ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF a complaint respecting the Honourable Justice Norman Douglas

BEFORE The Honourable Justice Stephen Borins
Court of Appeal for Ontario

The Honourable Annemarie E. Bonkalo
Associate Chief Justice, Ontario Court of Justice

Mr. J. Bruce Carr-Harris

Ms. Madeline Aldridge

COUNSEL Mr. Douglas C. Hunt, Q.C. and Mr. Michael J. Meredith
Presenting Counsel

Mr. Paul Stern for The Honourable Justice Norman Douglas

REASONS FOR DECISION

I

[1] On December 9, 2005 the Ontario Judicial Council (the "Council"), pursuant to ss. 51.4(18) and 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, ("*CJA*"), conducted a hearing in respect of a complaint by the Criminal Lawyers' Association that the Honourable Justice Norman Douglas has conducted himself in a manner that is incompatible with the due execution of the duties of his office. The particulars of the complaint are contained in Appendix "A" to these reasons.

II

[2] The evidence considered by the Council consisted of an Agreed Statement of Facts and the numerous references that were attached to the complaint. Justice Douglas did not testify and relied on the submissions made by his lawyer.

[3] The issue to be decided is whether some, or all, of Justice Douglas' conduct constitutes judicial misconduct. Specifically, this requires the Council to decide whether Justice Douglas has conducted himself in a manner that amounts to judicial misconduct. The Council is unanimous in finding that none of the conduct in which Justice Douglas engaged constitutes judicial misconduct, a term that is not defined in the *CJA*.

III

[4] Section 51.6(11) of the *CJA* sets out dispositions available to the Council upon completion of a hearing into whether a judge has engaged in judicial misconduct. It reads as follows:

> s. 51.6(11) After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge, may,
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> (a) warn the judge;
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> (b) reprimand the judge;
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> (c) order the judge to apologize to the complainant or to any other person;
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> (d) order that the judge take specified

> measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
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> (e) suspend the judge with pay, for any period;
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> (f) suspend the judge without pay, but with benefits, for a period up to thirty days; or
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> (g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.

Thus, Council is empowered to impose a broad range of sanctions if it finds that a judge has engaged in misconduct relative to the degree of the misconduct. In addition, where the Council dismisses a complaint it may comment on the appropriateness of the impugned conduct.

[5] Focusing on the broad scope of s. 51.6(1), in *Re:Baldwin* (2002) a Hearing Panel of this Council considered the meaning of judicial misconduct. In doing so, it relied primarily on two leading decisions of the Supreme Court of Canada: *Therien v. Minister of Justice*, [2001] 2 S.C.R. 3 and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249. The Council stated:

> In *Moreau - Bérubé v. New Brunswick (Judicial Council*), the Supreme Court discussed the tension between judicial accountability and judicial independence. Judges must be accountable for their judicial and extra-judicial conduct so that the public has [*sic*] confidence in their capacity to perform the duties of office impartially, independently and with integrity. When public confidence is undermined by a judge's conduct there must be a process for remedying the harm that has been occasioned by that conduct. It is

> important to recognize, however, that the manner in which complaints of judicial misconduct are addressed can have an inhibiting or chilling effect on judicial action. The process for reviewing allegations of judicial misconduct must therefore provide for accountability without inappropriately curtailing the independence or integrity of judicial thought and decision-making.
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> The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in s. 51.6(11) should be invoked, when necessary, in order to restore a loss of public confidence arising from the judicial conduct in issue.
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> Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, the question under s. 51.6(11) is whether the impugned conduct is *so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office or in the administration of justice generally and that it is necessary for the Judicial Council to make one of the dispositions referred to in the section in order to restore that confidence*.
>
> It is only when the conduct complained of crosses this threshold that the range of dispositions in s. 51.6(11) is to be considered. Once it is determined that a disposition under s. 51.6(11) is required, the Council should first consider the least serious - a warning - and move sequentially to the most serious - a recommendation for removal - and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally [emphasis added].

[6] A more discursive analysis of judicial misconduct was undertaken by another hearing panel of this Council in *Re: Evans* (2004). In doing so, the panel made extensive reference to *Therrien* in which the Supreme Court emphasized the close connection between standards of judicial conduct and the definition of judicial misconduct found in the operative principles of judicial impartiality, integrity and independence.

[7] In considering *Therrien*, the Council quoted extensively from the Supreme Court's discussion on the role of the judge in Canadian society. Significant, in our view, are the following passages from *Therrien* at paras. 110 and 111:

> Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:
>
> > Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
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> > (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)
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> The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

[8] Based on *Re: Baldwin* and *Re: Evans*, the test for judicial misconduct combines two related concerns: (1) public confidence; and (2) the integrity, impartiality and independence of the judge or the administration of justice. The first concern requires that the Hearing Panel be mindful not only of the conduct in question, but also of the appearance of that conduct in the eyes of the public. As noted in *Therrien*, the public will at least demand that a judge give the appearance of integrity, impartiality and independence. Thus, maintenance of public confidence in the judge personally, and in the administration of justice generally, are central considerations in evaluating impugned conduct. In addition, the conduct must be such that it implicates the integrity, impartiality or independence of the judiciary or the administration of justice.

