

Court File No.: T-604-16

**IN THE FEDERAL COURT OF CANADA**

**B E T W E E N:**

**DONALD BEST**

**Applicant**

**- and -**

**THE ATTORNEY GENERAL OF CANADA**

**and**

**THE HONOURABLE MR. JUSTICE J. BRYAN SHAUGHNESSY**

**Respondents**

**MOTION RECORD**

**Volume One of Two**

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**NOTICE OF MOTION**

**By JULIAN FANTINO**

TAKE NOTICE THAT Julian Fantino will make a motion before Prothonotary Aylen in Ottawa at the Courthouse 90 Sparks Street Ottawa Ontario K1A 0H9 on Wednesday October 11, 2017 at 9:30 a.m. or so soon thereafter as the motion can be heard.

THE MOTION IS FOR an Order granting leave to Julian Fantino to intervene in this Application and for directions.

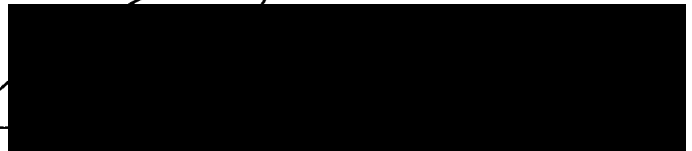
**THE GROUNDS FOR THE MOTION ARE**

1. This application is a judicial review of the decisions of the Canadian Judicial Council.
2. The Canadian Judicial Council is the tribunal appointed by Parliament to watch over Judges. In this matter no one speaks for mainstream Canadians who believe in and rely on fairness, transparency, and impartiality not only within the Judicial System but also the CJC.

- 2
3. The prospective intervener, the Honourable Julian Fantino, is an honoured and well known citizen of Canada who has made a career of serving the public as a leader in the law and police professions including as Cabinet Minister in the Federal Government.
  4. Mr. Fantino can assist this Honourable Court in a number of ways. He has specialized and general knowledge and expertise with respect to issues that are being examined by the Court.
  5. Rule 109

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

Affidavit of Julian Fantino. .



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**AFFIDAVIT OF JULIAN FANTINO**

I Julian (Giuliano) Fantino make oath and say as follows:

*I am applying to intervene in this court application which seeks to review a complaint disposition by the Canadian Judicial Council (CJC).*

1. I am a current member of the Queen's Privy Council for Canada. I was Member of the Parliament of Canada for the riding of Vaughan from 2010-2015. During that period I held the following posts at various times: Minister of State for Seniors; Associate Minister of National Defence; Minister for International Cooperation – Canadian International Development Agency, and Minister of Veterans Affairs.
2. Prior to that I had been Commissioner of the Ontario Provincial Police (2006-2010), Chief of Police of the Municipality of Metropolitan Toronto (2000-2005), Ontario's Commissioner of Emergency Management (2005- 2006), Chief of Police of London, Ontario Police Force (1991-1998), and of York Regional Police Force (1998- 2000). Before that I had been a Toronto police officer since 1969.
3. I notice that in this matter no one represents the people of Canada. Mr. Slansky represents Donald Best. The Attorney General of Canada represents the CJC and Mr. Wardle represents the Judge. No one speaks for me and other Canadians who believe in and rely

upon fairness, courtesy and honourable treatment within the justice system which includes the CJC.

4. I believe that my background, experience and life in service to the public make me suitable to assist the Court in assessing this matter. I am also aware of the rules of Expert Evidence and that my duty is to the Court.
5. Judicial independence is an important principle in the Canadian Justice System. That is all the more reason why Canadians must feel secure that the Canadian Judicial Council properly performs its function in dealing with complaints. The CJC was created by Parliament to serve the people of Canada and to maintain the integrity and high standards that people expect in their Justice System. It follows that full professional investigations and transparency should be the norm. Publicly defined standards for the CJC that are easy to access and easy to understand are of paramount importance to the mandate it received from Parliament, and for which it is accountable.
6. This would include ease of access by all Canadians and, where necessary, assistance by CJC staff trained to accommodate the different cultural, linguistic, and educational factors that are the hallmarks of our multi-faceted Canadian society. Not all Canadians have the skill set, educational background, or writing ability to properly compose a complete account of their concerns and complaints about their experiences in Court and how they are treated by Judges. Accordingly, I wish to contribute to this Court proceeding in evaluating and resolving the matters raised in regard to Mr. Best's Application.
7. I have reviewed the complaints by Mr. Best and the responses by the CJC as well as the factums that have been filed by Donald Best, Justice Shaughnessy, and the Attorney General of Canada in this Court.
8. I have reviewed transcripts of court hearings that are the subject matter of this Judicial Review hearing. I have also reviewed evidence which was filed before the Judge in the underlying legal action. Where I comment about some documents I have attached them as exhibits identified in the footnotes.
9. My belief is that there are records and other evidence which have not been identified or reviewed by the CJC. This case is a rare opportunity. It presents a matrix of thorough,

incontrovertible professional evidence of activities that took place out of the view of Canadians and that, in my opinion, needs to be investigated by the CJC.

10. Therefore this court and the CJC have a unique comprehensive window to address activities and facts that are not normally in view. Based upon my experience, I can comment as to where I believe the records are or should be located and how to obtain them.
11. There are a number of important issues which were overlooked when the CJC reviewed and dismissed the complaints. I wish to intervene to assist this Court and suggest that the matter should be further reviewed by the CJC in a manner that fairly addresses the issues that have been raised and especially those that the CJC overlooked or ignored.
12. In this affidavit I refer to Phase I and Phase II to define two time periods.
13. Phase I includes the period when Mr. Best was convicted of contempt of court and sentenced to prison in absentia (while he was not in Canada) upon the presentation by lawyers of provably false evidence during a private prosecution in a civil trial costs hearing. The court also convicted Mr. Best based upon affidavit evidence that was the product of illegal actions by a serving officer of the Ontario Provincial Police at the time that I was OPP Commissioner.
14. Further, my study of the court records and transcripts reveals serious questions about the validity of the procedures that resulted in Mr. Best's conviction. For instance, it is apparent that the court order dated November 2, 2009 that Mr. Best was found in contempt of, was actually made and signed by the Judge on November 12, 2009<sup>1 2 3</sup>; but was backdated ten full days.<sup>4 5 6 7</sup> This immediately put Mr. Best into contempt of the

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<sup>1</sup> Nov 12/09 Email from court files: (DB 000335) Ranking to Jackie Traviss, requesting Judge sign attached Order dated November 2, 2009, with hand-written note 'Nov 12/09 Order signed'

<sup>2</sup> Nov 16/2009 faxed letter: Best to Trial Coordinator Jackie Travis (DB 000119-b14) documenting phone call wherein Travis said Nov 2/09 court order was signed on Friday, Nov 13/09 and sent to Ranking on that day and Best did not receive the order.

<sup>3</sup> Nov 2/09 Transcript of Judge indicating he will make order in the future when lawyers settle upon the contents. Pg. 44 line 18 (DB 000112-g1-47) Judge "My order would reflect that ...",) page 46 line 27 (DB 000112-g1-49 Judge "So, I'd like you to pen that in to the draft order as well." Pages 68 to 69 start -71 line 31 (DB 000112-g1-71, -72) Ranking undertakes to 'redo the order. I'll have it circulated to Mr. Dewart, we'll have it approved as to form and content, and then send it out, presumably, to – to the court for signature."

<sup>4</sup> Nov 4/09 letter Ranking to Dewart (DB 005282) explaining that the draft order is again changed by Ranking and needs discussion etc. (ie: no order exists yet),

court order for failing to deliver business records to the prosecuting lawyers even before the Court Order existed. Further, the affidavit of service for this court order shows that the lawyers didn't send it to Best until November 18, 2009.<sup>8 9</sup>

15. The Order signed November 12<sup>th</sup> stated that past service of all documents on Mr. Best is validated- or in other words the Fresh Amended Motion Record first circulated among the lawyers the day before the Motion and not sent to Mr. Best was automatically and retroactively declared to be served on Mr. Best personally<sup>10</sup> even though there was no possibility that he could have received it since it was late and not sent to him. Mr. Best was advised there was a 'huge pile' of documents but he had not received them.

16. Also during this period the Judge allowed the court process to be used on an extra-jurisdictional basis that does not appear to be authorized by the Judges Act. That is to say the Judge improperly delegated his judicial power to the prosecuting lawyers<sup>11 12 13 14</sup> in order to interfere with and impact legal proceedings in other countries. The lawyers announced to the Judge on the court record that they were pursuing contempt of court

<sup>5</sup> Nov 16/09 Faxed Letter: (DB 005258) Ranking to all lawyers enclosing 'copy of the Order dated November 2, 2009 duly signed by His Honour Justice Shaughnessy.' Timeline supports Jackie Travis statement and email that order dated Nov 2/09 was only recently signed on Nov 12/09 and sent by court to Ranking on Friday Nov 13/09.

<sup>6</sup> Faxed copy of signed order dated Nov 2/09 (DB 000119-b8) showing Fax Date of Monday November 16, 2009 at 5:52pm. Further confirmation of Jackie Travis and other information that the order dated 'Nov 2/09' was actually received and then signed by the Judge on November 12 or 13, 2009 and then sent to Ranking on Friday November 13, 2009. Order requires Best to produce documents to Ranking one week prior to Nov 17/09 examination (ie: produce documents on Tuesday Nov 10/09 – two or three days before the Judge received and signed the order.)

<sup>7</sup> Nov 2/09 Transcript pages 10, 18 & 19 (DB 000112-g1-13, 21, 22).

<sup>8</sup> Sworn affidavit of Jeannine Ouellette dated November 24, 2009 (DB 00119-b18) stating that on November 18, 2009 she sent to Best in Kingston, Ontario via courier, a package that included a November 18, 2009 letter from Ranking to Best that included for the first time sent to Best, a copy of the signed court order dated Nov 2/09.

<sup>9</sup> November 18, 2009 Letter from Ranking to Best (DB 005191) that included (for the first time) the signed court order dated November 2, 2009 (that was actually signed on November 12<sup>th</sup> or 13<sup>th</sup>, 2009).

<sup>10</sup> Order signed November 12<sup>th</sup>, 2009 (DB 000192-3)

<sup>11</sup> The lawyers who brought the cost motion and contempt motion included all of the lawyers who were acting for the Defendants. (DB 000115-i2C2-1 thru 8).

<sup>12</sup> June 8, 2009 transcript (line 18) (DB 001100-1s-8): wherein Ranking advises Judge the defendants are filing the Zagar Affidavit and CDs for use in Florida: *"And the documents that - that - so the Minutes of Settlement that we're filing, we want filed and endorsed as filed by Your Honour, so that they are a matter of public record should we need to have reference to them in the Miami proceedings..."*

<sup>13</sup> June 8, 2009 transcript page 32 & 33 (DB 001100-1s-35, -36): Justice Shaughnessy allows filing of Zagar Affidavit and CDs for use in Florida, and also allows lawyers to continue to file documents in the court record on their own (for use in other jurisdictions) even though the case is settled and over.

<sup>14</sup> June 8, 2010 Endorsement by Justice Shaughnessy (DB 000313-2) authorizing filing of the Zagar Affidavit and CDs even though the case is settled and "... further material are to be permitted to be filed."

charges against Best in Toronto to gain evidence for a trial in Miami, Florida<sup>15</sup>. They advised that even if they received costs payments, they would not relent (or abandon the contempt proceedings) unless other people in Florida and elsewhere settled their own cases in their own jurisdictions.<sup>16</sup>

17. Further, this prosecution and eventual imprisonment of Mr. Best was being carried out in the name of a purported client that did not exist.<sup>17 18 19</sup> The CJC should investigate how this offshore non-person received substantial funds in court costs which raises questions about possible money laundering and currency control violations. .

18. Phase II was when Mr. Best returned to Canada to prove that the Court had been misinformed and mistaken when it found him in contempt. As a self-represented litigant, he asked that the original Order should be set aside along with the sanctions, which included a prison sentence and a fine. The Judge had earlier acknowledged that Mr. Best

<sup>15</sup> June 8, 2009 transcript page 8 (line 16) (DB 001100-1s-11): Ranking states that the Defendants will not release Best from contempt of court in the settlement, and will pursue him later to facilitate collection of evidence for the Miami action: *"because Mr. Best was so intimately involved with Mr. McKenzie in - in - in sitting in as the nominal plaintiff for Nelson Barbados, would he in fact have very germane evidence if compellable, to deal with the action in Miami?"*

<sup>16</sup> December 2, 2009 Transcript pages 46 to 49: (DB 000109-15b2-49 thru -52) December Ranking says he speaks for all and won't settle unless other jurisdictions are included. *"...I can tell you that there have been rumblings about actions being commenced in Florida. So, I am more than happy to settle this case today if my client were paid the caveat that I would insist upon, is that anybody related to- whether it's John Knox or Marjorie Knox, or whoever is behind all of this, provides a full and final general release that my client, and I'm sure I speak for all the defendant's, will not be sued anywhere else, because that is a legitimate concern."*

<sup>17</sup> Mr. Best continuously raised the issue that Mr. Ranking's client 'PricewaterhouseCoopers East Caribbean Firm' did not exist, despite Mr. Ranking's on the record assurance that it was a Barbados registered entity. The Judge did not deal with this and ended up approving a million-dollar payment to a non-existent company out of the jurisdiction. See Affidavit of Barbados lawyer Alair Shepherd (DB 000106-14c).

<sup>18</sup> [DB 000118-i3bg32] Barbados Business Registration and name change. When cross-examining Best on January 23, 2013, lawyer Gerald Ranking filed as an exhibit a Barbados Business Registration and name change for 'PRICEWATERHOUSECOOPERS EAST CARIBBEAN' as purported evidence that his client 'PricewaterhouseCoopers East Caribbean FIRM' existed as a registered Barbados entity. As he read out the document into the record, Ranking falsely added the word 'FIRM' on the end of the actual name shown on the document. Mr. Best laughed, pointed out that the document did not say what Ranking had stated orally on the record, and accused him of fraud. The document actually records that a Barbados business partnership named 'PricewaterhouseCoopers' existed from 1998, and changed its name to 'PRICEWATERHOUSECOOPERS EAST CARIBBEAN' on June 23, 2011. This name change (which did not use the word 'Firm' and so still didn't carry the name of Ranking's purported client) happened a year after the Nelson Barbados case ended, 18 months after convicting Best of contempt, and after 3 years of litigation in front of Justice Shaughnessy. Ranking's tendering of this document and the after-the-fact 2011 attempted name change indicates that his purported client 'PricewaterhouseCoopers East Caribbean Firm' did not exist at any time and that he used this phony non-entity to imprison Best and collect almost a million dollars in court costs.

