



Court File No.

T-1562-12

FEDERAL COURT OF CANADA

INDEPENDENT COUNSEL TO THE
INQUIRY COMMITTEE OF THE CANADIAN JUDICIAL COUNCIL
INTO THE CONDUCT OF
THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS
OF THE COURT OF QUEEN'S BENCH OF MANITOBA

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA AND
THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicant requests that this Application be heard at Ottawa.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court of Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATE: August 20, 2012

Issued by:


Registry Office
Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, ON K1A 0H9

TO: REGISTRAR OF THE FEDERAL COURT

**MAUREEN McCLOSKEY
REGISTRY OFFICER
AGENT DU GREFFE**

AND TO: THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS
c/o Sheila Block
Torys LLP
79 Wellington Street West, Suite 3000
Toronto ON, M5K 1N2

AND TO: ATTORNEY GENERAL OF CANADA
234 Wellington Street
Ottawa, ON, K1A 0H8

**AND TO: INQUIRY COMMITTEE OF THE CANADIAN JUDICIAL COUNCIL INTO
THE CONDUCT OF THE HONOURABLE ASSOCIATE CHIEF JUSTICE
LORI DOUGLAS OF THE COURT OF QUEEN'S BENCH OF
MANITOBA**
c/o George MacIntosh
Farris, Vaughn, Wills & Murphy LLP
25th Floor, 700 W Georgia Street
Vancouver, BC V7Y 1B3

Application

1. **This is an Application for Judicial Review in Respect of**

the decision of the Inquiry Committee of the Canadian Judicial Council into the Conduct of The Honourable Associate Chief Justice Lori Douglas of the Court of Queen's Bench of Manitoba (the "Committee"), dated July 27, 2012 (the "Decision"), whereby it claimed that it was empowered to instruct Committee Counsel to question witnesses called by Independent Counsel at the public hearing into four (4) allegations into the conduct of Associate Chief Justice Lori Douglas ("ACJ Douglas" or "the Judge"), in violation the relevant provisions of the *Judges Act*, the *Canadian Judicial Council Inquiries and Investigations By-laws*, the Canadian Judicial Council Policies on Inquiry Committees and on Independent Counsel, and the principles of fairness applicable to public inquiries into the conduct of a federally appointed judge.

2. **The Applicant Makes Application For:**

- a) An Order for a declaration that the presentation of the evidence at a hearing held by the Committee is to be carried out by the Independent Counsel (and any other party with standing to do so), and that the role of Committee Counsel is limited to advising the Committee;
- b) An Order in the nature of *certiorari* setting aside those parts of the Decision that relate to the purported powers of the Committee to instruct Committee

Counsel to examine witnesses called during the hearings of the Committee in any manner and to any end that it deems fit;

- c) An Order striking from the record those parts of the transcript where Committee Counsel cross-examined Michael Sinclair and Jack King;
- d) An Order prohibiting the Committee from instructing its Counsel to question witnesses;
- e) An Order providing that any questioning of witnesses by the Committee itself must be carried out only to the extent and in a manner which does not create an impression of the Committee having adopted a position on the facts, issues, or credibility; and
- f) Such further and other order as Counsel may request and this Court permit.

The Grounds for this Application are:

- 3. The Canadian Judicial Council ("CJC"), established pursuant to ss. 59(1) of the *Judges' Act*, R.S.C. 1985, c. J-1 (the "*Act*"), has adopted the *Canadian Judicial Council Inquiries and Investigations By-laws* (October 14, 2010) (the "*By-laws*") pursuant to ss. 61(3) of the *Act*.
- 4. Pursuant to ss. 63(3) of the *Act*, the Committee was constituted on or about August 7, 2011 to inquire into the conduct of ACJ Douglas.
- 5. Pursuant to s.7 of the *By-Laws*:

The Inquiry Committee shall conduct its inquiry... in accordance with the principles of fairness.

6. Pursuant to ss.8(1) of the *By-Laws*,:

The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.

7. Also on or about August 7, 2011, and pursuant to ss. 3(1) of the *By-laws*, Guy Pratte was appointed Independent Counsel.

8. According to ss. 3(2) of the *By-laws*,

The Independent Counsel shall present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings.

9. According to ss. 3(3) of the *By-laws*,

The Independent Counsel shall perform their duties impartially and in accordance with the public interest.

10. Later in the fall of 2011, the Committee appointed its own Counsel pursuant to s. 4 of the *By-laws*, which states:

The Inquiry Committee may engage legal counsel to provide advice and other assistance to it.

