CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

Ottawa, Ontario K1A 0W8

9 April 2014

Ms Sheila Block
Torys LLP
79 Wellington Street West
Suite 3000
Toronto, Ontario M5K 1N2

Dear Ms Block:

I am writing pursuant to instructions from Chief Justice Michael MacDonald, Chairperson of the Judicial Conduct Committee of Council, in respect of a letter dated 4 April 2014 you sent to Ms Suzanne Côté, Independent Counsel in the Douglas matter.

In your letter, you make reference to the Federal Court decision in *Douglas* v. *Canada* (2014 FC 299). You appear to suggest that the decision stands for the proposition that the role of Independent Counsel "is inconsistent with the creation of a solicitor-client relationship" and that, as a result, Ms Côté does not have a solicitor-client relationship with "the CJC."

You make reference to paragraph 167 of the Federal Court decision. The full paragraph reads as follows:

> [167] The content of the CJC *By-laws* and Policy statements that relate to the role of the Independent Counsel reflects the intent to carve out a position at arms-length from both the CJC and the Inquiry Committee to ensure fairness **in the presentation of the evidence to the Committee. In that role**, Independent Counsel has no client. **That role is inconsistent with the creation of a solicitor-client relationship** if the letter and spirit of the *By-laws* and Policies are to have any real meaning.
>
> (Our emphasis)

Those comments clearly pertain to Independent Counsel's duties in presenting the case – and the evidence – to the Inquiry Committee. In that role, according to Justice Mosley,

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there is no solicitor-client relationship. However, Justice Mosley did not go so far as to state that a solicitor-client relationship can never be formed with respect to matters outside of the presentation of the case to the Committee.

Further, the decision of the Federal Court is quite fact-specific. Justice Mosley did not make any findings in regard to the nature of the relationship between Ms Côté and Chief Justice Wittmann (now succeeded by Chief Justice MacDonald). On the contrary, Justice Mosley specifically noted that he was not aware of the exact scope of the mandate given to Ms Côté and that the nature of Ms Côté's relationship to "the CJC" was not relevant to his determinations of the issues before the Court (¶ 173):

> The fact that the present Independent Counsel asserts a solicitor-client relationship with the CJC is, in my view, irrelevant as the parameters of her appointment, not disclosed to the Court, may be significantly different from those which pertained to Mr. Pratte's appointment.

Chief Justice MacDonald is of the view that the relationship between Ms Côté and himself, in his capacity of Chairperson of the Judicial Conduct Committee of Council, is one of solicitor and client in certain key respects. That said, Chief Justice MacDonald confirms that no instructions whatsoever have been given to Ms Côté in respect of the presentation of the case to the Inquiry Committee. Chief Justice MacDonald agrees with the Federal Court's finding that the role of Independent Counsel is "not that of a free-standing public office" but that the role is to further, in the public interest, the objectives of the Inquiry Committee and the CJC to inquire into whether or not a recommendation should be made that a judge be removed from office.

Notwithstanding his view that a solicitor-client relationship exists with Ms Côté, and the fact that the Federal Court decision on the solicitor-client relationship with Mr Pratte might be appealed, Chief Justice MacDonald has decided that it would be in the public interest to disclose the Pratte communications that were before the Federal Court under seal. Without waiving privilege or abandoning any right of appeal on this issue, Chief Justice MacDonald has therefore authorized me to share with you the communications with Mr Pratte, for the following reasons.

First, there is a strong public interest that the Douglas matter proceed forward in a timely manner without any further delays. In our view, the release of the Pratte communications should facilitate a resumption of the Inquiry Committee proceedings, and is therefore desirable. Second, upon reviewing the Pratte communications and all of the evidence, the Federal Court found that the nature of the relationship between Independent Counsel and