<sup>19</sup> Transcript January 23, 2013 cross-exam of Best pages 406 – 411 (DB 005407-146 thru -151) showing the exchange when Ranking filed the Barbados business registration and name change.

would be entitled to purge his contempt<sup>20</sup>. In response to a motion by Mr. Best seeking to set aside the conviction and sentence, the Judge had issued a stay on the original order to allow Mr. Best to return to Canada.

19. The record shows that after Best requested a review of his conviction and sentence, the Judge refused to consider his fresh exculpatory evidence (including but not limited to secretly made and forensically certified voice recordings of a telephone call with the lawyers that showed they placed false evidence before the Judge<sup>21 22</sup>, refused to allow Best to cross-examine<sup>23 24</sup> the lawyer-witnesses, their clients and 'private investigator' James Van Allen, who together provided the false evidence that the court used to convict and sentence Best. I cannot recall any other case where a Canadian was convicted and sentenced *in absentia* (when the accused was not present) upon provably false and/or illegally sourced evidence, and was then refused the basic right to cross-examine the witnesses and accusers that the court relied upon to convict and sentence.
20. The judge then in court and on the record reaffirmed the original Conviction Order containing a sentence of 3 months and lifted the stay on the original Committal Warrant. Court ended and the Judge left the courtroom. The courtroom staff ended their duties and Mr. Best was taken away to prison.
21. Then, in Mr. Best's absence, in a backroom and off the court record with no transcript and no endorsement on the record, the Judge secretly created a new Warrant of Committal and increased Best's time to be served in prison by 50%.<sup>25</sup> The materials

<sup>20</sup> Transcript January 15, 2010 p. 38 Line 12 (DB 000109-15b3-41)

<sup>21</sup> Transcript December 11, 2012, pages 24 & 25 (DB 000107-14a-27, -28) Justice Shaughnessy mistakenly says that the motion before him is only to purge Best's contempt, and refuses to consider new evidence; especially any showing maleficence by lawyers Ranking and Silver. *"And again, I just remind Mr. Best, your application brought by your then counsel, was to purge the contempt. In other words, change it, alter it, or expunge it, or none of the above. And that's- that was what's before the court."* and *"But I'm saying to you, I'm not expanding this to a brand new hearing. I'm not re-litigating. You must understand this Mr. Best; I am not the Court of Appeal. I made a judgment. I made a finding. I am not the Court of Appeal. The Court of Appeal deals with anything that they feel I did wrong. The Court of Appeal is where you make applications for new evidence, not me."* Application Record p. 270-271

<sup>22</sup> Transcript May 3, 2013 page 56, line 26 (DB 000110b11-56) COURT: *"Noted previously, Rule 60.11(8) confers on the court a wide discretion to give orders for directions and to make such other orders as is just. This has therefore proceeded on no new or fresh evidence from Mr. Best."*

<sup>23</sup> Endorsement of Justice Shaughnessy January 25, 2013. (DB 000122-b34-2)

<sup>24</sup> May 3, 2013 transcript Page 17, line 13. (DB 000110-b11-17)

<sup>25</sup> See Appendix A



before the Court indicate that this new secret Warrant of Committal was given only to the prison authorities and was not placed into the court records.

22. The CJC did not address these actions by the Judge, but rather summarily dismissed the issue by ruling that it was not 'conduct'.<sup>26</sup>
23. I note that the Judge's factum before this Judicial Review (which is not proper sworn and cross-examinable evidence) presents various opinions as to meaning of the wording of the Judge's secret new Warrant of Committal. I can assist the court in resolving this issue of a 'secret backroom hearing' which I discuss below. What is apparent is that it increased Mr. Best's prison time by 50%. There is no justification for this which appears to be a vindictive and punitive act and it needs to be closely scrutinized.
24. Further as I detail in following sections of my affidavit, there is disturbing evidence, some strong and apparently irrefutable, and some circumstantial, that in four groups of incidents in the civil case and even during the present Judicial Review, police resources and personnel were (or appear to have been) improperly retained, used and coopted to assist one side of a private civil dispute in the Ontario courts.
25. The prosecuting lawyers hired and submitted an affidavit from Mr. Van Allen. They claimed that he was a private investigator and failed to disclose that he was a serving police officer with access to police resources. This police officer obtained confidential information not available to the public which was then used by the Judge to convict, sentence and imprison Mr. Best for contempt.
26. There is also evidence of involvement by other police forces before the finding of contempt by the court and later who have been involved in this civil court matter. Some of it with the apparent intent of using the investigation results to influence, impact or derail this Judicial Review.<sup>27</sup>
27. If left to stand, these abuses in total would result in the undermining of public confidence in the police, the judicial process, the CJC and the Rule of Law. My background and experience is such that I can assist the Court in determining the truth about what appears to be significant abuses of police resources to improperly influence the justice system in the civil case and perhaps even in this Judicial Review.

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<sup>26</sup> CJC letter of Jan. 28, 2016 (DB 015866-24, -25)

<sup>27</sup> Details and supporting exhibits appear in following sections of my affidavit.

28. I can also assist the Court in assessing the Review Procedures that apparently caused CJC Executive Director Norman Sabourin to arbitrarily reject complaints without providing reasons. To my mind Canadians are entitled to understand and access the CJC complaint process with confidence and ease. Transparency and detailed reasons with respect to each point that the complaint raises are important throughout this process where Canadians engage and rely on the CJC to be sure that they are being treated fairly and that there is public accountability of the judiciary.
29. The CJC considered Mr. Best's letters as a continuum. The original complaint sets out a number of issues.<sup>28</sup> The CJC's response<sup>29</sup> is cryptic. In the final result after considering the total complaint the CJC's response was "*your allegations are either outside of the jurisdiction of the Council to review or they do not warrant further consideration by the Council pursuant to its mandate under the CJC*" and also that the Judge's actions were not 'conduct'.<sup>30</sup>
30. This Judicial Review will hopefully discern the meaning and boundaries of these statements. I can assist the Court because I have been closely involved with tribunals that have been designed and implemented to protect the Canadian public and provide public accountability to important government and societal processes.
31. The CJC's responses to Mr. Best ignore many facts which were submitted to the CJC and which seem beyond dispute. In any event the CJC should have diligently looked into all the facts, but it is apparent from the CJC's responses to Mr. Best that this was not done. At the very least Canadians are entitled to be informed what facts were assessed, what evidence was reviewed and how they factor into the CJC's ultimate decision. Canadians have a right to be able to know the standards by which the CJC and therefore the judges, operate. It is simply a fundamental matter of public trust.
32. I note that the CJC did not assist Mr. Best, an unsophisticated and unrepresented person, who could not possibly have had a full comprehension of the Judicial System or the standards of the CJC. The CJC did not enlighten, guide, or assist Mr. Best even though he was self-represented.

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<sup>28</sup> The letter is attached. (DB 015924-1 thru 90). To conserve paper, the supporting documents are available on a memory stick.

<sup>29</sup> CJC letter May 1, 2012 (DB 015936)

<sup>30</sup> Application Record p.534-535 (DB 015867-239 & 240)

33. The CJC did not even ask him to clarify certain points he had made in his complaints. It did not ask whether there might be additional supporting evidence or witnesses. It did not make any inquiries of its own. There is no list of documents which were considered by the CJC or were sent to Chief Justice Scott. All of which resulted in the denial of natural justice to Mr. Best.
34. I have no reason to believe that Mr. Best's complaints to the CJC were handled any differently than those of other Canadians. I have no reason to believe that the CJC's apparent arbitrary standards, lack of investigation, lack of transparency and absence of support to an unrepresented person in Mr. Best's case is unusual for the CJC. I believe that the CJC's handling of Mr. Best's case is representative of the standard CJC treatment of unrepresented persons – with one important difference which in Mr. Best's situation merely supported the imprisonment of an apparently innocent man and that is simply unacceptable and wrong.
35. Unlike most Canadians, Mr. Best as a former police officer had some professional background in collecting evidence, which can bring higher levels of confidence when courts or tribunals are searching for an accurate account of events. For instance, on November 17, 2009 immediately after a phone call with Donald Best, some of the involved lawyers created an official 'Statement for the Record' that they as Officers of the Court formally filed with the court as evidence. In this official document the lawyers gave evidence that Donald Best had told them during the telephone conversation that he had received a copy of certain court order the day before, November 16, 2009.
36. When in court and on the record, the lawyers submitted their Statement for the Record and assured the Judge orally that their record was accurate, and that Mr. Best's version of events in a letter written to the court was defamatory and not true. The Judge accepted the lawyers' Statement for the Record and verbal assurances on the record as true and used this evidence to convict Mr. Best *in absentia* of contempt of court and sentence him to 3 months in prison. Mr. Best was out of the country and not present in court.
37. What neither the lawyers nor the Judge knew at that time was that Mr. Best had made two audio recordings of the telephone call with the lawyers which he had forensically certified and transcribed. The certified recordings and transcript clearly showed that Best did not state to the lawyers that he had received the court order. In fact, he stated many

- times exactly the opposite: that he had not received the order and asked the lawyers to send it to him. The recordings and transcript showed that the lawyers had even cross-examined Best closely on this point, and he again denied receiving the court order.
38. Nonetheless, immediately after the telephone conversation with Best ended, these senior lawyers had created their false 'Statement for the Record', and when challenged on the statement's veracity in court, swore verbally to the judge that their version was the truth.
39. As indicated earlier in the footnotes, when Best returned to Canada and asked the Judge to set aside the conviction, the Judge refused to consider Best's voice recordings or any fresh exculpatory evidence. Mr. Best's appeal was not allowed to go forward because he could not pay a security deposit of several hundred thousand dollars cash, and so had to abandon his appeal and serve his prison sentence. I am advised and believe that to this day no court has listened to the recordings, nor has the CJC according to their communications to Mr. Best.
40. The factum of Justice Shaughnessy argues that there is no evidence to support Best's allegations in the complaint of "*abuse of office, bad faith or analogous conduct*".<sup>31</sup> In fact, Mr. Best disagreed and sent a number of documents and court exhibits to the CJC which argue otherwise.<sup>32 33</sup> There is no record that the CJC acknowledged or assessed this evidence and court documents and no understanding of why they were or were not part of the process whereby the complaints were dismissed.
41. Further there is no indication as to whether the CJC might have wished to have more evidence of issues that it was assessing. There is no record of follow up or consideration of the totality and context of the Judge's actions and omissions. If the CJC had properly investigated Mr. Best's complaints, the outcome might have been different. My background is such that I can assist the Court in this regard.
42. The CJC reports show that it did not investigate or comment about a number of factors that might very well have altered the outcome of the complaint procedure. If I am permitted to intervene I will expand further.

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<sup>31</sup> Responding Record of the Respondent Mr. Justice Bryan Shaughnessy, page 20 para 89. (DB 015886-35)

<sup>32</sup> Best Complaint to CJC dated Jan 5, 2016. (DB 015866-42)

<sup>33</sup> See footnote 28 Best Complaint to CJC 2011: Mr. Best's initial complaint was 90 pages plus 529 pages of exhibits and addresses abuses of various types by the Judge. Provided in digital form subject to direction from the court.

43. The CJC did not identify the documents that were provided to Chief Justice Scott.

However the May 1, 2012 letter would suggest that they were only records of court appearances and orders. These do not tell the whole story. The final CJC reply<sup>34</sup> to Mr. Best repeats this flawed and aborted procedure.

**Involvement of Police personnel and resources to support one side of a private civil dispute**

44. There are four general incidents in the civil case, CJC record and in the current Judicial Review where police resources and personnel were improperly and even illegally and secretly used and coopted. In chronological order, these incidents involved:

45. Ontario Provincial Police Detective Sergeant James Arthur Van Allen – October 2009 to January 2010 ('Van Allen involvement')

46. Unknown Durham Regional Police court officer – December 2009 ('Durham Court Officer incident')

47. Peel Regional Police – January 2010 ('Peel Police incident')

48. Durham Regional Police 2016 ('Durham Police Judicial Review Investigation')

**Van Allen Involvement**

49. The October 21, 2009 affidavit<sup>35</sup> of a purported 'private investigator' and expert witness Jim Van Allen was submitted to the court by lawyers in support of their belated November 2, 2009 motions to, among other things; attempt to obtain an order on that day validating service of all motion materials upon Donald Best, ordering substitutional service against Donald Best, compelling Donald Best to appear for examination and to produce business records in advance of that examination.

50. The Judge also relied heavily upon the affidavit of 'private investigator' Jim Van Allen in his January 15, 2010 finding of contempt of court against Donald Best.<sup>36</sup> Two suspiciously redacted Van Allen invoices to the law firm were also exhibits before the Judge on January 15, 2010.

51. Although the lawyers regularly referred to Van Allen as a 'private investigator' in their legal documents and on the court record in verbal submissions and discussions with the

<sup>34</sup> January 28, 2016 letter CJC Director Norman Sabourin to Best. (DB 015868-246 & -247)

<sup>35</sup> October 21, 2009 affidavit of Jim Van Allen. (DB 015924-308 thru -313) – the Lawyers agreed that Mr. Best had not received this by November 2<sup>nd</sup>.

<sup>36</sup> January 25, 2010 Reasons on Motion for Contempt (DB 015866-159 thru -172). Judge recounts investigations and affidavit evidence of investigations.

Judge, Jim Van Allen was not a licensed private investigator. James 'Jim' Arthur Van Allen, was in fact a serving Ontario Provincial Police Detective Sergeant and manager of the OPP's Criminal Profiling Unit who was working secretly and illegally as an unlicensed private investigator.

