IN THE MATTER OF AN INVESTIGATION PURSUANT TO SECTION 63(2) OF THE *JUDGES ACT* REGARDING THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

DATE : October 13, 2014

RULING OF THE INQUIRY COMMITTEE ON THE TIME AND PLACE OF THE HEARING OF THE PRELIMINARY MOTIONS ON OCTOBER 27-29, 2014

I. INTRODUCTION

[1] This Inquiry Committee ("**Committee**") was established and its members appointed on March 13, 2014 to inquire into and report its findings to the Canadian Judicial Council ("**CJC**") in relation to complaints and allegations made against Associate Chief Justice Lori Douglas ("**ACJ Douglas**"). The allegations at issue are set out in the Notice to Associate Chief Justice Lori Douglas ("**Notice of allegations**") dated August 20, 2014 provided to ACJ Douglas by Independent Counsel.

[2] Pursuant to a case management conference call held on July 10, 2014, a timetable as to the conduct of the inquiry was confirmed by the Committee and agreed upon by counsel for ACJ Douglas and the Independent counsel. This timetable notably provides the following procedural steps and time lines :

- *No later than October 1, 2014: Communication to the Committee and to counsel of the preliminary motions, if any;*
- *October 27, 28 and 29, 2014 : Hearing of the preliminary motions, if any; and*
- *November 24 to November 28 as well as December 1 to 5, 2014 : Hearing of the Inquiry Committee*

[3] On October 1, 2014, ACJ Douglas filed a Notice of Motion ("**Notice of preliminary motion**") which seeks the following orders:

> *THE MOTION IS FOR an order:*
>
> *(a) summarily dismissing Allegations #1 and #2 from the Notice of Allegations;*
>
> *(b) striking Allegation #3 from the Notice of Allegations for a lack of jurisdiction, or in the alternative summarily dismissing Allegation #3;*

> *(c) returning Douglas ACJ's photographs, and if necessary, declaring that the photographs are inadmissible;*
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> *(d) sealing the confidential private medical evidence filed by Douglas ACJ in support of this motion;*
>
> *(e) that the hearing of the motions take place outside of Manitoba;*
>
> *or such other relief as this Inquiry Committee may deem just.*

[4] These reasons deal only with the order sought in paragraph (e) cited above in relation to the venue for the hearing of preliminary motions set out at paragraphs (a) to (d) of ACJ Douglas' Notice of preliminary motion (the "**Preliminary motions**").

[5] For the reasons set out below, the Committee orders that the Preliminary motions will be heard at 363 Broadway, suite 400, Winnipeg, Manitoba, from October 27 to October 29, 2014, starting at 9:30 am.

II. THE POSITION OF COUNSEL

[6] As set out in her written submissions, ACJ Douglas asks that the hearing of the Preliminary motions take place outside of Manitoba for the following reasons:

> *3. Douglas, ACJ submits that neither the public interest, efficiency, or cost favour hearing the Preliminary Motions in Winnipeg, for the following reasons:*
>
> *(a) the events underlying the Allegations are neither solely nor particularly tied to Winnipeg;*
>
> *(b) the case has national implications for judicial conduct, the independence of the judiciary and the treatment of victims of non-consensual distribution of intimate images, and there is no particular regional interest justifying a hearing in Winnipeg;*
>
> *(c) the Preliminary Motions will be heard in open court, and will undoubtedly be covered by the national and Winnipeg media alike;*
>
> *(d) holding the Preliminary Motions in Winnipeg would cause harm to Douglas, ACJ, the community and the administration of justice; and*
>
> *(e) cost and convenience favour hearing the Preliminary Motions in another location.*

[7] For her part, Independent Counsel asks that the hearing take place in Manitoba as she considers that the public interest mandates that such hearing take place in Winnipeg.