[9] Accordingly, a judge must be, and appear to be, impartial and independent. He or she must have, and appear to have, personal integrity. If a judge conducts himself, or herself, in a manner that displays a lack of any of these attributes, he or she may be found to have engaged in judicial misconduct.

[10] To make a finding of misconduct, the Council must be satisfied that the evidence meets the requisite standard of proof required to demonstrate judicial misconduct. In *Re: Evans*, the Hearing Panel reviewed the authorities and adopted the requirement that a finding of professional misconduct requires clear and convincing proof based on cogent evidence. The evidence in this inquiry consists of an agreed statement of facts documented through transcripts of trials, reasons for judgment written by Justice Douglas and other judges, e-mail communications and other correspondence. Thus, the facts are

not in dispute. It follows that the evidence before us is clear and cogent. Accordingly, the issue is whether this evidence is "convincing" evidence of judicial misconduct on the part of Justice Douglas.

IV

[11] Justice Douglas was appointed to the Ontario Court of Justice in 1994 and was assigned to the court in Brampton. In 1996, he was re-assigned to the court in Guelph where he has been the only judge of the Ontario Court of Justice conducting criminal trials. As such, Justice Douglas has presided over the trials of individuals charged with offences contrary to s. 253(b) of the *Criminal Code*, which states:

> 253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> . . .
>
> (*b*) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

These are known colloquially as "over 80" cases.

[12] To prove "over 80" charges, the Crown relies on the results of a breath analysis of the driver. Section 258(1)(c) provides that where the officer who obtained samples of the driver's breath has followed the correct procedure, evidence of the result of the breath

analysis, "in the absence of evidence to the contrary", is proof that the concentration of alcohol in the driver's blood was "over 80". It is very common for drivers charged with "over 80" to introduce as "evidence to the contrary" the opinion of a toxicologist that, based on the driver's evidence of what he or she had consumed, as well as the weight, height and age of the driver and other factors, his or her maximum blood alcohol level would have been "under 80". It would seem that toxicologists qualified to provide opinions of this nature are much in demand among members of the bar who defend people charged with "over 80" offences. Consequently, it is on occasion necessary to adjourn "over 80" cases for months to accommodate the schedules of busy toxicologists. Based on his experience in conducting "over 80" cases, it would appear that Justice Douglas was displeased with the number of defendants who elected to defend "over 80" cases by relying on the opinion of a toxicologist, and the delays resulting from the busy schedules of the few toxicologists who seemed to be much in demand among the defence bar in the Guelph area. Justice Douglas believed that this situation was causing serious backlogs in the Guelph Court and reflected poorly on the administration of justice.

[13] It is Justice Douglas' reasons for judgment in *R. v. Moore*, an "over 80" case, that is the starting point in the chain of events that culminated in the Criminal Lawyers' Association's complaint of March 1, 2004, to the Ontario Judicial Council about Justice Douglas' conduct. Justice Douglas delivered oral reasons for judgment in convicting Mr. Moore. In his reasons for judgment he was critical of those who enter a

defence to charges of "over 80" and of the law which the court is obliged to follow in adjudicating such a charge. Mr. Moore commenced a summary conviction appeal from conviction and sentence.

[14] The appeal was heard by Langdon J., whose reasons for judgment are reported as *R. v. Moore*, [2004] O.J. No. 3128. One of the grounds of appeal was that there was a reasonable apprehension of bias on the part of Justice Douglas in convicting Mr. Moore. In dealing with this ground of appeal, Langdon J. quoted the following passage from Justice Douglas' reasons for judgment in an earlier "over80" case, *R. v. Campbell*, [2004] O.J. No. 871, which he had decided about three weeks before he decided *Moore*:

> Allow me some *obiter dicta* now, at this stage. This requirement that the Crown disprove bolus drinking as referred to in *R. v. Grosse*, should be revisited. While I intend to follow the reasoning in that case, because I am bound by it, I wonder if the Court of Appeal, today in 2004 would decide it the same way. In this present day when the backlog is strangling our courts, and one of the main culprits doing the choking is the over 80 trial. All across the province, and I sit in various locations across the province, there are a number of defence counsel who hold themselves out to be experts in this field , who are demanding two and three days of court time to litigate over 80 charges. They often have the same handful of toxicologists who have a caseload larger than most lawyers, and often courts are held hostage by the diary of the toxicologist whose dancecard is sometimes full for the next two years.
>
> My humble view, a judge in the trenches, is that it might be time for our higher courts, particularly in this age of backlog, to come to the relief of the court by revisiting some of these decisions in over 80 cases, keeping in mind that in most of these cases we are talking about Charter arguments. We are not talking about the possibility, in many of the cases, of

> innocent people who did not drink and drive being convicted, we are talking about exclusion of evidence. That is the end of my obiter.

