Canadian Judicial Council
Conseil canadien de la magistrature

Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to the application of Alex chapman for standing and the funding of legal counsel

11 July 2012

Décision du Comité d'enquête au sujet de l'hon. Lori Douglas concernant la demande de Alex Chapman pour statut d'intervenant et paiement d'avocat

11 juillet 2012

(v. originale en anglais)

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RULING OF THE INQUIRY COMMITTEE ON THE APPLICATION OF ALEX CHAPMAN FOR STANDING AND THE FUNDING OF LEGAL COUNSEL

I. Background

A. Previous Rulings of Inquiry Committee

[1] Alex Chapman initiated this investigation into the conduct of Associate Chief Justice Douglas (Judge) by making a complaint to the Canadian Judicial Council dated July 14, 2010. At the initial public hearing of this Inquiry Committee, on May 19, 2012, he requested standing at the hearings and the funding of legal counsel to represent him. The Committee at that time ruled that counsel for Mr. Chapman be funded "for the limited purpose of allowing him to make further submissions addressing his application for standing and associated funding".

[2] Certain conditions were specified in that Ruling, including the requirement that written submissions on his behalf be distributed one week before the date for resumption of the hearing, at which time counsel could also make oral submissions. Mr. Chapman engaged Mr. Rocco Galati as his counsel for this limited purpose (Chapman's Counsel). In response to his written submissions, both Independent Counsel and Judge's Counsel made written submissions opposing Mr. Chapman's application for standing. Chapman's Counsel, in turn, provided a Reply.

[3] At the resumption of the hearings on June 25, the Committee heard oral argument by all three counsel in support of their respective written submissions. The next morning, the Committee again made an oral Ruling, this time stating that "in the exceptional circumstances here, Mr. Chapman will have certain limited rights of participation in this inquiry". The limitations that were imposed are listed in the Order at the end of this written Ruling. The Committee also advised it would provide its reasons for its Ruling. These are those reasons.

B. Scope of Inquiry

[4] In his written submissions, Chapman's Counsel argued that the evidence to be adduced in this case would support criminal charges against both the Judge and her husband, Jack King. Three *Criminal Code* offences were identified, namely, breach of trust in s. 122, obstructing justice in s. 139(2) and compounding or concealing an indictable offence in s. 141(1). Chapman's Counsel stated that: "... the failure of independent counsel to put forward criminal wrongdoing ... requires that the Applicant be allowed to do so by giving him standing".

[5] In his oral argument, Chapman's Counsel did not pursue these criminal allegations beyond merely saying that his client had "... put on the table with the review panel investigator that some of the conduct of both Mr. King and Associate Chief Justice Douglas may be criminal". He suggested, without elaborating, that the failure to allege criminal conduct was a denial of a fair hearing. (See pages 107-8 of the *Transcript of the hearing of 25 June 2012* posted on the Canadian Judicial Council website.)

[6] In light of these submissions, the Committee asked Chapman's Counsel whether Mr. Chapman was seeking to expand the scope of the inquiry if granted standing. He was also asked what that would mean for the structure already established for this Inquiry. It should be noted that the Notice of Allegations that currently exists has previously been the subject of submissions by counsel and refinement. It was pointed out that standing is typically granted to participate in an existing inquiry and not to expand its scope (pp. 108-115).

[7] Chapman's Counsel provided a number of responses. He stated that he would propose to address the issue of criminal conduct but only by way of submissions: "I don't propose to lead any further evidence ... that legal characterization flows from the evidence that the independent counsel will lead" (p. 113). He acknowledged the Committee's broad discretion over this matter: "... You can grant my client standing without allowing him to make submissions on that issue ... or you can expand it or not expand it" (p. 114).

[8] We mention this matter to emphasize that this Committee does not have jurisdiction to make determinations of civil or criminal liability. This Inquiry that has commenced and will continue on July 16 will proceed within the framework of the existing Notice of Allegations as refined by this Committee. The role of Chapman's Counsel will be limited in the manner that was described in the Committee's oral ruling on June 26 and is confirmed in the Order at the conclusion of this Ruling.