III. ANALYSIS

[8] The investigation and inquiry process concerning federally appointed judges is set out in various instruments, namely in the *Judges Act*[1] (the "**Act**"), the *Canadian Judicial Council Inquiries and Investigations By-laws*[2] (the "**By-laws**"), the *Canadian Judicial Council Procedures for Dealing with Complaints*[3] (the "**Complaints Procedures**") and the *Canadian Judicial Council Policy on Inquiry Committees* (the "**Policy**").

[9] These instruments do not specify where the hearing in relation to any inquiry or investigation is to take place. However, section 64 of the *Judges Act* provides as follows:

> *64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross examining witnesses and of adducing evidence on his or her own behalf.*

[10] The Committee thus has jurisdiction to set the time and place of any hearing in relation to the inquiry, and it falls within this Committee's discretion to make that determination. In exercising this discretion, the Committee is alive to the fact that the inquiry must be conducted in accordance with the principle of fairness[4].

[11] It is trite to state that inquiries into judicial conduct are *sui generis* by nature. Considering that there are no established guidelines for the determination of the time and place of inquiries conducted pursuant to the *Judges Act*, the Committee is entitled to rely on basic principles of criminal law, common law and administrative law to make that determination. The Committee will examine these principles and their application, adapting them *mutatis mutandi*s, taking into account the need for sound administration of justice, all the while keeping in mind the need to ensure adherence to the principle of fairness.

[12] While there are certain parallels between criminal proceedings and professional discipline proceedings, including in relation to judicial conduct, the Committee notes that it is not appropriate to import, without critical analysis, the criminal law concepts into judicial conduct inquiries. Indeed, as stated, although criminal law and disciplinary law have similarities, disciplinary law is *sui generis.*

[13] Notwithstanding these words of caution, it is useful to observe that in the criminal law setting, it is a well-established principle that trials should be held in the venue in which the alleged crime took place.

[14] In the matter of *R. v. Johnny*[5], Mr. Justice Bowden noted:

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[1] R.S.C, 1985, c. J-1, sections 63 and following.
[2] SOR/2002-371.
[3] Procedure for dealing with complaints made to the Canadian Judicial Council about Federally Appointed Judges, October 14, 2010.
[4] By-laws, s. 7.
[5] *R. v. Johnny*, 2013 BCSC 2288, para. 24.

> *24. It is clear that the trial of a person accused of a crime must be held at the place where the offence is alleged to have been committed unless it plainly appears that a fair or impartial trial cannot be held in that territorial jurisdiction.*

[15] As stated by Mr. Justice Doherty in the matter of *R. v. Suzack*[6], *"this principle serves both the interests of the community and those of the accused."*

[16] The presumptive principle applicable in the criminal context is subject to the application of section 599 of the *Criminal code* which provides for a change of venue under certain circumstances:

> *Reasons for change of venue*
>
> *599. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if*
>
> *(a) it appears expedient to the ends of justice; or*
>
> *(b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held."*

[17] In the matter of *R. v. Pappas*[7], Mr. Justice T.D. Clackson summarized as follow the factors which may inform the exercise of the discretion to order a change of venue pursuant to section 599 of the *Criminal Code:*

> *[2] Section 599(1)(a) of the Criminal Code provides me with the discretion to change the venue of a criminal trial where it appears expedient to the ends of justice. The Code does not offer further guidance on the matter. However, there have been a number of instances where the principles that inform the exercise of the discretion have been considered. Those principles are now settled and can be summarized as follows:*
>
> *1. It is well established that criminal trials should be held in the venue in which the alleged crime took place;*
>
> *2. The onus in such an application is upon the applicant;*
>
> *3. The onus upon the applicant to discharge the presumption of venue is a heavy one;*
>
> *4. The applicant must establish on a balance of probabilities that there is a fair and reasonable likelihood of partiality or prejudice among the prospective jurors in the presumed venue;*

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[6] *R. v. Suzack*, 2000 CanLII 5630 (ON CA), para. 30.
[7] *R. v. Pappas*, 2004 ABQB 668, para. 2.

