C.J.C. File No. 10-0216

CANADIAN JUDICIAL COUNCIL

COMPLAINT REGARDING

ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

SUBMISSIONS OF THE RESPONDENT, DOUGLAS, A.C.J. ON THE PRELIMINARY MOTION

October 15, 2014

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PART I – OVERVIEW

1. On this motion, Douglas ACJ asks that the Inquiry Committee address Allegations 1, 2 and 3 without conducting a formal evidentiary hearing. This Committee has the jurisdiction to do so and the public interest requires it, because conducting a formal hearing into the Allegations would undermine the principle of judicial independence, lessen the public's confidence in the judiciary, and cause further irreparable harm to Douglas ACJ.

2. The Allegations against Douglas ACJ are proceeding amid rapidly evolving perspectives on the harms occasioned to victims of the non-consensual distribution of intimate images. Since the time when the Review Panel made the decision to strike an Inquiry Committee to investigate allegations against Douglas ACJ, significant academic, legislative, and social changes have taken place that support the growing recognition that women whose intimate images are distributed without their consent are victims of a gendered form of abuse and worthy of protection while the perpetrators are morally culpable and deserving of criminal punishment.

3. In addition, unlike the Review Panel that struck an Inquiry Committee, this Committee has the benefit of sworn evidence from Justice Martin Freedman, the chair of the Judicial Advisory Committee that recommended Ms. Douglas' appointment to the Minister of Justice. Justice Freedman's evidence confirms Ms. Douglas' decision that her past victimization was not something that ought to be disclosed as reflecting negatively on herself or the judiciary. It is not the role of the CJC to second-guess decisions made by Judicial Advisory Committees or the Minister of Justice.

4. A decision to hold a formal hearing into Allegations 1 and 2 sends the message that Douglas ACJ is morally culpable for her conduct at issue in the facts underpinning these allegations, namely her lawful decision to engage in consensual sex with her husband and her expectation that her victimization could not reflect negatively on herself or the judiciary. There is nothing remotely culpable about Ms. Douglas' conduct. The suggestion that the allegations may support a recommendation for removal would cause an unequal chilling effect on female judicial applicants.

5. This Committee should not condone or encourage gender targeted abuse by holding an evidentiary hearing on the allegations against Douglas ACJ which were motivated by revenge, extortion, and the intentional infliction of harm. This Committee should instead discourage this destructive misconduct – the misuse of intimate images – by dismissing Allegations 1 and 2 on this motion. Summary dismissal – without victimizing the Judge by exposing her to a public inquiry hearing – will send a message to perpetrators that the CJC (and by extension Canada's Chief Justices) protects victims, by recognizing the harms caused by the non-consensual distribution of intimate images and places the blame for distribution on the perpetrators, not the victim.

6. Similarly, there is no need for this Committee to conduct a full evidentiary hearing on Allegation 3. Allegation 3 is beyond the jurisdiction of this Committee. In any event, the facts underlying Allegation 3 are not capable of supporting a finding of incapacity or a recommendation for removal within the meaning of s. 65(2) of the *Judges Act*. The materials submitted on this motion - which demonstrate that the conduct alleged is inextricably linked to the harm Douglas ACJ has suffered as a result of the non-consensual distribution of her images and by virtue of the re-victimization occasioned by the CJC process to date - provide the basis on which the Committee can fairly and justly adjudicate Allegation 3 in a timely, affordable, and proportionate way.

7. This motion presents an opportunity for this Committee to reflect the academic, legislative, and social guidance on the pressing issue of non-consensual distribution of images, and to show that the legal system refuses to perpetuate prejudices, stereotypes and assumptions about women's sexuality and will not tolerate blaming women for violations by others of their consent and privacy.

PART II – FACTS

The Background to the Complaint submitted to the CJC against Douglas ACJ

8. Prior to her judicial appointment, Lori Douglas was a practising lawyer along with her husband Jack King ("King"), at the Winnipeg law firm of Thompson, Dorfman, Sweatman ("TDS"). During the couple's private, lawful, consensual sexual activity, King took photographs

of Ms. Douglas. She consented to the taking of these photographs solely for King's private use.[1] No allegation is made that Ms. Douglas knew of any distribution having been made of these intensely private photos.[2]

9. In June 2003, it was revealed that King had posted photos on a website and had given 3 images to his client, Alex Chapman. Chapman threatened King and TDS with a lawsuit for sexual harassment.[3] No claim was made against Ms. Douglas. Seven years later Chapman claimed $67 million in damages for this conduct in three separate actions; each action was dismissed.[4]

10. King settled the matter with Chapman in July 2003 on terms that included the return or destruction of all material provided by King to Chapman, a release of all claims and a confidentiality clause. Chapman was required to confirm that he had not given copies of King's emails or King's pictures of Ms. Douglas to anyone. At this time, Chapman made no threats against Ms. Douglas for anything.[5]

11. Ms. Douglas had no knowledge of King's plan, his communications with Chapman or Chapman's involvement in this scheme until King told her of them on June 16, 2003.[6] King told her at the insistence of the law firm's managing partner, Michael Sinclair. Within days of confessing his actions to Ms. Douglas, King had the photographs removed from the website. When Ms. Douglas was informed of King's actions, she was devastated.

