complaints referred to it. A decision was rendered in this regard on November 17, 2020. The applicant then requested judicial review of the Committee's dismissal of his preliminary applications. As with other applications for judicial review, the Attorney General requested that the application for judicial review be stuck out as premature. Justice Dugré asked that this Court grant a stay, pending a decision of the Supreme Court of Canada. The Court struck out the application for judicial review of the Inquiry Committee's decision on the preliminary exceptions; it also dismissed the stay application.

- 2021 FCA 139

  The appeal from this Court's decision (2021 FC 448) to strike out the application for judicial review on the grounds of prematurity was dismissed. The appeal regarding the stay application was also dismissed.

[3] Since November 17, 2020, when the Inquiry Committee ruled on the preliminary exceptions raised by Mr. Justice Dugré, the Inquiry Committee has proceeded with its work. This work culminated in its Report dated June 9, 2022. The Committee's Report established under section 63 of the *Judges Act*, RSC 1985, c J-1, to conduct an inquiry into the conduct of Justice Gérard Dugré of the Quebec Superior Court consists of 687 paragraphs, the last of which states that the applicant "committed acts of misconduct and [the Committee] recommends that he be removed from office".

[4] Attached to the Report are the reasons for decisions on preliminary motions rendered on November 17, 2020. Those reasons alone consist of 225 paragraphs.

[5] The applicant is now seeking judicial review of this Report on the basis of an application for judicial review dated July 11, 2022. The application for judicial review also addresses the Committee's decision on preliminary exceptions.

[6] The Attorney General of Canada appears before this Court to request that the application for judicial review be struck because it would be, like the others, premature.

II. Positions of the parties

A. *Attorney General*

[7] The position of the Attorney General is based on the general principle that a reviewing court should not intervene during the course of an administrative process. In this case, the Attorney General states that the process has not been completed. Only once the Canadian Judicial Council has decided on the recommendation to be made to the Minister of Justice will there be a decision ending the process.

[8] The Attorney General seeks to rely on the case law of this Court, but even more so on the case law of the Federal Court of Appeal, including the decision of January 20, 2021, where the Federal Court of Appeal raised *proprio motu* that the appeals from the decisions handed down by this Court (2019 FC 1604 and 2020 FC 789) may be doomed to fail. The Chief Justice of the Federal Court of Appeal directed the parties to file submissions, and the Court eventually dismissed the appeals summarily, on the basis that the doctrine of prematurity applied to the case (2021 FCA 8).

[9] The consistent case law of the Federal Court of Appeal since the leading authority in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*C.B. Powell Limited*], culminating for our purposes in *Dugré v Canada (Attorney General)*, 2021 FCA 8, should dispose of this application to strike. According to that judgment, the rigour of the quasi-absolute principle of non-interference must not be compromised.

[10] The doctrine of prematurity instructs that exceptions, which are very rare, "require that the consequences of an interlocutory decision be so 'immediate and radical' that they call into question the rule of law" (respondent's memorandum of fact and law, para 80, citing *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 35).

[11] Thus, for the Attorney General, two elements are important. The process is not yet complete, as it is up to the CJC to decide whether to make a recommendation to the Minister of Justice, if necessary. However, the CJC may not make a recommendation for removal; it may also require clarification or further investigation. The final decision on a recommendation for removal rests with the CJC, at the next stage of the process. The other element will, of course, be the absence of exceptional circumstances to avoid the doctrine of prematurity. No such circumstances are present in this case. The applicant insisted that his reputation was tarnished by the Inquiry Committee's Report, which should now be accessible by the Federal Court. The Attorney General argues that the Federal Court of Appeal has already responded to the argument in *Newbould v Canada (Attorney General)*, 2017 FCA 106, [2018] 1 FCR 590 at para 31:

> [31] That said, the question is whether the appellant is able to show such damage to his reputation. The appellant says that the proceedings before the Inquiry Committee will irreparably harm the reputation he acquired in the course of his years on the bench. I

> am sensitive to this argument, but the difficulty I have is that the harm of which the appellant complains is inherent in the process in which he is engaged. If the appellant is likely to suffer irreparable harm solely from the fact that his conduct will be the subject of Inquiry Committee proceedings, then all judges who find themselves in the same position also suffer irreparable harm. I am not prepared to make such a finding.

