

Court File No. T-205-17

FEDERAL COURT

BETWEEN:

THE HONOURABLE JUSTICE FRANCIS J.C. NEWBOULD

FEDERAL COURT COUR FÉDÉRALE		D E P O S É
FILED	FEV 15 2017	
Applicant ALICE PRODAN GIL		
TORONTO, ON		

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.

NOTICE OF APPLICATION

TO THE RESPONDENT:

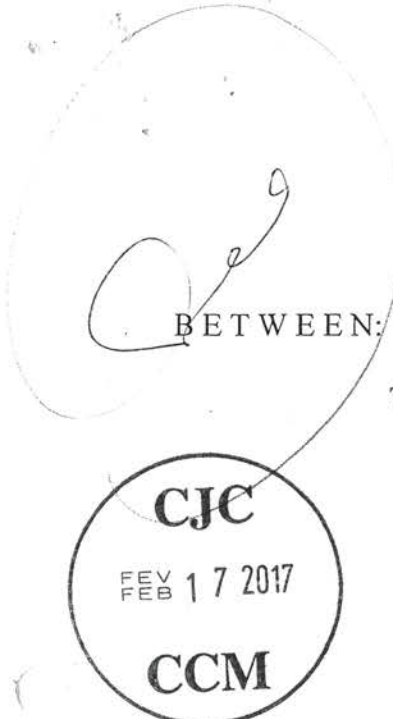
A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

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 applicant. The applicant requests that this application be heard at Toronto, Ontario.

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 at 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: February 15, 2017

Issued by:  
(Registry Officer)

**ALICE PRODAN GIL**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

Address of local office: 180 Queen Street West  
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Toronto, Ontario  
M5V 3L6

TO: **ATTORNEY GENERAL OF CANADA**  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Solicitors for the Respondent

## APPLICATION

This is an application for judicial review of the decision of a Judicial Conduct Review Panel (“Review Panel”) of the Canadian Judicial Council (“Council”), purporting to exercise authority under s. 63 of the *Judges Act*, R.S.C. 1985, c. J-1 (the “*Act*”) and s. 2 of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015* (“By-Laws”), dated February 10, 2017 and received by the Applicant on February 13, 2017, bearing the file number 15-0171, ordering that an Inquiry Committee be appointed to inquire into whether the applicant should be removed from judicial office.

### **The applicant makes application for:**

1. An order quashing the decision of the Review Panel, dated February 10, 2017, bearing the file number 15-0171;
2. A declaration that the Council did not have jurisdiction to revisit the initial determinations made by Chief Justice MacDonald that this matter should be closed;
3. An order prohibiting the Council from taking further steps concerning the complaints underlying this matter;
4. Costs of this Application; and
5. Such other relief as counsel may advise and this Court deems just.

### **The grounds for the application are:**

1. The applicant is a federally-appointed judge of the Superior Court of Justice of Ontario.
2. The Council is established by subsection 59(1) of the *Act*.
3. Subsection 63(2) of the *Act* grants the Council authority to investigate complaints or allegations in respect of a judge of a superior court. To guide this exercise of authority, the Council has adopted the By-Laws, the CJC's Complaints Procedures (“Complaints Procedures”) (effective from April 3, 2014 to July 28, 2015) and the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (“Review Procedures”) (effective from July 29, 2015 to present).
4. In late August 2014, the Council received five complaints concerning the applicant’s involvement in a public consultation earlier that month on a proposed settlement of a Saugeen First Nation land claim in respect of Sauble Beach, Ontario in which the Applicant’s family has

owned a cottage property for nearly 100 years. The applicant participated in the public consultation in his private capacity. At the request of the Mayor, he wrote in his personal capacity to the Mayor and the Town Councillors regarding the proposed settlement and the merits of the land claim.

5. On August 28, 2014, the applicant wrote to the Mayor and members of Council of the Town of South Bruce Peninsula to advise that he would have no further involvement in the matter.

6. On September 15, 2014, the Council notified the applicant of the five complaints it had received and invited him to provide written submissions to the Chairperson of the Council's Judicial Conduct Committee ("JCC"), Chief Justice MacDonald, who was appointed to review the complaints.

7. In his October 14, 2014 submissions to Chief Justice MacDonald, the applicant took full responsibility and apologized for his conduct in light of the perception that he acting in is capacity as a judge rather than a private citizen. Chief Justice Smith of the Superior Court of Justice of Ontario also provided submissions to the Chairperson.