Judicial Application and Appointment

12. In May 2005, Ms. Douglas was appointed a judge of the Family Division of the Manitoba Court of Queen's Bench. The material facts of King's conduct in attempting to solicit a client to have sex with Ms. Douglas by providing the client with photographs of a sexual nature of Ms. Douglas, the existence of a settlement and confidentiality agreement with the client, King's

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[1] Affidavit of William Gange, sworn September 30, 2014 ("Gange Affidavit") Motion Record ("MR"), Vol. 1, Tab. 3, at para. 6.

[2] *Ibid*., MR, Vol. 1, Tab 3, at para. 6.

[3] *Ibid*., MR, Vol. 1, Tab 3, at para. 7.

[4] *Ibid*., MR, Vol. 1, Tab 3, at para. 17.

[5] Gange Affidavit, Exhibits "B" and "C", MR, Vol. 1, Tabs 3B, 3C.

[6] Gange Affidavit, MR, Vol. 1, Tab 3, para. 6.

posting of the intimate photographs of Ms. Douglas on the internet until their removal and destruction in 2003 were known to the chair of the Judicial Advisory Committee ("the JAC"), Freedman, J.A. Those facts were also known to the then Chief Justice of the Manitoba Court of Queen's Bench Marc Monnin C.J. In 2009, Douglas was appointed the Associate Chief Justice of the Family Division.

13. Freedman J.A. testified at the previous Inquiry Committee in July, 2012 about the process the JAC followed for reviewing Ms. Douglas' application and his conclusion that Ms. Douglas' decision to check "no" to the question on the judicial application form "Is there anything in your past that could reflect negatively on the judiciary or yourself which should be disclosed?" was consistent with the fact that she was an innocent victim of the misconduct of others.[7]

14. Justice Freedman explained that he consulted with all of the judicial references listed on Ms. Douglas' application form and spoke with Monnin C.J in the spring of 2005 about her candidacy. Monnin C.J. advised Freedman J.A. that he had heard about the material facts of King's misconduct in the summer of 2003 and knew that intimate photographs of a sexual nature of Ms. Douglas had been posted on the internet.[8] Monnin C.J. explained that when he first learned of the existence of the photographs on the internet he withdrew his support for Ms. Douglas' candidacy, because he perceived the photos to cause a risk of embarrassment or blackmail.[9] However, when Freedman J.A. spoke to Monnin C.J. in the spring of 2005, Monnin C.J. was prepared to see her candidacy go forward, because he understood that Ms. Douglas was an innocent victim, the photographs had been destroyed and removed from the internet, and the passage of time had lessened the risks of embarrassment and blackmail.[10]

15. Justice Freedman testified that leading up to the JAC meeting he formed the view that the facts he had learned regarding Ms. Douglas' victimization needed to be shared with the other JAC members. Freedman J.A. explained to the Inquiry Committee that he was "absolutely

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[7] Excerpts of the evidence of Freedman J.A. before the previous Inquiry Committee in July 2012 ("Freedman evidence"), p. 2453, line 3, - p. 2454, line 5, p. 2464, line 19 - p. 2465, line 15, Affidavit of Lara Guest, sworn September 30, 2014 ("Guest Affidavit"), Exhibit "R", MR, Vol. 1, Tab 2R.

[8] *Ibid*., p. 2416, line 14 - p. 2417, line 3, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[9] *Ibid.*, pp. 2416, line 19 - p. 2417, line 3, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[10] *Ibid*., p. 2417, line 4-18, p. 2418, line 1-10, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

positive" that the issue of the photographs was discussed at the JAC meeting.[11] In fact, the issue of the photographs was raised at the meeting before he had an opportunity to raise it.[12] He explained that the JAC discussed King's attempt to solicit a client to have sex with Ms. Douglas, the fact that photographs of a sexual nature of Ms. Douglas had been given to the client and posted on the internet, the removal and destruction of the photographs, and that Ms. Douglas was an innocent victim in the matter.[13] The JAC determined that it needed to verify its understanding of the events and that if its understanding was confirmed, it would recommend her for appointment and flag the information regarding her victimization in the report to the Minister.[14]

16. The Minister needed to be informed of the fact of the information because the JAC had to provide the Minister with information that could potentially be problematic.[15] Therefore, a draft report to the Minister was prepared that would be sent to him if the information contained therein was confirmed by Ms. Douglas. The draft report explained the flag to the Minister about the incident with King attempting to solicit a client to have sex with Ms. Douglas, King giving the client and posting on the internet photos of a sexual nature of Ms. Douglas, Ms. Douglas being an innocent victim in the matter, and the photos having been destroyed and removed from the internet."[16] Freedman J.A. testified that the draft report was read out loud to the JAC members who all signed off on it.[17]

17. In order to confirm its understanding of the events, the JAC decided to follow a rarely used but permitted procedure to have Margaret Rose Jamieson, the Executive Director, Judicial Appointments, call Ms. Douglas on behalf of the JAC.[18] Freedman J.A. testified that he "had no doubt whatsoever" that Ms. Jamieson made this call to Ms. Douglas and confirmed the JAC's understanding.[19] His note confirming that this call took place was an exhibit before the previous

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[11] Freedman evidence, p. 2457, line 1-12, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[12] *Ibid*., p. 2430, line 7-15, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[13] *Ibid*., p. 2430, line 7-25, p. 2432, line 17-24, p. 2435, line 4-14, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[14] *Ibid*., p. 2431, line 4-25, p. 2432, line 2-16, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[15] *Ibid*., p. 2447, line 19 - p. 2448, line 8; p. 2450, line 2-9, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[16] *Ibid*., p. 2432, line 17-24; p. 2435, line 4-14, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[17] *Ibid*., p. 2432, line 25 - p. 2433, line 6, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[18] *Ibid*., p. 2432, line 2-10, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[19] *Ibid*., p. 2435, line 20 - p. 2436, line 16; p. 2448, line 19 - p. 2449, line 5, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

