Canadian Judicial Council
Conseil canadien de la magistrature

Inquiry Committee concerning the Hon. Lori Douglas

Comité d'enquête au sujet de l'hon. Lori Douglas

REASONS FOR RESIGNATION OF THE INQUIRY COMMITTEE

MOTIFS DE DÉMISSION DU COMITÉ D'ENQUÊTE (v. originale en anglais)

20 November 2013

Le 20 novembre 2013

REASONS FOR RESIGNATION OF THE INQUIRY COMMITTEE CONCERNING THE HONOURABLE LORI DOUGLAS

I. Overview

[1] This Inquiry Committee (Committee) was appointed September 6, 2011 to conduct an inquiry into the conduct of the Hon. Lori Douglas (Judge), Associate Chief Justice of the Manitoba Court of Queen's Bench. It has begun but not concluded its inquiry into the evidence relating to the allegations that have been made against the Judge. The hearings ended on July 27, 2012 following the Committee's Ruling dismissing the Judge's motion to terminate the proceedings. This matter has now been before the Federal Court on judicial review proceedings longer than it had been before the Committee prior to the Judge's initiation of those proceedings.

[2] In the normal course, by now the Committee would have concluded its hearings, prepared its report, and forwarded it to the Canadian Judicial Council (Council) for consideration. As matters have transpired, more than two years have now gone by and the hearings have not been completed. In light of recent events, it has become apparent that this Committee as presently constituted will not be in a position to complete its inquiry and submit its report to the Council for a very extended period of time. Even further delays and costs are unavoidable. In these circumstances, the Committee has determined that it must consider whether the public interest would be better served by resigning to permit a new inquiry committee to be appointed.

[3] The Committee ruled against the Judge's claim of reasonable apprehension of bias orally on July 27, 2012 and in its written Ruling dated August 20, 2012. That allegation was based on one ground, namely the questioning by Committee Counsel of two witnesses in the inquiry. The litigation commenced by the Judge in Federal Court includes an expanded list of allegations, specifically four others, never raised before this Committee as constituting a reasonable apprehension of bias. Thus, this Committee has had no opportunity to address those additional allegations.

[4] This Committee does not agree that the Federal Court has the jurisdiction to judicially review the proceedings of an inquiry committee which is deemed to be a superior court under the *Judges Act*, RSC 1985, c. J-1. The Council was recently granted status as an intervener to raise this issue. Finally resolving it will likely take considerable time.

[5] Further, there is now no one to take a position contrary to the Judge on the apprehension of bias issues and defend the process and challenged rulings on their merits, assuming for the sake of argument that judicial review were available. The Attorney General of Canada (AGC) is the only party with standing before the Federal Court who could do so. Indeed, this is normally the AGC's responsibility. That point was made in *Chrétien v Canada* 2005 FC 591 where the AGC took the position, with respect to a commission of inquiry, that

he was "the defender of the Commissioner's decision" as the AGC "is often called upon to do as respondent, in the public interest". That decision confirmed that this "is indeed what the Attorney General is called upon to do, from time to time, in the case of boards and commissions established under federal legislation...." As noted in *Hoechst Marion Roussel Canada v. Canada (Attorney General)* 2001 FCT 795, [2002] 1 FC 76, "an agency or tribunal whose decision is under review is entitled to expect that there will be a party present at the judicial review to oppose the applicant ...."

[6] The AGC first became involved in these proceedings when the Judge filed her judicial review application and named the AGC as respondent. The AGC opposed being named as respondent and applied to the Federal Court to be replaced. He contended it would not be in the public interest for him to participate in the judicial review proceedings since he must remain separate and apart from the judicial discipline inquiry process. In support of his position, he pointed out that should Council recommend that a judge be removed from the bench, the AGC, in his role as Minister of Justice, must decide whether to refer any recommendation to Parliament.

