

CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF THE INQUIRY PURSUANT TO SECTION 63(2) OF THE
JUDGES ACT REGARDING THE HONOURABLE LORI DOUGLAS, ASSOCIATE
CHIEF JUSTICE (FAMILY DIVISION) OF THE MANITOBA COURT OF QUEEN'S
BENCH

NOTICE OF MOTION BY INDEPENDENT COUNSEL FOR DIRECTIONS FROM THE INQUIRY COMMITTEE

I. BACKGROUND

1. On August 20, 2014, Independent Counsel filed a Notice of the allegations that she intends to present against the Honourable Lori Douglas, Associate Chief Justice (Family Division) of the Manitoba Court of Queen's Bench ("**ACJ Douglas**") in the context of the present Inquiry (the "**Notice of Allegations**"). The Notice of Allegations contains three allegations (the "**Allegations**").
2. Allegation #1 of the Notice of Allegations reads as follows:

*"On December 17, 2004, Ms. Douglas, as she then was, completed a Personal History Form ("**Form**") in connection with an application for judicial appointment. One of the questions on the Form was: "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?". Ms. Douglas answered "No".*

At the time of completing the Form, Ms. Douglas knew or ought to have known that:

*a) In 2002 and 2003, graphic photos of a sexual nature of her (some of which could be seen as demeaning to women) (the "**Photos**") were available on the [REDACTED] website (the "**Website**"), having been uploaded onto the Website by Ms. Douglas' husband, Mr. King;*

b) In April and May of 2003, Mr. King had tried to entice one of his clients, Mr. Chapman, into a sexual relationship with Ms. Douglas, in part by referring him to the Photos on the Website and by sending him certain of the Photos by email;

c) Ms. Douglas had met with Mr. Chapman on May 16, 2003 and May 30, 2003;

d) *On June 9, 2003, Mr. Chapman had complained to Thompson Dorfman Sweatman LLP (the “Firm”), where Ms. Douglas and Mr. King were practicing family law as partners, of Mr. King’s conduct, had threatened legal action against Mr. King and the Firm and had provided the Firm with copies of the Photos;*

e) *As a result of being made aware of Mr. King’s conduct, the Firm had required Mr. King to leave the Firm;*

f) *In June and July, 2003, the Photos had been removed from the Website at Mr. King’s request, Mr. Chapman had represented having returned all of the Photos in his possession and having not engaged in their distribution, and Mr. King and Ms. Douglas had destroyed all the Photos in their possession, both in electronic and paper form;*

g) *Mr. Chapman had returned the photos pursuant to the terms of a settlement agreement concluded between him and Mr. King, Mr. King having paid \$25,000.00 to Mr. Chapman, which sum had been loaned by Ms. Douglas to Mr. King; and,*

h) *The facts referred to above were or could be relevant to the assessment of her application for judicial appointment and should have been disclosed.”*

3. On this allegation, the Review Panel constituted pursuant to section 1.1 of the *Canadian Judicial Council Inquiries and Investigations By-Laws* unanimously concluded that it may engage subsections 65(2)(b) and (d) of the *Judges Act* and may be serious enough to warrant removal.

4. Allegation #2 of the Notice of Allegations reads as follows:

“Since 2002, the Photos (including alterations thereof) have been (and continue to be) available on the internet from time to time. The Photos could be seen as inherently contrary to the image and concept of integrity of the judiciary, such that the confidence of individuals appearing before the judge, or of the public in its justice system, could be undermined.”

5. On this allegation, the Review Panel unanimously concluded that it may engage subsection 65(2)(d) of the *Judges Act* and may be serious enough to warrant removal.

6. Allegation #3 of the Notice of Allegations reads as follows:

“Upon being advised of the complaint by Mr. Chapman and the initiation of an investigation by the Canadian Judicial Council, ACJ Douglas modified a personal diary that described an encounter with Mr. Chapman which she knew or ought to have known was relevant to the CJC’s investigation. ACJ Douglas subsequently made incorrect representations to former Independent Counsel about that modification.”

7. This last allegation, if accepted by the Inquiry Committee, is:
- (a) capable of supporting a finding that ACJ Douglas is incapacitated or disabled from the due execution of the office of judge by reason of having been guilty of misconduct and/or having been placed, by her conduct or otherwise, in a position incompatible with the due execution of the office of judge, within the meaning of paragraphs 65(2)(b) and/or (d) of the *Judges Act*; and,
 - (b) capable of supporting a recommendation that ACJ Douglas be removed from office.
8. On October 1, 2014, ACJ Douglas filed a Notice of Motion seeking, *inter alia*, the summary dismissal of Allegation #1 and Allegation #2, and the striking or summary dismissal of Allegation #3 (the **“Motion”**).
9. In support of the Motion, ACJ Douglas has filed a six volume Motion Record (the **“Motion Record”**) containing two affidavits, a medical report, three expert reports, 24 exhibits in support of the affidavits and 141 documents referred to in the expert reports.
- II. DECIDING THE ISSUE OF THE JURISDICTION OF THE INQUIRY COMMITTEE TO CONSIDER ALLEGATION #3 DOES NOT REQUIRE ANY EVIDENCE**
10. The issue of the jurisdiction of the Inquiry Committee to consider allegations that have not been considered by a Review Panel has already been the subject of

written submissions by both Independent Counsel and ACJ Douglas, filed on September 12, 2014 and September 22, 2014, respectively.