Inquiry Committee.[20] The report was not revised after Ms. Jamieson's call with Ms. Douglas and from Freedman J.A.'s understanding it was then sent on to the Minister.[21] Freedman J.A. explained that the Minister did not request that the JAC conduct any further investigation into Ms. Douglas' candidacy as was open to him under the procedures.[22]

Chapman Violates the Settlement Agreement and Re-posts the Photographs of Ms. Douglas

18. Unknown to King and in violation of the settlement agreement he had entered into, Chapman provided at least two of his friends in 2003 with copies of the emails and pictures of Ms. Douglas that King had sent him, and copies of pictures from the internet site which Chapman himself had copied.

19. In July 2010, Chapman deliberately breached the confidentiality provisions of the settlement by publicly disclosing to the CBC, his version of his dealings with King and disseminating copies of the emails and pictures.[23] Prior to Chapman's dissemination, in 2010, of the pictures he had wrongly retained in breach of his covenants, there is no evidence that the pictures had remained on the internet or reappeared after King had had them removed in June 2003. Only after Chapman distributed them in August 2010 did the pictures surface on the internet.[24]

20. Chapman filed a complaint against King with the Law Society of Manitoba. For the first time, he attempted to include Douglas ACJ in a complaint, and, upon learning that the Law Society did not have jurisdiction over judges, he filed a complaint with the CJC alleging sexual harassment and discrimination.

21. Allan Fineblit, the CEO of the Law Society of Manitoba, explained his understanding of Chapman's motivation for including Ms. Douglas in his complaints for the first time in 2010 to

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[20] Freedman evidence, p. 2484, line 19-22, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[21] *Ibid*., p. 2449, line 6-9, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

[22] *Ibid*., p. 2450, line 2 - 25; p. 2452, line 17 - p. 2453, line 2, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R; All of the documents, other than Freedman JA's procedural notes, have been destroyed by JAC members and the Minister and his officials, in accordance with the confidentiality requirements.

[23] Gange Affidavit, MR, Vol. 1, Tab 3, para. 14.

[24] *Ibid*., MR, Vol. 1, Tab 3, paras. 13, 14, 15, 19.

Independent Counsel.[25] Mr. Fineblit advised Independent Counsel that Chapman thought Douglas ACJ's friendship with Joyal ACJ (as he then was) interfered with his ability to obtain a fair hearing of the lawsuit Chapman had brought against the Winnipeg police. Joyal ACJ had presided over a conference at which the case was settled.[26]

22. In September 2010, Chapman filed lawsuits against each of King, Douglas ACJ, and TDS, seeking an aggregate of $67 million in damages.[27] When Bill Gange, King's lawyer, was served with the statement of claim on behalf of King, he found that Chapman had included a disk containing the photographs he had agreed to return and destroy in 2003.[28]

23. The Manitoba Court of Queen's Bench dismissed Chapman's claims on summary judgment as an abuse of process but was silent on costs.[29] On November 30, 2010, Mr. Gange received a telephone call from Chapman's counsel, Paul Walsh, urging him not to seek costs of the motion against Chapman. Mr. Walsh threatened Mr. Gange that "people" could post the photographs on websites outside of Canada, but that if King refrained from seeking costs Chapman would guarantee that such posting would not happen.[30]

24. Notwithstanding Chapman's threat, King instructed Mr. Gange to proceed with the costs motion. Chapman was ordered to pay costs in the amount of $7,500 in December 2010. A week after the cost order was issued, Mr. Gange received a telephone call from Mr. Walsh advising him that he had received an anonymous letter referencing a website, which was hosted in Sweden, on which the photos that Chapman had wrongfully retained had been posted.[31]

25. In June 2012, King obtained an order for final judgment in the amount of $25,000 payable by Chapman in respect of his breach of the terms of the settlement agreement described

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[25] Guest Affidavit, MR, Vol. 1, Tab 2, para. 5.
[26] *Ibid*., MR, Vol. 1, Tab 2, para. 5.
[27] Gange Affidavit, MR, Vol. 1, Tab 3, para. 15.
[28] *Ibid*., MR, Vol. 1, Tab 3, para. 15.
[29] *Ibid*., MR, Vol. 1, Tab 3, para. 17.
[30] *Ibid*., MR, Vol. 1, Tab 3, para. 18.
[31] *Ibid*., MR, Vol. 1, Tab 3, para. 18.

above. The Court also granted a permanent injunction against Chapman barring him from further disseminating the photos he had wrongfully retained.[32]

Academic Research on the Non-Consensual Distribution of Intimate Images

26. In recent years, there has been an increased focus of academic writing on the serious harms occasioned by the non-consensual distribution of intimate images. These writings highlight the long-term harms suffered by victims and the discriminatory attitudes and stereotypes that lead to disproportionate targeting of vulnerable groups, particularly women and girls.[33] The existing research in Canada also indicates that there is an intersection between the harm of the non-consensual distribution of intimate images and discrimination.[34]

27. Both men and women can be targeted by the non-consensual distribution of intimate images, but the available research indicates that "the majority of victims are women and girls, and that women and girls face more serious consequences as a result of their victimization."[35] For example, research in the United States from the Cyber Civil Rights Initiative's End Revenge Porn Project, which is led, in part, by Professor Mary Anne Franks, suggests that 90% of the victims of the non-consensual distribution of intimate images are women.[36] The preliminary Canadian research is consistent with this finding.[37]

The specific harms occasioned by the non-consensual distribution of intimate images

28. If a person shares an intimate image of herself with a trusted partner, she continues to have a reasonable expectation of privacy in that image. The context in which the image was shared constrains the extent to which she would reasonably expect that the image would be further disclosed to others. The public sharing of that image - whether initially by a trusted partner or through repeated redistribution by strangers - constitutes a violation of her consent and

[32] Gange Affidavit, MR, Vol. 1, Tab 3, paras. 22-23.