[15] Langdon J. then made reference to several passages from the reasons of Justice Douglas in *Moore* indicating his views of those who enter a defence to "over 80" charges. The final passage that he quoted reads:

> Smarter minds than mine have determined that there is no presumption of accuracy on those machines. Notwithstanding, thousands and thousands of people plead guilty because they register more than 80 on those machines but in cases where the evidence to the contrary is adduced, I must give the accused the benefit of the doubt if I have some doubt that the evidence to the contrary has raised a doubt about the guilt of the accused.

[16] Langdon J. accepted the position of Mr. Moore's counsel that Justice Douglas' *obiter dicta* in *Campbell* and his comments in *Moore* demonstrated on his part a patent distaste for those who exercise their right to defend "over 80" charges and for the law that the court is obliged to administer. Langdon J. continued:

> One clear possible inference from the judge's remarks is that it is simply ludicrous for anyone to challenge the accuracy of the machine. Why is its accuracy not presumed when thousands and thousands of people accept it by pleading guilty? One also perceives the frustration engendered by the tension between ever longer trials resulting from *Charter* motions and the pressure of attempting to cope with them in a timely and "11(b)-compliant" manner.

[17] Accordingly, Langdon J. allowed Mr. Moore's appeal on the ground that a reasonable and informed observer would perceive a reasonable apprehension of bias on the part of Justice Douglas. His reasons for judgment were released on July 19, 2004.

[18] Langdon J.'s decision did not come to Justice Douglas's attention until August 16, 2004, just two days before the time for the Crown to appeal the decision to the Court of Appeal for Ontario would elapse.[1] On August 17, 2004, Justice Douglas initiated a series of e-mail exchanges with Crown counsel in the Crown Law Office Criminal in an attempt to determine whether the Crown had appealed, or was intending to appeal, the decision in *Moore*. He was concerned about whether he was "…stuck with the result" because if there was no appeal he said: "…I am going to have to find a way around it or I'm going to be hit with recusal motions on every case — about 10 a week". He wanted to be able "to tell the lawyers who are lining up with recusal motions that the case is under appeal". As well, in his view an appeal presented "an opportunity for the Court of Appeal to address head on the issue of the over . 80 cases back-logging our courts". Justice Douglas was informed that the decision was being appealed and was given the name of the Crown lawyer to whom the appeal had been assigned. As will be seen, Justice Douglas' concern about "recusal motions" proved to be accurate.

[1] Langdon J., a judge of the Superior Court of Justice, sat as a judge of the summary conviction appeal court in *R. v. Moore*: s. 829(1) of the *Criminal Code*. An appeal from the summary conviction appeal court to the Court of Appeal for Ontario may be taken only with leave of the court or a judge thereof on any ground that involves a question of law alone: s. 839(1) of the *Criminal Code*. The *Moore* case has not been heard by the Court of Appeal for Ontario. It was perfected on February 7, 2006 and at this time has not been listed for hearing.

[19] The next day Justice Douglas wrote an e-mail to the Crown lawyer to whom the appeal had been assigned in which he said, in part:

> I'm told that you have been assigned this Crown appeal. I would like to send you my thoughts on it, since Langdon J. granted the summary conviction appeal on his interpretation of what I said as opposed to what I did say. If you believe they could be of some assistance to you, please advise.

Crown counsel responded to Justice Douglas, but only to advise him that it would not be appropriate for him to communicate with the judge regarding the appeal. On the same day, a senior lawyer with the Crown Law Office Criminal wrote to Regional Senior Justice Graham to apprise him of the e-mail inquiries from Justice Douglas and to inform him that the policy of that office was to decline contact with judges in regard to whether an appeal should be taken in a given case.

[20] It is significant to note that on September 17, 2004, the Assistant Deputy Attorney General – Criminal Law Division informed Regional Senior Justice Graham that it was determined that the Crown was legally obliged to disclose to defence counsel the e-mail exchange between Justice Douglas and the lawyers in the Crown Law Office Criminal.

[21] On July 14, 2004, Justice Douglas had presided in *R. v. McKee*, another "over 80" case. Dr. Michael Ward, a toxicologist, testified for the defence and provided an opinion on the level of alcohol in the defendant's blood at the relevant time. At the conclusion of Dr. Ward's testimony, Justice Douglas ascertained in a discussion with him that he had no available dates on which to testify until 2005 as he was scheduled to testify in

"over 80" cases every day of the week. This discussion does not appear to have been relevant to any issue in the case. In his oral reasons for convicting Mr. McKee, reported at [2004] O.J. No. 3640, Justice Douglas had this to say in para. 5 about the defence expert, Dr. Ward:

> With regard to Dr. Ward, I accept his evidence when he does the math. That is basically what these toxicologists do. That is basically what he did here. He did the math, based on what the accused said he had to drink and based on what the accused eliminates per hour. That is not rocket science. It is not even probably Grade 8 math. It is probably Grade 4 math. And that is what he did.… Dr. Ward also gave some evidence on Constable Fisher's evidence. I do not need to go here with regards to finding the accused guilty, but I do go here because I think it is time somebody did. When he comments, in his opinion, on Constable Fisher's expertise with regard to the machine, let me just say this, that I take his evidence in the context that he is a professional witness with a vested interest in the outcome of this case. I say that because he said in his evidence under oath that he testifies every day for the defence in these types of cases, and he is so booked that he is booked into next year, and he only has room for cases in the near future if something else falls off the table. That tells me these cases are his bread and butter, or should I say steak and lobster, and therefore, when he offers his opinion on things other than doing the math, I am entitled to take into account that he is not a completely objective, independent witness. And therefore, since I have rejected the accused's evidence, in any event, Dr. Ward's evidence is of no use to me, and I find the accused guilty as charged.

