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Judges Act, R.S.C., 1985, c. J-1

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

**REPORT OF THE REVIEW PANEL
CONSTITUTED BY THE
CANADIAN JUDICIAL COUNCIL
REGARDING
THE HONOURABLE PATRICK SMITH**

5 November 2018

I. INTRODUCTION

[1] The Executive Director of the Canadian Judicial Council (the “CJC”) has referred the matter of the appointment of the Honourable H. Patrick Smith (“Justice Smith”) of the Superior Court of Justice (Ontario) to the position of Interim Dean (Academic) of the Faculty of Law at Lakehead University in Thunder Bay, Ontario to the Honourable Robert Pidgeon, Senior Associate Chief Justice of the Quebec Superior Court, in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the CJC. The referral of the matter to Pidgeon ACJ was for a review and consideration of the relevant background facts, pursuant to section 4.3 of the Council’s *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the “Review Procedures”), with respect to possible misconduct, including a potential breach of section 55 of the *Judges Act*, R.S.C., 1985, c. J-1.

[2] On 28 August 2018, following his review, Pidgeon ACJ issued a written decision in which he concluded that the matter of Justice Smith’s appointment as Interim Dean of the Faculty of Law at Lakehead University “might be serious enough” to warrant the removal of Justice Smith from his judicial office. Accordingly, Pidgeon ACJ referred the matter to a Judicial Conduct Review Panel (the “Review Panel”), pursuant to subsection 2.1 of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015* (SOR/2015-203, hereafter the “By-Laws”) to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*.

[3] Section 55 of the *Judges Act* states:

Judicial duties exclusively

55. No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

Incompatibilités

55. Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui.

[4] Subsections 2(4) and (5) of the *By-Laws* state:

(4) The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.

(5) If the Judicial Conduct Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Chairperson or Vice-Chairperson of the Judicial Conduct Committee for them to make a decision on the most appropriate way to resolve it.

(4) Le comité d'examen de la conduite judiciaire ne peut décider de constituer un comité d'enquête que s'il conclut que l'affaire pourrait s'avérer suffisamment grave pour justifier la révocation du juge.

(5) S'il décide qu'un comité d'enquête ne doit pas être constitué, le comité d'examen de la conduite judiciaire renvoie l'affaire au président ou au vice-président du comité sur la conduite des juges pour que ce dernier décide de la manière la plus appropriée de la régler.

[5] The Review Panel has conducted its review and has concluded that although Justice Smith should not have accepted the appointment to the position of Interim Dean (Academic) of the Faculty of Law at Lakehead University, because doing so contravened section 55 of the *Judges Act*, the actions of Justice Smith were not serious enough to warrant his removal as a Judge. Therefore, no Inquiry Committee is to be constituted as a result of this decision, and the matter will be sent back to Pidgeon ACJ for his consideration of the most appropriate way to resolve this matter.

II. THE BACKGROUND FACTS

[6] On 16 April 2018, Dr Moira McPherson, Interim President and Vice Chancellor of Lakehead University (“Lakehead”) wrote to Justice Smith to request that he consider an appointment as Interim Dean at Lakehead’s Bora Laskin Faculty of Law (“the Faculty”). Dr McPherson requested that Justice Smith take on those duties starting on 1 May 2018 and continue them until Lakehead had completed its search for a new Dean or “until such other time as is mutually agreeable.”

[7] Dr McPherson stated that her request was based on Justice Smith’s “knowledge, skills and experience as a Judge of the Superior Court of Ontario,” his reputation, and his “significant work with Indigenous Communities and [his] important publications focused on Aboriginal Law in Canada.”

[8] Later, on 16 April 2018, Justice Smith sent an e-mail to Chief Justice Heather Smith, noting that “affairs at the Faculty were in a “Crisis”, and that he had been contacted “out of the blue” by Dr McPherson regarding an appointment as acting Dean of the Faculty.

[9] Justice Smith stated his desire to accept a “short term” appointment, with Chief Justice H. Smith’s and the Minister of Justice’s approval, to assist the Faculty, given a concern that the Faculty could “lose its accreditation and reputation”.