[33] Expert Report of Professor Jane Bailey, dated September 30, 2014 ("Bailey Report"), MR, Vol. 1, Tab 7, para. 8.

[34] *Ibid*., MR, Vol. 1, Tab 7, para. 31.

[35] Expert Report of Professor Mary Anne Franks, dated September 30, 2014 ("Franks Report"), MR, Vol. 1, Tab 6, p. 4; Bailey Report, MR, Vol. 1, Tab 7, para. 38.

[36] Bailey Report, MR, Vol. 1, Tab 7, para. 37.

[37] *Ibid*., MR, Vol. 1, Tab 7, paras. 31-33.

privacy. It is non-consensual sexual activity. The harm caused through the non-consensual disclosure is "immediate, devastating, and in most cases irreversible."[38]

29. When the images are distributed without consent, victims' relationships, careers, families, and security are negatively impacted. The wounds caused by distribution rarely heal fully. Victims experience further damage each time their names are typed into a search engine by a new partner, a potential employer, or a friend, and each time they are forced to confront the effects that the images, widely shared and viewed, have on their personal lives and professional trajectories.[39] Further, victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Tragically, some victims have committed suicide.[40]

30. The non-consensual distribution of intimate images also "infringes upon targets' fundamental human interests in autonomy, privacy and dignity." In particular, Professor Jane Bailey notes that "the capacity to consent to a particular act in a particular context without being presumed to consent to such an act for all time or in all situations is essential to autonomy."[41] Dissemination of a person's intimate images without their consent violates the person's autonomy and privacy, because the person is stripped of the right to choose to consent to share the image in one context without consenting to share it more broadly.[42]

31. The recurring presence of a victim's intimate images and alterations thereof on the internet highlights the immediate, devastating, and irreversible nature of the harm caused by non-consensual disclosure.[43] The internet facilitates easy, rapid, and anonymous redistribution of non-consensually shared images, exposing images to millions of viewers, while "allowing the

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[38] Franks Report, MR, Vol. 1, Tab 6, para. 12.

[39] House of Commons, *Standing Committee on Justice and Human Rights*, 41st Parl, 2nd Sess, No. 024 (13 May 2014) at 6-7 (Kimberly Chiles), Guest Affidavit, Exhibit "M", MR, Vol. 1, Tab 2M; House of Commons, *Standing Committee on Justice and Human Rights*, 41st Parl, 2nd Sess, No. 022 (6 May 2014) at 5 (Steph Guthrie), Guest Affidavit, Exhibit "P", MR, Vol. 1, Tab 2P.

[40] Franks Report, MR, Vol. 1, Tab 6, para. 12.

[41] Bailey Report, MR, Vol. 1, Tab 7, para. 41.

[42] *Ibid*., MR, Vol. 1, Tab 7, para. 41.

[43] Franks Report, MR, Vol. 1, Tab 6, para. 12.

posters themselves to hide in the shadows."[44] The violation at issue is not merely a question of privacy, but of privacy from the relentlessly intrusive humiliation of sexualized online bullying.[45]

32. The violation of privacy has a particular impact on women and girls. As Dean Sossin notes, "cyberbullying cannot be divorced from the particular impact this form of harassment has for women and girls."[46] Similarly, Professor Bailey explains:

> [the] non-consensual distribution of intimate images could well have 'far more serious consequences for' girls and women and members of the LGBTQ community, compared to heterosexual boys and men, due at least in part to pervasive discriminatory practices and beliefs that:
>
> (1) consistently disrespect or minimize women's sexual autonomy;
>
> (2) expose women and girls to humiliation, embarrassment and reputational ruin for expressing their sexuality or simply for exposing their bodies (despite superficially conflicting messages that girls' and women's social success depends upon emulating a stereotypical, heteronormative version of "sexy"); and
>
> (3) expose members of the LGBTQ community to contempt on the basis of their involvement in same sex sexual activity and/or for non-conformist gender representations."

33. As a gendered form of abuse, the harms caused by the non-consensual distribution of intimate images are not only inflicted on the individual victims but also on society as a whole. Professor Franks explains "discriminatory abuse exacerbates social prejudices against those groups and inhibits the ability of those groups to participate fully in society. This, in turn, undermines the values of equality, diversity, and autonomy essential to democracy."[47] This gendered form of abuse also "validates and promotes views of male superiority, male sexual entitlement, and female subordination."[48]

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[44] Franks Report, MR, Vol. 1, Tab 6, para. 13; Bailey Report, MR, Vol. 1, Tab 7, para. 3.

[45] *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567 at para. 14, Book of Authorities ("BOA"), Tab 1.

[46] Expert Report of Dean Lorne Sossin, Signed September 28, 2014 ("Sossin Report"), MR, Vol. 1, Tab 5, para. 12.