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the Vice-chair of JCC did not result in any institutional bias and that there was "no suggestion that the Vice-Chair of the JCC, or anyone else from the CJC interfered with Mr Pratte's presentation of evidence and submissions to the Inquiry Committee" (¶ 197 & 200). It should be emphasized that the Pratte communications related to whether Mr Pratte was acting beyond the scope of his mandate when filing, on his own motion, a judicial review of the Inquiry Committee's interlocutory decision. As was found by Justice Mosley at paragraphs 198 and199, "the scope of the Independent Counsel's appointment is not without limits" and "[t]he duty of fairness… does not require that Independent Counsel be recognized as having standing, in his or her own right, to challenge interlocutory decisions of the Inquiry Committee." It was the Vice-Chair of the JCC's view that Mr Pratte was in fact acting outside his mandate, as was suggested to him in these communications. Third, the Pratte communications are irrelevant in respect of the ongoing relationship between Chief Justice MacDonald and the current Independent Counsel and the ability of the Inquiry Committee proceedings to proceed. For all of these reasons, it is Chief Justice MacDonald's view that it is in the public interest to release the Pratte communications at this time.

Accordingly, please find attached the following communications, which are provided without waiving privilege generally or abandoning any right of appeal of the Federal Court's decision:

- Letter from Mr Sabourin to Mr Pratte dated 29 August 2011;
- Letter from Mr Pratte to Mr Sabourin dated 20 August 2012;
- Letter from Mr Sabourin to Mr Pratte dated 24 August 2012;
- Letter from Mr Pratte to Mr Sabourin dated 26 August 2012.

Yours sincerely,

Norman Sabourin
Executive Director and Senior General Counsel

Encls.

cc: Ms Suzanne Côté

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de la magistrature

Ottawa, Ontario K1A 0W8

CONFIDENTIEL

Notre référence : 10-0216; 10-0119

Le 29 août 2011

Me Guy Pratte
Borden Ladner Gervais
World Exchange Plaza
100, rue Queen Bureau 1100
Ottawa (Ontario) K1P 1J9

Maître,

Au nom du juge en chef Neil Wittmann, vice-président du Comité du Conseil sur la conduite des juges, je vous remercie d'avoir accepté d'agir comme avocat indépendant dans l'affaire de l'enquête publique sur la conduite de l'honorable A. Lori Douglas de la Cour du Banc de la Reine du Manitoba.

Le mandat de l'avocat indépendant est unique. Il consiste à présenter l'affaire au comité d'enquête en conformité avec les principes de justice fondamentale. Dans l'exercice de votre mandat, vous devez agir de manière indépendante et dans l'intérêt public. Vous voudrez sans doute vous guider sur la *Politique sur l'avocat indépendant*, que le Conseil a adoptée en 2010 (copie ci-jointe); cependant, vous ne recevrez aucune instruction particulière du Conseil relativement à cette affaire. Cela étant dit, je serai à votre disposition si vous avez des questions quelconques au sujet du processus. Je serai aussi responsable de toute question administrative ou gestionnaire concernant votre nomination.

Comme vous le savez, le juge en chef Wittmann a nommé trois membres de la magistrature au comité d'enquête : l'honorable Catherine Fraser, juge en chef de l'Alberta (présidente), l'honorable Warren Winkler, juge en chef de l'Ontario, et l'honorable Jacqueline Matheson, juge en chef de la Cour suprême de l'Île-du-Prince-Édouard. Le ministre de la Justice est censé nommer deux avocats au comité d'enquête avant le 6 septembre 2011.

Le comité d'enquête retiendra sans doute les services de son propre avocat qui le conseillera sur le déroulement de l'enquête.

M[e] Sheila Block, du cabinet d'avocats Torys de Toronto, représente la juge en chef adjointe Douglas dans cette affaire.

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Je vous envoie une copie des deux plaintes initiales qui ont amené le comité d'examen à décider de constituer un comité d'enquête. J'ai fourni cette information à la juge en chef adjointe Douglas, mais je ne la fournirai pas au comité d'enquête. Il vous appartiendra de décider si et, dans l'affirmative, comment vous voulez fournir les plaintes initiales au comité d'enquête.