II. No Standing as a Complainant or Witness

A. Status as a Complainant

[9] In his written submissions, Chapman's Counsel asserts that a complainant "... under s. 63(2) of the *Judges Act,* whose complaint has given way to an Inquiry Hearing, has a *right* to standing and funding, as a party on the same plane as the subject-Judge of the Inquiry". We do not agree. There is no support in the *Judges Act* for such a contention. Section 63(2) merely states that: "The Council may investigate any complaint or allegation made ...." There is no mention of any right to standing by a complainant in relation to such an investigation. By contrast, s. 64 expressly specifies the participatory rights of any judge who is the subject of an inquiry committee established under s. 63(3).

[10] Moreover, this claimed automatic right to standing for a complainant fails to take into account the nature of the investigation process under s. 63(2). This process was explained in detail in our May 15 Ruling and referred to in our subsequent June 22 Ruling. The "evolutionary" nature of that process means that the complaint which initiates the investigation could well lead to broader, narrower or different allegations ultimately becoming the mandate of an inquiry committee. Indeed, a complaint could initiate an investigation and lead to the appointment of an inquiry committee even if the complaint were anonymous. In fact, an anonymous complaint has led to one of the allegations contained in the Notice of Allegations before this Inquiry Committee.

[11] The Council's *Complaints Procedures* do provide that a complainant should be informed,

to a limited extent, of the progress of the Council's consideration of a complaint. But there is nothing in the Council's Policies, *Canadian Judicial Council Inquiries and Investigations By-laws* or in the *Judges Act* itself that would require standing before an inquiry committee to be granted simply on the basis that the person seeking standing made the complaint that initiated the investigation that led to the constituting of that inquiry committee.

[12] Chapman's Counsel argued that since a complainant may have access to judicial review in relation to a complaint, it follows that the complainant should have full standing before an inquiry committee. We agree with Independent Counsel that the potential access to judicial review does not demonstrate a right to standing. Although a person's status as a complainant might well permit judicial review in certain circumstances, no logical basis has been suggested for extrapolating from that possibility any consequential "right" to participate in a related hearing before an inquiry committee.

[13] Chapman's Counsel argued that public inquiries provide a source of analogous procedure. Pointing out that "The rule in most complaint-driven public inquiries is that the complainant has full standing", he submitted that this supported Mr. Chapman's argument for full standing in this Inquiry. He also noted that Donald Marshall Jr., Guy Paul Morin and Thomas Sophonow all received standing in the public inquiries into their wrongful convictions and imprisonment. We do not find this analogy of assistance on this issue since the individuals in question did not receive standing because of their status as complainants. There is no status of "complainant" in a public inquiry; it is not initiated by a complaint but by an order. Marshall, Morin and Sophonow were all granted standing, not because they were complainants, but because they had a "direct and substantial interest" in the subject matter of those respective inquiries.

[14] Independent Counsel argued that professional discipline proceedings were most analogous to an investigation under s. 63(2) of the *Judges Act.* As pointed out, generally complainants in disciplinary proceedings before, for example, a law society or college of physicians and surgeons are not granted standing although limited participation may be granted in exceptional circumstances. As with an investigation into a judge's conduct, the disciplinary tribunal is focussed on the broader public interest. That public interest transcends the interests of an individual complainant.

[15] We have concluded that the mere status of being the complainant whose complaint has initiated an investigation under s. 63(2) of the *Judges Act* does not grant any right to standing before an inquiry committee constituted in the course of that investigation. That said, there may be exceptional circumstances warranting limited participation in an inquiry under the *Judges Act* where the person who has made a complaint also has an interest that goes beyond the status generally of a complainant. That is a separate issue which we address below.

B. Status as a Witness

[16] Independent Counsel and Judge's Counsel both argued that Mr. Chapman's status at this Inquiry would be merely that of a witness. In their view, the fact that Mr. Chapman's credibility and reputation may be tested is no different from what any witness might expect in any trial or

quasi-judicial proceeding. Thus, that status alone provides no basis for granting him standing.