B. *Justice Dugré*

[12] The applicant has provided the Court with various comments from the Inquiry Committee's Report, which he argues are damaging his reputation. He criticizes the inquiry process, which he states was marked by breaches of procedural fairness: this requires immediate intervention. In fact, it would not be an interlocutory decision but a final decision, thereby circumventing the doctrine of prematurity. He refers to a [TRANSLATION] "factual and legal context different from that of previous proceedings" (applicant's memorandum of fact and law, para 9). The applicant refers here to applications to strike made and allowed in this Court and confirmed in the Federal Court of Appeal.

[13] This factual and legal context essentially consists of the claim that the Inquiry Committee exhausted its jurisdiction when making its recommendation: it produced its Report, which has [TRANSLATION] "very serious" consequences for the applicant.

[14] The applicant argues that his rights are irrevocably lost if he cannot proceed with judicial review now instead of waiting for [TRANSLATION] "further decisions to be rendered on the basis of a report that is ill founded and null since it is, among other things, the result of several

breaches of procedural fairness committed against the applicant" (applicant's memorandum of fact and law, para 21).

[15] The CJC's decision will be no more final than the "decision" of the Inquiry Committee. In any event, it too is no more than a recommendation. In any case, it is preferable to review an unjust report than to inconvenience more than 17 CJC members (this is the quorum required for a decision).

[16] The applicant states that the content and conclusions of the Report of the Inquiry Committees are so immediate and final as to call into question the rule of law and procedural fairness.

[17] Finally, the applicant seeks to benefit from a passage from Justice Martineau's decision to strike out two initial applications in December 2019 (2019 FC 1604). I repeat paragraph 23:

> [TRANSLATION]
>
> [23] Due to the current administrative fragmentation, the multi-stage process before the Council is such that it protects the rights of the applicant. It is not appropriate to intervene before the process that has been set in motion has at least reached the fourth stage, that of Inquiry Committees, where the applicant will be given the opportunity to make all the arguments on preliminary matters and on the merits justifying dismissal of the complaints in question. Indeed, as I noted in *Girouard*, the Inquiry Committee will also have the power to rule on any question of fact or law, including any constitutional argument or statutory interpretation, and may decide on the merits of any "*Boilard* motion" that the applicant may make in this case (see also *Alexion* at para 48; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 40–45; on the ability of the Inquiry Committee to decide constitutional issues, see *Report of the Inquiry on its Jurisdiction to Conduct an Inquiry into Justice Gratton of the Ontario Court of Justice, Ottawa,*

January 26, 1994; on the "*Boilard* motion", see *Cosgrove v Canada (Attorney General)*, 2008 FC 941).

[18] At this stage, Justice Dugré filed two applications for judicial review before the Inquiry Committee could even begin its work. The establishment of the Inquiry Committee was announced in September 2019. The first two applications for judicial review were made on October 4 and 7, 2019, and they were declared premature on December 13, 2019. It is in this context that my then colleague, Justice Martineau, stated that it would not be appropriate to intervene before the investigation process has even begun, or at least passed the fourth stage.

[19] The applicant seeks to turn these words into a judgment that this Court has thus announced the conclusion that access to the Court would be possible once the Inquiry Committee's Report is issued.

III. Analysis

[20] In my view, the application for judicial review of the Inquiry Report, including decisions on preliminary exceptions, is premature. Barring exceptional circumstances, such a request can only be made once the "administrative" process has ended. This process can only be that of the Canadian Judicial Council, which ends with a decision on whether, under the *Judges Act*, to make a recommendation for removal. The doctrine of prematurity requires that this process be completed before seeking judicial review.

[21] First, I intend to review the process mandated by the *Judges Act* and the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015, SOR/2015-203 [By-laws]. I will

then review the relevant case law on the force of the doctrine of prematurity before applying it to the circumstances of our case.