Veuillez noter que l'une des deux plaintes est de source anonyme et qu'elle comporte des photos numériques et des fichiers HTML sur disques compacts. Certaines de ces photos montrent la juge en chef adjointe Douglas nue et sont donc **de nature délicate**. Veuillez également noter que M[e] Block s'est fortement opposée à ce que le Conseil fasse usage de ces photos, mais que cette position a été constamment rejetée aux différents stades d'examen de cette affaire jusqu'à présent. Par ailleurs, le comité d'examen a exprimé l'avis que ces photos sont facilement accessibles sur Internet.

Je vous fournis aussi une copie des motifs de la décision du comité d'examen dans cette affaire. Ces motifs ont été fournis à la juge en chef adjointe Douglas. Il vous appartiendra de décider quel usage vous voulez faire des motifs de la décision du comité d'examen.

En plus de la *Politique sur l'avocat indépendant* mentionnée plus tôt, je vous fournis également une copie d'autres politiques du Conseil, du *Règlement administratif du Conseil canadien de la magistrature sur les enquêtes* et d'autres documents pertinents.

Il y a peu de temps, j'ai reçu du cabinet de M[e] Block une demande de détails à propos des enquêtes que le Conseil a tenues dans le passé, y compris les « Avis des détails des allégations » qui ont été fournis aux juges dans ces affaires antérieures. J'ai refusé d'acquiescer à cette requête et j'ai indiqué que toute demande de renseignements concernant le processus à suivre dans l'affaire de la juge en chef adjointe Douglas devrait vous être adressée. J'ai pris cette position pour les raisons suivantes. Le processus a changé l'an dernier, comme suite aux modifications qui ont été apportées au *Règlement administratif sur les enquêtes* et aux instruments connexes. De plus, dans le passé, la délivrance d'un « Avis des détails des allégations » était laissée à la discrétion de l'avocat indépendant; en fait, il n'y a aucune obligation de délivrer un tel avis (il y a sans doute d'autres moyens d'assurer le respect de l'exigence du *Règlement administratif sur les enquêtes* voulant que « l'avocat indépendant donne au juge, à l'égard des plaintes ou accusations que le comité d'enquête entend examiner, un préavis suffisamment long pour lui permettre d'offrir une réponse complète »). En outre, je suis d'avis qu'un comité d'enquête est maître de sa propre procédure et qu'il ne peut être lié, en tant que tel, par des décisions de procédure prises antérieurement par d'autres comités d'enquête. Il se peut donc que vous receviez de M[e] Block une demande de renseignements concernant les enquêtes que le Conseil a tenues dans le passé.

Comme suite à nos discussions, je confirme que le Conseil est en mesure de vous offrir des honoraires [redacted]

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[redacted] Permettez-moi de souligner que, de l'avis du Conseil, le montant horaire et le total de vos honoraires professionnels relèvent du secret professionnel de l'avocat.

Vos factures de services professionnels devraient être envoyées à mon attention mensuellement, de façon à ce que toute question financière ou administrative puisse être soulevée dans les meilleurs délais, le cas échéant. Ces factures devraient être **accompagnées d'une lettre** indiquant ce qui suit : le nombre total d'heures facturées; le montant total des honoraires professionnels; le montant total des débours. Les détails des travaux accomplis devraient être indiqués **en annexe** à vos factures.

Si vous décidez que vous avez besoin de services de recherche ou d'une autre forme d'assistance pour réaliser votre mandat, veuillez m'en aviser à l'avance pour que nous puissions nous entendre de manière satisfaisante sur les dépenses additionnelles que cela pourrait entraîner.

Je vous signale que le Conseil va publier, en temps voulu, un communiqué de presse pour annoncer les noms des membres du comité d'enquête ainsi que votre propre nomination et, de façon générale, pour décrire les prochaines étapes du processus (vous recevrez à l'avance une copie de ce communiqué). Je serai le porte-parole du Conseil; cependant, il se peut fort bien que vous receviez des demandes de renseignements de la part des médias. Ce sera à vous de décider comment répondre à de telles demandes.

Mon personnel et moi serons à votre disposition pour vous aider à résoudre toute question administrative qui pourrait faciliter la réalisation de votre mandat.

En vous souhaitant de mener à bien cette tâche importante, je vous prie de recevoir, Maître, l'assurance de ma considération.