> *5. The applicant must also show on a balance of probabilities that partiality or prejudice cannot be overcome by jury screening, peremptory challenges, challenges for cause and the cleansing inherent in the trial process;*
>
> *6. The goal is to ensure that both Crown and accused have a fair trial with an impartial jury.*

[18] In the civil law context, the place of instituting actions is most often a function of the domicile of the defendant, the place where the cause of action arose or the place where a contract giving rise to the action was made[8]. Again, this presumptive principle is often subject to exceptions based on defined circumstances[9].

[19] In the context of disciplinary proceedings, the Committee notes that the places of hearings vary. They are sometimes provided in the rules of procedure of any given disciplinary body, or simply based on practice.

[20] Based on the foregoing, the Committee is of the view that the presumptive rule which is applicable in this instance is that the hearing takes place in the location of the alleged events as more particularly described in the Notice of allegations as filed by Independent counsel on August 20, 2014, which we find to be Manitoba, unless there are compelling reasons relating to fairness which dictate otherwise.

[21] There are no such compelling reasons in this instance.

[22] The case law and doctrine relating to the open court principle and the public nature of the inquiry which was referred to at length by counsel for ACJ Douglas and Independent counsel are relevant to the extent that moving the hearing outside of Manitoba would essentially take away the Manitoba public's right to attend the hearing. While a hearing outside of Manitoba would still be a public hearing and presumably the media and members of the public would be allowed to attend and report on it, the Committee is of the view that the local public should be considered and given more weight in making the determination as to the location of the hearing.

[23] Indeed, although any judicial conduct inquiry is of national interest and may well attract the media and the public's attention nationwide, the Manitoba public in particular has to be considered and has a specific interest in having the hearing held in that province.

[24] Also, although the location of counsel and that of the witnesses, if any, is a relevant factor, it is not determinative in this instance considering that both counsel and the Committee members are located all across Canada, from Halifax to Vancouver, as well as Toronto and Montreal.

[25] As to the alleged harm and prejudice that would be suffered by ACJ Douglas should the hearing be held in Manitoba, the Committee notes that ACJ Douglas' own argument as to the national importance and the potential national coverage of the hearing would yield the same result. Given the nature of the allegations at issue in this inquiry as well as the

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[8] See notably article 68 of the *Code of civil procedure* of Quebec.

[9] For example, article 75.0.1 of the *Code of civil procedure* of Quebec provides that *"In exceptional cases and in the interest of the parties, the chief judge or chief justice or the judge designated by the chief judge or chief justice may, at any stage of a proceeding, order that a trial be held or an application relating to the execution of a judgment be heard in another district."*

media attention which it has already attracted, any impact of the hearing is likely to be the same wherever its location.

[26] As to the submissions of ACJ Douglas respecting a potential disruption of the hearing due to the intervention of disgruntled or disruptive individuals, the Committee believes that such unfortunate events are not dependant on the venue and could potentially occur at any venue. However, the Committee notes the submission of counsel for ACJ Douglas that she "seeks a dignified, respectful process which minimizes the damage of the process to her family, personal well-being and the community". The Committee intends to conduct the Preliminary motions and the process of this Inquiry in general in a dignified, respectful and efficient manner. The Committee is of the view that this can and should be done in Winnipeg.

[27] Furthermore, the Committee stresses that pursuant to section 63(4) of the *Judges Act*, it is deemed to be and it has the same powers of a superior court. The Committee thus has the necessary jurisdiction and power to uphold the order of its proceedings and to ensure that the hearing of the Preliminary motions proceeds in an orderly fashion, in keeping with the principle of fairness and the rights of ACJ Douglas to a fair hearing.

Signed by F. Rolland

Chief Justice François Rolland (Chair)

Signed by A. Cullen

Associate Chief Justice Austin F. Cullen

Signed by C. Brothers

Ms. Christa Brothers, Q.C.

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