[10] On 18 April 2018, Chief Justice H. Smith wrote to the Minister of Justice, requesting the Minister’s approval to grant Justice Smith a six month leave of absence pursuant to subsection 54(1)(a) of the *Judges Act*. Chief Justice H. Smith noted the following parameters for the proposed leave:

- (a) Justice Smith would take on the title of “Special Academic Dean” or some other similar title;

- (b) Justice Smith’s responsibilities would be confined to academic leadership;
- (c) Justice Smith would delegate administrative responsibilities to other personnel within the Faculty, including recruitment, financial decisions, and academic appeals; and
- (d) Justice Smith would not receive remuneration from Lakehead.

[11] In her communication to the Minister of Justice, Chief Justice H. Smith, noted that the request for Justice Smith to serve as Acting Dean would “take him outside his judicial duties in a role that is unprecedented for a judge of [the Superior Court of Justice], and that “the Court’s judicial resources are significantly stretched and this temporary assignment would stretch them further.”

[12] However, Chief Justice H. Smith noted that Justice Smith’s status as a supernumerary judge would lessen the impact of his leave of absence on the Court’s workload and underlined the importance of the Superior Court of Justice taking advantage of an opportunity to respond positively to the Truth and Reconciliation Commission’s recommendations by supporting the Faculty in an apparent time of crisis. Chief Justice H. Smith noted the Faculty’s unique mandate of serving Indigenous students (14% of the student body) as well as other under-represented groups (60% of the student body having multiple under-represented group characteristics).

[13] Chief Justice H. Smith cited her willingness to grant a leave of absence to Justice Smith as “tangible evidence of the Ontario Superior Court’s commitment to respond to this challenge.” Chief Justice H. Smith also outlined her view of the crisis facing the Faculty: “There is a real concern that if a leader of stature and gravitas, instilling confidence, is not immediately identified, this new law faculty may be at risk of losing its accreditation and hard-won reputation.”

[14] On 27 April 2018, the Minister of Justice wrote to Chief Justice H. Smith, noting her understanding of the Faculty's need for leadership, the Chief Justice's authority to grant a six-month leave of absence, and the support of Justice Smith's colleagues in the Northwest Region for this leave of absence.

[15] The Minister of Justice indicated that she had "no concerns" regarding Justice Smith being granted leave from June 2018 to November 2018 to take on decanal duties on the conditions outlined in Chief Justice H. Smith's 18 April 2018 letter, that she would consider a request for further leave "at the appropriate time," and that Lakehead should move quickly in appointing a permanent Dean.

[16] On April 30, 2018, Chief Justice H. Smith wrote to Justice Smith granting him a "special leave" pursuant to paragraph 54(1)(a) of the *Judges Act* from 1 June 2018 to November 2018 to serve as Interim Dean at the Faculty. The Chief Justice's letter contained conditions similar to those proposed in her letter to the Minister of Justice.

[17] On 9 May 2018, Mr Norman Sabourin, the Executive Director of the CJC wrote to Justice Smith raising concerns regarding his appointment as Interim Dean and specifically informing Justice Smith that the situation may warrant consideration by Council and, in that case, the matter would be referred to the Chairperson of the Judicial Conduct Committee of Council. Mr Sabourin requested a response by 23 May 2018.

[18] Chief Justice H. Smith responded on 11 May 2018 noting an "existential crisis" at the Faculty and the need for Justice Smith to provide the Faculty with stability by way of a leader with "appropriate gravitas and experience." Chief Justice H. Smith noted that her approval of the leave of absence, and the conditions thereon, were intended to confine Justice Smith's role within the CJC's ethical principles and to insulate Justice Smith from concerns about future litigation.

[19] On 22 May 2018, Mr Sabourin wrote separate letters to Chief Justice H. Smith and to Justice Smith advising them that the matter had been referred to Pidgeon ACJ in his capacity as Vice-Chairperson of the Judicial Conduct Committee, and asking them for their comments on several specific issues which had been identified by Pidgeon ACJ.