Le directeur exécutif et avocat général principal,

Norman Sabourin

P. j.(s)

Guy J. Pratte
T 613.787.3521
gpratte@blg.com

Borden Ladner Gervais

August 20, 2012

Delivered by Courier

Norman Sabourin
Executive Director and Senior General Counsel
Canadian Judicial Council
150 Metcalfe Street
Ottawa, ON K1A 0W8

Dear Sir,

Re: Inquiry into the conduct of ACJ Lori Douglas of the Manitoba Court of Queen's Bench

Further to our telephone call late Friday afternoon, wherein you asked me to consider certain matters before filing any application for judicial review pertaining to the Inquiry Committee's July 27, 2012 ruling by which it claimed that it had the power to instruct its own counsel to conduct cross-examinations on its behalf, I wish to advise that I have decided to go forward with the Application, a copy of which is enclosed.

In the circumstances, it is appropriate that I should briefly respond to the points you asked me to consider.

First, you suggested that the application may be premature since the CJC can ultimately reject any finding of fact that the Inquiry Committee may have made. It is not immediately apparent to me how the CJC could do that in the specific circumstances of this case. For example, findings on credibility may be made based on a number of pieces of evidence, some of which may be tainted and others not. Moreover, beyond any surgical analysis of the evidence, the fundamental reason the appropriateness of the Committee relying on its own counsel to conduct examinations must be clarified now, is that continuing the practice adopted by the Committee seriously runs the risk of violating the very raison d'être of the Independent Counsel in the first place. According to the Policy on Independent Counsel:

> "This allows Independent Counsel to present and test the evidence forcefully, without reflecting the predetermined views of the Committee or the Council."

In my respectful view, by confounding the roles of Committee Counsel and Independent Counsel, the Committee is not only acting beyond its jurisdiction, but risking tainting the entire process with an appearance of bias. Should that happen, nothing can be done retroactively to cure the

damage done. It is therefore in the public interest that the situation be clarified now, rather than risk having to begin the entire process anew at a later time.

Secondly, you suggested that Independent Counsel may not have the authority to challenge a decision of the Committee because the Policy stipulates that he is "subject to the rulings of the Inquiry Committee". As you know, Independent Counsel has already abided by various discretionary rulings of the Committee, including that by which the Committee afforded standing to Mr Chapman and a right to counsel, over my objections. I respectfully suggest, however, that the Policy cannot apply to rulings that go beyond the Committee's jurisdiction and which fundamentally alter the role of Independent Counsel. Indeed, the policy, if it were intended to go as far as you suggested, would in my view violate the Bylaws which create the position of Independent counsel (s. 3) and violate the principles of fairness by which the Committee is bound (s.7).

Thirdly, you suggested that the CJC might not pay the fees incurred by Independent Counsel should he pursue any application for judicial review in Federal Court. I refrain from commenting on the appropriateness of this suggestion other than to repeat what I told you in this regard, namely, that if necessary I am prepared to undertake this matter of fundamental principle on a *pro bono* basis.

In essence, both the July 27, 2012 ruling of the Committee and the points you raised with me strike at the very core of the raison d'être of the "Independent Counsel". If the Committee is correct that it can cross-examine witnesses aggressively through its own counsel, and if you are correct that Independent Counsel is powerless to clarify in a court of law the proper allocation of roles between Committee counsel and Independent Counsel notwithstanding the Bylaws and the Policies adopted by the CJC, then the notion of "Independent Counsel" is for all practical purposes a hollow one.

Accordingly, I respectfully submit that it is in the public interest to know now which view of the role of Independent Counsel is the correct one.

Yours very truly

Guy J. Pratte
GJP/slg

Encl.
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Ottawa, Ontario K1A 0W8

PROTECTED
Solicitor-client privilege

24 August 2012

Mr Guy Pratte
Independent Counsel appointed by the CJC
in the matter of the Douglas Inquiry
Borden Ladner Gervais LLP
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9

Dear Mr Pratte:

I am writing further to your letter of 20 August 2012, informing me of your decision to file an application for judicial review before the Federal Court in the Douglas matter. For absolute clarity, I wish to note that this communication is subject to solicitor-client privilege, one which rests with the Canadian Judicial Council, your client.

