

Court File No.:

*A-216-14*  
(T-1567-12)

**FEDERAL COURT OF APPEAL**

B E T W E E N :

**CANADIAN JUDICIAL COUNCIL**

Appellant  
(Intervener)

- and -

**THE HONOURABLE LORI DOUGLAS**

Respondent  
(Applicant)

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent  
(Respondent)



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**NOTICE OF APPEAL**

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**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 180 Queen Street West, Suite 200, Toronto, Ontario, M5V 3L6.

**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.**

April 22, 2014



**YOGINDER GULIA  
REGISTRY OFFICER  
AGENT DU GREFFE**

Issued by:

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Solicitors for the Canadian Superior Courts Judges' Association

**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the Judgment of Mosley, J. of the Federal Court, dated March 28, 2014 (2014 FC 299).

**THE APPELLANT ASKS** that this Honourable Court:

1. Set aside the Judgment of Mosley J. (the "Applications Judge"); and
2. Grant such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

**A. Background**

1. The Judgment relates to an application for judicial review brought by the Applicant relating to a proceeding before an Inquiry Committee of the Canadian Judicial Council ("CJC"), which was constituted to hear a complaint and allegations against the Applicant under the *Judges Act*, R.S.C. 1985, c. J-1.
2. On July 27, 2012, the Inquiry Committee issued a ruling wherein it dismissed the Applicant's request that it recuse itself on the basis of an alleged reasonable apprehension of bias. On August 20, 2012, the Applicant filed an application for judicial review of the Inquiry Committee's ruling pursuant to s.18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended. The Applicant sought declaratory relief and an order in the nature of prohibition to prevent the Inquiry Committee from

continuing its proceedings. The Attorney General of Canada was named as the respondent in the Application.

3. On August 26, 2012, Independent Counsel to the Inquiry Committee, Guy Pratte, resigned after having filed on August 20, 2012 an application for judicial review in which he challenged the authority of the Inquiry Committee to question witnesses through its own counsel.

4. On August 27, 2012, the Applicant requested that Norman Sabourin, Executive Director and Senior General Counsel to the CJC, provide her with the Independent Counsel's resignation letter and any related communications.

5. On August 28, 2012, Mr. Sabourin, on behalf of the Vice-Chair of the Judicial Conduct Committee of the CJC, declined to provide the Applicant with the requested material on the basis that it was protected by solicitor-client privilege. That same day, the Applicant served a formal request on Mr. Sabourin for production under Rule 317 of the *Federal Courts Rules* for Independent Counsel's resignation letter and any related correspondences.

6. By letter of September 17, 2012, Mr. Sabourin, on behalf of the Vice-Chair of the Judicial Conduct Committee, responded to the Applicant's Rule 317 request. Mr. Sabourin declined to produce the requested material for reasons including: (1) Rule 317 did not apply to the material as it was not in the possession of the Inquiry Committee, the decision-maker whose order was under review; and (2) the requested material was privileged, as a solicitor-client relationship had formed between the

Independent Counsel and the CJC through the Vice-Chair of the Judicial Conduct Committee.

7. The Notice of Application was subsequently amended to additionally seek judicial review of the CJC's assertion of a solicitor-client relationship with the former Independent Counsel on the basis that the assertion gave rise to a reasonable apprehension of institutional bias. The Applicant's amended Notice of Application was issued on June 10, 2013.

8. On June 11, 2013, the CJC was granted standing to intervene in the Application on the issue of institutional bias and to participate in any motion to compel production of former Independent Counsel's resignation letter and related material.

9. On July 16, 2013, the Applicant brought a motion pursuant to Rule 318 of the *Federal Courts Rules* to compel the CJC to produce the resignation letter and related material. The CJC opposed this motion on the bases that: (1) the material requested was not "in the possession of a tribunal whose order is the subject of the application". The judicial review application concerned the order of the Inquiry Committee, and the Inquiry Committee did not have access to or possession of the material; (2) the material requested was not relevant; (3) the motion was premature, since an issue on the main application was whether the institutional bias issue is premature, and the material related to the institutional bias argument; and (4) the material requested was protected by solicitor-client privilege between the CJC, through the Vice-Chair of the Judicial Conduct Committee, and Independent Counsel.

10. On September 13, 2013, the Prothonotary issued a ruling, wherein she deferred the questions of prematurity and solicitor-client privilege to the Applications Judge hearing the merits of the judicial review and ordered that the documents in question be sealed and placed before the Applications Judge.

11. On September 19, 2013, the CJC provided formal notice that it would raise before the Applications Judge preliminary questions relating to the jurisdiction of the Federal Court to consider the Application and, should jurisdiction be established, as to whether the Application was premature.