Mr. McKee appealed his conviction.

[22] In another "over 80" case, *R. v. Locke*, on three occasions between July 6, 2004 and July 27, 2004 Justice Douglas considered a defence request for an adjournment on the ground that the defence expert, Dr. Ward, was not available to testify on the

scheduled trial date. As he had done on previous occasions, Justice Douglas stated his concern about the number of toxicologists testifying in "over 80" cases:

> My concern is this. With the number of toxicologists that are being subpoenaed in our courts I will not be held hostage by the diary of toxicologists. In other words, we are getting more and more concerned about delay.

[23] At the suggestion of Justice Douglas, and with the consent of the Crown, the defendant was able to avoid a lengthy adjournment of his trial by tendering a written report and opinion prepared by Dr. Ward, thereby avoiding the need for him to testify. This pleased the trial judge, who stated:

> That's very good news because this matter has been adjourned twice already, once on the Crown's request and once on your request and I had a judgment prepared in the event that you were going to ask me to put this over in to the New Year to accommodate Dr. Ward's schedule. I'll just keep this judgment in abeyance until I need it because this issue needs to be addressed, particularly when two weeks ago I asked Dr. Ward in the witness stand how busy he is and he is in court every day, five days a week, until the New Year just about. I was going to give judgment today that I won't need to now.

[24] On September 3, 2004, which was about two weeks after he had attempted to become involved in the Crown appeal in *R. v. Moore*, Justice Douglas heard an adjournment application in another "over 80" case, *R. v. Laird*, in which the proceedings and the judge's ruling are reported at [2004] O.J. No. 3713. Mr. Laird had been charged about a year earlier. His trial, which had been adjourned on four occasions to accommodate Dr. Ward's schedule, was fixed for September 14, 2004. Defence counsel

sought an adjournment on the grounds of pending appeals in *R. v. Moore* and *R. v. McKee*. Defence counsel proposed, with the consent of the Crown, that the trial should be adjourned until the appeals had been decided.

[25] Justice Douglas dismissed the application for an adjournment. In a lengthy oral ruling, Justice Douglas used the occasion to review and analyze his reasons for judgment in *R. v. Moore*, and those delivered by Langdon J. in ordering a new trial on the ground that there was a reasonable apprehension of bias. In doing so, he reproduced his *obiter* in *R. v. Campbell* as well as portions of Langdon J.'s reasons and a dialogue between Langdon J. and Crown counsel that took place while counsel was making her submissions in *Moore*. Justice Douglas' counsel conceded that he had prepared this part of his ruling previously with the intention of using it should there be an opportunity to do so. It is to be recalled that in *R. v. Locke* Justice Douglas indicated that he had a judgment prepared in the event that the defendant was going to ask him to grant an adjournment to accommodate Dr. Ward's schedule.

[26] After extensive reference to, and criticism of Langdon J.'s reasons, Justice Douglas stated at para. 47 of *Laird*:

> I am bound by Justice Langdon's decision in *Moore*. I am not bound, and do not accept Justice Langdon's following conclusions:
>
> 1. That I approach my responsibilities as a judge with cynicism, impartiality and intolerance.
>
> 2. That I criticized the Supreme Court of Canada.

3. That I have a distaste for those lawyers who argue cases before me.

4. That I have a distaste for the law.

5. That I think it is ludicrous to challenge the accuracy of the breath machine.

[27] After quoting passages from his reason for judgment in *R. v. Moore* and providing his characterization of what he meant, at para. 56 he concluded:

> Since I am the only one who can, with any authority, convey the meaning of what I said, let me say this: I meant what I said. There was no hidden meaning. There was no sarcasm. There was no need to interpret it differently. I was not disingenuous. I did not disregard the law that binds me. I mean no disrespect to Mr. Justice Langdon. I am bound by his decision and I intend to abide by it. The issue is, "What am I bound by?" Clearly I am bound by the result. In that specific case I am bound by the conclusion that I erred in that case by making the *obiter* remarks that I did. The issue isn't what my intentions were. The issue is would a reasonable, informed observer walk away from the courtroom saying the judge was biased. While my intention was merely to provide detailed reasons as the Court of Appeal requires me to do and explain that I had not tripped on any of the "land mines" that are strewn along the path in every "over 80" journey, that is not the test. Justice Langdon says I ought not to have made the remarks that I did and I am bound by that, I should not have made them.

