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T-568-24

FORM 301 Rule 301

Application

T- -24

FEDERAL COURT

F I L E D	FEDERAL COURT COUR FÉDÉRALE		D E P O S É
	MAR 18 2024		
	RENEE CORNICK		
ST. JOHN'S NL		1	

BETWEEN

Anton Oleynik,

Applicant

-and-

Attorney General of Canada,

Respondent

APPLICATION UNDER SECTION 18.1(1) OF THE FEDERAL COURTS ACT

(R.S.C., 1985, c. F-7)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant.

The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at St. John's, Newfoundland and Labrador.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor or, if the applicant is

self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

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 APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

March 18, 2024

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
RENEE CORNICK
Issued by: REGISTRY OFFICER
AGENT DU GREFFE
Address of local office: 354 Water Street,
Suite 209, St. John's, NL, A1C 1C4

TO: Ms. Shalene Curtis-Micallef
Deputy Attorney of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

APPLICATION

This is an application for judicial review in respect of the decision of the Canadian Judicial Council ('CJC') reviewing member to dismiss a complaint of misconduct made against the Honourable Glen N.C. Noel of the Supreme Court of Newfoundland and Labrador as being 'wholly without merit' and 'made for an improper purpose as provided by paragraph 90(1)(a)' of the *Judges Act*, R.S.C., 1985, c. J-1. The applicant makes this application for a judicial review of the CJC decision under Section 18.1(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The applicant submits that the decision is unreasonable on several grounds and seeks a declaration that it be quashed and remitted to the CJC for reconsideration.

The grounds for the application are as follows.

1. Section 86(1) of the *Judges Act* stipulates that 'complaints may be made to the Council, in the form specified by the Council, in respect of a judge of a superior court for any reason referred to in paragraphs 80(a) to (d).' The applicant made a complaint against Noel J. on 4 July 2023 for alleged misconduct, a reason referred to in paragraph 80(b). The applicant complained, *inter alia*, about Noel J.'s repeated refusal to protect the integrity of court records and his choice to publish and disseminate documents whose integrity was compromised beyond a reasonable doubt. On 21 August 2023 the complaint was amended.
2. Noel J. chose to append a copy of an altered or modified document to his decision to reject the applicant's request for the recusal of Noel J. from the multiplicity of case-managed proceedings involving the applicant.¹ The appended document does not match the draft order 'provided to the Court on February 25, 2021, by Memorial's Counsel, Mr. Samms and copied to all parties.' The appended document was modified *ex post*.

¹ *Oleynik v. Memorial University of Newfoundland*, 2023 NLSC 86 (CanLII), paragraph 163 (Appendix 'G'), emphasis in the original

3. The amendments to the *Judges Act* received Royal Assent on 23 June 2023, which triggered revision of CJC's By-laws and Review Procedures. As acknowledged by this Court, 'the CJC has the authority, in accordance with the Judges Act, to make by-laws governing inquiries and investigations into judicial conduct, and has done so; and the CJC's choice of procedure is clearly set out in their By-laws and Review Procedures'.²
4. The CJC made and published neither new By-laws nor new Review Procedures during the first three months and a half after the applicant submitted his complaint. On 21 September 2023 the applicant inquired whether the judge who is subject of the complaint and/or to the chief justice of the court of which the judge is a member were notified of the complaint. The issue of notification is not theoretical. The chief justice of the court of which the judge is a member (a) is a CJC member, (b) designated the judge who is subject of the complaint to act as a case management judge in all proceedings in which the undersigned is a party, and (c) heard an application made against the applicant the week of 25 September 2023.³
5. The CJC posted its new Review Procedures (2023) on its website after 17 October 2023. No new By-laws were made public at all material times, however.
6. The *Judges Act* does not provide for notification of the chief justice of the court of which Noel J. is a member (the Supreme Court of Newfoundland and Labrador). Section 93 of the *Judges Act* requires that Noel J. be notified only: 'the reviewing member shall give the judge who is the subject of the complaint an opportunity to make written submissions about the complaint within the time limit established by the Council for the purpose of this section.'
7. Section 7.3(1) of the new Review Procedures mandates notification of the chief justice: 'in accordance with s. 93 of the Act, the reviewing member shall give