[47] Franks Report, MR, Vol. 1, Tab 6, para. 1.

[48] *Ibid*., MR, Vol. 1, Tab 6, para. 8.

The Criminalization of the Non-Consensual Distribution of Intimate Images

34. Professor Franks notes that "the law has been slow to respond to non-consensual [distribution], just as it has been slow to respond to other forms of abuse that disproportionately affect women."[49] A reason for this is society's tendency to minimize harms that are inflicted disproportionately on women.[50] It is an unfortunate reality that "[F]or much of Western history, abuses directed at women have been treated as natural, trivial, deserved, or some combination of the three."[51] However, Parliament has now responded to the harms occasioned to victims of the non-consensual distribution of intimate images; in the time since the CJC commenced these proceedings against Douglas ACJ, Parliament has introduced a bill that would make the perpetrators of this abuse criminally responsible.

35. In November 2013, the Canadian Federal Government introduced Bill C-13, the *Protecting Canadians from Online Crime Act*, and described the legislation as the government's way to address the "horrible crime of cyberbullying."[52] Bill C-13 is currently before the House of Commons and it seeks to make the non-consensual distribution of intimate images a criminal offence.[53] In the introduction to Bill C-13, Minister of Justice Peter Mackay described the proposed criminal conduct as a "particularly vile and invasive form of cyberbullying."[54] The component of Bill C-13 which includes the proposed new offence was met with unanimous support from Parliament.[55] Once passed, it will be a criminal offence to publish or make available "an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct."[56]

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[49] Franks Report, MR, Vol. 1, Tab 6, para. 14.

[50] *Ibid*., MR, Vol. 1, Tab 6, para. 14.

[51] *Ibid*., MR, Vol. 1, Tab 6, para. 2.

[52] Bailey Report, MR, Vol. 1, Tab 7, para. 11.

[53] Bill C-13, *An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, 41st Parl., 2nd Sess., 2013, Sossin Affidavit, Exhibit "C", MR, Vol. 2, Tab 5C.

[54] House of Commons Debates, 41st Parl., 2nd Sess., No. 25 (27 November 2013) at 1520 (Hon. Peter MacKay), BOA, Tab 2.

[55] House of Commons Debates, 41st Parl., 2nd Sess., No. 25 (27 November 2013) at 1540 (Françoise Boivin, Sean Casey), BOA, Tab 2.

[56] Bill C-13, *An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, 41st Parl., 2nd Sess., 2013, Sossin Affidavit, Exhibit "C", MR, Vol. 2, Tab 5C.

36. An important impetus for Bill C-13 was the increased attention paid in Canada to the harms inflicted by the non-consensual distribution of intimate images following a number of high-profile teen suicides.[57] In particular, the recent cases of 17-year-old Rehtaeh Parsons from Nova Scotia and 15-year-old Amanda Todd from British Columbia received extensive media attention after the girls each tragically committed suicide after being victimized through the non-consensual distribution of their intimate images.[58]

37. The goal of the forthcoming criminal code provision is to protect the victims. There is no requirement of malice in the elements of the offence. Instead, there is a recognition that intimate images are often "originally intended for an individual… but are disseminated more widely than the originator consented to or anticipated. The effect of this distribution is a violation of the depicted person's privacy in relation to [the] images, the distribution of which is likely to be embarrassing, humiliating, harassing, and degrading or to otherwise harm that person."[59]

38. Bill C-13 has passed its second reading in the House of Commons. On April 28, 2014, the Bill was referred to the Standing Committee on Justice and Human Rights ("the Standing Committee").[60] After hearing submissions from various stakeholders, the Standing Committee issued its Report to Parliament on June 12, 2014. The Report made one amendment to the Bill in relation to the timing of when a comprehensive review of the new provisions of the *Criminal Code* sought to be introduced through the Bill ought to occur.[61] The Bill was again debated on September 22, 2014.[62]

39. The Standing Committee heard submissions from family members of victims, surviving victims, lawyers, and academics. These submissions highlight the significant harms occasioned

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[57] House of Commons Debates, 41st Parl., 2nd Sess., No. 25 (27 November 2013) at 1520 (Hon. Peter MacKay), BOA, Tab 2.

[58] Canada, Cybercrime Working Group, *Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-Consensual Distribution of Intimate Images* (2013) at p. 3, Bailey Affidavit, Exhibit "L", MR, Vol. 4, Tab 7L.

[59] Canada, Cybercrime Working Group, *Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-Consensual Distribution of Intimate Images* (2013) at p. 3, Bailey Affidavit, Exhibit "L", MR, Vol. 4, Tab 7L.

[60] Legisinfo, 41st Parliament, 2nd Session, Bill C-13, online: Legisinfo <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=6301394&Language=E&Mode=1>, BOA, Tab 3

[61] The Standing Committee on Justice and Human Rights, 41st Parliament, 2nd Session, Sixth Report, June 12, 2014, Bailey Affidavit, Exhibit "PP", MR, Vol. 4, Tab 7PP.