[28] *R. v. Musselman* was another "over 80" charge over which Douglas J. was scheduled to preside. The defendant asked Justice Douglas to recuse himself on the ground that there was a reasonable apprehension of bias. He relied on five grounds arising from the judge's comments in other cases: (1) he had criticized the "bolus" drinking defence; (2) he characterized Dr. Ward as not being a completely objective

independent witness; (3) he had an "intolerance" for "over 80" trials; (4) he had become "exasperated" by the backlog caused by "over 80" trials; and (5) he had corresponded with counsel in the Attorney General's office, and this conduct "might be interpreted to be influential on the agents" of the Attorney General.

[29] Justice Douglas devoted most of his 19-page ruling to responding to each of the five grounds. As in *R. v. Laird* (a copy of which he attached to his ruling), he wrote a lengthy criticism of Langdon J. and his reasons for allowing the appeal and a detailed explanation of why he considered it important for the Crown to appeal the result in *R. v. Moore*. In dismissing the application that he recuse himself, Justice Douglas said:

> My conclusion is that an objective, informed, reasonable person would conclude these grounds do not meet the burden on the applicant. They do not rebut the presumption that a judicial officer can be expected before a trial even begins to honour his oath of office.
>
> When all the smoke clears, what did I do? I mused about the backlog issue. I carefully explained my reasons in *R. v. Moore* over a 26-page transcript. I assessed a witness who had offered an opinion. I tried to find out if *Moore* was being appealed. I tried to explain the need for someone to challenge the conclusions by Justice Langdon; not in the case but about my manner of judging generally, and I was worried that Justice Langdon's decision would result in days like we are having today.
>
> This application falls far short in convincing me that any 'reasonable person' would see these facts in the same way as the applicant. The application is therefore dismissed.

[30] Mr. Musselman's appeal from Justice Douglas' ruling was allowed by Corbett J. who concluded that there was a reasonable apprehension of bias and who issued an order

prohibiting Justice Douglas from presiding over Mr. Musselman's trial: *R. v. Musselman* (2004), 25 C.R. (6th) 295 (S.C.J.). Corbett J. provided a thorough summary of the facts commencing with the *Moore* trial, the appeal heard by Langdon J., Justice Douglas's e-mail communications with the Crown law office urging an appeal from Langdon J's ruling, his reasons for refusing an adjournment in the *Laird* case and for refusing to recuse himself in the *Musselman* case. In reviewing the facts and the rulings written by Justice Douglas, Corbett J. identified a number of indiscretions on the part of Justice Douglas which we, respectfully, adopt.

[31] In paras. 3 and 4, Corbett J. stated:

> The learned trial judge did not believe Moore. Thus the foundation for Dr. Ward's evidence was not established and it was, therefore, irrelevant. The learned trial judge believed police witnesses. For these reasons the charges were found proved.
>
> However, the trial judge did not restrict his reasons to making these findings. He made *obiter dicta* statements, some identified as such, and some strewn among the rest of his reasons, that could create the impression that he was less than pleased with the state of the law on the defence of "bolus drinking", the impact it was having on court delays, and the general independence and objectivity of defence expert toxicologists.

[32] Corbett J. properly characterized as a serious error in judgment Justice Douglas' communications with the Crown law office to determine whether an appeal was planned in *R. v. Moore*. He further described Justice Douglas' attempt to intervene as a "serious error" that could have had serious consequences in the *Moore* appeal.

[33] In respect to Justice Douglas' reasons for denying a request for an adjournment in *R. v. Laird*, Corbett J. had this to say at para. 12:

> …The way in which this request was framed was rather impractical: it was suggested that *Laird* be adjourned until after the disposition of the appeal in *Moore* in the Court of Appeal. The learned trial judge noted, rightly, that the *Moore* appeal might not be disposed of for a great many months, or longer, and it is possible that a further appeal might be taken to the Supreme Court of Canada. Clearly the *Laird* trial should not be postponed for years. However, the learned trial judge's reasons for refusing the adjournment request went well beyond a denial on practical grounds. Instead, he addressed Langdon J.'s decision in terms that reflected his deep disagreement, and profound hurt at the decision. I do not engage in a detailed review of his reasons in this judgment. Those reasons are similar to those given in the trial judge's ruling in the case before me, and similar concerns apply to them: in summary, the trial judge became an advocate in his own cause, and did not restrict himself to interpreting and applying the decision of Langdon J.

[34] Turning to Justice Douglas's reasons for refusing to recuse himself in *R. v. Musselman*, at paras. 13 and 14 Corbett J. stated:

> …In lengthy reasons, the trial judge denied the request. In the process of doing so he defended his language and *obiter dicta* statements in *Moore* while at the same time acknowledging that he is bound by that decision until such time as it may be reversed. The tone and language of the decision on the recusal motion again reflect the trial judge's deep and personal dissatisfaction with Langdon J.'s decision. He goes so far as to say that Langdon J. has called his integrity into question. Again, the trial judge should have restricted himself to interpreting and applying Langdon J.'s decision, and should not have gone further.
>
> I am impelled to the conclusion that the learned trial judge has now entered the "fray", on his own behalf, and has so

> personalized the *Moore* decision, and the impact of that decision on the perception of his ability to try "over 80" cases impartially, that an atmosphere has been created where it appears that the trial judge has matters of his own reputation and integrity in mind when approaching these cases, rather than the dispassionate adjudication of the underlying cases.