[7] Despite the expressed concerns, the AGC's motion to be replaced as respondent was rejected but without any recognition of the problems that this created for both the AGC and the judicial conduct process. This left the AGC in a position of conflict between two public interest positions – on the one hand, defending the process and the Committee's decisions by ensuring that submissions in opposition to the judicial review application are before the Federal Court; and, on the other, abandoning that responsibility in deference to the direct role of the AGC as Minister of Justice in the disciplinary process for superior court judges. This conflict placed the AGC in an untenable position.

[8] Unfortunately, therefore, the Federal Court's denial of the AGC's request to be replaced as respondent, combined with its denial of any standing to the Committee and its restriction in the standing of both the new Independent Counsel and Council, has left a gaping void in these proceedings.

[9] The AGC's actions to date with respect to the Judge's judicial review application compellingly demonstrate the consequences of that void:

(a) The AGC has not taken any steps to inform himself of relevant factual information relating to the judicial review application within the knowledge of the Committee, including whether the record filed by the Judge is accurate or complete;

(b) Despite the AGC's substantial criticism of the Whitmore Affidavit filed in support of the Judge's judicial review

application (as evidenced by his comments at paras. 95-99 of his Memorandum dated November 14, 2013), the AGC has not moved to strike any part of that Affidavit; the AGC has not moved to cross-examine on that Affidavit; and the AGC has not moved to file any affidavit in response;

(c) The AGC did not oppose the stay of the Committee's hearings requested by the Judge which was consequently granted, unopposed;

(d) The AGC has not defended the judicial review application on the basis of prematurity of the issues raised nor on the basis of the Judge's failure to attempt, let alone exhaust, any remedies that might have been sought before the Committee or later in the process; and

(e) The AGC did not appeal any of the decisions of the Federal Court denying intervener status to the Committee or restricting intervener status for the Council and the new Independent Counsel, despite having consented to these applications.

[10] Nor has the Committee known what position the AGC, as respondent, intended to take on the merits of the judicial review application notwithstanding repeated requests from counsel for the Committee. As the Federal Court observed in its decision of July 12, 2013: "As a reluctant Respondent, the Attorney General has not been forthcoming on what positions he might take on any particular issue." In fact, it was not until a few days ago, namely November 5, 2013, that the AGC advised, for the first time, that he intends to remain neutral and take no position on the merits of the Judge's judicial review application. His Memorandum, dated November 14, 2013, confirms that position of neutrality in the introductory paragraph. The Committee does not question this position. We understand the AGC's dilemma in view of the conflict issues mentioned. However, as a consequence, the Judge's judicial review application to strike down the Committee Ruling that there was no reasonable apprehension of bias will now remain completely unopposed. So too will every one of the new apprehension of bias allegations alleged by the Judge against the Committee.

[11] This is precisely what happened on the Judge's request for a stay of proceedings. No one who sought intervener status to oppose the stay was granted standing. The AGC, the only one who had standing to do so, did not even show up for the hearing. As a result, the Judge's stay application was unopposed and the crucial issues of jurisdiction and prematurity, which were fundamental to the authority of the Federal Court and fitness of a stay, were never addressed.

[12] The public must be able to believe in the judicial conduct process since it exists ultimately for the rule of law. In keeping with the constitutional principle of judicial independence, judges are entitled to a judicial conduct process that is fair. Fairness has many dimensions. Judges are not entitled to a process that includes unlimited steps and interlocutory privileges for the judge at public expense and certainly not one that defeats the wider public interest that must be served by the judicial conduct process itself. Public confidence in the public complaints process that Parliament has established would be abandoned if anyone with standing could cripple its critical role simply by engaging in interlocutory judicial review.