My intent, in speaking with you on Friday the 17th, was to raise questions with you, to the extent such questions could be useful. As I made clear at the time, those questions were designed to invite you to reflect on the course of action you were proposing to follow. I raised these questions because I was informed of your proposed course of action by a third party, and was surprised to learn of your proposed unprecedented action of seeking judicial review in the Federal Court of Canada. As a minimum, it seems to me it would have been appropriate for you to seek clarification about your mandate from Chief Justice Wittmann, who appointed you Independent Counsel in this case. As I noted to you during our conversation, my duty in these circumstances is to seek direction from Chief Justice Wittmann. I have now done so and he has asked me to write as follows.

Chief Justice Wittmann notes that allegations or complaints against federally-appointed must be reviewed fairly and expeditiously, in the public interest. This accords with Council's duties under the *Judges Act*. Chief Justice Wittmann is of the view that the very essence of the function of Independent Counsel is to assist the Inquiry Committee in

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carrying out its duties. Independent Counsel is neither akin to a Crown counsel in a criminal matter, nor to a representative of a party in a civil matter. Independent Counsel is not an office holder acting without any constraints. As is the case for all appointments of Independent Counsel by the Canadian Judicial Council, you were appointed to carry out a specific mandate. That mandate originates with the Canadian Judicial Council, specifically with Chief Justice Wittmann, who appointed you in his capacity as Vice-chairperson of the Judicial Conduct Committee in accordance with s. 3(1) of the *Canadian Judicial Council Inquiries and Investigations By-laws*. While Independent Counsel is expected to act at "arm's length" from the Council (and the Inquiry Committee), Independent Counsel must act within the framework of the legislation, the by-laws and the policies of the Council. That was made clear to you at the time of your appointment. The fact remains, that you are the lawyer and the Canadian Judicial Council, through Chief Justice Wittmann, is the client.

Nowhere is it contemplated that Independent Counsel's authority or discretion includes the filing, of their own motion, of an application for judicial review of decisions rendered by an Inquiry Committee. Chief Justice Wittmann is of the view that this specific action is contrary to Independent Counsel's main responsibility, which is to assist the Inquiry Committee by marshalling the evidence and presenting the case. Independent Counsel's mandate is not to unilaterally decide what lines of inquiry can and cannot be pursued by an Inquiry Committee. Furthermore, your application for judicial review raises issues that go well beyond this specific case and are essentially policy matters that are properly for the Canadian Judicial Council itself to raise or to consider.

In relation to this specific inquiry, your objections to the authority of the Inquiry Committee to "act on its own to explore additional issues," as reflected in Council's *Policy on Inquiry Committees*, is contrary to the very purpose and nature of an Inquiry Committee. In this context, it is difficult to see how your challenge of the Inquiry Committee's authority can be justified, considering the public interest.

When speaking with me on 17 August, you mentioned on a number of occasions that you were ready to resign as Independent Counsel. You also indicated to me that you had communicated to the Inquiry Committee that you were not available for further hearings until February 2013 and were concerned that the Committee might impose on you earlier sitting dates. These comments raise doubts about your willingness to carry out your duties on a timely and effective basis, in the public interest, even if you had not filed an application for judicial review.

Chief Justice Wittmann has also advised that the Canadian Judicial Council may seek intervener status in any judicial review application. One of the issues, never tested, is

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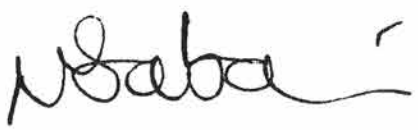
whether decisions of an Inquiry Committee are subject to judicial review at all, in light of Section 63 of the *Judges Act*, which states that an Inquiry Committee making an inquiry shall be deemed to be a Superior Court. It may be that the Canadian Judicial Council will take the position that decisions of an Inquiry Committee are not amenable to judicial review. Thus, under the peculiar circumstances that have arisen, the Canadian Judicial Council could be seen to be in the unseemly position of taking a position adverse to its Independent Counsel on this issue or the merits or scope of any judicial review.