[35] Justice Corbett made references to the numerous *obiter dicta* found in the reasons delivered by Justice Douglas in *Campbell*, *Moore*, *Laird* and *Musselman*, pointing out at para. 35:

> Further, the inclusion of *obiter dicta* is not, by itself, reversible error or, by itself, a basis for finding an apprehension of bias. But it generally detracts and distracts from the purpose of reasons for judgment which are to give a reasoned explanation for the disposition of the case. By definition, *obiter dicta* comments are irrelevant to the disposition of the case.

Justice Corbett continued at paras. 36 and 37:

> But - and in this respect the learned trial judge is in error - *obiter dicta* comments remain a part of the reasons for judgment. They may be "aside comments", in the sense of being unnecessary to the outcome, but if they are not part of the decision, why have they been said at all? The task of the judge is not to voice his personal opinions on topics diverse. In *Moore*, Langdon J. found that the cumulative effect of all the *obiter dicta* remarks was to leave the impression that the trial judge might be deciding the case on an irrelevant basis, because the trial judge had spent so much time on irrelevancies. Put another way, if the comments are made while delivering judgment, the reasonable observer could well infer that, at least in the mind of the trial judge, they had something to do with the matter at hand. At the very least, that bystander may have concluded that the trial judge was more concerned with his "other thoughts" than with the case before him.

> And that is why *obiter dicta* is discouraged. It usually adds nothing and may detract greatly. See *Sawridge Band v. Canada*, [1997] 3 F.C. 580 (F.C.A.).

[36] Justice Corbett went on to point out that if Justice Douglas felt that he was unable to dispose of the applications without "engaging" directly with Langdon J.'s reasoning in *Moore*, then perhaps he should have recused himself. He went on to state in para. 44 that "decisions should be restricted to the reasoning necessary to dispose of the case. 'Asides' are dangerous". In this regard, at para. 50 he concluded:

> "Longstanding tradition in Canada and in Great Britain is that a Judge speaks but once on a given case and that is in the Reasons for Judgment. Thereafter, the Judge is not free to explain, or defend, or comment upon the judgment or even to clarify that which critics perceive to be ambiguous." (Canadian Judicial Council, *Commentaries On Judicial Conduct*, p. 86). Most commentary on this principle concerns public or academic criticism. *It is surely beyond question that it is improper for a lower court to review, comment upon, or attack an appellate decision criticizing or overturning that trial court* [emphasis added].

[37] At paras. 63 and 64, Corbett J. stated these significant conclusions:

> The trial judge has sought to defend himself from what he regards as an unfair personal rebuke by Langdon J.
>
> In seeking to defend himself, the trial judge has crossed the line, both in promoting and offering to help in the appeal of Langdon J.'s decision, and in responding directly to Langdon J.'s reasoning in the decision in *Laird* and in the case before this court.

[38] Significant, as well, is what Corbett J. said in para. 67:

> On the record before me, there is no reason to fear that the trial judge is anything other than a jurist of integrity, commitment, and passion for justice. There is no reason to doubt that he has been very hurt by these events. I am confident that he will rise above these matters, and preside over criminal trials, including "over 80" trials, in a manner entirely consistent with his oath of office and his many years of distinguished past service.

[39] Before leaving Corbett J.'s reasons, in our view we can do no better in describing the circumstances that have led to this inquiry than to reproduce the first paragraph of his reasons for judgment:

> An appeal court does not expect a spirited, even bitter debate from a tribunal that it has overturned. That strange circumstance lies at the heart of this application. What began as a most unfortunate matter of a trial judge going too far in numerous *obiter dicta* comments in one case is now said to involve matters of the trial judge's integrity, honesty, his willingness and ability to observe his oath of office, and even whether the trial judge is "beyond redemption" (the trial judge's words). In the process, the trial judge has become an advocate in his own cause in the forum reserved for the disputes he is to decide impartially in a process of calm and detached deliberation.

[40] In keeping with the practice of Council, Justice Douglas was asked to respond to the complaint of the Criminal Lawyers' Association. In an eight page response he reviewed the grounds of the complaint and provided an explanation for his conduct. The following is a synopsis of his response contained in the Agreed Statement of Facts:

> Not having seen the *Moore* decision until there were two days left to appeal, I reflexively, and regrettably, engaged in email correspondence with the Crown Law Office. Corresponding directly with Crown counsel concerning an appeal and using the word "assistance", has understandably caused concern. I

> acknowledged my mistakes in this regard in open court, in the fall of 2004. I have admitted this mistake, long before any complaint was lodged, during the time of my reflection, coming to grips with, and accepting, what Mr. Justice Langdon had said. The emails should not have been sent, and I will never again engage in such correspondence with the Crown.
>
> Additionally, my digressions on legal issues are not helpful at all, and should not be expressed, and I have been told that by Mr. Justice Langdon and Mr. Justice Corbett. I will not be making these comments again.
>
> Being the subject of this complaint has been exceptionally difficult for me and my family. Media attention, disruption of my daily duties, and resulting stress have given me ample opportunity to reflect upon my comments and actions. I believe that I have learned a great deal.
>
> While I wanted to immediately dispel the basis for any belief that there was an appearance of bias, I clearly failed to do that. I reacted defensively, and regret the appearance that was left.