A. *Established system for investigation of judges*

[22] This is section 99 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) (as am. by *Canada Act, 1982*, c 11 (UK), Schedule to the *Constitution Act, 1982*, Item 1, RSC, 1985, Appendix II, No 5, which deals with the possibility of removing a superior court judge.

Tenure of office of Judges	**Durée des fonctions des juges**
99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.	**99 (1)** Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.
Termination at age 75	**Cessation des fonctions à l'âge de 75 ans**
(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.	**(2)** Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

[23] The *Constitution Act, 1867* does not provide for the procedure to be followed when Parliament is required to review the conduct of a judge to determine whether removal is warranted. This lack of a framework led to difficulties in the 1960s in the case of Justice Landreville. In that case, an investigation was conducted under the *Inquiries Act*, now RSC, 1985, c I-11. This is how Part II of the *Judges Act* was created. As noted by the Federal Court of Appeal in *Canada (Attorney General) v Cosgrove*, 2007 FCA 103, [2007] 4 FCR 714 [*Cosgrove*], pursuant to section 71 of the *Judges Act*, "it is possible in theory for a judge to be removed from office even if the inquiry procedure in Part II of the *Judges Act* is never engaged" (at para 49). But an inquiry under this Act is clearly favoured. The Federal Court of Appeal in *Cosgrove* stated that "the root of the problem was the lack of a fair and properly focused procedure for investigating complaints about the conduct of judges of the superior courts" (at para 48).

[24] That Act established the Canadian Judicial Council. The power of inquiry is conferred on the CJC by section 63 of the *Judges Act*. While the CJC must investigate if requested to do so by a provincial attorney general or the Minister of Justice of Canada (subsection 63(1)), it "may investigate any complaint or allegation made in respect of a judge of a superior court." (subsection 63(2)). This is the case in our instance.

[25] The composition of the CJC is defined by section 59 of the *Judges Act* and includes the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof. In addition, the Act allows the CJC to establish an Inquiry Committee (subsection 63(3)). It may consider any complaint or allegation pertaining to the

judge that is brought to its attention (By-laws, section 5). These By-laws provide a summary of the procedure to be followed by the Inquiry Committee. The CJC or an Inquiry Committee in making an inquiry or investigation is deemed to be a superior court with the power to summon witnesses and to require them to give evidence on oath and produce documents. The committee formed by the CJC will then report its conclusions to the CJC.

[26] The *Judges Act* provides that the CJC shall report its conclusions and submit the record of the inquiry or investigation to the Minister (subsection 65(1)). Subsection 65(2) states that the CJC may recommend removal "where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge" for any of the reasons provided. The Act expressly provides for the Council's ability to constitute an inquiry committee, and its role is to make its own recommendation to the Minister (*Girouard v Canada (Attorney General)*, 2020 FCA 129, [2020] 4 FCR 557 at paras 89 and 91). The body used for the inquiry is the Inquiry Committee, which is subject to certain requirements of the By-laws.

[27] In addition to the procedure to be followed during the inquiry (By-laws section 5, 6 and 7), it is expressly provided that the Inquiry Committee must submit a report "setting out its findings and its conclusions about whether to recommend the removal of the judge from office" (subsection 8(1)). As we can see, the Inquiry Committee does not replace the CJC, which by law makes the recommendation to the Minister of Justice of Canada. Rather, the Inquiry Committee is asked to rule on "<u>whether</u> to recommend the removal of the judge from office" (emphasis added). The French version uses the following terms: "consigne les constatations de l'enquête et

statue sur l'opportunité de recommander la révocation du juge". As it seems clear to me, the report of the Inquiry Committee is not the recommendation. This is the exclusive prerogative of the CJC. The role of the committee is to decide whether to recommend the removal of a judge, but nothing more. The CJC is, of course, free to form its own judgment on the recommendation to be made.

[28] Moreover, the By-laws recognize this fact, as the CJC must review the Inquiry Committee's report (and the judge's submissions) with a quorum of 17 members to deliberate the removal of a judge. There are several options available to the CJC. Section 12 of the By-laws reads as follows:

Clarification	**Éclaircissements**
12 If the Council is of the opinion that the Inquiry Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry Committee with directions.	**12** S'il estime que le rapport du comité d'enquête exige des éclaircissements ou qu'une enquête complémentaire est nécessaire, le Conseil peut renvoyer tout ou partie de l'affaire au comité d'enquête en lui communiquant des directives.