[13] Indeed, a parallel judicial review regime is fatally flawed. If the AGC is required to act as respondent but, given his unique position, regards himself as having sound public policy reasons for not defending on the merits and not opposing a stay of the hearings, who could do so? The new Independent Counsel has said that she cannot take a position on the merits as this would compromise her impartiality, and so she also has not done so. The Council, as the body reviewing the Committee's ultimate report, is unable to do so. And the Committee, as the fact finder in this inquiry, was not permitted to do so even on the issues of prematurity and jurisdiction. The result is this. The AGC's decision to remain neutral means that the judicial conduct process and an inquiry committee's role in it will never be able to be defended since this same conflict will arise every time a judge brings a judicial review application against an inquiry committee. The topic of the judge's judicial review application would not matter. That application, along with a request for an indefinite stay of the judicial conduct proceedings pending judicial review, would always be unopposed. In the end, the Federal Court would hear only from the judge on the merits of the case. With respect, this cannot induce confidence on the part of the public in the judicial conduct process.

[14] The unique, multi-staged process under the *Judges Act*, which already provides several levels of protection for judges personally before bodies deemed to be superior courts in their own right – all at public expense – has no place for the initiation of judicial review proceedings in another court. Nor do any such events add credibility to the repute of this process. If the process is allowed to be sidetracked in this way, a knowledgeable public would think that a judicial conduct process has been created which is, by its nature, doomed to delay, wasted costs, confusion, inconsistency and perhaps, in the end, failure. And it would be hard to disagree with them.

II. Do the New Allegations Warrant Recusal?

[15] The Judge's judicial review application has raised other allegations of apprehension of bias. As noted, these were never raised before the Committee on this basis. The AGC has

confirmed he will not respond to them in the judicial review proceedings. And the Federal Court denied the Committee standing even to raise the issue of prematurity in respect to these new allegations. Does anything in those additional allegations alter the Committee's decision not to recuse itself? If they did, we would consider ourselves duty bound, even at this late stage, to recuse ourselves. However, we have concluded that they do not.

[16] The only allegation of apprehension of bias placed before the Committee at the hearings stemmed from Committee Counsel's questioning of two witnesses. After the hearings adjourned, the Judge raised four additional allegations in her judicial review application: (i) the Committee wrongfully added another allegation to the Notice of Allegations that the Independent Counsel proposed to issue to the Judge; (ii) the Committee erred in preventing Judge's Counsel from cross-examining the complainant on certain aspects of his past sexual history; (iii) Committee Counsel told Independent Counsel to refrain from aggressively cross-examining the complainant; and (iv) the Vice-Chair of the Judicial Conduct Committee of the Council improperly interfered with the role of Independent Counsel, thereby creating an apprehension of institutional bias on the part of the Council.

[17] Item (iv) relates to matters with which the Committee was not involved. It engages issues relating to the Council itself and does not relate to any actions of the Committee in the conduct of the hearings. We therefore say nothing further about that matter.

[18] As to item (i), the original allegation by the complainant of sexual harassment by the Judge was not referred by the Review Panel to the Committee when it was constituted. Nevertheless, subsection 5(1) of the *By-Laws* provides that an inquiry committee "may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention." The only limitation is that the judge must be given sufficient notice of each such complaint or allegation (subsection 5(2)).

[19] In preparing the Notice of Allegations to be given to the Judge, Independent Counsel advised the Committee by letter dated May 18, 2012 that in the course of his preparation for the inquiry hearing, he had discovered that the Judge had "modified" her personal diary regarding relevant information about her meetings with the complainant and intentionally made incorrect representations to Independent Counsel about those changes. He indicated he was including these allegations as an additional allegation in the Notice of Allegations even though they had not been considered or dealt with by the Review Panel. In addition, he advised the Committee that "some of the facts we uncovered (and which may or may not have been before the Review Panel and may or may not have affected its conclusions as to the Chapman complaint) could provide support" for the complainant's version of events regarding the alleged sexual harassment. He added that this was "quite apart" from the

allegation about the Judge's alteration of the diary "which could be seen as significantly impairing ACJ Douglas' credibility".