8. On November 12, 2014, Chief Justice MacDonald informed the applicant of his determination, based on the materials before him, that it was in the public interest to close the file pursuant to section 5.1(a)(ii) of the Council's Complaints Procedures. That provision empowers the Chairperson to close a file where "the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint." Chief Justice MacDonald also determined that it was appropriate to "provide the judge with an assessment of their conduct and express any concerns the Chairperson may have about the judge's conduct", pursuant to section 5.2 of the Complaints Procedures.

9. On November 13, 2014, the Council notified the five complainants of Chief Justice MacDonald's decision to close the file. This constituted a final determination of those complaints.

10. On November 19, 2014, the Council received a complaint from the President of the Indigenous Bar Association, Ms. Koren Lightning-Earle, dated October 28, 2014, relating to the very same conduct that was the subject of the previous five complaints.

11. On January 6, 2015, the Council informed Ms. Lightning-Earle that Chief Justice MacDonald had taken all of the circumstances into account, including the information he had obtained in the previous review, and determined that “no further measures need to be taken by the Council pursuant to its mandate under the *Judges Act*.” In closing the file, the Chairperson acted in accordance with section 3.5(a)(i) of the Complaints Procedures, which provides that “[t]he chairperson shall review the file and may ... close the file if he or she is of the view that the complaint...does not warrant further consideration.” He also found that it was not in the public interest to request additional information from the complainant or to seek the applicant’s comments and those of his chief justice pursuant to section 3.5(b) and (c) of the Complaints Procedures. Nor did the Chairperson consider it to be in the public interest to refer the matter to a Review Panel, pursuant to section 5.1(d) of the Complaints Procedures and s. 1.1(1) of the By-laws.

12. On January 6, 2015, the Council notified the applicant of the fact of the Ms. Lightning-Earle’s complaint and the closing of the Council’s file with respect to the complaint. This constituted a final determination of that complaint.

13. On January 26, 2015, the Council notified the applicant of another complaint, made by Mr. John Close on December 12, 2014, relating to the same conduct that was the subject of the six previous complaints. Again, Chief Justice MacDonald, in accordance with the Complaints Procedures and the By-laws, determined that it was appropriate to close the file. This constituted a final determination of the last of the seven (7) complaints.

14. Six months after being notified of Chief Justice MacDonald’s decision to take no further measures and to close the file, Ms. Lightning-Earle requested a “reconsideration” this decision by letter dated a letter dated June 16, 2015. This request for “reconsideration” was not a new complaint, but simply reiterated the same matters that had been canvassed in the Chairperson’s review of the seven complaints. Ms. Lightning-Earle did not cite any authority or power under either the *Judges Act* or the Council’s By-laws and Complaints Procedures granting Chief Justice MacDonald or any other member of the JCC the authority to reconsider a matter that has already been determined. Instead, she stated that “if no such action is taken we will consider other

remedial options. Making the Council's review public; taking political action; and/or instigating a more formal review are among our current contemplations.”

15. Notwithstanding that he had issued a final determination of Ms. Lightning-Earle's complaint on January 6, 2015 and had closed the file, Chief Justice MacDonald “decided to defer” the request for reconsideration to another member of the Judicial Conduct Committee, Associate Chief Justice Pidgeon. Chief Justice MacDonald provided no reasons for “decid[ing] to defer”.

16. On May 30, 2016, and despite Chief Justice MacDonald’s previous determinations to close the files related to this matter, the applicant was informed of Associate Chief Justice Pidgeon's decision to constitute a Review Panel “in the matter of the complaint made against [him]”. Associate Chief Justice Pidgeon’s May 5, 2016 reasons for referring the matter to a Review Panel cite the very same conduct that was carefully considered by Chief Justice MacDonald and address no new allegations of misconduct. Those reasons for decision do not cite any authority granting Associate Chief Justice Pidgeon the ability to reconsider a matter that has already been finally determined by another member of the JCC.

17. The applicant was invited to make submissions to the Review Panel on whether an Inquiry Committee should be constituted in relation to the complaint, which he provided on July 20, 2016.

18. On September 19, 2016, Chief Justice Smith wrote to the Council’s Executive Director with respect to the referral of the complaint to the Review Panel. She raised serious concerns about the “reconsideration” process engaged in by the JCC with respect to the complaint against the applicant. She asked that her concerns be tabled with the JCC members and urged them to consider the appropriateness of the reconsideration by Associate Chief Justice Pidgeon and the referral to a Review Panel.