[62] Bailey Report, MR, Vol. 1, Tab 7, para. 18.

by the non-consensual distribution of intimate images and the need for a paradigm shift to move away from a culture of victim-blaming which serves to ensure that victims of this abuse are perpetually re-victimized. For example, Raetaeh Parsons' father submitted that "[t]he first and most important step we need to take to combat online crime involving harassment, stalking, threats, and image sharing, is to **stop treating the victim like they are part of the problem.** They are as innocent as the drunk-driving victim."[63]

40. Steph Guthrie, a feminist blogger, noted similar concerns regarding the endemic attitude of victim blaming that persists in the attitudes of law enforcement officials. In response to a question about the need to provide law enforcement officials with additional tools to prosecute the new offence, she explained that "a lot of time, the issue is less with the tools that are available to law enforcement and more with the specific attitudes individual law enforcement officers hold and potentially attitudes that are encouraged by the culture of law enforcement that often blames female victims of sexual offences for the offence rather than the perpetrator."[64]

41. The Standing Committee also heard of the vast, ruinous effects that the new offence causes for its victims. The Federal Ombudsman for Victims of Crime explained that "[w]hat is unique about cyberbullying is the staggering speed and reach of the abuse. In mere minutes, intimate and personal images can be shared across networks and the world, forever exposing their victims."[65] Ms. Guthrie explained that the impact of the violation affects every aspect of the victim's daily life. She stated:

> [T]he assault constricts the survivor's ability to live life normally and comfortably because they are constantly living with the idea that the people they encounter in their day-to-day lives may know intimate things about them that they didn't consent to share. Even if the survivor knows they did nothing wrong, they still must deal with the judgments, misperceptions, and intrusions of others. For many survivors, their ability to move freely, safely, and happily in this world is limited.[66]

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[63] Standing Committee on Justice and Human Rights, No. 024 (13 May 2014) at 1120 (Glenford Canning, emphasis added), Guest Affidavit, Exhibit "M", MR, Vol. 1, Tab 2M.

[64] Standing Committee on Justice and Human Rights, No. 022 (6 May 2014) at 1145 (Steph Guthrie), Guest Affidavit, Exhibit "P", MR, Vol. 1, Tab 2P.

[65] Standing Committee on Justice and Human Rights, No. 027 (29 May 2014) at 1110 (Sue O'Sullivan), Guest Affidavit, Exhibit "O", MR, Vol. 1, Tab 2O.

[66] Standing Committee on Justice and Human Rights, No. 022 (6 May 2014) at 1120 (Steph Guthrie), Guest Affidavit, Exhibit "P", MR, Vol. 1, Tab 2P.

42. Kimberly Chiles, a victim and survivor of the non-consensual distribution of intimate images shared her perspective and the effects of her abuse with the Standing Committee. Ms. Chiles was abused by the estranged spouse of a former partner who posted intimate images of her, without her consent, on a website called myex.com. She explained to the Standing Committee that when she found that the pictures had been posted:

> The anguish that was instantly triggered was like nothing I'd experienced to date. Panic set in, and I began to shake and sob. My mind raced, realizing quickly how swiftly these images could and would be seen. Family, colleagues, students, potential clients, friends, and strangers alike were privy to my personal … my privacy, my body. I was violated, I was in shock.
>
> …
>
> These explicit images, my personal information, my Facebook page, were all posted without my consent. Those images were shared with the expectation of privacy. My trust and privacy were violated. The ownership of those images is not transferable. I share my story in relation to Bill C-13.
>
> This bill is being labeled the revenge porn bill. I liken my experience to sexual assault, to rape, to harassment, but not to pornography. Internet crime existing in that gray area that it does provides no recourse for the victims of these experiences. **My own judgment and decision matrix should not be called into question when I call the authorities and police for help.**[67]

Public Opinion on the Harms of Non-Consensual Distribution of Intimate Images

43. In addition to Parliament's recognition that the non-consensual distribution of intimate images is conduct worthy of criminal punishment, public opinion is similarly shifting to perceive that this abuse is a gender-targeted crime and that a woman should not be blamed or judged for being the target.

44. In the wake of the recent non-consensual publication of dozens of intimate photographs of female celebrities, mainstream Canadian media reflected the growing consensus that "what these stolen and criminally disseminated images should evoke in us – beyond mere curiosity – is outrage."[68] The general consensus, as reflected in the multitude of media reports on the topic, is

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[67] Standing Committee on Justice and Human Rights, No. 024 (13 May 2014) at 1130 (Kimberly Chiles, emphasis added), Guest Affidavit, Exhibit "M", MR, Vol. 1, Tab 2M.

[68] Leah McLaren, "Leaked photos: a sex crime not a scandal", *The Globe and Mail* (3 September 2014) online: The Globe and Mail <http://www.theglobeandmail.com>, Guest Affidavit, Exhibit "A", MR, Vol. 1, Tab 2A.

that the publication of the images was a gender-targeted crime. The photo theft was perceived as a "chilling reminder that to be a woman is to be forever vulnerable."[69]

45. Amanda Hess from the National Post succinctly captured why the publication of these photographs invoked such an intense reaction from the public: "a woman['s]…body was exposed without her consent. The last three words of that sentence are the crucial ones".[70]

46. In her article in the Globe and Mail, Leah McLaren characterized the exposure of private celebrity photos as "a sex crime, not a scandal". She acknowledges that we, as a society, should be outraged by the publication of these private intimate photos. In her view, the "crucial exchange" is not even the theft itself, "but the exposition of private images in public". McLaren analogized asking a victim to "own" the crimes against her to "telling a rape victim to own her assault because she put on a cute dress and went to a party".[71]

47. Several international media outlets also recognized that blaming the victims of the incident was inappropriate and offensive. In Forbes Magazine, Scott Mendelson wrote that he "sincerely hope[d] that absolutely none of the victims involved in this current leak take any form of responsibility or apologizes for anything. The victims have committed no crime and committed no sin by creating said photos in the first place or in "allowing" them to be stolen. What occurred… is a theft and a crime, plain and simple." He described the publication of the photos as a "personal violation of a prurient nature."[72]

48. Jessica Valenti, writing for The Atlantic, explained: "[v]ictim blaming is just that, no matter how famous the victim is." She argued that "the fact that the photos have been shared already is beside the point and a weak justification for violating someone's privacy and sense of

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[69] Jen Zoratti, "The naked truth", *Winnipeg Free Press*, (6 September 2014) online: Winnipeg Free Press <http://www.winnipegfreepress.com>, Guest Affidavit, Exhibit "F", MR, Vol. 1, Tab 2F.