[17] We agree that the mere fact a witness's credibility and reputation are likely to be attacked does not, as a general rule, provide a legitimate ground for granting standing before an inquiry committee. Were it otherwise, every witness would be entitled to seek standing at every such trial or hearing. This would not only increase costs, it would effectively paralyze the process. More fundamentally, it would not serve the purpose of the inquiry in the first instance which is to determine what is in the public interest. Witnesses before an inquiry committee are in a position comparable to witnesses in a trial or other quasi-judicial proceeding; they are witnesses to the proceedings, not parties.

III. Are There Any Circumstances in which Standing May be Granted?

[18] The possibility of an inquiry committee granting standing in some circumstances to persons other than the affected judge and independent counsel is contemplated under s. 8(2) of the *By-laws*. It requires that a copy of the inquiry committee's report must be provided " ... to the judge, to independent counsel and to any other persons or bodies who had standing at the hearing". However, the *By-laws* do not specify the circumstances in which that standing might be granted.

[19] Independent Counsel left open the possibility that standing might be granted in some circumstances. After submitting that a complainant has no right to standing, Independent Counsel added:

> So if there's no right, then does there remain some room for you to grant standing? ... there may be in certain circumstances but these aren't them.

[20] Chapman's Counsel argued that the rare and exceptional circumstances of this case justified Mr. Chapman being given standing quite apart from his status as a complainant or witness. As Chapman's Counsel stated:

> It's easy to say that in the appropriate case, somebody can get standing, but if he doesn't on these facts, who out there ever gets standing on inquiry committee hearings?

[21] All counsel agreed that the standard test for granting standing requires that an applicant have a "direct and substantial interest" that goes beyond that of other members of the public. This is the test commonly applied in public inquiries. However, the Committee is of the view that a more stringent test is required for standing before an inquiry committee established under s. 63(3) of the *Judges Act*. Two reasons exist for this conclusion.

[22] First, an inquiry committee has a much more focussed role than the vast majority of public inquiries since it is making a specific inquiry into the specific conduct of a specific judge. Accordingly, this makes it less likely that the fact findings made will negatively impact on others. It must be remembered that the mandate of an inquiry committee is to make findings of

fact and determine "... whether or not a recommendation should be made for the removal of the judge from office" (*By-laws* s. 8(1)). No member of the public has a greater interest in this aspect of the inquiry than any other member of the public.

[23] Second, an inquiry committee has the assistance of an independent counsel to act in the public interest and to gather, marshall and present the evidence in a fair and impartial manner. In the vast majority of cases, the independent counsel will have no difficulty in fulfilling the institutional role imposed on independent counsel by the Council *Policies* and *By-laws*.

[24] Consequently, rarely will there be a basis for an inquiry committee to grant standing to others beyond the judge and independent counsel. That said, we recognize that there will be circumstances, as contemplated in s. 8(2) of the *By-laws*, where standing may be justified. Why is this so? It may be required in order to ensure that the inquiry committee is able to properly fulfill its mandate. That includes determining all the relevant facts relating to the issues raised by the notice of allegations. For this purpose, that necessarily means ensuring that the evidence before the Committee is fairly, frankly and fully presented. To achieve this objective, a grant of standing may be called for in special circumstances.

[25] Standing may also be required in order to ensure fairness, both procedurally and substantively. This does not mean that every complainant should be given standing; that is not the default position. But in the end, the process must not only be fair; it must also appear to be fair. The fair treatment of complainants is crucial to the preservation of public confidence in the process Parliament has established for dealing with complaints against judges. Otherwise, one risks undermining the integrity and legitimacy of that process which has served Canadians well.

[26] Thus, the test that we have adopted for determining whether a person should be granted standing before an inquiry committee under the *Judges Act* is this: *Does the person applying for standing have a direct and substantial interest of an exceptional nature?*

[27] Applying this test to Mr. Chapman's application for standing, we have concluded that he does have a direct and substantial interest of an exceptional nature in these proceedings but only with respect to allegation #1. That allegation relates to his alleged sexual harassment by Lori Douglas while she was in private practice. We offer four reasons for granting standing.

[28] First, Mr. Chapman's character and reputation are clearly in the direct line of fire here to a degree substantially greater than would be the case for a witness generally. In *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System),* [1997] 3 S.C.R. 440, Justice Cory, delivering the judgment of the Court, stated at para. 55:

> ... procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute.