11. The *By-laws* make no explicit reference to Committee Counsel playing any active role during the hearings, in contradistinction to the mandatory role attributed to Independent Counsel in this regard, and thus affords no jurisdiction to the Committee to instruct Committee Counsel to act as its advocate during the hearings.

12. Moreover, the Canadian Judicial Council Policy on Inquiry Committees explicitly states that

[...] The Committee may also direct the Independent Counsel to explore additional issues and present additional evidence. The Committee may also act *on its own* to explore additional issues.

[...] Counsel to the Inquiry Committee does *not* participate in the hearings...
(emphasis added)

13. The “bifurcation” of roles between that of the Independent Counsel and Committee Counsel, respectively, was adopted in or around 1993, in order to avoid any appearance that the Counsel responsible for presenting the evidence at the public hearing represented the views of the Committee itself.
14. Further to a procedural ruling made by the Committee on May 15, 2012, Independent Counsel sought confirmation from the Committee that his role, contrary to what was stated in the said ruling, was not limited to adducing the “strongest case possible” against the judge, but included presenting all relevant evidence, favourable or unfavourable to the Judge, in connection with the allegations made against the Judge.
15. On May 19, 2012, the Committee clarified its May 15, 2012 ruling and confirmed that Independent Counsel’s role in respect of the presentation of evidence was as he had stated it in his letter to the Committee dated May 18, 2012.
16. The public hearings in this matter officially opened on May 19, 2012 and dealt with certain procedural matters. The hearings resumed on June 25, 2012 to deal

with further procedural matters, and opening statements were made on June 26, 2012.

17. The Committee heard six witnesses during the weeks of July 16 and 23, 2012.
18. In respect of two witnesses, Committee Counsel was instructed by the Committee and did carry out extensive cross-examination, the second occurring at the very end of the day on July 25, 2012 and lasting over an hour.
19. On July 26, 2012, Counsel for ACJ Douglas sought the recusal of the Committee alleging an apprehension of bias was created by the questioning conducted by Committee Counsel.
20. Also on July 26, 2012, Independent Counsel formally objected to Committee Counsel cross-examining witnesses on the grounds that it constituted a violation of the CJC's *By-laws*, policies and the principles of fairness; that it was not the Committee's role to "enter the fray" at all and/or in the manner it instructed Committee Counsel to do; and that so doing created the risk of an appearance of bias which the *By-laws* and applicable policies were explicitly designed to avoid.
21. On July 27, 2012, the Committee rejected Independent Counsel's objection, as well as ACJ Douglas' motion for recusal.
22. The Committee justified its ruling, *inter alia*, on the basis that Committee Counsel's questions were all in the nature of "clarification" and that its resorting to Committee Counsel was more efficient.

23. The Committee indicated that it may resort to the same method of questioning witnesses in the future if it considered it necessary in conducting its “search for the truth.”
24. The hearings have been adjourned to a date yet to be fixed.
25. The procedure adopted by the Committee is beyond its jurisdiction; violates the CJC *By-laws* and policies; and is incompatible with the modification of its *By-laws* that led to the bifurcation of roles so that the sole responsibility of the presentation of the evidence (as between Independent Counsel and Committee Counsel) would be that of Independent Counsel. Further, it is inconsistent with the principles of fairness by which the Committee is legally bound.
26. In addition to the relevant provisions of the *Judges Act*, the *By-laws* and CJC Policies, reliance will be placed upon the provisions of the *Federal Courts Act*, s. 18 and 18.1; and the *Federal Courts Rules*, Rules 301 to 316.
27. Such further grounds as counsel may advise and this Court allows.

This Application will be Supported by the Following Materials:

28. The Affidavit of Roberto Ghignone and the Exhibits thereto.
29. Such further evidence as counsel may advise and this Court allow.

THE APPLICANT REQUESTS that the Committee, pursuant to Rule 317 of the *Federal Courts Rules*, send a certified copy of the audio recordings of the hearing for the days of July 20, 2012 and July 25, 2012.

DATE: August 20, 2012



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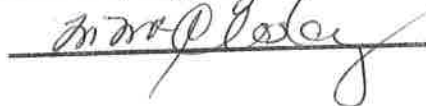
Lawyers for the Applicant

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 20

day of August A.D. 20 12

Dated this 20 day of August 2012



90 rue Sparks Street
Ottawa, Ontario
K1A 0H9

MAUREEN McCLOSKEY
REGISTRY OFFICER
AGENT DU GREFFE

Court File No.

FEDERAL COURT

Between:

INDEPENDENT COUNSEL TO THE
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COUNCIL
INTO THE CONDUCT OF
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