[20] On 24 May 2018, Justice Smith advised Mr Sabourin that his Interim Deanship was scheduled to begin on 1 June 2018 and responded to the questions that had been posed by Mr Sabourin. Justice Smith noted that he had been approached by Dr McPherson to take on the role of “Interim Dean,” his willingness to serve under a different title, Chief Justice H. Smith’s approval of his leave of absence, the Minister of Justice’s lack of concern with the leave the absence, the extraordinary nature of the request, the Faculty’s marginalized student profile, and his motivations for accepting Dr McPherson’s request and seeking a leave of absence from Chief Justice H. Smith.

[21] Justice Smith also indicated his view that section 55 of the *Judges Act* does not impose a “blanket ban” on “professional activities other than judicial duties,” and stated his view that his appointment as Interim Dean is not an “occupation or business” prohibited by Parliament in section 55. Justice Smith also stated that, in his view, a leave of absence granted pursuant to section 54 of the *Judges Act* relieved him from the obligation in section 55 to “devote himself...exclusively to judicial duties.”

[22] Justice Smith also stated he had no intention of engaging in judicial duties while acting as Interim Dean, he had no reason to believe there was a possibility of litigation in relation to Lakehead, and he intended to recuse himself from presiding over matters in which Lakehead was a party.

[23] On 28 May 2018, Chief Justice H. Smith wrote to Pidgeon ACJ to re-affirm her support of Justice Smith’s appointment as Interim Dean of the Faculty. Chief Justice H. Smith

endorsed Justice Smith's 24 May 2018 letter and provided a legal opinion dated 28 May 2018, from a respected counsel regarding sections 54 and 55 of the *Judges Act*.

[24] The opinion stated in part that it was not a breach of section 55 of the *Judges Act* for Justice Smith to take a leave and accept the appointment as Interim Dean of the Faculty, provided his role was narrowly circumscribed and met certain conditions as outlined in the opinion.

[25] On 31 May 2018, Justice Smith entered into a written agreement with Lakehead setting out the terms and conditions governing his role as Interim Dean, effective 1 June 2018. The terms of the agreement were consistent with the conditions recommended in the legal opinion obtained by Chief Justice H. Smith. The parties also agreed that Justice Smith would be given a title reflecting his academic role: Interim Dean (Academic).

[26] Justice Smith's 24 May 2018 letter and Chief Justice H. Smith's 28 May 2018 letter referred to Justice Smith's impending participation in Lakehead's 1 June 2018 convocation. Justice Smith participated in that convocation and was introduced as "Interim Dean" at the beginning of the convocation and provided graduates with their graduating hoods.

[27] Between 11 April 2018 and 10 May 2018, the circumstances surrounding the previous Dean's resignation from the Faculty and the potential appointment of Justice Smith as Interim Dean were the subject of extensive media coverage. The media outlets providing such coverage included the Toronto Star, the Aboriginal Peoples Television Network, the CBC, and the Canadian Lawyer magazine. The various articles and broadcasts examined the circumstances from a variety of perspectives which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law's Indigenous mandate and some criticism of Justice Smith's appointment from Indigenous leaders.

[28] On 12 July 2018, Pidgeon ACJ wrote to Justice Smith to pose seven additional questions about Justice Smith's role as Interim Dean. On 17 July 2018, Justice Smith wrote to Pidgeon ACJ to provide a response to those questions. On 28 August 2018, Pidgeon ACJ decided that Justice Smith's acceptance of the appointment of Interim Dean (Academic) might be serious enough to warrant his removal from the bench, and Pidgeon ACJ accordingly referred the matter to the Review Panel.

[29] As a result of issues associated with the decision of Pidgeon ACJ to refer the matter to a Review Panel, Justice Smith took the decision to resign from the position of Interim Dean (Academic) of the Law Faculty at Lakehead.

III. STATUTORY PROVISIONS

[30] Parliament has specifically regulated the scope of activities which judges are entitled to undertake by way of sections 55 and 56 of the *Judges Act*, both of which are under the heading “Extra-Judicial Employment.” Those sections state:

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly

Incompatibilités

55 Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui.