² *National Council of Canadian Muslims v. Canada (Attorney General)*, 2022 FC 1087 (CanLII), paragraph 207

³ *Memorial University of Newfoundland v. Oleynik*, 2023 NLSC 126 (CanLII)

the judge who is the subject of the complaint, as well as their chief justice, an opportunity to make submissions in writing'.⁴

8. The Honourable Tracey K. DeWare, the Chief Justice of the Court of King's Bench of New Brunswick and Vice-Chair of the Judicial Conduct Committee, dismissed the complaint on 27 February 2024. She found that 'that [the applicant's] allegations against Justice Noel are not only unsupported but, wholly without merit and were made for an improper purpose as provided by paragraph 90(1)(a).' The CJC decision does not address the key allegation, Noel J.'s consistent refusal to protect and maintain the integrity of court records and his choice to publish and disseminate documents whose contents were changed *ex post*.
9. The CJC notified the applicant of the reviewing member's decision on 28 February 2024. As per Section 18.1(2) of the *Federal Courts Act, R.S.C., 1985, c. F-7*, 'an application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board.'
10. After receiving the decision, the applicant contacted the CJC seeking clarification of two issues:
 - a. Has the CJC determined that the publication and dissemination of documents that were, beyond a reasonable doubt, modified or altered, 'fall within the ambit of judicial discretion'?
 - b. What was the ground for soliciting the comments from the judge's Associate Chief Justice?
11. No response has been received.
12. The applicant respectfully submits that the CJC decision to dismiss his complaint as unfounded, wholly without merit and 'made for an improper purpose' is unreasonable and should be set aside on the following grounds:
 - a. The CJC neither identified nor applied a test for distinguishing between matters that constitute judicial decision-making and matters

⁴ Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges (emphasis added)

that threaten the judiciary as a whole, which constitutes a **reviewable error of law**.

b. The CJC decision lacks internal coherence and a rational chain of analysis as far as the allegation of the publication and dissemination of altered documents (the first count of the alleged misconduct) and the provision of inaccurate information to the applicant (the third count of the alleged misconduct) are concerned. It is unclear whether the publication and dissemination of documents that were, beyond a reasonable doubt, modified or altered, ‘fall within the ambit of judicial discretion.’ The same goes for the provision of inaccurate information. This aspect ‘of the decision maker’s reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency’⁵ constitutes a **reviewable error of mixed fact and law**.

c. The notification of the chief justice of the Supreme Court of Newfoundland and Labrador made the applicant a party in the matter of judicial misconduct in the circumstances of the case, notwithstanding the caveat that ‘a complainant does not have standing in a matter related to judicial misconduct’.⁶ The decision to notify the chief justice extends the scope of CJC’s duty of procedural fairness owed to the applicant. The lack of procedural fairness constitutes a **reviewable error of law**.

13. This Court established a test for determining the scope of CJC’s reviewable decisions: ‘judicial councils have the expertise to make the distinction between matters that constitute judicial decision-making — that can be addressed by an

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, paragraph 94

⁶ Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges, Section 4.2(2)

appeal — and matters that threaten “the integrity of the judiciary as a whole” — that cannot be addressed by an appeal”.⁷

14. When determining if ‘a judge’s conduct in the course of judicial decision-making can give rise to judicial conduct that must be addressed under the Judges Act,’ this Court, following the highest’s Court guidance, held that ‘these exceptional cases are limited to occurrences where the conduct created a loss of public trust and concerns about the integrity of the judicial function itself’.⁸

15. The relevant highest Court’s ruling reads:⁹

‘In some cases... the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole.’

16. The CJC chose not to address the question as to whether Noel J.’s repeated refusal to protect the integrity of court records and his choice to publish and disseminate documents whose integrity was compromised beyond a reasonable doubt threatened the integrity of the judiciary as a whole.