[20] Accordingly, the Committee decided that the sexual harassment allegation should be placed before it for consideration as well and directed Independent Counsel to include it in the Notice of Allegations. In addition to the evidentiary claims asserted in the Independent Counsel's letter, the evidence relating to the first allegation was relevant, not only to the harassment allegation itself, but also to the other allegations. Specifically, what did the Judge know and when and what should have been disclosed by the Judge in her application for judicial appointment? What were the circumstances and the nature of the photographs that were available on the Internet? And what were the circumstances related to the event that was the subject of the Judge's alleged alteration of her diary and the subsequent intentional misrepresentations the Judge allegedly made to Independent Counsel?

[21] In these circumstances, viewed from the imperative of conducting a full, complete and transparent inquiry, we cannot see how adding the sexual harassment complaint to the Notice of Allegations could in itself lead to a reasonable apprehension of bias on the part of the Committee any more than the adding of the fourth allegation relating to the alleged alteration of the Judge's diary and the subsequent alleged misrepresentations to Independent Counsel. Judge's Counsel challenged before the Committee only the addition of the fourth allegation. This was the subject of a Ruling by this Committee. The Committee directed Judge's Counsel to raise any other jurisdictional issues at the opening of the hearing. She did not then raise the issue of adding the first allegation or any other issue.

[22] As to item (ii), the Committee did place limits on the degree to which the complainant's sexual activities with others could be explored in cross-examination. This ruling was based on well-known criminal law principles that restrict the degree to which a complainant's sexual history can be used simply to attack credibility. This is not the place to embark on a full discussion of the jurisprudence relating to this difficult area of the law. We would simply say here that even if we were wrong in the ruling we made (which the Committee does not accept), it would be at most an error of law on a matter of evidence.

[23] As to item (iii), what communications passed between Committee Counsel and former Independent Counsel is between them. When this issue was raised at the public hearing, Committee Counsel did not say that he told the Independent Counsel to cease aggressively examining the complainant. What he said was that the Committee wanted the examination to be fair and balanced. As he stated at page 2369, lines 20-23: "The message I was intending to convey, brief as it was, was along the line that both the good and the bad had to be explored." In the Committee's view, this cannot be said to amount to evidence of apprehension of bias on the part of the Committee for or against the complainant or the

Judge. Judge's Counsel did not raise this matter either at the time it arose or at the time she made the apprehension of bias motion before the Committee.

[24] The Committee does not therefore see any reason for reconsidering our decision on recusal. Accordingly, the Committee cannot recuse itself from continuing the inquiry on the basis of the additional allegations that have now been raised in the judicial review application but which were not raised before us. However, we have concluded that we ought to resign for the reasons set forth herein.

III. Judicial Conduct Process

[25] The ultimate purpose of the principle of judicial independence is to maintain public confidence in the judiciary. A key element of judicial independence is security of tenure which means freedom to judge according to law and conscience without fear of being "fired". Security of tenure is protected by s. 99(1) of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3 (U.K.) (*Constitution*) which provides:

> ... the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

[26] The concept of being removable and the standard of good behaviour add an important element to the principle of judicial independence. All judges are accountable for their judicial and personal conduct when it could reflect adversely on the judiciary. This standard of good behaviour is necessarily different for a judge than for most other people.

[27] Throughout most of Canadian history, the legal accountability of a superior court judge for his or her conduct was exclusively expressed in s. 99(1) of the *Constitution*. However, Parliament is an unwieldy institution for conducting an inquiry into the conduct of an individual judge. It became obvious that a process was required to better serve the public interest in ensuring judicial accountability while protecting judicial independence. The ultimate concern is the effect of the judge's conduct and the manner in which it is addressed upon public confidence in the judiciary. The public must have confidence that the process "works".

[28] Parliament amended the *Judges Act* in 1971 to prescribe a process designed to preserve judicial independence, on the one hand, and judicial accountability, on the other. The Council was created and given the responsibility to conduct investigations into complaints about the conduct of superior court judges. The Council and inquiry committees appointed to inquire into a judge's conduct were also given the status of a superior court in the holding of those inquiries. The Council was mandated to report to the Minister of Justice.