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[41] Judges are sensitive about having their decisions overturned by higher courts. Indeed, there may be nothing more disconcerting to a trial judge than to have his or her decision set aside by an appellate tribunal on the ground that he or she exhibited an apprehension of bias in deciding the case. But this is all part of a trial judge's job. From time to time, a trial judge's reasons will be reviewed and found wanting by an appellate court. The job of an appellate court is to correct errors made by trial judges. As they embark on their judicial careers, newly appointed judges are instructed that they will on occasion have a decision overturned by an appellate court, and that when this happens,

the judge must, as best he or she can, accept that fact. They are not to take issue in public with the decision of the appellate court, nor in their rulings or reasons for judgment in other cases. Nor should the judge contact the losing party to encourage it to appeal the decision, and to offer to assist in the appeal.

[42] These represent Justice Douglas' major indiscretions. There is no doubt that he exhibited alarmingly poor judgment. He should not have communicated with the Crown Law Office to encourage it to appeal from Langdon J.'s decision in *R. v. Moore* and to offer to provide assistance in preparing appeal materials. He should not have used rulings and reasons for judgment in other cases as vehicles for criticizing Langdon J.'s decision in *Moore* and for justifying his views regarding the defence of "over 80" charges. Nor should he have targeted the toxicologist, Dr. Ward, and placed a cloud over him and his testimony, by suggesting that he was, in effect, a gun for hire by the defence bar, and that he, and by extension, other toxicologists, were the cause of delays in trials of "over 80" charges leading to backlogs in the Ontario Court of Justice, especially in Guelph. As Corbett J. found on the basis of the impugned conduct, a reasonable and informed person would have a reasonable apprehension concerning the ability of Justice Douglas to preside fairly and in an unbiased manner over trials of those charged with the offence of "over 80". In other words, Corbett J. found that Justice Douglas's impartiality had been compromised and, thus, the public would be very concerned about Douglas J.'s impartiality and integrity.

[43] The issue is whether the undisputed evidence amounts to convincing proof that Justice Douglas has engaged in judicial misconduct as that term has been interpreted for the purpose of s. 51.6(11) of the *CJA*. Through his counsel, and in response to the complaint to the Judicial Council, Justice Douglas has acknowledged his errors and has admitted that he conducted himself inappropriately. He has, in effect, conceded that he failed to conduct himself in a manner that the public expects of judges, resulting in a loss of public confidence. Justice Douglas has stated that he has learned a lesson and has affirmed that there will not be repetition of the conduct that resulted in this hearing. As such, he submits that sanctioning him is unnecessary to restore public confidence in his ability to adjudicate impartially and with integrity. He has corrected his errors in judgment which, therefore, should not be found to be judicial misconduct.

[44] A criminal trial is a serious matter, both to the parties and to the public. The presiding judge is expected to act in a manner that inspires public confidence that even-handed treatment has been accorded to the parties. When a judge issues reasons for judgment, it is for the purpose of publicly explaining to the parties how he or she reached the result, in addition to explaining how other issues arising in the case were decided. This is done to ensure transparency of the judicial process. As such, reasons for judgment have a special status. They enable the public to measure how the courts in general, and individual judges in particular, administer justice. Judges must not abuse the special status of reasons for judgment. Although in appropriate cases it will not be improper for the court to recommend legislative changes or question whether a particular

decision should be re-examined in the light of changed circumstances, judges should refrain from discussing any matter that is not relevant to any issue in the case. Nor should judges use a ruling or reasons for judgment for the purpose of taking issue with the decision of an appellate court that has been critical of the judge's reasoning, or that has set aside the judge's decision.

[45] No doubt Justice Douglas has learned a lesson from the events leading to this hearing, and from the hearing. From all accounts, it has been a hard lesson. There is nothing that he said or did that we are able to condone. However, considering all of the circumstances, we are not prepared to conclude that he engaged in judicial misconduct, although we are bound to say that his conduct was very close to the line. We have come to this conclusion because we believe that Justice Douglas is sincere in acknowledging his inappropriate conduct. We are satisfied that in the future he will stick to the issues both in presiding over trials and in his rulings and reasons for judgment which will conform scrupulously with their purpose. We feel that our reasons for allowing Justice Douglas to continue to perform his judicial duties, together with the lessons learned from this hearing by Justice Douglas, will help restore the public confidence in his ability to preside impartially and with integrity.