56 (1) Les juges ne peuvent faire fonction de commissaire, d'arbitre, de conciliateur ou de médiateur au sein d'une commission ou à l'occasion d'une enquête ou autre procédure que sur désignation expresse :

a) par une loi fédérale ou par une nomination ou autorisation à cet effet du gouverneur en conseil, s'il s'agit d'une question relevant de la compétence législative du Parlement;

b) par une loi provinciale ou par une nomination ou autorisation à cet effet du lieutenant-gouverneur en conseil de la province, s'il s'agit d'une question relevant

authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

de la compétence législative de la législature d'une province.

[31] In the English version, section 55 of the *Judges Act* prohibits judges from engaging “in any occupation or business other than his/her judicial duties.” The French version mandates judges “de se consacrer à leurs fonctions judiciaires à l’exclusion de toute autre activité.”

[32] Subsection 56(1) creates a further restriction by prohibiting judges from acting as a “commissioner, arbitrator, adjudicator, referee, conciliator or mediator” on any commission or inquiry without legislative or executive authority from either the federal or provincial level. Subsection 56(2) specifies that the prohibition in subsection 56(1) does not extend to legislative regimes that require or authorize a judge to assess or ascertain compensation or damages.

[33] Also under the heading “Extra-judicial Employment”, is subsection 56(1), whereby Madam Justice Louise Arbour, then of the Court of Appeal for Ontario, was authorized to serve as prosecutor of the United Nations International Tribunals established to prosecute violations of international humanitarian law in the former Yugoslavia and in Rwanda, and which made provisions with regard to her moving and travel expenses, her leave without pay and her pension.

[34] Under an entirely separate heading, section 54 of the *Judges Act*, provides for leaves of absence for Superior Court judges of up to six months on the authorization of the judge’s Chief Justice and of greater than six months on the authorization of the Governor in Council. Section 54 states:

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

Notification of leave by chief justice

(1.1) Whenever a leave of absence is granted under paragraph (1)(a), the chief justice of the superior court shall, without delay, notify the Minister of Justice of Canada and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Notification of leave by Minister of Justice of Canada

(1.2) Whenever a leave of absence is granted under paragraph (1)(b), the Minister of Justice of Canada shall, without delay, notify the chief justice of the superior court and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Congés

54 (1) Les congés demandés par des juges des juridictions supérieures sont subordonnés :

a) s'ils sont de six mois ou moins, à l'autorisation du juge en chef de la juridiction supérieure en cause;

b) s'ils sont de plus de six mois, à l'autorisation du gouverneur en conseil.

Avis

(1.1) Dans le cas où un congé est accordé au titre de l'alinéa (1)a), le juge en chef de la juridiction supérieure en cause avise sans délai le ministre de la Justice du Canada. Si le congé est accordé à un juge d'une cour provinciale ou territoriale, il avise également le ministre de la Justice ou le procureur général de la province ou du territoire en cause.

Avis

(1.2) Dans le cas où un congé est accordé au titre de l'alinéa (1)b), le ministre de la Justice du Canada avise sans délai le juge en chef ou le juge principal de la juridiction supérieure en cause. Si le congé est accordé à un juge d'une cour provinciale ou territoriale, il avise également le ministre de la Justice ou le procureur général de la province ou du territoire en cause.

Report by chief justice of absence

(2) If it appears to the chief justice of a superior court that a judge of the court is absent from the judge's judicial duties without the approval required by subsection (1), the chief justice shall report the absence to the Minister of Justice of Canada.

Absentee judge to report

(3) Whenever a judge of a superior court is absent from the judge's judicial duties for a period of more than 30 days, the judge shall report the absence and the reasons for it to the Minister of Justice of Canada.

Rapport

(2) Le juge en chef ou le juge principal d'une juridiction supérieure doit signaler au ministre de la Justice du Canada les cas de congés non autorisés au titre du paragraphe (1) qu'il constate au sein de son tribunal.

Motifs de l'absence

(3) S'ils s'absentent pendant plus de trente jours, les juges d'une juridiction supérieure sont tenus d'en informer le ministre de la Justice du Canada et de lui faire part des motifs de l'absence.