In doing so, it may recommend that the judge in question should be removed from office. Over the following years, within the legislative framework set out by Parliament, the Council developed and refined a comprehensive and integrated process for dealing with concerns about alleged inappropriate or improper conduct on the part of superior court judges.

[29] In light of the importance of judicial independence and the constitutional protection of judicial tenure, there are many levels of scrutiny before the final stage of an Address of Parliament would ever be reached. According to the Supreme Court of Canada in *Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at para 147, the question that must ultimately be answered in any individual case involving a judge is whether the conduct is:

> ... so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his [or her] office. [Brackets added]

[30] The focus of the test is the public interest in maintaining "public confidence" in the judge under investigation and, by extension, in the judiciary generally. While the judge must be treated fairly throughout the process, the focus is not on protecting his or her interest in their office for its own sake.

[31] The judicial conduct process, arising out of a complaint, may be grouped into four broad phases. The first is an internal review that may be described as the "preliminary investigation" phase. The second is a hearing before an inquiry committee that might be described as the "formal investigation" phase. The third is a hearing by the Council in which the Council receives the inquiry committee report and such further or other evidence and submissions it deems fit and then provides its opinion to the Minister. The fourth phase itself consists of two stages. The Minister, on behalf of the executive branch of government, then decides whether to initiate proceedings before Parliament. If the Minister does so, then finally, Parliament could make an Address by both Houses of Parliament to the Governor General for removal of the judge in accordance with s. 99(1) of the *Constitution*.

[32] What does all this amount to? This is an extraordinary process that supplements s. 99(1) of the *Constitution*. It is so unique that it can be described as *sui generis* or absolutely one of a kind. It is the only process which permits an intrusion upon the constitutional protection of judicial tenure, apart from Parliament itself. It is also one in which all three branches of government are directly and openly involved. Consequently, analogies to tribunals set up by the federal government are not apt. The judicial conduct

process under the *Judges Act* stands apart from those involving any other profession in Canada – and must do so – given the constitutional requirements for judicial independence.

[33] If this process is to work as Parliament intended, it is imperative that there be no ability to interrupt an inquiry with litigation in another court that spawns its own further litigation and takes the process ever further away from the object of the inquiry. This is not in the public interest. We emphasize that this does not deprive the judge of a remedy where procedural or fairness issues arise in an inquiry, just that the *sui generis* judicial conduct process under the *Judges Act* has built into it a mechanism (by way of appeal from the Committee to the Council at the end of the inquiry process) to address those issues through the Council which is itself a superior court.

IV. The Unique Jurisdiction of an Inquiry Committee

[34] The most critical jurisdictional issue the Committee sought to raise as an intervener was that the Federal Court has no jurisdiction to stay or judicially review the proceedings of an inquiry committee or the Council. The Committee raised an objection to the reviewability of its Rulings by the Federal Court in its initial motion for standing dated May 10, 2013. The Committee's objection to the Federal Court's jurisdiction was repeated in its amended motion dated May 24, 2013. And it was repeated again in the appeal to a judge of the Federal Court from the Prothonotary's decision denying the Committee standing. However, the Prothonotary denied the Committee intervener standing for this purpose or any other purpose. A judge of the Federal Court then dismissed the Committee's appeal, meaning the Committee had no right even to speak on this matter before the Federal Court. As a result, the Committee's hearings were stayed indefinitely, unopposed by anyone, and without any consideration of whether the Federal Court had the authority to grant such a stay.

[35] This Committee does not consider itself entitled to concede any jurisdiction on the part of the Federal Court to interfere in the judicial conduct proceedings of an inquiry committee or the Council. The Federal Court, created in 1971, is a respected court with an important role in conducting judicial review in relation to federal administrative agencies. However, we are of the view that an inquiry committee under the *Judges Act* is not such an agency and is not subject to judicial review in the Federal Court.

[36] Had this central jurisdictional issue been dealt with at the time of the stay application, its resolution might well have foreclosed the issuance of a stay. While the Council itself has recently been granted the right to raise this jurisdictional issue as an intervener, realistically, its final resolution could well be measured in years. In the meantime, the stay remains in place, preventing the completion of the inquiry.