[29] Judge's Counsel has clearly indicated that her main response to the allegations the Judge faces will be to attack Mr. Chapman. That is illustrated by these excerpts about him in the Judge's Response to the Notice of Allegations:

> "... a complete fabrication ... wrongdoing by ... Chapman ... complete fabrications ... a willing participant in this despicable scheme ... materials were released to the public unlawfully ... out of malice ... lashed out at a woman who had done absolutely nothing to him ... malicious campaign designed, first to attack King through this attack on his wife ... irrational and misplaced anger at Associate Chief Justice Douglas ... malicious and wrongful strategy to strike back ... malicious actions of a disgruntled litigant ..."

[30] Woven throughout this Response are allegations that Mr. Chapman's underlying purpose was to extract a large sum of money from the Judge's husband by threats to broadly distribute embarrassing photographs of her on the Internet. In essence, he has been described as an irrational, dishonest, malicious and despicable person who is driven by greed. In effect, this approach could be characterized as putting Mr. Chapman "on trial" in these proceedings.

[31] Despite this approach, Judge's Counsel downplayed any potential impact on Mr. Chapman, arguing that:

> The committee will make findings of fact and recommendations with respect to Associate Chief Justice Douglas only. Unlike a public inquiry or a Royal Commission, no findings of wrongdoing by anyone else can be acted on by the Canadian Judicial Council. (pp. 177-8)

[32] That may well be so. But it misses the point. It is true that Mr. Chapman does not have any legal rights that will be affected by these proceedings. Nevertheless, the jeopardy facing Mr. Chapman with respect to his character and reputation is undeniable were this Committee to accept the position advocated by Judge's Counsel. Also, there is no valid distinction between a finding by this Committee and a finding of misconduct by a public inquiry. Neither has any legal or other official consequence beyond the finding itself and its potential effect on the reputation of the individual about whom it is made. That said, it must be stressed that this Committee has not yet heard any evidence and has certainly made no prejudgment on any of the issues before it.

[33] Independent Counsel also sought to distinguish between adverse findings that might be made by this Committee and a commission of inquiry as a reason for denying Mr. Chapman standing:

> … typically a public commission of inquiry has a very wide ranging mandate. It can issue … s. 13 notices, blaming certain people, including the person that complained, for example … this case is focused on the conduct of a single judge. And nothing you can do in your report to the Judicial Council can

> affect the rights or legal interest or obligation of Mr. Chapman, nothing. … nor [can the Committee] issue a notice of blame against Mr. Chapman as a commission of inquiry might (pp.143-4).

[34] While Mr. Chapman does not have any legal rights that will be affected by these proceedings, he does have a direct and substantial interest in potential findings in this case about his character that could negatively affect his reputation. More to the point, whether this Committee is required to issue a notice akin to a s. 13 notice is irrelevant to the standing issue. (A notice under s. 13 of the *Inquiries Act*, RSC 1985, c I-11, is similar to the notices required in corresponding legislation in provincial and territorial legislation dealing with public inquiries.) The purpose of that notice is simply to ensure that the principle of fairness is complied with. A public inquiry issues notice to the persons affected that it may make observations in its report about aspects of their conduct so that the recipients of such notice may provide a specific response to such potential findings. But the critical point is this. The fact that an inquiry committee under the *Judges Act* has no statutory obligation to issue a s. 13 notice does not affect the inquiry committee's authority to grant standing. Both a public inquiry and an inquiry committee must act fairly.

[35] In summary, the nature and degree of the attacks upon Mr. Chapman's character and reputation place him beyond the position of persons who might have a direct and substantial interest but not one "of an exceptional nature". The fact that Mr. Chapman faces potential adverse findings about his character which is inextricably linked to his reputation to a very significant degree weighs in favour of this Committee's granting him standing with respect to allegation #1.

[36] Second, contrary to most complaints about judges, allegation #1 relates to a private matter involving conduct off the Bench. Typically, an inquiry committee will have before it extensive documentary evidence, often including a transcript of a hearing or a ruling where many complaints about judicial conduct originate. Thus, there will be few issues of credibility to be resolved. This is particularly so where judicial conduct on the Bench is in question. In these circumstances, verifiable objective evidence usually exists to assist in determining what transpired.