52. Jim Van Allen worked under my command during the time I was OPP Commissioner from 2006 to 2010. I know that Van Allen was a serving police officer at the relevant times in 2009 and 2010. Mr. Van Allen's own CV which was notably absent from his affidavit shows he was an OPP police officer from May 1979 to October 2010.<sup>37</sup>
53. From my examination of the evidence that is already filed in court and was easily available to the courts and the CJC had they examined it, it is reasonable to conclude that OPP Detective Sergeant Jim Van Allen's inappropriate employment as a private investigator, his access to confidential information and the distribution of the same, and the very creation of his affidavit in order to benefit private parties in a civil lawsuit, represents a flagrant violation of various Provincial and Federal laws including the Police Services Act, the Private Security and Investigative Services Act, the Criminal Code and the Freedom of Information Act.
54. In no small way, Detective Sergeant Jim Van Allen violated his oath of office.
55. Detective Sergeant Van Allen's conduct and behavior in relation to this case occurred while I was OPP Commissioner. Had I known about it at the time, I would have immediately ordered an investigation to gather all evidence to determine the details, extent and duration of his activities with a view to possible provincial and/or criminal charges against Van Allen and, potentially, charges against other involved persons.
56. It is inconceivable that all the involved lawyers and Judge were unaware that 'private investigator' and expert witness Jim Van Allen was an OPP police officer. Considering many factors, including Detective Sergeant Van Allen's high public profile, the rules and normal vetting practices by lawyers and judges concerning Expert Witnesses, and the fact that Van Allen's affidavit and redacted invoices were clearly suspect on their face to any ordinary person let alone lawyers and judges, it is unbelievable that nobody in that courtroom knew the truth about Van Allen or otherwise cared to find out.

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<sup>37</sup> Van Allen CV emailed by Van Allen on December 31, 2013 (DB 015918-228, 229) to 'Ray Metivier'. Source is Exhibit 23 in February 11, 2014 affidavit of lawyer Che Claire.

### Van Allen's Public Profile

57. Given Van Allen's high professional and public profile, the hundreds of major cases in which he had been involved and testified in over a 30 year OPP career, and the international professional and media attention that Detective Sergeant Van Allen and his Criminal Profiling Unit received and still receive<sup>38</sup> it is inconceivable that none of the lawyers nor the Judge knew of Detective Sergeant Van Allen's true status.
58. Further, this was only a year after the 2008 Goudge Inquiry where Van Allen's name and expertise had come under widely publicized scrutiny and criticism in two subject cases; Lianne Gagnon and Louise Reynolds.<sup>39 40 41</sup>
59. The prosecuting lawyers highlighted his experience to the Judge<sup>42</sup> and both they and Mr. Van Allen admit that they were responsible for contacting Van Allen.<sup>43 44</sup>
60. I notice that Van Allen's two redacted invoices<sup>45</sup> are numbers 11 and 12 for the year 2009, which to me raises serious questions about how many other illegal investigations he had performed and which lawyer clients might have retained him previously. Had I known of his transgressions, I would have acted immediately as OPP Commissioner to deal with his rogue conduct.

### Expert Witness Rules and Normal Procedures

61. It is clear from the court transcripts of November, December 2009, and from the materials filed at that time, including Van Allen's affidavit, that the lawyers presented

<sup>38</sup> SooToday article. Even years later, news media articles write such as "Van Allen was the Manager of the OPP Criminal Profiling Unit for fifteen years and is a graduate of the FBI National Academy. He is recognized internationally for his expertise, and is regularly called upon by major news and media outlets to comment on, and offer insights into high profile crimes and criminal incidents." (DB 016043)

<sup>39</sup> Three articles by lawyer and former Toronto Star journalist Harold Levy, detailing how the Goudge Inquiry examined Van Allen's role in the Sudbury Police murder investigation of Lianne Gagnon in the death of her son Nicholas. (DB 016037, DB 016038, DB 016039)

<sup>40</sup> Closing Argument of Dr. Charles Smith at the Inquiry into Pediatric Forensic Pathology in Ontario, page 214. Dr. Charles Smith submits that Detective Van Allen agreed with the Crown (and Dr. Smith) that Louise Reynolds had murdered her daughter (who was actually killed in a dog attack). (DB 016040-214)

<sup>41</sup> Transcript of Pediatric Forensic Pathology in Ontario. January 24, 2008. Pages 216 thru 219. Lawyer Peter Wardle questions Inspector Brian Begbie about Detective Van Allen's role in the Louise Reynolds murder charge. (DB 016041-106 thru 108)

<sup>42</sup> Nov. 2<sup>nd</sup>, 2009 transcript page 18, line 28 to page 19, line 16 (DB000109-15b2-21 thru -22)

<sup>43</sup> November 2<sup>nd</sup>, 2009 transcript, page 19 line 9. (DB000109-15b2-22)

<sup>44</sup> Paragraph 6 of Van Allen's affidavit states "On October 7<sup>th</sup>, 2009 I was contacted by Mr. Gerald (Gerry) L.R. Ranking of Fasken Martineau DuMoulin LLP to locate Mr. Donald Robert Best." (DB 015667-2h-4)

<sup>45</sup> Two Van Allen Invoices dated Oct 24 and Nov 7, 2009. (DB 000130-b38)

Van Allen as an expert, and that the Judge accepted this and relied upon Van Allen's 'expert' evidence.

62. The Rules of Civil Procedure in Ontario require lawyers and Judges to be wary about accepting expert evidence.<sup>46</sup> This became even more compelling after the Goudge Report became public and I believe it is impossible that the Judges and lawyers did not know this. The CJC should have investigated this carefully but chose not to.
63. I believe it is highly unlikely that a number of large Toronto law firms, who would carefully vet any expert who was going to give evidence to a Court, and also the Judge, did not realize that the expert witness, Jim Van Allen, was in fact a serving police officer acting illegally as an unlicensed private investigator and that his affidavit was suspect and the product of illegal acts.
64. The CJC did not investigate why the Judge did not insist on or ask why the lawyers had not researched and satisfied themselves re Van Allen. It also did not ask why the Judge ignored even the most fundamental inquiries into this affidavit which was clearly suspect on its face mainly because it said that the Police Association had provided some of the information. Mr. Rick Perry, when speaking about the evidence in Mr. Allen's affidavit that says he accessed Mr. Best's information from the Toronto Police Association said he

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<sup>46</sup> Rule 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules, a) to provide opinion evidence that is fair, objective and non-partisan; b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.  
 (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

**Experts' Reports...**

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
  - i. a description of the factual assumptions on which the opinion is based,
  - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
  - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.



*“was horrified that the records had been accessed by somebody on behalf of Mr. Ranking’s private investigator and he thought it was a criminal offence.”*

65. Some of my own private information resides with the Toronto Police Association, and I would be greatly distressed if my information was shared and distributed to the public as is the case with Mr. Best.
66. At one point Mr. Van Allen provided the lawyers with Mr. Best’s driver’s licence number which is a breach-of the Police Act and privacy legislation including related to MTO regulations.<sup>47</sup>
67. I note that in a later telephone conversation Mr. Van Allen was quick to point out that he had been *“thirty one and a half years with the Ontario Provincial Police...doing criminal profiling and...threat assessment.”*<sup>48</sup> In late 2013, Mr. Van Allen also confirmed in a recorded phone call that he had retired from the OPP in *“October, 2010”* and as indicated in his CV which is attached.<sup>49</sup>
68. The CJC did not consider why the lawyers and later the Judge refused to allow Mr. Van Allen to be cross-examined<sup>50</sup> which would have quickly exposed his OPP employment and the illegal nature of his affidavit and expert opinion.
69. Further Mr. Best showed and I concur that it was irregular for Mr. Van Allen to have redacted his invoice to exclude evidence that he had illegally accessed information only available to police officers and then only for documented police investigations.<sup>51</sup> The lawyers tried to assert that perhaps the redactions were to hide so called solicitor client information but that cannot be right if the entire function of the Court is to assess what an expert did and did not do. The CJC did not look into this or why Mr. Best was refused copies of the unredacted invoices.
70. Then I note the following statements are contained in the Van Allen affidavit which border on the absurd, given Mr. Van Allen’s position as a police officer. *“...few people demonstrate the strenuous efforts...to create and convey false address history...”* In fact Mr. Van Allen would know, and so would the Judge who would have similar concerns,

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<sup>47</sup> Transcript Dec. 02, 2009 p. 19 line 20 ff- note that according to MTO rules they are not entitled to publicized Driver’s Licence information but only to use it for service. (DB 000109-15b2-22)

<sup>48</sup> Excerpt from Transcript (page 2) of telephone conversation dated Dec. 30, 2013. (DB 015918-232)

<sup>49</sup> See footnote 37.

<sup>50</sup> Transcript of Reasons May 3, 2013, page 17 lines 13 – 17. (DB 015868-179)

<sup>51</sup> v transcript best cross-exam p. 168 line 10-p. 169 line 11. (DB 000121-b32-168 thru 169)

that all current and former police officers safeguard their privacy and that of their families very carefully since they are day to day targets for the criminal element who wish them harm.

71. At one point the prosecuting lawyers stated that failure to make Mr. Best's personal information public is a "badge of fraud."<sup>52</sup> For senior counsel to accuse a police officer or former police officer of this is disrespectful and scandalous.
72. The lawyers at one point changed their story when they were asked "*who hired the private investigator?*" and answered "*I have no idea*".<sup>53</sup> The CJC did not look into why the Judge did not at this point disregard the evidence of Van Allen when even the prosecutors tried to disavow responsibility.
73. The CJC did not inquire as to why the Judge did not insist on seeing the unredacted version of the invoice from Mr. Van Allen<sup>54</sup> and specifically the information that was hidden. Does the CJC intend to condone the actions of a Judge who, when sentencing a person to prison in absentia, allows partial information to be produced when the unredacted version might have alerted the Judge to the illegality of the evidence he was relying on?

#### **Procedural Observations**

74. Regarding the December 2<sup>nd</sup> contempt motion it had been sent to Mr. Best on November 27, 2009 which was a Friday and according to the earlier order that said service was effective four days after mailing that meant that the motion was served on Wednesday December 3, 2009<sup>55</sup>. i.e. 1 day after the motion date. The CJC did not take note of this as one of the continuing aberrancies in the Judge's Orders.
75. I note that the November 12<sup>th</sup>, 2017 Order for Substitutional Service four days after mailing relied on the affidavit of Mr. Van Allen and the prosecuting lawyers' statement that the lawyers had tried to find Mr. Best.<sup>56</sup>
76. The acceptance by the Judge of the false statements of the prosecuting lawyers in their 'Statement for the Record' which they reaffirmed as fact, on December 2, 2009,<sup>57</sup> was

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<sup>52</sup> Excerpt from Transcript December 2, 2009 (page 14, line 30) (DB 000109-15b2-17)

<sup>53</sup> Excerpt from Nov 17<sup>th</sup> transcript of telephone call p. 16 (DB015667-2j-19)

<sup>54</sup> Van Allen Redacted Invoices (DB 015957-2)

<sup>55</sup> Affidavit of service of contempt motion. (DB 000007)

<sup>56</sup> Excerpt from Transcript Nov. 2, 2009 p.36 line 10. (DB 000112-g1-39)

<sup>57</sup> Excerpts from Transcript December 2, 2009 pages 4,5,39,41 & 43. (DB 000109-15b2)

part of the Judge's reasons for the contempt finding. The November 2<sup>nd</sup> statements by prosecuting lawyers that a former police officer would perpetrate a fraud would seem to have also been accepted as fact by the Judge. Even when it was later proved beyond any doubt that the lawyers had misled the Court<sup>58</sup> the Judge refused to listen.<sup>59</sup> The CJC did not check that when the Judge decided on December 2<sup>nd</sup>, 2009 that "*I find that Donald Best is deliberately avoiding personal service...*"<sup>60</sup> he was relying on the expert opinion of James Van Allen.

77. He was also relying on the so called 'Statement for the Record' filed by the prosecutors which was not sworn evidence but rather a transcript that the lawyers created after their conversation with Mr. Best on November 17<sup>th</sup>, 2009 which contains the false statements that Mr. Best said he had received the Court Order during a telephone call with them. Later when Mr. Best advised the Judge in a letter that the Statement for the Record was false the prosecuting lawyers insisted once again that he had admitted receiving it and further Mr. Best's statement to the contrary was defaming them.
78. Later when the certified digital recording<sup>61</sup> was produced by Mr. Best that was incontrovertible evidence that the lawyers had lied to the Judge he refused to listen to it. The CJC also decided not to listen or investigate any further.
79. In summary the two underpinnings of the Judge's Orders were either illegal, false, or both. And yet the CJC did not make any inquiries. It also did not question why the Judge did not allow cross-examination on this evidence. Continuing attempts to cross-examine Mr. Van Allen have been denied.<sup>62</sup>

#### **Durham Court Officer Incident**

80. The CJC did not look into the evidence of Durham Police Court Officer involvement in this civil matter during December, 2009. There is no justification for Police to become involved in civil matters and this 'behind the scenes' activity which took place before the contempt hearing has been ignored by the CJC.<sup>63</sup> The evidence shows that Sergeant

<sup>58</sup> Transcript of Certified recording. (DB000107-14j-24 thru 43)

<sup>59</sup> Excerpts from Transcript April 30, 2013 pages 43 & 44. (DB 000113g10-45 thru 46)

<sup>60</sup> Excerpts from Transcript December 2, 2009 page 60. (DB 000109-15b2-63)

<sup>61</sup> Affidavit of Edward Primeau, paragraphs 4 & 5. (DB015667-2j-2) sworn Jan 7, 2013 so there was no question the recordings were authentic and accurate yet the Court would not listen to them. The CJC did not consider them.

<sup>62</sup> Excerpts from Transcript April 30, 2013, page 78. (DB 000113g10-79)

<sup>63</sup> This was confirmed by Officer Laurie Rushbrook. See footnote 64.

Laurie Rushbrook of the Durham Regional Police told Mr. Best that in “*December of 2009, over a month prior to my January 15<sup>th</sup>, 2010 trial in absentia, a Durham Police court constable performed an undocumented investigation into me, Donald Best, most likely in assistance to the Court.*”<sup>64</sup>.