V. Dilemma Facing the Committee

[37] Resignation of an inquiry committee before the completion of its work is a very serious step to take. Having undertaken to discharge the responsibility of conducting an inquiry and reporting to Council, the members of the Committee have a duty to complete this work unless special circumstances dictate otherwise. The primary consideration is whether the public interest would be better served by the Committee remaining or leaving. We have been influenced in our decision to resign by certain overwhelming considerations.

[38] The argument in favour of continuing is primarily the familiarity of the existing Committee with the case and the fact that several days of evidence have already been heard. The significance of this is mitigated somewhat by the fact there is a new Independent Counsel, and she has indicated that it is her intention to seek to recall witnesses who have already testified. Although the record includes a transcript of all oral evidence given at the hearing, the Committee understands that she wishes to supplement past witness evidence with additional material not covered by the previous Independent Counsel. New Independent Counsel also proposes to call a number of other witnesses that the prior Independent Counsel did not propose to call. Thus, the normal advantages of having the existing Committee continue the hearing as opposed to a new committee restarting the hearing do not seem as significant in these unusual circumstances.

[39] The Committee must also now confront certain realities of the litigation process. The costs in this case have been exacerbated by the interlocutory court proceedings that have occurred. Those costs will continue to rise and will no doubt be significant. The Committee had attempted to resume its hearings, but the Judge applied for and was granted a stay by the Federal Court until a final determination of the Judge's judicial review application. As noted, the stay was granted, as could be expected, since no one opposed it. The critical issues of prematurity and jurisdiction were not addressed. The hearing of these issues and the merits of the judicial review application are now scheduled for the end of November, 2013.

[40] If the Judge is unsuccessful, she may appeal with respect to either or both matters. If the Council is unsuccessful on prematurity and jurisdiction, it may also appeal, given the importance of these issues to the integrity of the whole conduct regime. New Independent Counsel and the AGC may also appeal. Further unexpected delays in the proceedings could also occur. If this Committee decided to "wait out" the "final" determination of the judicial review, realistically, it would be at least another year, if not more, before it could resume its hearings or a new inquiry committee be constituted. However, if this Committee resigns now and a new inquiry committee is appointed, the necessity for the Judge's proceeding with the interlocutory judicial review proceedings relating to the Committee's Rulings would be obviated.

[41] Moreover, for the reasons explained earlier, as of now, there is no voice in defence of the process and an inquiry committee's role in it. Thus, this fundamental part of the process is silenced and paralyzed. The importance of some party being able to put, and in fact putting, the case for the Committee, in the interests of "fully informed adjudication" by the reviewing court, is reflected in decisions such as *Children's Lawyer for Ontario v Goodis* (2005), 75 OR (3d) 309 (C.A.) at paras 34-45; and *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, 45 Alta. L.R. (5th) 1, 2011 ABCA 94 at paras 23-29; leave to SCC denied, [2011] SCCA No. 260 (QL). It is ironic that the only way this Committee can meet the transparency requirements so essential for public confidence and inform the public of this critical flaw in the process is to resign but, regrettably, that appears to be the case.

[42] We have placed all of these considerations on the scale. We have concluded that the course of action most likely to be effective in returning the focus of the inquiry to where it belongs is for the Committee to resign to allow for the appointment of a new inquiry committee. The public interest in avoiding the further costs and delays inherent in resolving most issues raised by the Judge's judicial review application must prevail. This consideration trumps all others. Accordingly, we hereby resign as members of the Committee effective immediately.

Dated November 20, 2013

(Signed) "Catherine Fraser"
Chief Justice Catherine Fraser, Chair

(Signed) "*J. Derek Green*"
Chief Justice Derek Green

(Signed) "*Jacqueline Matheson*"
Chief Justice Jacqueline Matheson

(Signed) "Barry Adams"
Mr. Barry Adams

(Signed) "Marie-Claude Landry"
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