17. In the applicant’s respectful view, it did. He expressly opined in the complaint that the first count of the alleged misconduct is most important being sufficient to warrant CJC’s intervention. The applicant relied on the Law Society of Ontario Tribunal’s decision:¹⁰

‘The public cannot trust the integrity of court records and the independence and fairness of the justice system. A public perception that there is corruption in the administration of justice, however small, must be taken seriously even if not yet proven.’

18. The issue of the judge’s duty to maintain and protect the integrity of court records cannot be adequately addressed by an appeal. By using the appeal

⁷ *Lochner v. Canada (Attorney General)*, 2021 FC 692 (CanLII), paragraph 100

⁸ *Patel v. Canada (Attorney General)*, 2023 FC 922 (CanLII), paragraph 79

⁹ *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 (CanLII), [2002] 1 SCR 249, paragraph 58

¹⁰ *Law Society of Ontario v. Zappia*, 2019 ONLSTH 159 (CanLII), paragraph 32

process, the applicant seeks to set aside Noel J.'s decision dated 9 June 2023.¹¹ Its scope does not include Noel J.'s alleged misconduct threatening the integrity of the judiciary as a whole.

19. The duty to protect and maintain the integrity of court records should be reaffirmed independently of the outcomes of the appeal because of its public importance, the applicant submits. The Court of Appeal has no mandate to determine if Noel J.'s repeated refusal to protect the integrity of court records and his choice to publish and disseminate documents whose integrity was compromised beyond a reasonable doubt constitutes the misconduct undermining public trust and raising reasonable concerns about the integrity of the judicial function itself.
20. Furthermore, the appeal is currently postponed pending the chief justice's determination.¹² The chief justice heard the underlying matter on 27-28 September 2023 without issuing his decision to date. In those circumstances, neither the underlying issue is moot, nor the applicant can be accused of trying to rehear the matter already decided, *chose jugée*.
21. The inadequacy of CJC's reasons constitutes the second ground of this appeal. With due respect, it is neither intelligible nor transparent how the publication and dissemination of documents that were, beyond a reasonable doubt, modified or altered, refer to 'the discretion to comment and ask questions on the evidence and the submissions presented' highlighted by the Honourable Tracey K. DeWare.
22. By notifying the chief justice of the Supreme Court of Newfoundland and Labrador, who has been a case management judge in the matters involving the applicant since September 2023, the CJC made the applicant a party to the matter of judicial misconduct. An informed and reasonable observer anticipates that the applicant will likely be penalized again for raising the issues of the integrity of court records and the judge's refusal to protect it.¹³ The applicant's

¹¹ *Oleynik v. Memorial University of Newfoundland*, 2023 NLSC 86 (CanLII)

¹² *Oleynik v Memorial University of Newfoundland*, 2023 NLCA 29 (CanLII)

¹³ *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 99 (CanLII), paragraph 3

personal interests are adversely affected as a result of the notification of the chief justice.¹⁴


This application will be supported by the following material:

1. The amended complaint made against Noel J. with attachments (some attachments were provided to the CJC in electronic form and the applicant intends to supply the Court and the opposing party with their copies in the same format),
2. Correspondence to the CJC dated 15 September 2023,
3. Correspondence to the CJC dated 19 September 2023,
4. Exchanges between the applicant and the CJC dated 21-22 September, 8 and 24 October 2023,
5. Metadata of the CJC Review Procedures (2023) posted on its website after 17 October 2023,
6. CJC's decision communicated on 28 February 2024,
7. Correspondences to the CJC dated 28 February and 4 March 2024.

The applicant requests that other material relevant to this application that is in the possession of the Canadian Judicial Council be filed and served pursuant to Rule 317 of *Federal Courts Rules*, SOR/98-106.

March 18, 2024

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____
day of _____ MAR 18 2024 A.D. 20 _____
Dated this _____ day of _____ MAR 18 2024 _____


Dr. Anton Oleynik, the Applicant,
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¹⁴ Cf. *National Council of Canadian Muslims v. Canada (Attorney General)*, 2022 FC 1087 (CanLII), paragraph 201