[70] Amanda Hess, "Jennifer Lawrence doesn't need your advice", *The National Post* (2 September 2014) online: The National Post <http://www.nationalpost.com>, Guest Affidavit, Exhibit "B", MR, Vol. 1, Tab 2B.

[71] Leah McLaren, "Leaked photos: a sex crime not a scandal", *The Globe and Mail* (3 September 2014) online: The Globe and Mail <http://www.theglobeandmail.com>, Guest Affidavit, Exhibit "A", MR, Vol. 1, Tab 2A.

[72] Scott Mendelson, "Jennifer Lawence Nude Photo Leak isn't a 'scandal'. It's a sex crime", *Forbes Magazine* (1 September 2014) online: <http://www.forbes.com>, Guest Affidavit, Exhibit "G", MR, Vol. 1, Tab 2G.

safety. Even if we're not the people who stole the photos… looking at naked photos of someone who doesn't want us to goes beyond voyeurism, it's abuse."[73]

49. Other journalists commented on the sexist and discriminatory nature of the crime. Roxane Gay, an academic writer for the Guardian noted that the issue is not just one that only famous women must deal with. "The practice is so pervasive that it even has its own name - revenge porn - nude photos and explicit videos unleashed on the internet, most often by disgruntled ex-lovers. There are websites online forums dedicated to this pernicious genre. Lives have been, if not ruined, irreparably harmed, because we are a culture that thrives on the hatred of women, of anyone who is Other in some way, of anyone who dares to threaten the status quo." She wrote that the individuals who perpetrate these harms are "reminding women that, no matter who they are, they are still women. They are forever vulnerable."[74] Gay concludes her article with the chilling message underlying the deliberate choice perpetrators make to publish intimate images without the women's consent:

> Don't get too high and mighty, ladies. Don't step out of line. Don't do anything to upset or disappoint men who feel entitled to your time, bodies, affection or attention. Your bared body can always be used as a weapon against you. You bared body can always be used to shame and humiliate you. Your bared body is at once desired and loathed.

50. Ashley Csanady, of the Edmonton Journal, wrote that the "general consensus was distaste" at the theft and non-consensual publication of the intimate photographs. However, Csanady argues that the online reaction should give us hope: "Yet there's hope to be found in the collective condemnation of breaching that final wall of celebrities' privacy". That the "visceral reaction [to the publication] went as viral as the pictures" shows that "the collective 'we' [have] at least some sense of decency left".[75] It is this sense of decency that this Inquiry Committee should reflect and embody, not the toleration of the harms visited on an innocent victim by a malicious act of a disgruntled litigant.

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[73] Jessica Valenti, "What's wrong with checking out stolen nude photos of celebrities", *The Atlantic* (3 September, 2014) online: The Atlantic <http://www.theatlantic.com>, Guest Affidavit, Exhibit "D", MR, Vol. 1, Tab 2D.

[74] Roxane Gay, "The great naked celebrity photo leak of 2014 is just the beginning", *The Guardian* (1 September 2014) online: The Guardian <http://www.theguardian.com>, Guest Affidavit, Exhibit "C", MR, Vol. 1, Tab 2C.

[75] Ashley Csanady, "Do leaked nude photos of celebrities cross the Internet's own line", *The Edmonton Journal* (1 September, 2014) online: The Edmonton Journal <http://www.edmontonjournal.com>, Guest Affidavit, Exhibit "H", MR, Vol. 1, Tab 2H.

Independent Counsel's Notice of Allegations

51. Four years after Chapman filed his unfounded complaint with the CJC, and amid the evolution of the academic, legislative, and public opinion to recognize the harms occasioned to victims of the non-consensual distribution of intimate images and the blameworthiness of the perpetrators and not the victims, Independent Counsel delivered a Notice of the Allegations (the "NOA") she intends to present against Douglas, ACJ.[76] The NOA proposes that this Inquiry Committee hear evidence on three allegations.

Allegation 1

52. The first allegation is that Douglas ACJ failed to disclose certain facts in her application for judicial appointment ("Allegation 1"). Allegation 1 is that Ms. Douglas' failure to respond "yes" to the question on the judicial application form "[I]s there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed" in light of seven enumerated facts could support a recommendation for her removal. Allegation 1 states that at the time Ms. Douglas completed her 2004 judicial application, she knew or ought to have known that:

(1) In 2002 and 2003, graphic photos of a sexual nature of her (some of which could be seen as demeaning to women) (the "Photos") were available on [a website], having been uploaded onto the Website by Ms. Douglas' husband, Mr. King;

(2) In April and May of 2003, Mr. King had tried to entice one of his clients, Mr. Chapman, into a sexual relationship with Ms. Douglas, in part by referring him to the Photos on the Website and by sending him certain of the Photos by email;

(3) Ms. Douglas had met with Mr. Chapman on May 16, 2003 and May 30, 2003;[77]

(4) On June 9, 2003, Mr. Chapman had complained to Thompson Dorfman Sweatman LLP (the "Firm"), where Ms. Douglas and Mr. King were practising

[76] Notice to Associate Chief Justice Lori Douglas dated August 20, 2014 at para. 1 ("Notice of Allegations").