[29] As we can see, the choice of the CJC is not just a binary one: to recommend removal or not. Clarification or a supplementary inquiry may be necessary from the Inquiry Committee. From this, a fairly clear inference can be drawn. Only the CJC may make a recommendation to the Minister of Justice of Canada. The Inquiry Committee is essentially at the service of the CLC and may receive instructions even after it has completed its work and submitted its report in which the Inquiry Committee may only determine whether to recommend removal.

[30] The CJC is mandated by the *Judges Act* to investigate complaints and allegations against judges of superior courts. It makes a recommendation to remove a judge on one of the grounds under subsection 65(2) of the Act. This process stops there, not at the stage of the work done by the Inquiry Committee. The next step is a different matter. *Cosgrove* reads as follows:

> [64] As explained above, the Council has no power to remove a judge from office. That can be done only by the Governor General on the joint address of the Senate and House of Commons. If the question of removal is to be put before Parliament, it is the Minister who does so. It is open to the Minister to put the question to Parliament, or to decline to do so. Like all acts of an Attorney General, the Minister's discretion in that regard is constrained by the constitutional obligation to act in good faith, objectively, independently and with a view to safeguarding the public interest. It is presumed, in the absence of evidence to the contrary, that the Minister will fulfil that obligation.

B. *Whether application for judicial review premature*

[31] Having established that the process set up by the *Judges Act* involves action by the Canadian Judicial Council, the only question that arises is whether judicial review of the Report made by the Inquiry Committee set up by the Canadian Judicial Council is premature, since the process provided for by the Act has not yet been completed. In my view, the doctrine of prematurity must be fully applied.

[32] The judgment of the Federal Court of Appeal in *Dugré v Canada (Attorney General)*, 2021 FCA 8, seems to me to be correct. In that decision, the Federal Court of Appeal repeats paragraphs 30 to 32 of *C.B. Powell Limited*, which has become the leading decision in this regard. I will repeat them again, highlighting the passages that, in my opinion, describe the doctrine, and adding paragraph 33:

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted].

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, above, paragraph 38, *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, above, at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994) 119 D.L.R. (4th) 136 (B.C.S.C.), affd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 1991, 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision makers who, like judges, have decision-making responsibilities to

> discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 48.
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> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D. J. M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998), at paragraphs 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 485–494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, above; *Okwuobi*, above, at paragraphs 38–55; *University of Toronto v C.U.E.W.*, Local 2 (1988), 55 D.L.R. (4th) 128 (Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
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> [Emphasis added.]

[33] The doctrine of prematurity only gained momentum in the years that followed. In *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 FCR 467 [*Wilson*], the Federal Court of Appeal emphasized the force and pervasiveness of the doctrine:

> [32] The weighty nature of these public law values explains the force and pervasiveness of the general rule against premature judicial reviews. Indeed, in appropriate cases, the general rule can form the basis of a preliminary motion to strike: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] D.T.C. 5001, at paragraphs 66 (motion to strike available), 51–53 (general rule against supporting affidavits)

> and 82–89 (discussion of prematurity in the context of motions to strike). Such motions serve to nip in the bud premature judicial reviews that corrode these values.
>
> [33] The force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained. As *C.B. Powell*, above, explained, the recognized exceptions reflect particular constellations of fact found in the decided cases. They are rare cases where the public law values do not sound loudly in the particular circumstances, the public law values are offset by competing public law values, or both. For example, there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 27–30. In these cases—often cases where prohibition is available—the values underlying the general rule against premature judicial reviews take on less importance.
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> [Emphasis added.]