81. Police departments are required to document and keep careful notes of their investigations and this information alone is disturbing and the CJC should have studied it intensely since it indicates that a Durham Police Court Officer, who frequents the Court house where the Judge that sentenced Mr. Best presides, was investigating Mr. Best, a party involved in a civil lawsuit costs hearing, and obtaining information about him but not preparing official reports or keeping notes. This happened at the same time as Detective Sergeant Van Allen’s involvement in the same case. Officer Rushbrook went further to advise Mr. Best that the Durham Regional Police Force do this type of investigations with respect to civil court matters all the time.<sup>65</sup>
82. I note that Mr. Best is blunt and to the point about this disturbing set of events: he says when referring to the January 15<sup>th</sup>, 2010 contempt hearing and the preceding police investigation which he notes was not documented according to normal police procedures “*the entire hearing was polluted to the point where there has been a miscarriage of justice and probably means that this court had to disqualify itself then and has to now*”<sup>66</sup>
83. The Judge rebuffed Mr. Best severely and would not consider this evidence. The CJC should have investigated this very seriously since the implications undermine the fabric of the Canadian legal system where all evidence must be presented in open Court. This is especially important when it relates to a very serious charge, contempt of court, where the ‘accused’ is facing a possible prison term, a fine, and other sanctions. The CJC chose to ignore it.
84. The Judge’s reaction to this evidence : *It’s insulting to me. What this is insinuating is that I ...in presiding over the case... ” ... ” I don’t care what the police officially advised you.*”<sup>67</sup> is disturbing. It is unfair for a Judge to put an unrepresented person who is about to be sentenced by that Judge in that position. In effect some people might be of the

<sup>64</sup> Best affidavit sworn April 29, 2013, page 1. (DB 001101-1)

<sup>65</sup> Best affidavit sworn April 29, 2013, pages 2 & 3. (DB 001101-2 & 3)

<sup>66</sup> Excerpt from Transcript April 30, 2013 page 9. (DB 000113g10-10)

<sup>67</sup> Excerpt from Transcript April 30, 2013 pages 10 & 11. (DB 000113g10-10 & 11)

opinion, as am I, that these comments by the Judge would be intimidating to an unrepresented litigant since the obvious implication is that the Judge might have been involved. The Judge and the CJC should have taken the reasonable and fair approach and made sure there was an investigation of this unlawful and irregular investigation.

85. All of this creates even more of a concern about what went on behind the scenes that may have influenced the Judge even more than the Van Allen affidavit and the false evidence placed before the court by the lawyers. The CJC ignored what is recorded in the Court transcript where Mr. Best pleaded for an investigation because he had been told by the RCMP that the "*undocumented court police investigation of me was secret, private, on-the-side*" and "*It was only revealed when the Commissioner of the RCMP commenced an internal audit concerning access to the Canadian Police Information Centre computer database known as CPIC.*"<sup>68</sup> I believe that the aggression by the Judge toward Mr. Best was inappropriate.<sup>69</sup>
86. In the CJC pamphlet – ‘Conduct of Judges’ the CJC says it will ‘*if necessary an independent counsel*’ and I believe this area of behaviour by a Judge warrants the appointment of an independent investigator.
87. The exchange between Mr. Best and the Judge went on to point out that Mr. Van Allen had been implicated via the Goudge committee and report in that he helped “put innocent mothers into prison for the murder of their babies”<sup>70</sup>
88. This exchange cries out for an investigation by the CJC because of its implications however the CJC ignored it.
89. The CJC did not investigate why the Judge did not react appropriately.
90. There is no indication in the transcripts that the Judge appreciated that the evidence presented by Mr. Best was worrisome and an indication that the entire proceeding that resulted in a prison sentence was potentially poisoned by the evidence .
91. So there was powerful evidence that the process that led to Mr. Best’s conviction for contempt and prison sentence included back room investigations by Court police officers that may or may not have influenced the Judge and the CJC decided that it was not

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<sup>68</sup> Excerpt from April 30, 2013 Transcript. p. 9 lines 13-20 (DB 000113g10-10)

<sup>69</sup> Excerpt from April 30, 2013 Transcript pages 9 - 12. (DB000113g10 thru 13)

<sup>70</sup> Excerpt from Transcript April 13, 2013 page 13, line 22. (DB 000113g-10-14)

necessary to look into this. The fact that the Judge rejected it summarily and refused to listen to it or take it into consideration is something that the CJC and the entire administration of Justice needs to assess now. This impacts not only on the entire contempt proceedings in Phase I and Phase II but the much larger issue of whether this type of activity goes on in that Courthouse and indeed anywhere in Canada. The suggestion by the Judge that the Durham Police Force should investigate itself is unacceptable and counter-intuitive. The CJC did not even bother to address this issue that is important to all Canadians.

92. I am concerned that the CJC did not look into alternatives that were available to the Judge on January 15<sup>th</sup>, 2010 when Mr. Best did not appear. Given that the Supreme Court of Canada has mandated that a person must be served personally with a motion for contempt<sup>71</sup> and the Judge could not be sure he had personal knowledge it is presumed that the contempt motion could have waited until Mr. Best was able to attend Court.

#### **Peel Police Incident**

93. Mr. Best pointed out that the Peel Regional Police were also involved in the matter. I believe that should also be investigated since it is not acceptable for police to be involved in civil court matters unless they are subpoenaed so that their work can be vetted in public.
94. . The Peel Regional Police was the agency that placed the Judge's January 15, 2010 Committal Warrant for Best onto CPIC, the Canadian Police Information Centre; a confidential police database. Further, it was discovered that the Peel Regional Police has no information file or warrant package about Best in their records as they normally would and should have when placing an arrest warrant on CPIC.
95. In my experience, the involvement of the Peel Regional Police in handling Best's arrest warrant that was issued in a civil case costs hearing in Durham Region is unprecedented and highly unusual. The missing official records makes this occurrence highly suspicious. I cannot think of a single legitimate circumstance under which this might have happened.
96. In context of what we now know about Detective Sergeant Van Allen's unauthorized involvement in this civil case, the involvement of a Durham Court Police Officer, and the

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<sup>71</sup> Ref. SCC case

unauthorized release of Best's confidential personal information by the Toronto Police Association all occurring just prior to the involvement of the Peel Regional Police – the involvement of Peel Police cries out for serious investigation. The CJC should have recognized this fact and addressed it.

**The extrajudicial file**

97. On June 8<sup>th</sup>, 2009 the prosecuting lawyers appeared before the Judge and no one else appeared. At that point the Judge allowed those lawyers to create what I will call an extrajudicial file. This was a court file that is not related to any legal dispute between parties or any administrative act which the Judge might sometimes fulfil. This file was created and to be maintained in the Ontario Judicial System for the sole purpose of allowing the prosecuting lawyers to be able to file any documents they wished to file without any judicial supervision or control. These documents were known by the Judge to be used in future litigation in other countries. The judge specifically delegated whatever judicial supervisory powers that he might have been given under the Judges act to the prosecuting lawyers. The Judge let them have access to and control over this file as if it was related to the case which had already been fully resolved and adjudicated. However the Judge did then and always had supervisory obligations over this process to prevent abuse and the CJC needs to look into why the Judge did not exercise Judicial control.
98. Later and even after the prosecuting lawyers had advised the Judge that Mr. Best had complied with all the Orders<sup>72</sup> the Judge participated in their attempt to maintain Mr. Best in fear of incarceration if he did not supply evidence for actions in other countries by offering to leave the jail term in abeyance as long as Mr. Best answered questions for further use in other cases.<sup>73</sup>
99. The CJC needs to look into this curious behavior by the Judge. The Judge had earlier been told that the lawyers were only seeking evidence and documents not for the matter at hand but rather for cases in other country. I believe there is nothing in the Judges Act which gives the Judge the power or discretion to do this especially because it interferes with Courts in other countries. The CJC did not address this and should do so.

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<sup>72</sup> Transcript Apr 30, 2013, page 89 (DB 000113g10-90)

<sup>73</sup> Transcript Apr 30, 2013, page 121 (DB 000113g10-122)

100. I also note that the nature of the documents which were put into the extrajudicial file were not reviewed by the Judge and are mostly related to matters which have nothing to do with the subject matter of the Nelson Barbados action. It also contains documents which relate to people engaged in other matters in other countries and their own private affairs. The laws of those other countries may prohibit this. I am greatly concerned that the Judge took no care to vet the documents and then abdicated all responsibility for doing so over to the prosecuting lawyers.

### **Backroom hearing**

101. On January 15th, 2010 the Judge convicted Mr. Best of contempt based on the aforementioned alleged evidence which has now been shown to have been unlawful, in breach of privacy laws, and false. He stated " For the reasons provided, I impose on Donald Best a sentence of 3 months incarceration to be served in a provincial correctional institution.

102. In Phase II when Mr. Best was appearing on his motion to set aside the contempt order and jai sentence the Judges reasons on January 25, 2010 at par 7 state: "*A transcript of the examination...*" but there was no transcript of an examination. This was repeated again on May 3rd, 2013. What the Judge was referring to was the 'Statement for the Record'. As discussed above this document was created in Mr. Best's absence when the lawyers dictated a statement to the special examiner where, among other things, they said that Mr. Best had acknowledged receipt of the Order which the Court stated had been issued from this Court November 2nd, 2009. Not only was that not accurate but the Judge went further and stated that with respect to the Statement for the Record "*I accept as an accurate account*".<sup>74</sup>

103. The Statement for the Record quotes lawyer Heidi Rubin as disagreeing with the lawyer's assertion that Mr. Best had acknowledged receiving the November 12<sup>th</sup> Order. She was overridden by the prosecuting lawyers who said" ....*that he, indeed, indicated that he had obtained the court order.*", in which was another falsity.<sup>75</sup> The CJC did not look at this and the further error by the Judge when he said "*which is not disputed by counsel*" when Heidi Rubin had disputed it on the record. The Judge had refused Mr.

<sup>74</sup> Transcript of reasons May 3<sup>rd</sup>, 2013 page 42, lines 17-21. (DB 000110 -b11-42)

<sup>75</sup> Statement for the Record, page 12, par. 5 (DB 001109-13)



Best's request to cross-examine the lawyers who had created this 'Statement for the Record' <sup>76</sup> which the Judge had relied on as being accurate and had been one of the main reasons why Mr. Best was found in contempt.

104. Paragraph 8 of those same reasons by the Judge asserts that "Defense counsel serve on him by mail another appointment for the examination on November 25, 2009" <sup>77</sup>

However the CJC did not look at the affidavit of service which said it had been sent out along with the Statement for the Record November 18th, 2009. (Notably a copy of the courier bill of lading is not attached to the affidavit of service.) <sup>78</sup> which meant that according to the Judge's earlier order service was not effected until November 24th, 2009 at the earliest received this the day before the November 25th, appointment.

105. Mr. Best showed the Judge a publication on the internet that exposed his personal information including his addresses, his birth date, and the "*expert opinion of the private investigator*" which the author said was contained in a report that he had received which obviously was that of Mr. Van Allen. <sup>79</sup> This was published just prior to the November 2nd, 2009 court date i.e. on October 30, 2009 and urged the readers to track down Mr. Donald Best.

106. The CJC did not consider this evidence and what effect it might have had on Mr. Best and that the Judge did not consider it as a reason why Mr. Best was being wary of being located and not attending in Court but rather leaving the country to ensure his personal safety. However there is no question that Mr. Best made it clear to the Judge that he had concern for his personal safety <sup>80</sup> He stated in an affidavit that he had been threatened by violent gang members when he was previously a police officer and detailed valid reasons why he was scared. He also detailed the serious and worrisome threats that had surrounded him regarding the legal action and witnesses for his case. He stated that he had been assaulted, his car was shot up and one of the witnesses, John Knox, had been beaten violently with a two by four. The CJC did not consider why the

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<sup>76</sup> Excerpt from Transcript May 3, 2013 page 17 lines 13-17 (DB000110-b11-17)

<sup>77</sup> Excerpt from Transcript of reasons May 3, 2013, page 43. (DB 000110-b11-43)

<sup>78</sup> Affidavit of Service sworn November 24th, 2009 (DB 000119-b18-2)

<sup>79</sup> Excerpt from Article dated October 30, 2009 (DB016042-4)

<sup>80</sup> Excerpt from Best affidavit sworn April 18, 2012, page 3 (DB 001096-3)

Judge ignored this evidence and did not accommodate Mr. Best's concerns when he made his decisions.<sup>81</sup>

107. The CJC did not consider why the Judge did not realize or at least be aware that Mr. Best's leaving Canada on November 11<sup>th</sup>, 2009 was justified and was a factor in why he had not attended in Court or personally for examination.

108. On May 3, 2012 the Judge stated that he would not consider any of the new evidence<sup>82</sup> and lifted the stay on the January 15<sup>th</sup>, 2010 finding of contempt and 3 month prison sentence. The CJC did not evaluate whether the Judge was entitled to refuse to consider evidence that explained the reasons for the absence of Mr. Best because of threats that had been made.<sup>83</sup>

109. The CJC did not look into the fact that the Judge made it very plain on the record in Court that he was lifting the stay of the January 15<sup>th</sup>, 2010 finding and three month prison sentence. Then the Judge convened a hearing off the record and after leaving the Courtroom and stating he would never return to this matter he did the contrary and increased Mr. Best's sentence by 50% by stating that Mr. Best would not be entitled to remission<sup>84</sup>. The CJC did not consider that this behaviour by the Judge might have been motivated because the Judge, based on the illegal and false evidence discussed above may have been acting improperly and outside his mandate under the Judges Act in order to create or bolster evidence for use in another lawsuit in another jurisdiction.

110. The Judge argues in his factum that Justice Molloy later stated that the secret order was ambiguous.<sup>85</sup> but that was not a ruling about the Judge's behavior but rather part of a decision, supported by the Crown and AGO, that the Judge was wrong to do what he did because it was unconstitutional i.e. it breached Mr. Best's Charter rights.<sup>86</sup> This may be one of the factors the CJC would look at but instead it ignored the entire issue.