For all these reasons, Chief Justice Wittmann comes to a view that a grave difference of opinion exists between you and the Canadian Judicial Council in regard to the terms of your mandate as communicated to you and as contemplated at the time of your appointment. This, and the other factors noted above, lead him to the conclusion that the lawyer / client relationship has been severely damaged. The mutual trust and confidence essential to the maintenance of the relationship between Independent Counsel and the Canadian Judicial Council cannot exist in these circumstances. Chief Justice Wittmann therefore invites you to withdraw your application for Judicial Review, having reconsidered the matter. Your early response would be appreciated.

Yours sincerely,



Norman Sabourin
Executive Director and Senior General Counsel

Guy J. Pratte
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Borden Ladner Gervais

August 26, 2012

Delivered by Email and Courier

Norman Sabourin
Executive Director and Senior General Counsel
Canadian Judicial Council
150 Metcalfe Street
Ottawa, ON K1A 0W8

Dear Sir,

Re: Inquiry Committee into the Conduct of ACJ Lori Douglas of the Manitoba Court of Queen's Bench and the Application for Judicial Review filed by Independent Counsel in relation to the decision of the Inquiry Committee, dated July 27, 2012 (the "Application")

I INTRODUCTION

Upon receipt of your letter of August 24, 2012, to which you requested an early response, I wish to advise that I have reached the conclusion that I have no option but to resign as Independent Counsel effective immediately.

I will attempt to limit my response to matters that are required to correct or complete the record. I do so with the utmost respect for those whose views differ from mine. However, I hope that, as Independent Counsel, I will not be begrudged the right to put my views on record before finally relinquishing my appointment. To the extent that I do not address any particular point made in your letter, it should not be assumed that I agree with it.

I will deal with the following issues:

1. The purpose of your call of August 17, 2012;
2. The scope of the mandate of Independent Council; and,
3. The alleged lack of willingness of Independent Council to prosecute this matter diligently in the public interest.

II DETAILED RESPONSE

1) The purpose of your call of August 17, 2012

I do not know what your intent was when you phoned me last Friday; who it was that told you of what I had been contemplating; or who told you to phone me. But I know this: at no point did you ever suggest that I should communicate with Chief Justice Wittmann to discuss my intentions with *him,* anymore than the concerns *you* were raising with *me.*

On the contrary, you suggested that you were simply communicating with me because of the candour with which our professional relationship had been imbued up to that time. Indeed, you made a number of candid comments during our conversation which I interpreted to be of a purely confidential nature and to which I accordingly made no reference whatsoever in my response of August 20, 2012.

In addition, we discussed at some length the three major points you made and to which I formally responded in my letter of August 20, 2012. For your part, you told me that you would consider my views carefully. Never did you suggest that my concerns were frivolous or dictated to me by anything other than my genuine appreciation of the public interest and of the applicable law.

In those circumstances, the suggestion that I should have called Chief Justice Wittmann is surprising since you never hinted that you were calling on his behalf, or that he wished me to call him, or that you thought I should. Moreover, my doing so would have been totally inconsistent with my understanding of my role as Independent Counsel, to which I now turn.

2) The Scope of the mandate of the Independent Counsel

As to the scope of my mandate, I agree that this question must be answered with reference to the *Council Inquiries and Investigation By-laws* (the "*By-laws*") and applicable policies.

In this regard, I note that s. 3 of the *By-laws* provides:

> (1) The Chairperson or Vice-Person of the Judicial Conduct Committee shall appoint an independent counsel, who shall be a member of the bar of a province having at least 10 years standing and who is recognized within the legal community for their ability and experience.
>
> (...)
>
> (3) The independent counsel shall perform their duties impartially and in accordance with the public interest.