[34] The same theme can be found in *Alexion Pharmaceuticals Inc. v Canada (Attorney General)*, 2017 FCA 241, of which I have reproduced paragraphs 47 and 49:

> [47] The normal rule is that parties to an administrative proceeding may proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. This means that, ordinarily, a party to an administrative proceeding must put to the administrative decision-maker all arguments that it has the jurisdiction to hear, and must obtain its decision, before launching an application for judicial review *(Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, at paras. 30–31, [2011] 2 F.C.R. 332; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras. 35–37, [2012] 1 S.C.R. 364).
>
> …
>
> [49] Many of the good reasons that animate this rule and show it to be in the public interest are summarized in *C.B. Powell*, above at para. 32. Among them is avoidance of multiplicity of proceedings, avoidance of the waste associated with interlocutory

> judicial review applications when the applicant for judicial review may succeed at the end of the administrative process anyway, ensuring that the court has the benefit of the administrative decision-maker's findings, and judicial respect for the legislative decision to invest administrative agencies with decision-making authority. Where the issue is a constitutional issue, proceeding first to court also risks depriving the court of the views of the administrative decision-maker based on "its factual appreciations, insights gleaned from specializing over many years in the myriad complex cases it has considered, and any relevant policy understandings" (*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at paras. 42, 45, [2015] 4 F.C.R. 75). The strength of the rule and its underlying rationales is reflected both in its regular invocation as a basis for a motion to strike (*Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras. 32–33, [2015] 4 F.C.R. 467) and the court's entitlement to raise the rule on its own motion (*Forest Ethics*, above at para. 22).
>
> [Emphasis added.]

As can be seen, the doctrine has such force that it can be raised *proprio motu* and can be invoked upon a motion to strike.

[35] However, in this case, the report in question is that of an Inquiry Committee, which must lead to a decision by the body mandated by the *Judges Act*, the Canadian Judicial Council. The process is that of the CJC. As the By-laws so aptly state, the Inquiry Committee merely draws conclusions about whether to recommend the removal. It is the CJC that makes the decision, and in fact, it may even require from the Inquiry Committee a clarification or a supplementary inquiry. Thus, the Inquiry Committee has no decision-making power: this resides with the CJC after deliberation on the question to be decided, that is, whether the CJC should recommend removal.

[36] Therefore, the doctrine of prematurity, which seeks to prevent judicial remedies until the process has finished, should apply with full force in a case where not only has the process not been completed, but the decision has not been made. It seems to me that the passage from *C.B. Powell Limited*, at paragraph 32, applies here in every respect. This prevents fragmentation of the process, eliminates costs and delays and avoids the "waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway [citations omitted]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings". In this case, this is all the more true given that the CJC's decision, the only one that counts, has not yet been made. Not only is removal not a foregone conclusion, but clarification and further investigation are expressly provided for in the By-laws.

[37] It is possible for a reviewing court to intervene earlier, where "exceptional circumstances" have been demonstrated by an applicant. Strictly speaking, the applicant in this case does not rely on any. Instead, he seeks to transform an inquiry committee's report into a "final decision" that suffers from breaches of procedural fairness and damages his reputation. As stated and reiterated by the Federal Court of Appeal, concerns about procedural fairness, bias or even constitutional issues are not exceptional circumstances that give rise to premature judicial review. As for the argument concerning reputation, this was again addressed in the decision of the Federal Court of Appeal dated January 20, 2021 (2021 FCA 8):

> [48] Indeed, none of the other arguments raised by the appellant, both in the memoranda and the written submissions in response to the directions, points to circumstances directly or indirectly resembling the exceptional circumstances referred to in *C.B. Powell*. While the existence and conduct of removal proceedings may be damaging to the appellant's reputation, that is

> the nature of any removal proceeding (*Newbould v. Canada (Attorney General)*, 2017 FCA 106, [2018] 1 F.C.R. 590, at paras. 31–34). The appellant has failed to show how his particular situation is different from that of any other judge subjected to a removal proceeding.