IV. ANALYSIS

[35] This case concerns the interpretation of section 55 of the *Judges Act* and a consideration of the extent of the limits on a judge's ability to participate in the public affairs of his or her community.

[36] The background facts of this case are challenging because Justice Smith was asked by the Vice-Chancellor of Lakehead to provide assistance to an important public institution which was facing significant problems. Justice Smith wanted to provide the assistance which was being sought and he took the reasonable step of seeking a leave of absence from Chief Justice H. Smith to enable him, on an interim basis to help the University and its Faculty of Law. Chief Justice H. Smith consulted with the Minister of Justice and obtained a legal opinion before ultimately granting the leave requested by Justice Smith.

[37] This is not a case involving bad behaviour or improper motives on the part of Justice Smith. Therefore, the Review Panel readily decided that Justice Smith's conduct was not serious enough to warrant his removal from his judicial office and that no Inquiry Committee should be constituted. Nevertheless, the Review Panel has concluded that Justice Smith should not have accepted the appointment as Interim Dean (Academic) and by doing so, he contravened section 55 of the *Judges Act*.

Section 55 of the *Judges Act*

[38] Section 55 of the *Judges Act* was first enacted in 1905. Although its wording has been changed periodically, the section has always been comprised of two foundational components:

- (a) A prohibition on judges carrying on extra-judicial activities; and
- (b) A requirement that judges devote themselves exclusively to their judicial duties.

[39] The prohibition, and the requirement are set forth in clear and explicit terms in the current version of section 55.

[40] The prohibition in the English version is expressed in terms of an “occupation or business”, whereas the French version uses the broader term “*activité*.” The English version, by referring to “occupation or business” may imply that the prohibition is limited to some form of remunerative livelihood, but the French version, by using the broader term, is more explicit in prohibiting any activity other than judicial functions.

[41] The broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word and with the French version of section 55.

[42] However, even focusing exclusively on the English version, a review of the legislative history of the provision demonstrates that although some of the remarks during the initial debates in the House of Commons in 1905, including those of Prime Minister Laurier, reflected a concern to restrict the commercial activities of judges, other members took a broader view. The Minister of Justice, Charles Fitzpatrick (later the Chief Justice of Canada) commented that “The less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the bench.”

[43] Furthermore, the broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is reinforced by the narrow and specific exceptions to the general prohibition in section 55.

[44] Those exceptions are outlined in section 56 of the *Judges Act*. They are limited to acting in some specific dispute resolution capacities when expressly authorized to do so by the appropriate legislative or executive authority at either the federal or provincial level. Another exception outlined in section 56 relates to federal or provincial legislation which may authorize a judge to act as an arbitrator or assessor of compensation or damages.

[45] A final exception is found in section 56.1 of the *Judges Act*, which authorized Madam Justice Arbour to serve as Prosecutor of the United Nations International Tribunals.

[46] In summary, section 55 of the *Judges Act* contains a prohibition on judges carrying on extra-judicial activities and a requirement that judges devote themselves exclusively to their judicial functions. In circumstances in which Parliament is of the view that there is a sufficiently important public goal to justify judges engaging in other activities, it has legislated specific, narrowly defined exceptions.

[47] Accordingly, the Review Panel has concluded that:

- (a) Section 55 requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role; and
- (b) Subject to those exceptions, judges are prohibited from engaging in any other occupation, whether paid or unpaid.

[48] The above-noted conclusions are consistent with the objectives of maintaining judicial independence and the preservation of the dignity and respect associated with the judicial office. Section 55 of the *Judges Act* is also intended to promote the efficient administration of justice and to uphold the dignity and integrity of the judiciary by restricting judges, except in very limited circumstances, to performing judicial functions.