As for the Council's *Policy on Independent Counsel*, it provides:

> The central purpose for establishing the position of Independent Counsel is to permit such counsel to act at "arm's length" from both the Canadian Judicial Council and the Inquiry Committee. This

> allows Independent Counsel to present and test the evidence forcefully, without reflecting any predetermined views of the Committee or the Council...
>
> The role of Independent Counsel is unique. Once appointed, Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel's best judgment of what is required in the public interest... [emphasis added]

The legal framework, therefore, makes it clear that no "normal" client-lawyer relationship is created as between the CJC and Independent Counsel, quite the opposite. Indeed, beyond actually making the appointment, *nothing* suggests that the Chair or Vice-Chair of the Conduct Committee, or anyone else at the CJC, could or should give *any* instructions to the Independent Counsel.

Furthermore, it should be made clear that at no time, either when I was appointed or subsequently, did Chief Justice Wittmann or you suggest that I was anything less than totally independent within the legal framework defined by those instruments. Indeed, on a number of occasions (including during our call on August 17, 2012), you personally confirmed this – presumably to ensure that the appropriate distance would be maintained.

Whether, as Independent counsel, I was justified in my view of the proper allocation of the roles between Committee counsel and Independent Counsel, is the question I believed a court should decide because, at the very least, that is a serious legal question – as you conceded when we talked.

That being said, you are incorrect when you suggest (p. 2, second full paragraph) that I object to the authority of the Committee to "act on its own to explore additional issues". Indeed, I explicitly noted that it could do so in the Application I filed in Federal Court (para. 12). The Committee could do that, indeed, but on their *own* - not through aggressive cross-examinations conducted by Committee counsel.

You also omit to quote from the *Policy on Inquiry Committees* the part that says that, "[s]ince counsel to the *Inquiry Committee counsel does not participate in the hearings*, they may assist in drafting rulings and the final report." [emphasis added]

You also fail to refer to the portions of Professor Ratushny's book (*The Conduct of Public Inquiries*, pp. 230-233) to which I referred the Committee on July 26, 2012, where it is made clear that the position of Independent Counsel was created in order to avoid any possibility that Committee counsel participating in the hearing would create an apprehension of bias. As you know, Professor Ratushny was involved in the establishment by the Council of the position of Independent Counsel and is surely a reliable authority as to the genesis and purpose of the creation of this unique role.

In my August 20, 2012 letter, I addressed the import of the statement contained in the *Policy on Independent Counsel* to the effect that, "Independent Counsel is...subject the rulings of the

Inquiry Committee..." In essence, I contended that, in light of the *raison d'être* and unique role of Independent Counsel, this could not mean that he was subject to rulings that went beyond the Committee's jurisdiction. I will only add, in this regard, that the *Policy on Council Review of Inquiry Committee Report* makes clear that Independent Counsel can make submissions to the Council which – presumably – may well diverge from the conclusions reached by the Inquiry Committee. Indeed, that is exactly what happened in the *Boilard* matter where Independent Counsel argued forcefully against the ruling of the Committee that it was appropriate for it to continue the investigation into Judge Boilard's conduct, contrary to the recommendation Independent Counsel had made to the Committee. What is more, the CJC ultimately adopted the views of Independent Counsel. It must follow that Independent Counsel is not bound to accept the Committee's rulings or views in all circumstances. That being so, and there being no avenue by which the entire CJC can be seized of interlocutory matters, the Federal Court was the only option.

You state that by Independent Counsel bringing the Application in Federal Court, the "...Council could be in the unseemly position of taking a position adverse to its Independent Counsel on this issue or the merits or scope of any judicial review" [emphasis added]. This statement presumes that the CJC and the Independent Counsel are in a "normal" client-lawyer relationship which, I respectfully submit, is manifestly not the case. First, as all tribunals whose decisions are challenged in Federal Court, the Attorney General of Canada would be representing the interests of the CJC, not the CJC itself (see Rule 303(1) of the *Federal Courts Rules*). Secondly, and more important, the fact that the CJC and the Independent Counsel might disagree in an open court as to the proper interpretation of the applicable law, including its By-laws and policies, would only attest to the CJC's commitment to the notion of *Independent* Counsel and the rule of law. I fail to see anything "unseemly" in that.