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<sup>81</sup> Excerpt from Best affidavit sworn April 18, 2012, pages 3-6 (DB 001096-3 thru 6)

<sup>82</sup> Excerpt from Transcript May 3, 2012, page 56 (DB 000110b11-56)

<sup>83</sup> May 3, 2013 Judgement (DB000112-b1 )

<sup>84</sup> May 3, 2013 Warrant of committal (DB 000112-b2-1)

<sup>85</sup> Excerpt from Respondent Shaughnessy, J. Factum (page 3) (DB 015886-18)

<sup>86</sup> Curiously the AGO did not invoke Judges Act s. 63(1) and demand that the CJC look into this but rather decided to act for the Judge during this Judicial Review.

111. The Judge argues in his factum that the words '*no remission is ordered*' is ambiguous.<sup>87</sup> The CJC did not choose to investigate that these words were inserted on purpose by the Judge and were a drastic departure from the January 15<sup>th</sup>, 2010 warrant of committal that he had reinstated just hours earlier in Court. If the Judge is arguing that he intended to create this ambiguity then that is all the more reason why the CJC should investigate. This type of conduct cannot possibly be consistent with the Judge's duties as set out in the Judges Act. However, this ambiguity as he claims it to be, resulted in a certainty of an added period of incarceration.

#### **Durham Police Judicial Review Investigation**

112. I am advised by Mr. Best and verily believe that the Durham Police became involved again on May 31, 2016, which is just after this Application for Judicial Review was delivered by Mr. Best. I have attached the confirmation of this investigation and note that it involved three different police officers using computers which is a very major investigation.<sup>88</sup> Mr. Best's lawyer notified the Durham Chief of Police and thereafter the investigation continued albeit suddenly by an internet proxy called HideMyAss which I expect was to try, unsuccessfully as it turned out, to hide the identity of the Durham Regional Police.<sup>89</sup>

113. On April 17, 2016, Mr. Best's lawyer Paul Slansky filed the current Application for a Judicial Review of the CJC's decision respecting Best's complaint about the Judge. In May, Durham Regional Police initiated an extensive investigation lasting over a period of many weeks that at the very least involved the methodical collection of online evidence and legal documents having to do with Mr. Best's then new Application for the current Judicial Review.

114. The Durham Police investigation was exposed when Mr. Best noticed and monitored the activities of the police investigators as they attended at Mr. Best's public website. The involved Durham Police personnel were apparently unaware that their Internet connection IP (Internet Protocol Number) 66.163.5.113 was registered to the Durham Police, and that their activity was automatically logged when they visit websites – including details of the individual computers, smartphones and tablets used.

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<sup>87</sup> See footnote 85.

<sup>88</sup> Detailed record of the comprehensive and lengthy Internet searches by the Durham Police. (DB 015879-4 thru 7)

<sup>89</sup> Record of the Internet searches by the Durham Police. (DB 015923)

115. On June 15, 2016, Best's lawyer Paul Slansky wrote to Durham Regional Chief of Police Paul Martin and included website and Internet records showing the monitored Durham Police investigation activities from May 31 to June 6, 2016.
116. Mr. Slansky's letter informed Chief Martin of the case background and confirmed that Mr. Best had filed an Application for a Judicial Review of the CJC decision to challenge the dismissal of the complaint against the Judge.
117. The letter informed the Chief "My client is concerned about why this is taking place. He has committed no crime. Why is the DRPS investigating him or his website? He feels intimidated by these actions. In light of the past 'off the record' investigation by the DRPS, that he was advised of by Detective Rushbrook, my client is concerned that this may not be an official DRPS investigation."
118. Slansky asked for the nature and purpose of the police investigation and offered that his client Mr. Best would be willing to speak with the Durham Police investigators about whatever they were looking into.
119. Mr. Slansky also stated that if the Durham Police investigation was not sanctioned, "...my client is requesting that a DRPS investigation be commenced as to the unauthorized use of DRPS resources (equipment; computer access and manpower) to investigate him. If the investigation of my client was not authorized, this would seem to be a violation of the Police Act and/or the Criminal Code."
120. In response to his letter of concern, the Executive Officer to Chief Martin refused to answer any questions and replied, "*Your client's public website is easily accessible by any individual who wishes to view it. No further response to your letter will be provided.*"
121. I am informed by Mr. Best that after Mr. Slansky's letter, the Durham Police investigation continued but that the investigators now attempted to conceal their police affiliation and origin through various means, including the use of the 'Hide-My-Ass' paid proxy service. Mr. Best advises that the 'Hide-My-Ass' proxy was not, however, properly configured and revealed the investigators' same Durham Regional Police IP number of 66.163.5.113. For the sake of efficiency and if it will assist the Court or the CJC I would work with counsel and the Court to retain an independent expert to investigate.

122. The Durham Regional Police investigation appears to be a significant deployment of police investigative resources over a number of weeks, and that is only what we see through Mr. Best's website records. It may be that the police investigation included other inquiries and efforts off the Internet that I am unaware of.
123. We do not know if the investigation was 'official' with a documented occurrence number, and retention of reports, notes and other records, or if this major deployment of investigative resources was conducted by police personnel who maintained no records. Considering other incidents of improper police involvement for the benefit of private parties in this civil case, I am concerned.
124. The timing of the investigation is of interest and concern because it occurred shortly after the filing of the Application for this Judicial Review. The website records can be reviewed to discover how or why the documents that were accessed and downloaded by the police at around the time of the start of this Judicial Review. That will allow a determination of which articles and documents on other subjects available on Best's website appear to be of interest to police for the CJC.
125. I pose the following unanswered questions:
126. Who caused or commissioned this police investigation?
127. Was the intent of the investigation to collect evidence to impact or influence the current Judicial Review?
128. Did the police or anyone else intend that this investigation would intimidate Mr. Best or his lawyer who had just filed an Application for a Judicial Review of a CJC decision?
129. What police and/or government databases were used by the investigators? What information was exchanged with other police or government agencies? What information was transferred to or from private parties?
130. Who received briefings or reports? What were the results of the investigation? Were Crown prosecutors under the Attorney General of Ontario or Canada involved?
131. The Durham Regional Police know the answers to at least some of these questions, but refuse to say.
132. If the investigation was requested or caused by any of the parties served with the Notice of Application on May 15, 2016, namely the Attorney General of Ontario, the

Attorney General of Canada, the Canadian Judicial Council or the Judge, I would have grave concerns.

### Other concerns

133. Mr. Best left the country on November 11<sup>th</sup>, 2009. So the Judge must have known there would be delays when Mr. Best could not have received the motion materials: The Further as Amended Motion Record returnable November 2, 2009 and many letters were not sent to Mr. Best or were sent so late as to be sure that he had not been properly served. Mr. Best had written to the Judge earlier<sup>90</sup> to say that he was aware that the November 2<sup>nd</sup>, motion for costs was peremptory and that he was confident that the Judge would be fair in fixing costs and that they would be paid. There is no record that the Judge or the prosecuting lawyers contradicted that understanding.

134. Later Mr. Best advised the Court that he had left the country because the Defendants distributed his personal information and there had been an attack on him and his fear was increased because of incidents such as Mr. Van Allen saying that the Police Association had provided his confidential information. *"I didn't go to the police because Mr. Ranking's private investigator was into the confidential records illegally. And he was into confidential records and that was published."*<sup>91</sup>

135. When there was evidence that the prosecuting lawyers had published personal and private information of Mr. Best with an invitation for rogue police officers and bikers to track down Mr. Best's family<sup>92</sup> which was presented to the Court the Judge refused to consider it.<sup>93</sup> When this discussion was underway and Mr. Best demanded to know who had been responsible for placing this on the web one of the prosecutor lawyers said to the other *'kill this.'*<sup>94</sup> The lawyers then went on to respond to Mr. Best's fears about safety and that of his family by saying *"I can't help find that out nor would I if I could."* And

<sup>90</sup> November 2<sup>nd</sup>, 2009 transcript page 36 line 17. (DB 000112-g1-39)

<sup>91</sup> Excerpt from cross-exam of Mr. Best dated January 15, 2010 p. 164. (DB000121-b32-165)

<sup>92</sup> Excerpt from Nov 17<sup>th</sup> transcript of telephone call p. 167. (DB 015667-2j-11)

<sup>93</sup> May 3<sup>rd</sup> 2013 p.37 transcript 000110-b11-37- the judge had not dealt with threats earlier other than when one of the Defendants told lawyer McKenzie to 'watch his back' so it appears the Judge did not review the earlier records when he made this statement.

<sup>94</sup> Excerpt from Nov 17<sup>th</sup> transcript of telephone call, p. 15. (DB015667-2j-18)

when asked who had done this the lawyers responded “*I have no idea nor do I care.*”<sup>95</sup>

The CJC would need to investigate why the lawyers were not sanctioned for their lack of courtesy to an unrepresented litigant.

136. Throughout Mr. Best could not have known that the Further Amended Motion Record had been delivered to the Court just prior to November 2<sup>nd</sup> and it was not served on him. In fact the Order which the Judge signed on November 12<sup>th</sup>, 2009- (the trial coordinator said it had been sent to Mr. Ranking on Friday November 13<sup>th</sup>)<sup>96</sup> -had already immediately and retroactively placed Mr. Best in contempt for failing to provide documents two days before the Order was signed. It also is illogical because it imposed a 4 day service period for further documents which meant that the Order was served after the November 17<sup>th</sup>, 2009 examination which Mr. Best was ordered to attend so he was also in contempt of that Order with no possibility that he could receive it within the time frame mandated by the Judge’s Order. Mr. Best repeatedly requested a copy of the Order during the phone call on November 17<sup>th</sup>, 2009<sup>97</sup>

137. The CJC did not fully take into consideration that its function is to serve the people of Canada. Not all Canadians are able to fully understand let alone report about the nuances of what happens in Court and the CJC has decided it will give them no guidance. Whereas other tribunals<sup>98</sup> engage investigators and information gatherers who are well versed in the areas under consideration that will interview, review, and generally help a complainant make a full and focused complaint the CJC does nothing of the sort. Apparently, Mr. Sabourin and the Judge are of the view that the CJC can reject a complaint arbitrarily<sup>99</sup>

138. The CJC’s did not recognize that its interpretation of ‘conduct’, as vague as it is, needed to be considered on the basis of the full context of the Judge’s actions and omissions. The Judge heard all of the motions regarding costs and there was a continuum of evidence and questions which were not examined.

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<sup>95</sup> Ex. DB015667-2j-19 Nov 17<sup>th</sup> transcript of telephone call p. 16

<sup>96</sup> trial coordinator letter November 16<sup>th</sup> (DB001096-1e-2)

<sup>97</sup> See footnote 95.

<sup>98</sup> OLB, OHSA, LSUC,

<sup>99</sup> The Judge’s factum page 1 argues that the word ‘may’ in Section 63(2) means that any complaint can be rejected summarily. (DB-0015886-16)

139. The point is being made by all parties that the CJC's definition of 'conduct' is vague and ambiguous. It is not reliable or clear. Its examination of context, circumstances, and underlying legal issues that defined some of the actions of the Judge is not comprehensive. I can assist the Court in its judicial review function. (I note that counsel seem to agree that case law presents a variety of definitions. )

140. The CJC's methods and its letters seem calculated to 'cherry pick' evidence to suit the result it wished to obtain. This must be changed so that its review is more thorough, professional, and deals with evidence and expertise that is readily available. The challenge in a matter such as this is the need to consider underlying factors that motivate and explain certain conduct in the context of what appears on the record and what is not evident or even hidden from the record. It does not seem that was done in this case.

#### **Self-Represented Canadians and the CJC**

141. The lack of assistance and guidance for the complainant adds a layer of mystery and lack of transparency to an already oblique arrangement where it appears that one person, Mr. Sabourin, whose credentials are not known, is the filter for all information that is assessed. This appears incongruous with the very specialized and unique knowledge that are required to review the jurisdiction and actions of judges.

142. Other tribunals which are in place to serve the public in specialized benefit from the assistance of fully trained assessors who can assist the aggrieved person and be certain that the full import of the complaint is fairly presented. This type of assistance is all the more important when it comes to Courts and Judges which may be the most important factor or bulwark in the preservation of democracy. My experience and body of knowledge will assist the Court in identifying and expanding upon events that have yet to be explored and are not presently available to the Court. (Note that this type of investigation needs a well trained investigator with insight and skill to deal with the public who mainly cannot be expected to understand the detailed mandate under which Judges operate.<sup>100</sup>

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<sup>100</sup> [https://www.labour.gov.on.ca/english/hs/pubs/ohs\\_inspections.php](https://www.labour.gov.on.ca/english/hs/pubs/ohs_inspections.php); see also <https://www.canada.ca/en/treasury-board-secretariat/services/healthy-workplace/prevention-resolution-harassment/investigation-guide-policy-harassment-prevention-resolution-directive->



143. While the CJC publicizes guidelines as to how Canadians can expect to be treated in Court when they are unrepresented litigants the CJC does not extend those same considerations to Canadians who complain about their treatment in Courts by Judges.<sup>101</sup> The CJC's response to the complaint emphasizes that this type of assistance and proactive treatment is not extended to complainants to the CJC.
144. The report of Mr. Sabourin indicates that he alone was the intake person, chose the facts and evidence that he sent for analysis to Justice Scott, and chose not to look into much less obtain the evidence necessary to fully assess this matter. There is no indication in his decision of how much time he spent looking into this matter, whether he did conduct any type of inquiry, whether he was relying on precedent from other CJC decisions to be able to understand and apply the standards that ought to have been applied. What this means is that somehow he has been the sole 'gatekeeper' of the facts, standards, and thinking process the CJC went through to make his decision while not sharing or enunciating any of it with the complainant when he rejected the complaint and apparently in a summary fashion. Because this matter evolved over a period of time I have reviewed various documents to find areas that Mr. Best did not report to the CJC but raise concerns that the Judge may have not been acting judicially and further investigation is required. They include:
145. -Backdating an Order that immediately placed Mr. Best in contempt of Court. The CJC does not appear to have reviewed or addressed the anomaly in respect to the November 2<sup>nd</sup>, 2009. The Rules of Practice in Ontario may have misled the CJC into believing that Order took effect on November 2, 2009 simply because it arose out of a motion which was initially argued on November 2<sup>nd</sup>. However the Order shows that the Judge overlooked the fact that the Order should not have been dated November 2<sup>nd</sup>, 2009 because it was not clear what it would say until it was submitted to him for signing on November 12<sup>th</sup>, 2009. The judge made no endorsement and gave no reasons why he would backdate an Order that, on its face, immediately placed the Mr. Best in contempt. Further the Judge made no endorsement and gave no reasons why he would order that

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[harassment-complaint-process.html](#), which speaks of investigation processes that the Treasury Board uses for their workplace violence and prevention policy. See also CJC booklet re complaints.

