

FEDERAL COURT OF APPEAL

BETWEEN:

THE HONOURABLE JUSTICE FRANCIS J.C. NEWBOULD

Applicant
(Appellant)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent in Appeal)



NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.


IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date MAR 31 2017

Issued by


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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgment of Justice Boswell of the Federal Court (the “Motions Judge”) dated March 29, 2017 by which the Appellant’s Motion for a Stay of the decision of a Judicial Conduct Review Panel (“Review Panel”) of the Canadian Judicial Council (“Council”), dated February 10, 2017 and bearing the file number 15-0171, pending the outcome of the judicial review application in Federal Court File No. T-205-17 was dismissed (the “Judgment”).

THE APPELLANT ASKS:

1. That the Judgment be set aside and that the Appellant’s motion for a stay be granted;
2. For his costs of the application and the appeal; and
3. Such other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Motions Judge erred in law in considering the issue of prematurity as a bar to an order for a stay pending judicial review and dismissing the Appellant’s motion primarily on that basis. The prevailing state of the case law requires that the issue of prematurity be considered at the first stage of the well-established tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, where the court considers whether there is a serious issue to be tried. The only appropriate mechanism to obtain a freestanding finding that an application for judicial review is premature prior to the hearing on the merits is in the context of motion to strike. No motion to strike was brought in this case.

2. Applying the proper legal test for a stay, the Appellant meets all of the requirements for a stay to be granted. The Motions Judge erred in law or, alternatively, made errors of mixed fact and law, or, in the further alternative, erred in fact in concluding otherwise. In particular:

- (a) The Motions Judge erred in failing to find that the Respondent conceded at the hearing of the motion that the underlying judicial review application raises a serious issue to be tried and is not frivolous or vexatious;
- (b) The Motions Judge erred in finding that the application for judicial review does not fall within the “exceptional circumstances” category of cases that might otherwise be found to be premature. The issue raised in the application (whether the Review Panel acted without jurisdiction in referring previously-closed complaints against the Appellant to an Inquiry Committee); the harm the Appellant will suffer if an Inquiry Committee is struck; the exhaustive record relating to the jurisdiction issue on which to decide the matter on the merits; and the inapplicability of one of the rationales underlying the prematurity doctrine (promoting efficiency in administrative proceedings and preserving scarce judicial resources) all bring this application within the “exceptional circumstances” category of cases;
- (c) The Motions Judge erred in characterizing this matter as a “middle-of-the-line” case rather than a “start-of-the-line” case, a finding that is inconsistent with established case law. This is a “start-of-the-line” case in which substantial time and money will be wasted if the Inquiry Committee hearing proceeds and the underlying judicial review application is successful. This error bears on the Motions Judge’s flawed conclusion that the application is premature;

- (d) The Motions Judge erred in his alternative finding that the tripartite test for a stay was not met. While recognizing that the application for judicial review raises a serious issue to be tried, the Motions Judge erred in finding that the Appellant had not demonstrated he would suffer irreparable harm if the stay were not granted. Specifically,
- (i) the Motions Judge erred in considering at this stage that “the principle of judicial deference to an uncompleted administrative proceeding trumps the Applicant’s interests since his circumstances are not exceptional.” This is not a proper consideration in determining whether failure to grant a stay would cause irreparable harm.
 - (ii) The Motions Judge further made a palpable and overriding error in finding an Inquiry Committee could complete its work prior to June 1, 2017, the date on which the Appellant will retire – a decision he conveyed to the Minister of Justice prior to receiving the Review Panel’s decision in this matter. That an Inquiry Committee could not complete its work before this date was not in dispute between the parties; the Respondent appropriately agreed in her written submissions that “given that he is retiring effective June 1, 2017, it is unlikely that any findings of misconduct will be made against him prior to that time.” It was an error for the Motions Judge to find otherwise.
 - (iii) Finally, the Motions Judge erred in finding that “[a]ny harm caused to the Applicant’s reputation by reason of the Review Panel’s decision has

conceivably already occurred as a result of media coverage.” Further harm will arise from the Inquiry Committee’s process, which will subject the Appellant’s conduct to scrutiny on a national stage in the context of a formal hearing where he will be subjected to findings about his credibility and fitness to hold office. The Motions Judge erred in failing to recognize this would constitute irreparable harm.

3. The Motions Judge did not consider the third part of the tripartite test for a stay: whether the balance of convenience favours granting a stay. The balance of convenience favours a stay in this matter. The Appellant is the only party with a direct interest affected by the Inquiry Committee proceedings. The Appellant will suffer grave reputational and professional harm if the Review Panel’s decision is not stayed and an inquiry process is commenced. On the other hand, the Respondent and the Council will suffer no prejudice if the striking of an Inquiry Committee is stayed pending the outcome of the judicial review on its merits. Further, it would be a waste of public resources to permit an Inquiry Committee to proceed, only to have the Federal Court find mid-way through the proceedings that the Inquiry Committee was not properly constituted.

4. The Appellant proposes that this Appeal be heard in Toronto.

5. The Appellant further proposes that this Appeal be heard on an expedited basis.



March 31, 2017

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