By threatening to terminate Independent Counsel's mandate if he does not withdraw the Application, whose purpose is essentially to delineate the proper scope of the Committee and his own authority, it seems to me that the CJC is choosing to determine the legal question of independent counsel's independence unilaterally. Whether that is a proper course to follow others may decide for themselves.

3) The alleged lack of willingness of Independent Counsel to prosecute this matter diligently in the public interest

Finally, I must address your suggestion (p. 2, third full paragraph) that my unavailability until February 2013 "raises doubts about (my) willingness to carry out (my) duties on a timely and effective basis, in the public interest, ..." That comment is unwarranted.

When I was appointed, I disclosed to you and Chief Justice Wittmann that I was involved in a very long joint trial of two massive class actions and that as a result there may be some constraint on my availability. Nevertheless, I believe that it is accurate to say that both Chief Justice Wittmann and you strongly expressed the wish that I accept to act as Independent Counsel – which I did.

Had our investigation not been delayed as a result of multiple challenges we experienced prior to the start of the hearings (the reasons for which you are perfectly familiar with) and, after the hearings formally started, as a result of the Committee's ruling that Mr Chapman was entitled to his own counsel, there is little doubt that the evidentiary phase could have been concluded, or at least substantially concluded this summer. I cannot accept that I am responsible for the fact that it could not.

Beyond that, and for reasons totally beyond my control, matters evolved such that I am required to be in court in Montreal on those class actions for virtually the totality of the next six months. For its part, the Committee advised – as I recall – that it was only available for a very limited period in November and December.

Still, I advised that I could, if necessary, be available for a week in early December, although it would be difficult for me as I would be in the middle of complex cross-examinations. I also advised that Ms. Crain could attend to complete a number of witnesses in my absence.

I have been completely forthright with the Committee on this score (through Mr. Macintosh) at all times. To suggest that there can any doubt about my willingness to carry on with this mandate with the same professional commitment as was evinced up until now, is an unfounded suggestion – to say the least. This is particularly so since the Committee in its recent oral and written decisions, has purported to express confidence in the quality of Independent counsel's work as well as the wish that I would continue in that role. I must presume that it did so well aware of my time constraints, as these had repeatedly been discussed with Mr. Macintosh, including as recently as one week or so *before* the Committee issued its written ruling on August 20, 2012.

III CONCLUSION

Notwithstanding the above, I have come to the conclusion that I have no choice but to submit my resignation as Independent Counsel. For it is impossible for me to withdraw the Application, as you have asked me to do, without doing violence to what I believe, after much consideration, to be a sound position in principle and in law, solely taken in the public interest.

On the other hand it is obvious that, if I have lost – as you state – the confidence of the person who appointed me on behalf of the Canadian Judicial Council (and assuming, as I must, that Chief Justice Wittmann in this respect reflects the views of the Canadian Judicial Council as a whole), it is not in the public interest to seek to have the appropriateness of the revocation of my appointment (as opposed to the merits of the Application I filed) debated further. For that might create the (incorrect) impression that I was seeking to aggrandize my personal role in the name of the public interest, rather than genuinely wishing to have a court elucidate and delineate the respective roles of the Inquiry Committee (including its counsel) and Independent Counsel. While I sincerely hope that these matters will some day be clarified in a transparent way, I am not prepared to run the risk that my personal motives might be questioned and thus obscure the important questions I believe need to be addressed.

I take this step with great reluctance, for it has been a great and singular honour for me to serve in the capacity of Independent Counsel. Indeed - if you allow a personal comment-, I vividly recall the pride I felt when Chief Justice Wittmann called me last summer to ask me to act as Independent Counsel. To be asked to serve the public interest, independently and solely, is a challenging task in and of itself - the more so in the unusual circumstances of this case. But to me, it was above all a matter of public duty which any lawyer should undertake if the opportunity is afforded to him or her.

I genuinely wish that I could have, in good conscience, completed the task that was given to me last summer. I deeply regret that no acceptable course of action is open to me other than to resign.

You can be assured that I and my colleagues at BLG will do everything possible to facilitate the transfer of this matter to whomever will be appointed in our stead.

Yours very truly

Guy J. Pratte
GJP/nc