11. At that time, ACJ Douglas advanced the jurisdictional argument without adducing any evidence, and there is no reason why the debate regarding the jurisdiction of the Inquiry Committee to consider Allegation #3 would require any evidence. Moreover, and subsidiarily, none of the evidence contained in the Motion Record is relevant to this issue.

III. DECIDING THE ISSUE OF WHETHER ALL OF THE ALLEGATIONS SHOULD BE SUMMARILY DISMISSED DOES NOT REQUIRE ANY EVIDENCE

12. In order to determine the test to be applied by the Inquiry Committee to decide whether any of the Allegations should be summarily dismissed, it is instructive to consider what has been referred to by the Federal Court of Appeal in *Cosgrove v Canadian Judicial Council*, [2007] 4 FCR 714 as the “*Boilard Rule*”, pursuant to which summary dismissal of an allegation is justified where the allegation “*does not on its face disclose an arguable case for removal*” (at paragraph 52).
13. In its May 15, 2012 *Ruling*, the previous Inquiry Committee addressed the test for summary dismissal, referring to the *Boilard Rule*, and indicated that summary dismissal of an allegation by an Inquiry Committee could be warranted where:
 - (a) “*there is simply no available evidence in support of an allegation*” (at paragraph 84); or,
 - (b) “*an allegation does not disclose cause for a finding of misconduct, or indeed that there is no case to present and therefore no case to answer*” (at paragraph 89).
14. In the *Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec*, which gave rise to the *Boilard Rule*, summary dismissal is described as being warranted where “*the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry*”.

15. In sum, on the basis of the various interpretations of the *Boilard* Rule, Independent Counsel submits that the test which should be applied by the Inquiry Committee in deciding whether to summarily dismiss any of the Allegations is as follows:
 - (a) *Has it been shown that there is no evidence in support of the allegation?;*
and,
 - (b) *If not, does the allegation, if established, disclose an arguable case for removal?*
 16. The Motion does not allege that there is no evidence at all in support of the Allegations.
 17. Therefore, in deciding the Motion, the Inquiry Committee solely has to determine whether each allegation, on its face, discloses an arguable case for removal. This requires the Inquiry Committee to determine whether it is arguable that each allegation, on its face, falls within the scope of one of the paragraphs of subsection 65(2) of the *Judges Act* and can result in a finding that public confidence in ACJ Douglas would be sufficiently undermined to render her incapable of executing judicial office in the future. Answering these questions does not require any evidence.
- IV. THE EVIDENCE CONTAINED IN THE MOTION RECORD IS NOT ADMISSIBLE AT THE STAGE OF THE HEARING OF THE MOTION**
18. For all of the above reasons, Independent Counsel requests that the Inquiry Committee direct that it will not consider, at the hearing of the Motion, any evidence contained in the Motion Record.
 19. At best, it is only at the hearing on the merits of the case that such evidence, subject to a determination as to its legality and relevance, could be considered. In such a case, this evidence would have to be tested by way of cross-examination.

20. Subsidiarily, even if the Inquiry Committee considers that evidence can be adduced at the stage of the hearing of a motion such as the Motion at a preliminary stage, Independent Counsel submits that the evidence contained in the Motion Record does not constitute admissible evidence for the purpose of determining the Motion and requests that the Inquiry Committee direct that it will not consider, at the hearing of the Motion, the evidence contained in the Motion Record.
21. As indicated above, the Motion attacks whether there is an arguable case for removal resulting from the Allegations, should they be made out.
22. Independent Counsel submits that the evidence contained in the Motion Record is of no assistance whatsoever to the Inquiry Committee in determining whether such an arguable case for removal exists.
23. Whether an arguable case for removal exists turns on a consideration of legal issues that are within the sole purview of the Inquiry Committee and ultimately of the members of the CJC who will consider the Inquiry Committee's report. The evidence contained in the Motion Record has no bearing, in Independent Counsel's respectful submission, on this legal issue to be determined by the Inquiry Committee at this stage.
24. Furthermore, some of the evidence contained in the Motion Record is also inadmissible as it relates to persons who will be called as witnesses before the Inquiry Committee on the merits.
25. The prior testimony of a witness, or statements made by a witness to Independent Counsel in the course of her investigation, can only be admissible as evidence before this Committee if it is impossible or unreasonable to require that witness to testify before the Inquiry Committee, neither of which are considerations which apply in the present circumstances.
26. Should the Inquiry Committee determine that the evidence can be considered in deciding the Motion at a preliminary stage, Independent Counsel submits that responding to this evidence will require cross-examinations to take place prior to

the hearing of the Motion and Independent Counsel may wish to file responding evidence, through affidavits and expert reports.

V. DIRECTIONS SOUGHT BY INDEPENDENT COUNSEL

27. In light of the above grounds, Independent Counsel respectfully request that the Inquiry Committee:

DECLARE that the evidence contained in the Motion Record shall not be considered in determining the Motion at a preliminary stage;

DEFER the consideration of the Motion to the hearing on the merits;

DIRECT that Independent Counsel shall be entitled, prior to the hearing on the merits, to cross-examine the affiants and the experts having provided affidavits or expert reports contained in the Motion Record; and,

RESERVE Independent Counsel's right to adduce responding evidence;

SUBSIDIARILY,

DETERMINE a timetable for the hearing of the Motion, including the time for the cross-examination of the affiants and the experts having provided affidavits or expert reports contained in the Motion Record and for the filing by Independent Counsel of responding evidence.

Dated at Montreal, this 8th day of October, 2014

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