[37] However, in this case, there is limited documentation of the kind often available when the alleged misconduct occurs in court. The positions of the Judge and Mr. Chapman are diametrically opposed with respect to the allegation of sexual harassment. In effect, each claims that the other is lying. It appears that the factual determinations about the conduct involving the Judge, Mr. Chapman and others will depend in large part on findings about the credibility of Mr. Chapman and the Judge.

[38] In his opening statement, Independent Counsel spoke of the "unique" and "unprecedented" circumstances involved here. Given these circumstances, a grant of standing in favour of Mr. Chapman and associated funding for legal counsel ensures that the system is not seen to be skewed in favour of the Judge who has legal representation.

[39] Third, where, as here, an inquiry involves a direct credibility contest between a judge and a complainant over private events where the positions are polarized to the point that each accuses the other of lying, the reality is that independent counsel is placed in an untenable position. Independent counsel is expected, at a minimum, to cross-examine both the complainant and the judge in relation to the same subject matter. From the point of view of public perception of the fairness of that process, the risk is great that no matter how effective an independent counsel might be, there may well be a feeling that independent counsel was "harder" or "easier" on one side than the other. That is the situation with respect to allegation #1. Hence, fairness warrants granting Mr. Chapman standing on the sexual harassment allegation.

[40] Fourth, unresolved issues may remain with respect to Chapman's solicitor-client privilege with the Judge's husband and the extent to which it has been waived. Mr. Chapman complained of the personal acts of the Judge towards him at a time when her husband was acting as his lawyer and Lori Douglas was his partner in the same law firm and involved in the family law practice of that firm. Here too, concerns about the fairness of the process justify granting Mr. Chapman standing so that counsel might be retained to protect whatever rights he may have on this front.

[41] For these reasons, we concluded that Mr. Chapman met the standard of a "direct and substantial interest of an exceptional nature". Thus, we ordered that he be granted standing. However, we restricted Mr. Chapman's participation in the manner stated in the Order which follows.

IV. Funding

[42] With respect to whether funding should be provided to allow Mr. Chapman to retain counsel, we determined that it should. On the evidence before us, it was clear that Mr. Chapman had established the need for such funding. No one before us questioned that need. But that alone would not necessarily be sufficient to justify this Committee's ordering funding for counsel. However, we also concluded that the issues likely to arise during the course of this Inquiry with respect to allegation #1 were sufficiently complex that Mr. Chapman could not properly represent his own interests. Accordingly, we ordered that funding for counsel should also be provided and that was addressed in the Order made.

[43] The Committee examined and explained the role of independent counsel in detail in its May 15 Ruling. This new Ruling by the Committee does not reflect any lack of confidence in the role that Council has defined for independent counsel. Indeed, under the current process, the authority for an inquiry committee to grant standing in exceptional circumstances provides a valuable mechanism to supplement that role when required by fairness.

V. Constitutional Right to Standing

[44] The written submissions of Chapman's Counsel contained some arguments in favour of a constitutional right to standing for his client in this case. He did not pursue these in oral

argument. Independent Counsel simply dismissed them as being "of no relevance to your interpretation of the statute, bylaws and the policy". In view of this Ruling, there is no need for the Committee to address this argument.

VI. Order

[45] In the exceptional circumstances here, we confirm that Mr. Chapman will have certain limited rights of participation (standing) as follows:

> (a) Chapman's Counsel will be permitted to participate in the questioning of Mr. Chapman and, among those witnesses currently subpoenaed, Associate Chief Justice Douglas, Mr. King and Mr. Histed;
>
> (b) Chapman's Counsel will be permitted to make final submissions;
>
> (c) Mr. Chapman's participation through his counsel is confined in all respects to Allegation 1;
>
> (d) Funding will be limited to one lawyer for this hearing plus reasonable preparation time;
>
> (e) Fees must be in accordance with the rates prescribed by the Department of Justice; and
>
> (f) Administrative arrangements are to be established by the Executive Director of the Canadian Judicial Council.

Dated this 11th day of July, 2012.

(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

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