[38] Essentially, the applicant's argument seems to me to revolve around the Report of the Inquiry Committee, which he argues is a [TRANSLATION] "final decision against him" (memorandum of fact and law, para 10). He claims that the Inquiry Committee has exhausted its jurisdiction, which would mean this "administrative process" has ended. With due respect, such an argument ignores the process set out in the *Judges Act*, which entrusts the Canadian Judicial Council with the decision on a recommendation to the Minister of Justice of Canada. This is where the decision-making power resides. There is no final decision by an Inquiry Committee. There is a report to be provided to the CJC. Moreover, as stated above, once the report has been submitted to the CJC, the CJC may require clarification or further investigation from the Committee, which clearly demonstrates that the Inquiry Committee is at the service of the CJC. It is difficult to see how such a report could constitute a final decision. However, even more fundamentally, the case law of the Federal Court of Appeal requires that parties cannot turn to a reviewing court until the "administrative process" has run its course (*C.B. Powell Limited*, at paras 30–32, cited *in extenso* by the Federal Court of Appeal at paragraph 34 in *Dugré v Canada (Attorney General)*, 2021 FCA 8). The process set out in the *Judges Act* is only completed once the CJC has made its decision. It will have received the report of its Inquiry Committee, which will have had the opportunity to express its opinion on the advisability of making a recommendation, but it is the CJC who must ultimately decide. The Inquiry Committee is the CJC's tool for carrying out the task entrusted to it by Parliament.

[39] Finally, the applicant sought to make an argument in writing with respect to an observation made by Justice Martineau in his decision in *Dugré v Canada (Attorney General)*, 2019 FC 1604. My colleague wrote in paragraph 23 that [TRANSLATION] "it is not appropriate to intervene until the process has at least reached the fourth stage, that of the Inquiry Committees, where the applicant will be given the opportunity to make all arguments on preliminary matters and on the merits justifying dismissal of the complaints in question".

[40] The applicant argues that this Court has expressed its views as to when the applicant may apply to this Court.

[41] I agree with the respondent that this is not a ruling that has that scope. It is likely not even a ruling. First, it can only be *obiter dictum*, as the only question was whether the application for judicial review was premature. At face value, the commentary was not necessary for the decision to be rendered. The commentary is consistent with the Latin phrase "*obiter dictum*," which means something that is "said in passing" (Black's Law Dictionary, West Group, 7th ed.).

[42] Furthermore, far from expressing a view that the remedy is open at this stage, that is, once a report of an Inquiry Committee has been completed, the passage merely points out that the work of the Inquiry Committee had not even begun. In addition, the passage states little in the sense that the [TRANSLATION] "the process has at least reached the fourth stage" [emphasis added]; accordingly, we do not know the precise moment when an application for judicial review can be validly made.

[43] Finally, it should be noted that Justice Martineau had clearly referred to the relevant and binding case law of the Federal Court of Appeal. Paragraph 13 of the decision states that [TRANSLATION] "[t]he normal rule is that an applicant cannot obtain a judicial remedy until the administrative process has been completed and all effective remedies been exhausted [citations omitted]. Exceptionally, a court may agree to intervene on judicial review at a preliminary stage". If the applicant can speculate on the scope of *obiter dictum*, it is equally possible to speculate that paragraph 23 refers only to the point at which judicial review could be considered at a preliminary stage, without commenting on the precise moment, before the process has ended, at which an application for judicial review should be possible. In other words, in the context of this decision, the application for judicial review was made even before the preliminary stage was completed. The Court simply expressed how premature the application for judicial review was, when the inquiry had not yet begun. Nevertheless, the applicant's argument is outweighed by the force and pervasiveness of the doctrine of prematurity.

IV. Conclusion

[44] The motion to strike out the application for judicial review on the grounds of prematurity must be allowed. The case law of the Federal Court of Appeal sets out the rigorous principle of non-interference on review when the current process has not ended. Such a process is ongoing until the Canadian Judicial Council completes the cycle set out in the Act and By-laws.

[45] Considering the doctrine of prematurity, this application for judicial review is doomed to fail: it is clear and obvious that the application for judicial review has no reasonable possibility

of success in the circumstances (*Sagos v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 47 at para 3; *Wilson*, above at para 33).

[46] No costs are awarded.

JUDGMENT in T-1423-22

THIS COURT'S JUDGMENT is as follows:

1. The Attorney General of Canada's motion to strike out the application for judicial review in docket T-1423-22 of the Federal Court is allowed.

2. No costs are awarded.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1423-22
STYLE OF CAUSE:	THE HONOURABLE GÉRARD DUGRÉ v THE ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
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