<sup>101</sup> Application Record p.607-618—Statement of Principles on Self Represented Litigants for Judges dealing (DB 015867-312-323

service was to be effective four days after mailing the Order and then Order the Mr. Best to attend in Toronto on the 17<sup>th</sup> which is 1 day later [see Calendar]. In other words the Judge signed an Order which, which, even if it had been sent out the same day- which it wasn't- would not be deemed by his own order to have been served until November 18<sup>th</sup> which was the day after the Ordered attendance.

146. In 2009 when the prosecuting lawyers advised the Court that the real reason for the motions was to gather evidence to be used in courts in other jurisdictions the Judge did not react except in an accepting manner. Later the Judge assisted this scheme when the prosecuting lawyers appeared on June 8<sup>th</sup>, after the costs were settled, and the Judge proceeded to allow them to file thousands of documents in the Court file many of which have nothing whatsoever to do with the action. What was worse there is private and personal information in those records about people that were never involved in the subject matter of the action. Then the Judge went further and anointed the prosecuting lawyers with powers that the Judge was not entitled to delegate: he empowered the lawyers to file further materials without Judicial supervision: "*further material are permitted to be filed.*"<sup>102</sup> and thereby transcended and delegated the powers given to him by <sup>103</sup> the Judges Act to prosecuting lawyers. No checks and balances were created by the Judge that would limit the lawyers and that means they could do anything they wanted and the Judge would not have to do his job of filtering the information. The matter is all the bigger concern because the people whose privacy and intimate personal information is being filed in court and thereby accessible to anyone don't even know the Judge did this to them.

147. On the last day of hearings on May 3, 2013 the Judge acknowledged and urged Mr. Best to agree to an Order that raises the question whether the contempt proceedings were being used to force Mr. Best to agree to provide evidence regarding a matter in another jurisdiction in exchange for not being jailed. While the subject matter of the mediation before Justice Edwards is meant to remain confidential it seems that was the start of a process designed to intimidate Mr. Best and scare him into

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<sup>102</sup> Endorsement June 8, 2010 (DB000417-1)

<sup>103</sup> Examples are not filed with this affidavit because of privacy concerns but are available to the Court pending an application for a sealing order to protect these people from being further exposed by having their confidential and private information filed in this Court.

capitulating.<sup>104</sup> There is no way that Mr. Best could have understood that this was wrong and his naivety in this matter seems to have been what eventually got him into trouble. Needless to say the Judge should have known and never advised Mr. Best or made any statement on the Record that would have alerted Mr. Best to this reality. The CJC was not alerted that this was a concern because an unrepresented litigant and probably any reasonable person could not possibly know that Court was likely not authorized to allow this behaviour and that the CJC needed to look into it.

148. A more thorough investigation by the CJC now that all the facts are known may show that the Judge was wilfully blind and whether in these circumstances that does not amount to judicial conduct. It may very well be that the record belies the mischief that was being achieved simply because the Judge had total control over the process.

Sworn Before Me )

At VAUGHAN )


Ontario )

This 27 day of )

September, 2017 )

A Commissioner etc.

LSJC 10891A

  
\_\_\_\_\_  
Julian Fantino

<sup>104</sup> April 30 transcript p. 118-123 (DB---113g10-119-122)– judgement proposed by the lawyers –(DB000425)

Court File No.: T-604-16

IN THE FEDERAL COURT OF CANADA

BETWEEN:

DONALD BEST

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA -and- THE HONOURABLE MR. JUSTICE  
BRYAN SHAUGHNESSY

**JULIAN FANTINO'S WRITTEN SUBMISSIONS**

**(MOTION TO APPEAR AS INTERVENER)**

**Overview**

1. Two bulwarks of Canadian democracy underpin the Canadian Justice System: 1) judicial independence and 2) public faith in the impartiality and fairness of judges. These principles are especially important where people do not have a lawyer.
2. Because these principles come under scrutiny in this application for judicial review, it is critical that the public interest be fully and properly represented. As it stands, there is no one speaking for the people of Canada. Mr. Fantino, who has long-served the Canadian public in a variety of roles, is uniquely qualified to serve this function as an intervener in this proceeding.
3. As a long-standing, public servant working various high profile and executive roles in the justice system, Mr. Fantino understands the intricacies of judicial conduct within a complex legal system, particularly where unrepresented litigants are concerned. As a former member of Parliament and Cabinet Minister, Mr. Fantino is also familiar with the larger context of justice issues. He has experience, expertise and insight relevant to a review of the conduct of the Canadian Judicial Council (CJC) and the judges the CJC oversees. Accordingly, the Canadian public would be well-served by the addition of his input in as an intervener this proceeding.
4. The CJC is charged with ensuring coherence and consistency in areas of judicial ethics. This in turn helps ensure and enhance public confidence in the judiciary. In the case at hand, the CJC failed to meet its obligations in this regard.
5. The general context of this judicial review is as follows. The Applicant filed a complaint with the CJC in respect of the actions and decisions of the Respondent Justice Shaughnessy. In handling

complaints, the CJC has a two-fold obligation: 1) to thoroughly review the material submitted, and 2) to be fair, transparent and clear in its communications with complainants. To do otherwise undermines the public's faith in the independence and impartiality of judges and the fairness of the systems they operate within, including the CJC.

6. The complainant was an unrepresented person and, as such, was ill-equipped to understand the complexities and challenges of making a fully informed complaint about a Judge. He could not have understood the intricacies and boundaries of acceptable Judicial conduct.
7. The Applicant made a series of complaints to the CJC relating to his treatment by the Judge. The CJC did not assist him in any way or otherwise focus on the important issues that should have been examined. The CJC neither asked for more information nor reviewed documents which were easily available. As a result, the CJC appears to have overlooked important evidence and failed to fulfill its mandate in dealing with Mr. Best's complaints. It apparently 'cherry picked' the evidence it reviewed while at the same time invoking a vague and opaque definition of Judicial conduct.<sup>1</sup>
8. Instead of conducting a thorough and thoughtful review, the CJC summarily dismissed the complaints. To compound the issue, the CJC was not transparent in its own conduct. The CJC failed to clearly communicate to the Applicant how it processed the complaint, what specific evidence it considered (or dismissed out of hand) and why it rejected the Applicant's allegations. The CJC's statement that the judge's actions and decisions did not constitute 'conduct' could not have been understood by the Applicant.
9. There are several areas where the CJC seems to have overlooked its duty to inquire further before analyzing the Applicant's complaints. Mr. Fantino can assist this Court in its analysis. This is all the more important when it is apparent, as here, that the person who complains to the CJC does not have the expertise or experience to understand the subtleties of the expected conduct of Judges.
10. Mr. Fantino is well placed to assist this Court in its analysis of the context of the Judge's behaviour in what was a complicated and not always transparent proceeding.
11. The CJC did not comment upon, much less investigate, a series of incidents that were reported by the Applicant that appear to be non-judicial behaviour. Mr. Fantino seeks to

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<sup>1</sup> Mr. Best's complaints and CJC responses – see Application Record Volume 1, Tab C2- 3 A to V and CJC response at Tab 4; Fantino Affidavit exhibit 26, 28 Motion Record Tab 26, 28. (this complaint had hundreds of pages attachments and they are supplied in electronic format to the lawyers in anticipation of directions from the Court)

point out to and assist the Court in reviewing these important factors and evidence which the CJC overlooked or ignored perhaps because it did not investigate properly.

12. Full scrutiny by the CJC may very well have changed the outcome of the complaints. The CJC's omissions presumably occurred because this was a complicated matter and the Applicant, an unrepresented person, could not possibly have had the expertise to focus his complaint. He could not have understood the intricacies and boundaries of acceptable Judicial conduct.
13. Without feedback from the CJC Mr. Best did not have any assistance in preparing his complaints and is asking that this matter be sent back to the CJC for a 'better look'. Mr. Fantino can assist this Court in assessing that issue and also in providing an unbiased and objective viewpoint.
14. Mr. Fantino's participation is timely and, with two days scheduled for the hearing, there is more than enough time to accommodate his submissions and evidence.
15. This Judicial Review proceeding presents a rare opportunity to evaluate whether the CJC fully and impartially performed its function in a particular case and, as such, to examine the standards applicable to the CJC. By doing so, this Court has an opportunity to bolster public confidence in the justice system as a whole.
16. The evidence available to the Court is extensive and reliable. With that evidence in hand, the Court can fully examine the standards applicable to the CJC in its role as a guardian of judicial ethics and conduct. First, the Court can ensure that the CJC fully address complaints having regard to all available evidence. Second, the Court can ensure that the CJC understands and carries out its important function of ensuring that Judges remain true to the principles of dispensing justice without bias, interference, or undue influence. In doing so, this judicial review may bolster the highest level of public confidence as seen from the viewpoint of all Canadians.

### **Facts**

17. After the Judge had stayed a legal action against multiple Defendants in the Superior Court of Ontario they then sought costs against the Plaintiff, an Ontario Corporation. The Plaintiff knew that the costs assessment motion was scheduled for November 2<sup>nd</sup>, 2009. The Plaintiff wrote to the Court advising it would not attend and that it was confident that the Judge would be fair in

assessing the costs and then they would be paid. The Plaintiff had promptly paid previous Court cost awards against it. .

18. Even though an earlier Order had specified that 10 days service was required upon the Plaintiff the Judge allowed a Further Amended Motion Record to be filed the day before the November 2<sup>nd</sup> return date. It had not been served on the Plaintiff or Mr. Best but the Judge proceeded anyway.
19. The motion was supported by the affidavit of James Van Allen. This document was suspicious on its face for many reasons including when it said that evidence had been obtained from the Toronto Police Association.<sup>2</sup> That organization, which is the repository of personal information about serving and former police officers –Mr. Best was a former police officer- never releases personal information for obvious reasons: the criminal element constantly wish them harm.
20. No cross-examination of Mr. Van Allen was ever permitted. The Judge did not question his credentials, his expertise, nor did he comment on the apparent release of confidential identity information by the Police Association.
21. Using information obtained via this obvious breach of privacy laws and violation of the Police Association rules Mr. Van Allen then gave his expert opinion that Mr. Best had arranged his affairs so that he could not be found. The tone of the affidavit suggested that Mr. Best was sinister for doing this. Mr. Van Allen must have used his authority as a senior OPP Police officer to obtain Mr. Best's personal information in violation of his oath of office and of the controls set up by the Police Association to prevent such malicious acts.
22. At the time Mr. Van Allen was a serving officer of the Ontario Provincial Police and was breaching his duty under the Police Act by providing this evidence to the Court under the guise of being a private investigator.<sup>3</sup> In addition it was well known that he had been publically criticized for his role in falsely accusing two innocent mothers of murdering their children.<sup>4</sup>
23. The Judge did not make even the most rudimentary inquiries into the bona fides or expertise of this alleged expert even overlooking that there was no C.V. produced for Mr. Van Allen.
24. Based only on Mr. Van Allen's evidence and knowing that Mr. Best could not possibly have known about this Further Amended Motion, the Judge signed an Order on November 12<sup>th</sup>, 2009 that immediately and retroactively placed Mr. Best in contempt.

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<sup>2</sup> Van Allen Affidavit Motion Record Fantino Affidavit Ex 35 Tab 35-

<sup>3</sup> Van Allen Affidavit Motion Record Fantino Affidavit Ex 35 Tab 35-

<sup>4</sup> Motion Record Fantino Affidavit Exhibits See Tab 39, 40, 41

25. Mr. Fantino can assist the Court in its function of analyzing all of the underlying facts including the duties and responsibilities of Mr. Van Allen at the time while he was a senior police officer.
26. Subsequently on January 15<sup>th</sup>, 2010 the Judge found Mr. Best in contempt for failing to obey his November 12<sup>th</sup> Order. Other than the Van Allen affidavit the other 'evidence' the Judge had relied on was the so called 'Statement for the Record'<sup>5</sup> by the prosecuting lawyers. Not only was this not sworn evidence, it contained a false statement when those lawyers assured the Court that Mr. Best had admitted receiving the November 12<sup>th</sup> Order. To the contrary Mr. Best had said repeatedly that he had not received it.<sup>6</sup>
27. Overlooking the *stare decisis* principle whereby the Supreme Court of Canada has mandated that a person cannot be convicted of contempt unless the Court is 100% sure that he has been personally served or has personal knowledge<sup>7</sup> the Judge convicted Mr. Best of contempt *in absentia*. (He had been out of Canada at the time and later said he did not know about the January 15<sup>th</sup> Court date.)
28. When he found out about the contempt Order Mr. Best returned to Canada to ask that it be set aside. The Judge stayed the January 15<sup>th</sup>, 2010 Order to allow him to do so. He did not have a lawyer and hearings were held on April 30<sup>th</sup> and May 3, 2013. His brief to the Judge was characteristic of unrepresented litigants: it was not focused and contained a large number of documents. No assistance was provided to this unrepresented litigant to get it right as he tried to explain the circumstances to the Judge. Instead the Judge decided not to consider evidence filed by Mr. Best and directed Mr. Best to purge his contempt.
29. The Judge chose to overlook incontrovertible evidence (a digital recording of a telephone call with Durham Police Sergeant Rushbrook. It can be listened to on the CD which is filed with the motion record entitled "Donald Best Applicant, Rushbrook Conversation, Supplement to Exhibit 64) that during the period just prior to the January 15<sup>th</sup>, 2010 contempt hearing was to take place there had been an investigation by the Durham Regional Police Court Officer.
30. This surprising evidence included an admission by the Durham Regional Police that its Court Officer had investigated Mr. Best prior to the January 15<sup>th</sup>, 2010 contempt hearing.<sup>8</sup> The Judge stated that he was insulted by this evidence and would not look into it.