Section 54(1) of the *Judges Act*

[49] The leaves of absence contemplated in section 54 of the *Judges Act* relieve judges to whom such leaves are granted from the obligation in section 55 to “devote himself or herself exclusively to those judicial duties.” Such leaves do not remove the prohibition against judges carrying on extra-judicial duties. The legislation recognizes that in the working life of a judge, circumstances may arise in which a judge may require a leave of absence, such as an illness, a period of recovery from accident or a parental leave. Section 54 is not an

enabling measure, providing judges with the opportunity of excusing themselves from their judicial duties and responsibilities, while they become active in pursuing extra-judicial activities.

[50] Section 54 prohibits leaves of six months or less, except with the approval of the chief justice. It also prohibits leaves of more than six months, except with the approval of the Governor in Council. Strict notification requirements are set forth in subsections 54(1.1) and 54(1.2), underscoring the importance to be placed on judges devoting themselves to their judicial duties, except in a narrow set of circumstances and when approvals have been obtained and notices have been issued.

[51] There is nothing in the language of section 54 of the *Judges Act*, to suggest that leaves of absence properly granted and with proper notices issued, may be granted to enable judges to take on responsibilities outside of the judicial sphere.

[52] Furthermore, the structure of the *Judges Act* supports the view that section 54 was not intended to create an exception to the duty in section 55 to refrain from extra-judicial activities. Section 54 was not included under the heading of “Extra-Judicial Employment”, in contrast to sections 56 and 56.1, which are such exceptions and which were included under that heading.

[53] Although a leave of absence granted pursuant to section 54 of the *Judges Act* relieves a judge of the obligation in section 55 to devote himself or herself exclusively to judicial duties, it does not relieve the judge of the restriction placed by that section on participating in other occupations or businesses. Neither a Chief Justice, nor the Governor in Council can relieve the judge of that restriction; only Parliament has the necessary authority to do so.

[54] In Justice Smith’s communications with the CJC, his reasoning apparently was that once he obtained a leave of absence from his Chief Justice, he was permitted to act as the

Interim Dean (Academic) at Lakehead, because during the leave he was no longer engaged in judicial activities.

[55] The Review Panel strongly disagrees with that proposition. A judge's ethical obligations, including the obligation pursuant to section 55 not to engage in other occupations or businesses, remain constant, whether or not a judge is on leave.

The CJC's Practices and Statement of *Ethical Principles for Judges* and Other International Standards

[56] In undertaking its analysis, the Review Panel has considered the CJC's statement of *Ethical Principles for Judges* and various international standards from the United Kingdom and the United States.

[57] The Review Panel has also reflected on societal changes and the attitude which is sometimes expressed that judges should not be isolated from their communities, but, rather should be involved in their communities, subject to some appropriate limitations.

[58] Academic pursuits, such as the studying or teaching of the law have been traditionally viewed as appropriate and worthy activities for judges, provided those activities did not impinge on their judicial responsibilities.

[59] When considering the CJC's own ethical principles and other international standards, it is notable that although the particulars may differ, there is consensus that there must be limitations on the extra-judicial activities which a judge undertakes. In general, those limitations relate to:

- (a) Maintaining the judge's independence and impartiality (e.g. by not accepting remuneration or becoming involved in fundraising);
- (b) Avoiding public controversy;

- (c) Avoiding conflicts of interest or appearances of bias;
- (d) The propriety of a judge becoming a public spokesperson for an organization; and
- (e) Avoiding the perception that the judge has lent his or her judicial status to enhance the credibility or prestige of the outside organization.

[60] Within that framework, the Review Panel specifically considered the past circumstance of the former Chief Justice of the Supreme Court of Canada, Gérald Fauteux serving as Dean of the Faculty of Law at McGill University (1949-1950) while a judge of the Superior Court of Quebec and Dean of the Ottawa Law School while a justice of the Supreme Court (1953-1962), and the more recent circumstance of Justice Gillese of the Ontario Court of Appeal occupying the position of Chancellor at Brescia University College.

[61] With respect to Justice Fauteux's service as Dean of two Canadian law schools, the Review Panel notes that societal norms are shifting, and that it is much more likely in the present day that individuals assuming leadership roles within universities will be required to deal with controversial and highly public topical issues, than was formerly the case.