19. Despite Chief Justice Smith's request, her letter was not placed before the members of the JCC. In a letter dated October 18, 2016, the Council’s Executive Director explained that Chief Justice Smith’s letter would only be forwarded to the JCC members to be considered as a policy

matter “once the current matter is concluded”. He stated that the applicant was welcome to make further submissions directly to the Review Panel.

20. On October 26, 2016, counsel for the applicant requested that the Council’s Executive Director place Chief Justice Smith’s letter before the Review Panel “to form a part of its record in the discharge of its functions and to act on the issues raised in her letter as it sees fit.”

21. On December 7, 2016, counsel to the applicant received a letter addressed to the applicant, enclosing the Review Panel’s reasons for its decision to have an Inquiry Committee constituted pursuant to subsection 63(3) of the *Judges Act*. The letter was apparently sent in error, as explained in an email the next day from the Council’s Executive Director, as all members of the Review Panel had not signed the decision. The reasons for decision neither referred to Chief Justice Smith’s letter of September 19, 2016, nor cited any authority granting Associate Chief Justice Pidgeon or the Review Panel the power to reconsider a matter that has already been determined.

22. On December 13, 2016, counsel for the applicant wrote to the Council’s Executive Director to raise his concern that the Review Panel did not consider his letter of October 26, 2016, which enclosed Chief Justice Smith’s letter.

23. On December 20, 2016, the Council’s Executive Director expressed regret that the Review Panel did not receive Chief Justice Smith’s letter because of an internal email management issue. The applicant was advised that his counsel’s letter and the enclosed letter from Chief Justice Smith would be provided to the Review Panel, which would “review this information before finalizing their decision in this matter”.

24. On December 22, 2016, the applicant forwarded to the Review Panel correspondence which provided context to the question of whether the JCC had jurisdiction to reconsider a decision to dismiss a complaint in accordance with its mandate under the *Judges Act*. The applicant also advised the Council’s Executive Director that his counsel would prepare a memorandum on the jurisdictional issue in early January 2017, and requested that the memorandum be forwarded to the members of the Review Panel.

25. On January 20, 2017, counsel for the applicant provided written submissions to the Review Panel, which outlined the reasons why the JCC had no jurisdiction to reconsider or in any way revisit Chief Justice MacDonald's January 6, 2015 decision to close the file on the basis that Ms. Lightning-Earle's complaint warranted no further consideration. These submissions asked the Review Panel to reinstate Chief Justice MacDonald's decision and direct that this matter be closed.

26. On February 10, 2017, the applicant notified the Minister of Justice and the Council of his decision to retire effective June 1, 2017.

27. On February 13, 2017, the Council sent to the applicant the Review Panel's reasons for its decision to refer the "complaints" against the applicant to an Inquiry Committee. These reasons were dated February 10, 2017. The Review Panel concluded the Council had jurisdiction to reopen the decision of Chief Justice MacDonald and that the Review Panel therefore had the jurisdiction to review the matter before it. The Review Panel found that an Inquiry Committee should be appointed to inquire into certain enumerated issues.

28. The decision of the Review Panel to order that an Inquiry Committee be appointed was made without jurisdiction, in that it is based on a conclusion, incorrect in law, that Associate Chief Justice Pidgeon had the jurisdiction to reconsider the January 6, 2015 decision of Chief Justice MacDonald or any of the other decisions Chief Justice MacDonald had made pertaining to complaints about the same subject matter. In the alternative, the Review Panel's decision was unreasonable.

29. Sections 59 and 63 of the *Judges Act*, R.S.C. 1985, c. J-1.

30. Subsection 2(1) and section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

31. Section 2 of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*.

32. Such other grounds as counsel may advise and this Court may permit.

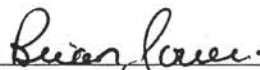
This application will be supported by the following material:

1. A supporting affidavit of the Applicant and exhibits thereto;



2. The Certified Tribunal Record, including materials provided to or created by the Review Panel and the Council in File No. 15-0171; and,
3. Such other evidence as counsel may advise and this Court deems just.

February 15, 2017



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Brian Gover

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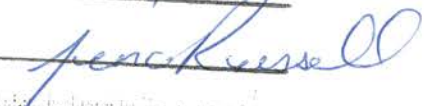
Solicitors for the Applicant

I HEREBY CERTIFY that the above document is a true copy of  
the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme  
à l'original déposé au dossier de la Cour fédérale.

Filing date 15-Feb-2017  
Date de dépôt

16-Feb-2017  
Dated  
Fait le

  
**JENA RUSSELL**  
REGISTRY OFFICER  
AGENT DU GREFFE