[46] Under s. 51.7(4) of the *CJA*, we would recommend to the Attorney General that Justice Douglas be compensated for his costs incurred for legal services in connection with this hearing. However, to enable us determine whether the compensation should relate to all or part of the judge's costs for legal services, and to enable us to fix the

amount of the compensation, as we must do, we require the assistance of counsel. We ask Justice Douglas' counsel to file with the Registrar brief submissions with respect to compensation within ten days of the release of these reasons. Presenting counsel will then have ten days to file his responding submissions. In the alternative, counsel may agree on the amount of the compensation and advise the Registrar.

DATED at the City of Toronto, in the Province of Ontario, March 6, 2006.

The Honourable Justice Stephen Borins
Court of Appeal for Ontario

The Honourable Annemarie E. Bonkalo
Associate Chief Justice of the Ontario Court of Justice

Mr. J. Bruce Carr-Harris

Ms. Madeleine Aldridge

APPENDIX "A"

CRIMINAL LAWYERS' ASSOCIATION

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February 1, 2005

The Ontario Judicial Council
P.O. Box 914
Adelaide Street Postal Station
31 Adelaide Street East
Toronto, Ontario
M5C 2K3

Dear Council Members:

Re: Mr. Justice Norman Douglas

I am writing on behalf of the Criminal Lawyers' Association pursuant to the provisions of the *Courts of Justice Act*, and particularly Section 51.3, to complain about the conduct of Mr. Justice Norman Douglas of the Ontario Court of Justice. The conduct complained of is the following:

1. Mr. Justice Douglas communicated with Crown Attorneys and urged an appeal from the summary conviction appeal in *Regina v. Moore*. Doing so leaves the impression that the judge has an interest, instead of being disinterested, as is required, in the result of a particular case or particular offences, and seeks to affect the course of litigation and obtain an appellate ruling consistent with that interest. The email communication of August 19, 2004, from Mr. Justice Douglas to Mr. Perlmutter, with his offer of assistance in the appeal, illustrates a partisan interest in the outcome of the appeal;
2. The expression of opinion by Mr. Justice Douglas about "over 80" cases in *Regina v. Campbell* indicates partiality toward a particular offence and an unwillingness to accept the clear *dicta* of appellate courts regarding legitimate defences that can be raised;
3. The impropriety of the manner of communication chosen. It is our suggestion that communications between jurists and counsel ought not to be made in respect of the conduct of further litigation once the trial has been completed before the Judge concerned, and, further, that any proper communication in respect of a specific case should be made with notice to opposing counsel, and not privately;

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4. Partiality toward future cases, as evidenced by the email forwarded by Mr. Justice Douglas indicating he would like to tell lawyers appearing with recusal applications that the case is under further appeal;
5. "Entering the fray" as a result of his comments in *Regina v. Musselman* on the summary conviction appeal decision of Langdon, J. in *Regina v. Moore*, raising the concern that he will have his own reputation and integrity, rather than dispassionate adjudication, in mind in deciding cases of "over 80" and in considering the evidence of defence experts in such cases - - see Canadian Judicial Council, Commentaries On Judicial Conduct, page 86, cited by Corbett, J. in *Regina v. Musselman*, paragraph 50; and
6. By commenting negatively on the defence articulated in *Regina v. Grosse* and the rule of law stated in *Regina v. Noble*.

I have attached the following for your reference regarding the complaint:

1. **Email Correspondence**

   - From Douglas, J. to John Pearson, August 17, 2004;
   - From John Pearson to Douglas, J., August 17, 2004;
   - From Douglas, J. to John Pearson, August 17, 2004;
   - From John Pearson to Douglas, J., August 17, 2004;
   - From Douglas, J. to Pearson, Brewer, Rupic and McMahon, August 18, 2004;
   - From Pearson to Brewer, Rupic and McMahon, August 18, 2004;
   - From Douglas, J. to Brewer and Rupic, August 18, 2004;
   - From Garson to Douglas, J., August 18, 2004;
   - From Douglas, J. to Perlmutter, August 19, 2004; and
   - From Perlmutter to Douglas, J., August 19, 2004.

2. A letter from Mr. Rupic to Regional Senior Justice Graham, dated August 19, 2004;

3. Letter from John McMahon to Regional Senior Justice Graham, dated September 17, 2004;

4. Transcript of Reasons for Judgment of Langdon, J. in *Regina v. Moore*, Guelph SCA #0027/04;

5. Transcript of Reasons for Judgment in *Regina v. Locke*, July 6, 2004, July 13, 2004, and July 27, 2004 (Douglas, J.) (O.C.J.);

6. Transcript of questions put to Dr. Ward in *Regina v. McKee*, July 14, 2004, Douglas, J. (O.C.J.);

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7. Transcript of Ruling of Douglas, J. in *Regina v. Laird*, September 3, 2004;

8. Transcript of Ruling of Douglas, J. in *Regina v. Musselman*, September 30, 2004; and

9. The decision of Corbett, J. in *Regina v. Musselman*, [2004] O.J. No. 4226 (Ont.SC.).

Yours very truly,

Ralph B. Steinberg
President
RBS:dmj