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<sup>5</sup> Statement for the Record -Motion Record Fantino Affidavit Exhibit 8 Tab 8 [DB 015924-ATT16 pp. 330-345]

<sup>6</sup> Fantino Affidavit par 37; 78 Motion Record Tab 61 Certifying Digital Recorded conversation dated November 17<sup>th</sup>, 2009-

<sup>7</sup> R v Bhatnager

<sup>8</sup> When Mr. Best raised this issue and said "Your Honour, great respect, it probably means that this court has to disqualify itself..." The Judge retorted: "Don't use those words "respect" It's insulting to me." Then later when Mr. Best asked the Judge to listen to what the police told him and advised that the evidence is "it was the police who told me it was likely done , 99.9%, in



31. In due course the prosecuting lawyers advised the Judge that Mr. Best had complied with all outstanding Orders however that was not enough for the Judge who refused to consider Mr. Best's evidence.
32. Mr. Fantino can assist the Court in this Judicial Review because of his expertise as Toronto Police Chief and, later, Commissioner of the Ontario Provincial Police. This will assist the Court in evaluating the legality and reason for the police investigation and how it may have impacted on the January 15<sup>th</sup> hearing and the later hearings before the Judge. The hearings into whether the January 15<sup>th</sup> contempt Order should be set aside concluded on May 3, 2013. The Order was reinstated and Mr. Best was sent off to serve his three months in jail. Then the Judge secretly increased his time to be served by 50%. Mr. Fantino can assist the Court by providing evidence of this process and the protocols that should have been undertaken by the Court and the jail.
33. Mr. Best complained to the CJC about the Judge's behaviour throughout. The CJC dismissed the complaints.
34. The CJC website which is available to the public says:  
*"The complaint process is described fully in this website, but generally, when the Council receives a complaint about a judge, a member of the Council's Judicial Conduct Committee reviews the complaint and decides how the matter should be handled."*<sup>9</sup>
35. But that is not what happened: instead Mr. Sabourin who is described as *"a person who supports members of the Council in their work."*<sup>10</sup> dismissed the complaints.
36. Mr. Sabourin rejected the complaints because they did not deal with 'conduct'. However the CJC has not published a clear definition of conduct. Generally the CJC does not publish details of all its decisions so it is virtually impossible for an unrepresented or unsophisticated person to comprehend the CJC's view of the meaning of this word. The French version of the word conduct as shown by the CJC's publications is "bonne conduit" which has various meanings depending on context.<sup>11 12</sup>

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assistance to the court." The Judge's response was "I don't care what the police officially advised you." **Ref.** Transcript April 30, 2013 hearing Page 10 line 3-7 ; page 11 l. 17-18; Application Record vol. 2 p. 311-312', 322 l 23, 26

<sup>9</sup> [https://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_inquiry\\_en.asp](https://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp)

<sup>10</sup> [https://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_members\\_en.asp](https://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_members_en.asp)

<sup>11</sup> [https://www.cjc-ccm.gc.ca/french/conduct\\_fr.asp?selMenu=conduct\\_main\\_fr.asp](https://www.cjc-ccm.gc.ca/french/conduct_fr.asp?selMenu=conduct_main_fr.asp)

<sup>12</sup> <https://www.merriam-webster.com/dictionary/conduct> Conduct is defined in the dictionary in various dictionaries and generally can be summarized as follows. "the act, manner, or process of carrying on" and "a mode or standard of personal behavior especially as based on moral principles"

37. It follows that an Unsophisticated Person will have no opportunity to have any insight or access to any consistent definition of 'conduct'. Accordingly it seems all the more important that when an Unsophisticated Person writes to the CJC about a judge there must be a proper evaluation of the complaint but only after there has been a sufficient investigation so that the CJC is not being misled or acting without sufficient information. The CJC web site does nothing to guide the Unsophisticated Person or ensure that all relevant facts are marshalled.
38. The failure of the CJC to investigate and review the background and context of the actions of the Judge and especially the behind the scenes activities leaves many questions as to the Judge's behaviour and motivations. The whole story needed to be heard.
39. The function of the CJC goes much deeper. According to its public statement: " *...judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges*".
40. It follows that the CJC has the mandate of ensuring that every judge lives up to and complies with this duty. It cannot possibly be able to do this without knowing and understanding all of the events that occurred both in Court and behind the scenes.
41. The complaints in this matter suggested that something amiss had happened. A secondary question that the CJC did not address was whether the totality of the Judge's surrounding actions compromised judicial independence in some way.
42. It follows that if Judges must fulfil their duty then the CJC has similar duties as it carries out its function. The CJC did not gather much less assess all of the evidence and overlooked other evidence which was readily available. In the final result this lack of assistance to Mr. Best and lack of transparency by the CJC is the focus of this Judicial Review and, speaking on behalf of all Canadians, Mr. Fantino's experience and public service viewpoint can be of assistance to the Court.
43. The CJC does not appear to have done its job: it summarily dismissed complaints about what appears to be a very disturbing act by a Judge on the basis that it was not 'conduct'. Its failure to act was inconsistent with its mandate if only because it has never established guidelines or a definition of 'conduct'.

44. *Cosgrove v. Canadian Judicial Council*, [2007] 4 FCR 714, 2007 FCA 103 speaks of the screening process which takes place upon receipt of a complaint. That case was about a judge who had made a ruling in court that the Attorney General did not like and ordered an inquiry under S. 63(1). This was clearly an investigation about judicial conduct and there is therefore no justification for a ruling in another matter that the CJC can decide not to look into judicial conduct. Alternatively the CJC will have to pin down and define what appears to be a floating and incomplete definition of judicial conduct.
45. In *Cosgrove* the Federal Court looked into the conduct of the judge sitting on the bench and made findings that what the judge had done was far beyond what a judge is permitted to do. Using the same analysis here the Judge made findings of fact against the Applicant which were “*unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.*”<sup>13</sup>
46. With this guidance in mind from the Federal Court of Appeal it shows that the CJC failed to make the proper inquiries even to the point of determining whether there might be evidence that would lead to an inquiry about similar conduct from the Judge. The CJC should have considered whether the Judge’s rulings were based on minimal evidence bolstered by substantial misinformation provided by the prosecuting lawyers. Based on such findings it should have considered whether that led the Judge into the area of obtaining and filing in the Court record evidence that had nothing to do with the real issues in the case.
47. The question remains why then did the CJC not apply full investigative procedures and analysis in order to satisfy itself that there was no such evidence before summarily dismissing the complaint?

**Judge and CJC dealings with unrepresented litigant**

48. The CJC has published guidelines for Judges who are dealing with unrepresented litigants. These guidelines and more apply to the same degree to the CJC when it receives a complaint. The CJC was created by the Judges Act is to serve the people of Canada and ensure that Judges are operating reasonably within their mandate. The more complicated the matter under review the more the CJC has a duty to be helpful to unrepresented and unsophisticated persons.

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<sup>13</sup> *Cosgrove* See Par. 12- see Responding Record of Justice Shaughnessy Volume 1 Tab 10

49. In this matter Mr. Best got no feedback from the CJC during the intake stage and never after that. (Qu. Can the CJC not dedicate resources to interacting with the complainant especially in complicated or not well documented complaints are received? The inconsistencies and irregularities evident on the record in this matter raise questions that were not addressed or maybe not even known to the CJC). Mr. Fantino's background and especially as Privy Councillor and Federal Cabinet Minister gives him a broad perspective of what Canadians need and should be able to expect when they are dealing with the CJC.
50. Given the prevalence and ongoing nature of discussions regarding unrepresented litigants and access to justice the CJC did not take note of nor comment about the exchanges between the Judge and Mr. Best when he raised the issue of unwarranted and suspicious police investigations.<sup>14</sup> Courtesy in challenging an unrepresented litigant who is explaining evidence is a subject that needs further investigation and comment having regard to the CJC's own standards regarding unrepresented litigants.
51. The unanswered question is why did the CJC ignore some parts of the original complaint and not answer each point directly then or at any later stage of its process? On their face these allegations are disturbing enough that resources should have been applied at the CJC to not only substantiate whether these facts are fully known. Then it needed to examine why the Judge agreed to take actions which were far beyond what was needed to complete the finalization of the costs award phase of the legal action that was before the judge.
52. A crucial point that was apparently not addressed by the CJC and would have escaped the notice of Mr. Best is that the Judge had been appointed as the Judge to hear all motions. Such a designation creates a continuum of conduct during and between hearings such that the Judge's actions are cumulative and cannot be reviewed singly.
53. It is not clear from any record of the CJC why it 'cherry picked' parts of the complaints and apparently conducted no investigations. Instead the cherry picked documents, which are not identified by the CJC, seems to have convinced the adjudicator, Chief Justice Scott, of Manitoba to decide that on the first instance and from what he had been given, there was no need to proceed any further.
54. The judicial system and the CJC is complicated and specialized knowledge is required to negotiate it. Where a person does not possess that knowledge it is incumbent on the system itself to reach out and assist. Other tribunals have investigative facilities whereas

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<sup>14</sup> Transcript April 30<sup>th</sup> Motion Record Exhibit 67 Tab 67 [DB000113-g10-10-11]

the CJC has failed to implement any i.e. a complaint may be obviously deficient of relevant facts on its face and the CJC does not assist but rather can reject a complaint simply because it is not complete. While it may be the only body that has the expertise to understand and investigate the operations of Judges within the Judicial System it does not extend its own expertise to assist a complainant.

#### **Police involvement and interference**

55. It is difficult to know when police investigations began given that Officer Rushbrook of the Durham Regional Police advised that this was not the first case where the police have been tasked with investigating matters related to civil lawsuits. However when Mr. Best showed the Judge evidence of suspicious Police involvement<sup>15</sup> the judge became insulted and in effect accusatory toward Mr. Best. This was curious when some people might have thought the appropriate response might be more conducive to discovering what really happened behind the scenes. In any event Mr. Fantino can be of great assistance to this Court because of his background in police work.
56. There has been no investigation or sourcing of facts that may lead to a conclusion that the Judge was influenced improperly by matters that took place outside of the courtroom e.g. the Durham Police Court Officer investigation. Had this been done it would have thrown light on errors in the Judge's see the Reasons of January 15<sup>th</sup>, 2010 when he convicted Mr. Best of contempt.
57. The formal reasons of January 25<sup>th</sup>, 2010 indicate that paragraph 24 might have been different in the light of the police investigation not being considered. The finding in this paragraph is not based on proper evidence contained in the Court record. To the contrary subsequent evidence shows that the Judge relied in part on the Statement of the Record by the prosecuting lawyers which he accepted as true even though it was unsworn and fabricated by those lawyers. The subsequent evidence proved beyond any doubt that the

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<sup>15</sup> Motion Record Fantino Affidavit ex 64- tab 64 April 29<sup>th</sup> 2013 Best Affidavit –Ruling on April 30, 2013 re April 29, 2013 Best affidavit which raises this issue and presents a digital recording of a conversation with Officer Rushbrook. Application Record pages 319=320 which follow submissions by Mr. Best highlighting the disturbing nature of this evidence. Also **Ref.** Peel Police Department Don Best affidavit April 29, 2013-par. 10 Rushbrook- placed arrest warrant on the CPIC system- this is extraordinary from the point of view of police procedure- so it has yet to be determined how it found its way to the Peel Police Department-

Statement of the Record was false. The Judge may also have been indirectly influenced by the police investigation.

### **Secret Proceedings**

58. The CJC did not make any inquiries about the backroom or secret proceeding that occurred on May 3, 2012 after the Judge left the Courtroom. In Court he had declared that the Order and sentence to incarceration that had occurred on January 15<sup>th</sup>, 2017 would be reinstated (it had been stayed) and therefore would take effect. The Judge further stated emphatically that he was done with the proceeding and nothing to do with this matter should ever be brought back before him. This further raises concerns about the secret proceeding that took place after he said that and left the Courtroom.
59. The CJC did not look into this and, because Mr. Best was removed from the Court and taken to jail at the time, he was unable to know that a secret hearing had occurred that increased his sentence. For that reason the summary conclusion that this was Judicial conduct cannot possibly be supported without knowing more. The CJC may have accepted that what the Judge said in Court before he adjourned was the only information they needed to know. If that is the case then the CJC needs to be reminded to look more carefully at the context and surrounding circumstances.

### **Improper evidence**

60. The judge in the transcript December 2<sup>nd</sup>, 2009 says that he warned counsel not to write to him: <sup>16</sup> and yet later the prosecuting lawyers continued to file letters to and from Mr. Best asserting that they were evidence and the Judge read them.

### **Extrajudicial activity**

61. Ultimately when the motion to set aside the January 15<sup>th</sup> contempt Order were underway (Phase II) the Judge said to the prosecuting lawyers "*I was under the impression that effectively he did comply to the best of his ability with my orders.*" And the prosecuting lawyers replied "yes". <sup>17</sup>

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<sup>16</sup> Transcript December 2<sup>nd</sup>, 2009 Page 46 -50

<sup>17</sup> Transcript April 30, 2013 hearing Page 89 line 2-9 ;Application Record vol. 2 p. 390I. 2-9

62. And yet not only did the Judge not take this into consideration in taking a fresh look at the proceedings the Judge actually secretly the sentence. The motivation for this was not clear nor was it explored by the CJC.
63. The answer may lie in another area that was overlooked by the CJC. It appears that the Judge acted outside his powers provided in the Judges Act in trying to assist the prosecuting lawyers in an out of jurisdiction endeavour.
64. Throughout the various court proceedings that were supposed to be focused on costs issues the prosecuting lawyers made it clear and the Judge acquiesced in pursuing another agenda: The action had been stayed at the pleadings stage and there had been no discovery. The Defendants were concerned that the subject matter of the action would be litigated in another country i.e. the United States or Barbados. They decided to use the excuse of bringing a cost motion in Ontario in order to obtain and file evidence in the Court file so that it could be used in those jurisdictions.
65. The Judge encouraged the prosecuting lawyers and assisted their plan. When he could have fixed the costs early on he demurred because the prosecuting lawyers wanted his assistance to obtain evidence and make it available in other jurisdictions.
66. On June 8<sup>th</sup>, 2010 the costs had been settled and the *lis* was extinguished. At that point the Judge pre-approved the filing of evidence with the Court for the sole purpose of it being used in other countries. The Judge failed to exercise any control over this process and ceded power and authority to the prosecuting lawyers without any impediments to their doing as they wished with no judicial supervision.
67. The result was that a great deal of evidence- thousands of pages- that had nothing to do with the action was filed in a special Court file. This included personal and solicitor client as well as confidential medical records with respect to innocent bystanders.<sup>18</sup>
68. These people had no warning or knowledge that their privacy was being violated and those records were now available to the public. The Judge did not know where the information came from, what it was, and did not even bother to ask. The Judge took no cognizance that he was or might have been exceeding his powers under the Judge's Act or that he was violating privacy and Charter rights available to all persons named.