12. On October 11, 2013, the Applicant again amended the Notice of Application to include an allegation that the assertion of solicitor-client privilege was "wrong", and seeking an order prohibiting the CJC from continuing the proceedings in their current form.

13. On November 20, 2013, one week prior to the hearing before the Applications Judge, the Inquiry Committee resigned. The issues relating solely to the Inquiry Committee ruling therefore became moot.

14. On March 28, 2014, the Applications Judge issued his Judgment.

#### **B. Judgment Under Appeal**

15. The Applications Judge found that the Federal Court had supervisory jurisdiction over the CJC when it was conducting an inquiry or investigation pursuant to section 63 of the *Judges Act*, and that the Application was not premature with respect to the question of institutional bias. The Applications Judge further

found that a solicitor-client relationship was not formed between the Vice-Chair of the Judicial Conduct Committee and former Independent Counsel, and that even if a limited solicitor-client relationship had formed, the resignation letter and related communications were not covered by the privilege. The resignation letter and related communications were therefore ordered produced. Finally, the Applications Judge dismissed the Applicant's judicial review application on the basis that the Vice-Chair of the Judicial Conduct Committee's relationship with former Independent Counsel did not give rise to a reasonable apprehension of institutional bias.

16. The CJC submits that, in finding that the Federal Court has jurisdiction over the CJC, that no solicitor-client relationship existed between the CJC and Independent Counsel, and that in any event the disputed documents were not covered by the privilege, the Applications Judge erred in law and principle, misapprehended the evidence that was before him, and erred in the application of legal principles to the facts at issue. These errors included the following, any or all of which require the intervention of this Honourable Court:

17. The Applications Judge erred in finding that the Federal Court has jurisdiction under s. 18 of the *Federal Courts Act* to judicially review the CJC – a deemed superior court – when the CJC is conducting an inquiry or investigation pursuant to section 63 of the *Judges Act*. The Applications Judge erred in finding that when the CJC is conducting an inquiry or investigation pursuant to section 63 of the *Judges Act*, it is in a "federal board, commission, or other tribunal" within the meaning of the *Federal Courts Act*.



18. The Applications Judge erred in finding that the Federal Court has jurisdiction to judicially review the CJC when it is reporting its conclusions and submitting a record of an inquiry or investigation to the Minister of Justice pursuant to section 65 of the *Judges Act*.

19. The Applications Judge erred in finding that the Minister of Justice and Parliament are "wholly ill-equipped to adjudicate" issues of fairness and legality of the CJC's process.

20. The Applications Judge erred in finding that an amendment passed in the legislative process which deemed inquiries and investigations conducted by the CJC to be of no legal effect. The Applications Judge further erred in failing to consider the procedural and substantive limitations and difficulties inherent in an application for judicial review brought before the Federal Court.

21. The Applications Judge erred in failing to identify the appropriate standard of review of the Vice-Chair of the Judicial Conduct Committee's decision to assert solicitor-client privilege and that his decision was entitled to deference in that the decision under review was in the exclusive jurisdiction of the Vice-Chair.

22. The Applications Judge erred in finding that a solicitor-client relationship was not formed between the Vice-Chair of the Judicial Conduct Committee and former Independent Counsel, Guy Pratte, and in making this finding he erred by relying on irrelevant considerations and ignoring important evidence.

23. The Applications Judge erred in finding that even if a solicitor-client relationship formed between the Vice-Chair of the Judicial Conduct Committee and former Independent Counsel, that the communications relating to the latter's appointment and resignation did not come within the scope of solicitor-client privilege.

24. The Applications Judge erred in ordering that certain privileged communications between the Vice-Chair of the Judicial Conduct Committee and former Independent Counsel contained in the sealed record be released to the parties and form part of the public record.

25. In addition to the grounds of appeal noted above, the Appellant will rely on:

- (a) Sections 2, 18, 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (b) Sections 60, 62-65, 70-71 of the *Judges Act*, R.S.C. 1985, c. J-1, as amended;
- (c) Section 99 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 99, reprinted in R.S.C. 1985, App II, No. 5; and
- (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

26. In the event that the CJC is outside the time limit for filing a notice of appeal in respect of any aspect of the Judgment, the CJC seeks an extension to the period of time for filing the notice of appeal from this Honourable Court, pursuant to section 27 of the *Federal Courts Act* and Rule 369 of the *Federal Courts Rules*.

27. The Appellant proposes that the appeal be heard in Toronto, Ontario.

April 22, 2014



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