[62] With respect to Justice Gillese's circumstances, in 2015, the Chairperson of the CJC's Judicial Conduct Committee, Chief Justice MacDonald concluded that the position of Chancellor was not incompatible with Justice Gillese's judicial functions, in part because of the strict limitations which were agreed to by the administration of Brescia University College and Justice Gillese, and because of the ceremonial nature of the post of Chancellor.

Justice Smith's Role as Interim Dean (Academic)

[63] Justice Smith's acceptance of the position of Interim Dean (Academic) of the Law School at Lakehead in late May 2018 (effective 1 June 2018), as reflected in a written agreement between Justice Smith and the University dated 31 May 2018, occurred at a time when several media reports referred to elsewhere in these Reasons had already been published or broadcast. Those articles and broadcasts highlighted the issues, controversies

and potential controversies associated with the former Dean's resignation and with Justice Smith's appointment. Those articles also highlighted the challenges being experienced by the Law School and the University.

[64] Justice Smith's appointment was subject to some criticisms (arguably unfounded) which attracted publicity. Media stories also emphasized that Justice Smith was a judge and commented on his skills and experience as a judge as being important factors in his appointment as Interim Dean (Academic) in such challenging circumstances.

[65] Justice Smith was aware of the many issues surrounding the former Dean's resignation and his appointment as Interim Dean (Academic). Indeed, he and Chief Justice H. Smith, after obtaining legal advice, attempted to address those problematic issues by way of a series of conditions (which will be commented upon below).

[66] In addition to those potential controversies, another issue warranted consideration, namely, the use of Justice Smith's judicial reputation, and the reputation of the Ontario Superior Court of Justice generally, to bolster the Faculty of Law.

[67] It is evident that Justice Smith's appointment as Interim Dean (Academic) was intended to lend greater prestige to the Faculty. The photo of Justice Smith on the Faculty's web page is of Justice Smith in his judicial robes. Justice Smith is presented as a judge on the Dean's page and was introduced as such at convocation. The Dean's page also introduces Justice Smith as a "resident of Thunder Bay, Justice Patrick Smith is recognized for his judicial expertise and understanding of Canadian Indigenous and Aboriginal issues". Dr MacPherson's initial letter requesting that Justice Smith consider this appointment stated that Lakehead made "this urgent request based on [Justice Smith's] knowledge, skills and experience as a Judge of the Superior Court of Ontario."

[68] Chief Justice H. Smith's correspondence, both to the Minister of Justice and to the CJC also repeatedly makes reference to the Superior Court of Justice supporting the Faculty.

[69] It raises ethical concerns for a court, or a judge thereof, to lend its (or his or her) reputation to an institution to instill public confidence. It is of even greater concern in this particular case given the possibility of the Law Society of Ontario removing the Faculty's accreditation. Any judicial review of such a decision by the Law Society would come before the Divisional Court pursuant to the Judicial Review Procedure Act, R.S.O. The Divisional Court is composed of judges of the Superior Court of Justice, which is the court responding to a call for assistance to support the Law School.

[70] Furthermore, prior to Justice Smith making his final decision to accept the appointment as Interim Dean, he had received correspondence from Mr Sabourin of the CJC dated 9 May 2018, alerting him to the prospect that the "situation may warrant consideration" by the CJC. Justice Smith received further correspondence from Mr Sabourin dated 22 May 2018 advising him that the matter of his appointment had been referred to Pidgeon ACJ, in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the CJC.

The Conditions

[71] In the circumstances which existed in May 2018, Justice Smith was facing a choice fraught with risk and controversy. The circumstances and public debate surrounding the situation at the Law School had the potential of exposing Justice Smith to criticism and unwelcome publicity inconsistent with the dignity of judicial office.

