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Douglas Inquiry Committee Resigns

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Decision commented on: Inquiry Committee concerning the Hon. Lori Douglas, Reasons For Resignation of the Inquiry Committee (November 20, 2013)

In a stunning development, the Inquiry Committee charged with investigating the conduct of the Hon. Lori Douglas, chaired by Chief Justice Catherine Fraser of the Alberta Court of Appeal, has resigned en masse. Associate Chief Justice Douglas was investigated by the Canadian Judicial Council in relation both to her conduct prior to her judicial appointment and to her disclosures during the appointment process. The Inquiry Committee was additionally charged with considering her conduct during the Canadian Judicial Council's investigation, and in particular allegations that she interfered with the investigation. (For a previous discussion of this case on ABlawg see here).

The Inquiry Committee's hearing has been fraught with problems. ACJ Douglas alleged that the Committee was biased, and after the Committee rejected that allegation she sought judicial review to the Federal Court, and obtained a stay of the Committee's proceedings. In addition, the Independent Counsel to the Committee resigned and has been replaced.

The resignation reasons of the Inquiry Committee provide a different perspective on the proceedings to date, and raise some serious questions about the position that the Committee was placed in by the Federal Court in its response to applications brought by ACJ Douglas.

First, the Inquiry Committee notes that, in the ordinary course, the Attorney General for Canada (AGC) is the party with standing to "take a position contrary to the Judge on the apprehension of bias issues and defend the process and challenged rulings on their merits" (at para 5). Here, however, the AGC was named as a respondent by ACJ Douglas, which meant that the AGC was placed in a fundamental conflict "between two public interest positions – on the one hand, defending the process and the Committee's decision… 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" (at para 7). The Inquiry Committee observes that the Federal Court permitted this conflict by denying the "AGC's request to be replaced as a respondent" and then exacerbated it by denying the Committee itself standing, and by restricting the standing of the Canadian Judicial Council and of the Independent Counsel to the Committee.

The result of this conflict was that on many matters ACJ Douglas's applications to the Federal Court were simply unopposed; in particular, there was no opposition to her application for a stay of proceedings (at para 9(c)). Further, at no point were arguments made to the Federal Court with respect to the prematurity of ACJ Douglas's application or with respect to her failure "to attempt, let alone exhaust, any remedies that might have been sought before the Committee or later in the process" (at para 9(d)).

Second, the Inquiry Committee raises some serious questions about the legitimacy of the Federal Court considering the applications brought by ACJ Douglas prior to the conclusion of the proceedings for removal of a judge, including the Inquiry Committee process. It notes the extensive "multi-staged process under the *Judges Act*" and that that process grants "several levels of protection for judges personally" (at para 14). The Inquiry Committee further notes the paramount importance of judicial independence, and that the *Judges Act* creates "an extraordinary process that supplements section 99(1) of the *Constitution*" which cannot be analogized to other administrative bodies created by Parliament and subject to judicial review (at para 32). The Inquiry Committee suggests that it is fundamentally inappropriate and an improper intrusion on judicial independence for its process to be subjected to interlocutory judicial review before the Federal Court:

> [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.

The Committee states that it "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" (at para 35). The Committee notes that the Federal Court has now granted it standing to raise that jurisdictional issue, but that that process would be "measured in years" while the stay against the Committee persists (at para 36).

Third, the Committee notes the allegations of bias raised by ACJ Douglas at the Federal Court that were not raised before the Committee and judges those allegations to be groundless (at paras 15-22).

Given all of this, the Committee in its reasons states that it is in the public interest that the Committee resign. It notes that there are few advantages to it continuing given that the new Independent Counsel has indicated that she plans to revisit the evidence introduced by the former Independent Counsel. Further, the disadvantages arising from the "realities of the litigation process" have to be confronted. The Committee cannot continue while the interlocutory review continues and the stay persists, and the review may take some time to complete. The Committee also notes that the only way for it to raise the "critical flaw" arising from the lack of defence for the Committee at the Federal Court is through resignation:

> [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 (CA) 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.

Obviously the Inquiry Committee's reasons do not represent a balanced assessment of the issues. On their face, however, they do raise three issues that seem *prima facie* of concern: 1) the legitimacy of having rulings by the Federal Court about its process without any submissions made on the Committee's behalf; 2) the legitimacy of the Federal Court reviewing the Committee's conduct on an interlocutory basis; and 3) the legitimacy of the Federal Court intervening in a process designed to respect judicial independence, and to provide a mechanism for implementing section 99 of the *Constitution Act 1867*.

Most of all, however, the reasons cement the status of the Inquiry into ACJ Douglas's conduct as an unmitigated disaster for public confidence in the fair and efficient administration of justice.

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