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<sup>18</sup> The Zagar affidavit which contains all of these documents and was filed with the Court is available electronically however the intervenor would not file it with this Court until proper protections are provided to all those named.

69. The CJC will have to examine all of the facts and determine the nature of the Judge's actions and omissions in this matter and how they may have influenced the proceedings.
70. Here unrepresented persons who were not involved in the subject action including the costs issues had their Constitutional and Privacy rights abused. They did not even know that they were being violated. The Judge made no inquiries, examined none of the evidence, and imposed no controls on the actions of the prosecuting lawyers who were given carte blanche to file anything they wished in the Court file.
71. The CJC review ignored the strong evidence that all of the proceedings after November 2<sup>nd</sup>, 2009 were potentially an abuse of process. The record shows that Mr. Best was aware of an Order that said that the November 2 proceedings were to fix costs and peremptory on the parties. He expressed contentment and approval of that process and the Judge and lawyers were aware of that because he wrote them to say so. What he could not have known is that the lawyers and Court agreed that the proceedings were now remarkably different and intended to elicit evidence, after the action had been dismissed, to be used in courts in other jurisdictions. It is virtually impossible for any layperson (and most lawyers) to understand how abusive this process had become and the CJC has ignored it.
72. The December 2<sup>nd</sup>, 2009 transcript does not show that the Judge refused to become involved in the plans of the prosecuting lawyers to continue to utilize the Court to force Mr. Best to settle the cause of action outright or provide evidence to be used in other countries.
73. The evidence that that showed private information of Mr. Best on line might have something to do with Mr. Best's concern that he was being harassed and threatened as part of an intimidation process. The information contained in the documents that were filed in the extra-judicial file may have been part of this process and the CJC did not examine why it was not controlled by the Judge.
74. It is common ground that when a case is resolved by settlement the judge becomes *functus* once having approved the settlement. If a Judge is engaged to approve a settlement he must take several factors in mind even if all parties have agreed to the terms of the settlement. The Judge has to keep in mind larger issues such as the administration of Justice and being a reasonable settlement within the confines of the *lis* that was before him. He must also guard against the release to the public of documents and information



that might abuse the rights of others, especially if they have not been given notice to allow them to intercede. That did not occur here and Mr. Fantino can assist the Court because of his awareness of various protocols and laws that are in place to prevent abuse.

75. However in this matter the Judge is seen to approve a settlement that impacts on the privacy and constitutional rights of many third parties who had no notice. In addition the Judge then went further than the terms of the settlement and appears to have created a shadow judicial system whereby the lawyers became the adjudicators of further materials that they chose to file with the Courts without any supervision by any properly appointed Judicial Officer (i.e. Judge or Master). This 'carte blanche' Order made without notice to anyone arguably far exceeds the powers given to the Judge under the Judge's Act. The motivation for this curious Order needs to be explored and understood and Mr. Fantino has the expertise to assist the Court in examining this issue.

#### **Law**

76. "*The objects of the [CJC] are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.*" Judges Act Sec. 60(1)
77. The CJC's own policy manuals describe its mandate and mission. The attached CJC pamphlet entitled '*The Conduct of Judges, and the Role of the Canadian Judicial Council*' advises that you do not need a lawyer to complain about a Judge. It states that Parliament created the CJC in 1971 to investigate and rule on complaints about the conduct of Judges. It is not clear but it seems to contemplate that when a Judge's behaviour is a concern then the CJC will investigate. The CJC promises to be fair, objective and effective. Mr. Fantino's background can be helpful to this Court to assess the Judge's behaviour in the context of the actions of the Judge and especially behind the scenes events that were not known and/or evaluated by the CJC.<sup>19</sup>
78. Judges AC 63(2) says that the CJC may investigate a complaint or allegation. At present it is difficult to understand how an unsophisticated person might be able to write a complaint with no guidance or assistance. If the CJC is acting fairly and judiciously this clause must mean that it will gather complete information even when it appears that the author of the complaint does not have the ability or understanding to create a solid well reasoned and insightful complaint.

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<sup>19</sup> CJC Pamphlet: 'The Conduct of Judges' is attached.

79. Rule 109 (1) states that the Court may, on motion, grant leave to any person to intervene in a proceeding.

80. In *J.V.D. Mill Services*, the Board also described its approach to granting of status to public law intervenors by drawing upon the principles adopted by the Court of Appeal in *R. v. Latimer*[5]. In *J.V.D. Mill Services*, the Board says at paragraphs 24 *et seq.*:

*[24] Public Law (or often called Public Interest) intervenor status is granted when a court "is satisfied that the participation of the applicant may help the court make a better decision". Public Interest Standing has been recognized by the courts in Saskatchewan. The principles to be applied in determining whether to grant status to a public interest intervenor were set out by the Saskatchewan Court of Appeal in R. v. Latimer:*

- a. Whether the intervention will unduly delay the proceedings?*
- b. Possible prejudice to the parties if intervention be granted?*
- c. Whether the intervention will widen the lis between the parties?*
- d. The extent to which the position of the intervenor is already represented and protected by one of the parties? and*
- e. Whether the intervention will transform the court into a political arena?*

*[25] The Court in Latimer, supra, also noted that "[A]s a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must also balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the "lis".*

81. By analogy to *R v. Hape* 2007 SCC 26 no thought was given by the Court to the abuse of the Charter Rights of each of the persons who was 'outed' in the filing of the documents on June 8<sup>th</sup>, 2010 and thereafter. International Law has no rule of stare decisis (per Lord Denning quoted in *Hape*) and the Judge and CJC failed to examine how filing documents in a special Court file might infringe on the rights of those identified in those documents. The CJC failed to look into why the Judge allowed this exercise which was

- basically providing evidence to foreign jurisdictions in a manner that would not be allowed in Canada without judicial supervision after hearing from the affected parties.
82. In interpreting the Judges Act, the Ontario Courts of Justice Act and the earlier versions of the Judicature Act *Bell ExpressVu v Rex 2002 SCC 42* will be invoked by Mr. Fantino as authority for the fact that the Statutes are not ambiguous and speak for themselves. No power is given to an Ontario Superior Court Judge to create a Court file that contains private, personal, and confidential material for the purpose of allowing it to be used to introduce evidence into a legal action in a foreign jurisdiction.
83. The Judges Act creates and circumscribes the function and duties of a Judge in Canada. The Courts of Justice Act (following after the Judicature Act) in Ontario regulates the power of Judges. The Judge has no powers other than given by statute and his powers are circumscribed by statute.
84. The Supreme Court of Canada has stated that a statute must be plainly read and no authority is found anywhere for a Judge to concern himself with choosing, authorizing, validating or in any way directly or indirectly becoming involved with legal actions that are or may be taking place in foreign jurisdictions such as happened here. A Superior Court Judge has jurisdiction in Ontario to do justice between the parties to a legal action and nothing more. Once that legal action is over, as in the case here, the Judge has no further power to do anything regarding the rights of those parties or, as here, the rights of other parties who did not even know what the Judge was doing.

### **Relief Sought**

Mr. Fantino seeks intervenor status on the basis that no one speaks for the people who are supposed to be served by the Judicial System and the CJC's mandate to assist Parliament by dealing with complaints about the behavior of Judges.

All of which is respectfully submitted by

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# CJC Pamphlet

et le rôle du  
Conseil canadien  
de la magistrature

# LA CONDUITE DES JUGES

# THE CONDUCT OF JUDGES

and the role of the  
Canadian Judicial Council

## CANADIAN JUDICIAL COUNCIL

The Canadian Judicial Council is made up of 39 members and is chaired by the Chief Justice of Canada. Membership consists of the chief justices, associate chief justices and some senior judges from provincial and federal superior courts across the country. The Council collectively has authority over a body of more than a thousand federally appointed judges. The Council meets twice a year. In the meantime, it is through committees that the Council does much of its work. Some of these are permanent, standing committees; others are formed to deal with specific issues or projects.

*The operation of Canadian justice relies on the existence of a highly trained, professional and independent judiciary.*

Canadians rightly demand a high degree of professionalism and good conduct from their judiciary. They also need a judiciary that is independent and able to render judgments without fear of reprisal. To that end, Parliament created the Canadian Judicial Council in 1971, giving it power under the *Judges Act* to investigate and rule on complaints about the conduct of federally appointed judges.

Canadian Judicial Council  
Ottawa, Ontario  
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## THE CONDUCT OF JUDGES

Every year, federally appointed judges in Canada make thousands of decisions on matters that range from procedural questions to the most fundamental interests of those appearing before them.

Judges can make mistakes. When one side or the other in a legal dispute thinks that a judge has come to the wrong **decision**, our system of justice allows that person to appeal the decision to a higher court. Appeal courts can reverse or vary the decisions made by other judges. The fact that an appeal court has overturned a judge's decision does not mean that the judge's conduct was improper or that grounds exist for removal of the judge from the bench.

Whether judges are correct or incorrect in their decisions, a high standard of personal **conduct** is expected of them. When someone believes that a judge's behaviour is of serious concern, or that a judge is not fit to sit on the bench, here too our system of justice provides for a remedy. In such cases, a complaint may be addressed to the Canadian Judicial Council.

## AN IMPORTANT DIFFERENCE

When issues arise concerning a judge's role in a trial, the distinction between *decision* and *conduct* is fundamental in deciding where you should go for remedy.

Issue	Remedy
A judge's <i>decision</i> is questioned	Appeal – a higher court reviews the decision
A judge's <i>conduct</i> is questioned	Complaint – the Canadian Judicial Council reviews the judge's conduct

The Council's Judicial Conduct Committee is responsible for reviewing judicial conduct in a way that is fair, objective and effective. It must also guarantee a prompt and fair hearing for judges who are accused of misconduct. In all cases, judicial independence – the foundation stone of Canadian justice – is central to the process.



## The Complaints Process

Canadians can have confidence in their judges. From the tens of thousands of judicial hearings that take place every year in Canada's superior courts comes a very low number of complaints. Although the Minister of Justice or a provincial Attorney General may generate an inquiry, most complaints come from the general public, and around half relate to cases in family law.

- If you wish to make a complaint, you do not need to be represented by a lawyer. Simply make your complaint *in writing* to the Canadian Judicial Council at:

Canadian Judicial Council  
Ottawa, Ontario  
K1A 0W8

Your letter should include:

- Your name and address
- Name of the judge, court, date and circumstances of the conduct in question
- Detailed description of the conduct

- A member of the Canadian Judicial Council's Judicial Conduct Committee examines the complaint and determines whether the judge in question should be contacted. If necessary, an independent counsel may be appointed to make further inquiries. If more than one perspective is needed, a panel made up of Council members and puisne judges (that is, ordinary judges, not chief justices or associate chief justices) may be struck.
- If the matter is very serious, or if the complaint comes from a provincial Attorney General or the Minister of Justice of Canada, an Inquiry Committee may be appointed to hold a public hearing, after which the matter goes on for discussion by the full Council.
- After considering the report of an Inquiry Committee, the Council may recommend to Parliament (through the Minister of Justice) that the judge be removed from office.

- The Council's only power is to recommend to Parliament that a judge be removed from office. Parliament has never had to face such a situation, although sometimes judges retire or resign before the matter gets that far. Where appropriate, the Council may express concerns about a judge's conduct where the matter is not serious enough to recommend that the judge be removed.
- When your complaint has been considered and determined, the Council will advise you of the decision in writing.

### **Authority of the Canadian Judicial Council**

The Council has authority only over federally appointed judges – that is, those presiding over the courts listed below. A complaint about a provincial or territorial court judge should be directed to the judicial council in your province or territory.

#### **Canada**

Supreme Court of Canada  
Federal Court of Appeal  
Federal Court  
Court Martial Appeal Court of Canada  
Tax Court of Canada

#### **Newfoundland**

Supreme Court, Court of Appeal  
Supreme Court, Trial Division

#### **Prince Edward Island**

Supreme Court, Appeal Division  
Supreme Court, Trial Division

#### **Nova Scotia**

Court of Appeal  
Supreme Court

#### **New Brunswick**

Court of Appeal  
Court of Queen's Bench

#### **Quebec**

Court of Appeal  
Superior Court

#### **Ontario**

Court of Appeal  
Superior Court of Justice

#### **Manitoba**

Court of Appeal  
Court of Queen's Bench



Saskatchewan  
Court of Appeal  
Court of Queen's Bench

Alberta  
Court of Appeal  
Court of Queen's Bench

British Columbia  
Court of Appeal  
Supreme Court

Yukon  
Supreme Court

Northwest Territories  
Supreme Court

Nunavut  
Court of Justice

Saskatchewan  
Court d'appel  
Cour du Banc de la Reine  
Alberta  
Court d'appel  
Cour du Banc de la Reine  
Colombie-Britannique  
Court d'appel  
Cour supreme  
Yukon  
Court supreme  
Territoires du Nord-Ouest  
Cour supreme  
Nunavut  
Cour de justice



BEST, Donald  
Applicant

**-and-**

Court File No.: T-604-16

THE ATTORNEY GENERAL OF CANADA et al.  
Respondents

FEDERALCOURTOFCANADA  
Application commenced at  
TORONTO

**MOTION RECORD**  
**Volume Two of Two**

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