[72] In those circumstances, Chief Justice H. Smith, with Justice Smith's concurrence, initially proposed conditions to contain Justice Smith's role, in an attempt to respect and conform with the applicable ethical principles. Specifically, Justice Smith's temporary appointment would not be a paid position and would be in place solely to provide academic leadership. In addition, the University would be required to make other arrangements for financial and administrative decision making and education appeals. Subsequently, after

Chief Justice H. Smith and Justice Smith received legal advice, an additional eight conditions were added, the most important of which were that Justice Smith:

- (a) Would have no involvement in fundraising on behalf of the Faculty or the University, whether from governmental or non-governmental sources;
- (b) Would be particularly sensitive in making public statements;
- (c) Would continue to be vigilant about avoiding conflicts or potential conflicts;
- (d) Approach his Chief Justice immediately should circumstances change or should any issues arise which might raise ethical implications or lead to public controversy; and
- (e) Attempt to facilitate and expedite the Faculty's process of appointing a permanent Dean.

[73] When conduct has been prohibited (e.g. not engaging in any occupation or business other than judicial duties) in order to promote ethical standards, conditions designed to permit limited exceptions to the prohibition may prove problematic.

[74] The total number of conditions associated with Justice Smith's appointment, and the lack of specificity of some of these conditions illustrate that the use of such conditions may be an imperfect attempt to address unknowable contingencies arising in a dynamic environment.

[75] The conditions which applied in this case were inadequate to address several of the issues referred to earlier in these Reasons, which the CJC's own ethical principles and other international judicial standards seek to address, including:

- (a) The avoidance of public controversy;
 - (b) The avoidance of conflicts;
 - (c) The propriety of a judge appearing to be a public spokesperson for an organization;
- and

(d) The avoidance of the perception that a judge has lent his or her judicial status to an outside organization.

Summary of Conclusions

[76] The Review Panel has reached the following conclusions:

(a) Section 55 of the *Judges Act* requires judges to devote themselves exclusively to their judicial duties and to abstain from businesses and occupations falling outside the judicial sphere. This conclusion is supported by the language used in sections 55, 56 and 56.1 of the *Judges Act*, the legislative history of section 55, and the structure and organization of the *Judges Act*;

(b) The meaning of “occupation” is to be broadly interpreted to capture all non-judicial activities, whether paid or unpaid, that interfere with a judicial role, whether due to their onerous or time consuming nature, or given their incompatibility with judicial office; and

(c) Being granted a leave of absence under section 54 of the *Judges Act* does not permit a judge to take on a business or occupation outside of the judicial sphere (except for acting as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry and provided certain statutory conditions under section 56 of the *Judges Act* are met).

(d) Regardless of the interpretation ascribed to sections 54 to 56.1 of the *Judges Act*, Justice Smith has an ethical obligation as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. There were also reputational risks to Justice Smith and to the Ontario Superior Court of Justice associated with lending their support to the Faculty of Law at Lakehead during a time of crisis.

(e) In the circumstances facing Justice Smith in 2018, notwithstanding his genuine desire to help the Faculty of Law at Lakehead, his decision to accept an appointment as Interim Dean (Academic) at the Faculty of Law was ill-advised. By doing so, he contravened section 55 of the *Judges Act*.

V. DECISION

[77] Subsection 2(4) of the *By-Laws* stipulates that a Review Panel “may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.”

[78] Although the Review Panel has concluded that Justice Smith’s decision to accept the position of Interim Dean (Academic) at the Law School at Lakehead was ill-advised and contravened section 55 of the *Judges Act*, his conduct was not serious enough to warrant his removal from judicial office. Therefore, no Inquiry Committee will be constituted.

[79] Justice Smith was motivated by a genuine desire to use his skills, background and experience to help the Faculty in a time of crisis. As previously noted, this is not a case involving bad behaviour or improper motives on the part of Justice Smith. He sought to make an expeditious decision. He did so thoughtfully, seeking guidance and support from Chief Justice H. Smith and he acted in accordance with legal advice which was received.

[80] Accordingly, pursuant to 2(5) of the CJC’s Inquiries and Investigations By-laws, this matter will be sent back to the Vice-Chairperson of the Judicial Conduct Committee for a decision on the most appropriate way to resolve this matter.

Respectfully submitted and dated this fifth day of November 2018.

Original signed by:

The Honourable R.S. Veale (Chairperson); The Honourable N. Duval Hesler;
The Honourable S. Perlmutter; The Honourable Margaret Larlee; Mr André Dulude