[77] The evidence before the previous Inquiry Committee and disclosed by Independent Counsel in this proceeding demonstrates that Ms. Douglas was cajoled by King to go to a restaurant and on both occasions Chapman and King has pre-arranged that Chapman would arrive, supposedly by coincidence: Ms. Douglas knew nothing of this pre-arrangement.

family law as partners, of Mr. King's conduct, had threatened legal action against Mr. King and the Firm and had provided the Firm with copies of the Photos;

(5) As a result of being made aware of Mr. King's conduct, the Firm had required Mr. King to leave the Firm;

(6) In June and July, 2003, the Photos had been removed from the Website at Mr. King's request, Mr. Chapman had represented that he had returned all of the Photos in his possession and had not engaged in their distribution, and Mr. King and Ms. Douglas had destroyed all the Photos in their possession, both in electronic and paper form;

(7) Mr. Chapman had returned the photos pursuant to the terms of a settlement agreement concluded between him and Mr. King, Mr. King having paid $25,000.00 to Mr. Chapman, which sum had been loaned by Ms. Douglas to Mr. King.[78]

53. The facts alleged in support of Allegation 1 relate to the conduct of others, not Ms. Douglas. Whether the conduct is that of King, Chapman or the TDS partners, Allegation 1 states that Douglas ACJ could be removed because she ought to have known of the conduct of the men around her. Independent Counsel has made clear to the Judge and her counsel that she has no evidence that Douglas ACJ had any knowledge of King's wrongdoing before he confessed in June 2003.

54. The essence of Allegation 1 is that (1) Ms. Douglas' victimization reflects negatively on her or the judiciary, (2) she ought to have known that such a negative reflection would stem from her victimization, and (3) therefore she should have disclosed wrongful conduct by others on her application for judicial appointment. The notice alleges that Ms. Douglas' failure to disclose those facts about others' conduct on her application is "(1) capable of supporting a finding that ACJ Douglas is '*incapacitated or disabled from the due execution of the office of judge*' within

[78] Notice of Allegations, para. 5.

the meaning of subsection 65(2) of the *Judges Act*, and, (2) capable of supporting a recommendation for removal."[79]

Allegation 2

55. Allegation 2 asserts that the photos posted online without Douglas ACJ's consent "could be seen as inherently contrary to the image and concept of integrity of the judiciary, such that the confidence of individuals appearing before the judge, or of the public in its justice system, could be undermined."[80]

56. The NOA alleges that such posting online by others and the speculative effect of such posting on public confidence is "(1) capable of supporting a finding that ACJ Douglas is '*incapacitated or disabled from the due execution of the office of judge*' within the meaning of subsection 65(2) of the *Judges Act*, and, (2) capable of supporting a recommendation for removal."[81] In effect, Allegation 2 is that the public nature of Ms. Douglas' victimization has rendered her "incapacitated" as a judge.

Allegation 3

57. Allegation 3 relates to two events outside the scope of this Committee's jurisdiction and Independent Counsel's authority. First, Allegation 3 impugns Douglas ACJ for writing over an entry in her personal gardening journal in 2010. The previous Independent Counsel noticed the change when he subpoenaed the personal diary for his investigation. The diary has not been subpoenaed by new Independent Counsel in her fresh investigation, nor is the diary evidence before this Inquiry Committee. Put simply, the first element of Allegation 3 relates to Douglas ACJ's right to write over an entry in a personal diary that is not in evidence before this Committee and was not evidence before the previous Inquiry Committee when the change was made.

58. Second, Allegation 3 asserts that when former Independent Counsel asked for a conference call to tie up loose ends in his investigation, but instead his co-counsel pressed

[79] Notice of Allegations, para. 6.
[80] Notice of Allegations, para. 7.
[81] Notice of Allegations, para. 8.

questions on Douglas ACJ about her private diary entry, that the Judge was not fully forthright. The context of this conference call – which involved previous Independent Counsel, his co-counsel, and counsel for the judge all in different cities with Douglas ACJ on the phone alone from her home – is not included in Allegation 3. It is likely not included because Independent Counsel has no knowledge of it and no evidence regarding the event. She was not present for the call. The CJC not had any complaint filed in accordance with its procedures about this call. However, the confidential medical evidence filed with this Committee does lend context to the trauma Douglas ACJ was experiencing when she was subjected to intrusive questioning by phone about a diary entry that related to King's betrayal of her trust and Chapman's betrayal of her privacy.

59. Allegation 3 does not relate to matters referred by the Review Panel for inquiry. Nor does it relate to Independent Counsel's investigation in this proceeding. Rather, it impugns Douglas ACJ's conduct with respect to the previous Independent Counsel appointed to present different allegations to the previous Inquiry Committee. The private diary entry in question bears no relevance to the two matters that were sent forward by the Inquiry Committee.

Allegations 1 and 2 are based on Ms. Douglas' Victimization

60. There is no issue in these proceedings that Ms. Douglas was not involved in any dissemination of the photos. Instead, the Review Panel, the previous Independent Counsel, and the current Independent Counsel, all determined that there was no basis to conclude that Ms. Douglas had any involvement whatsoever in the publication or distribution of the photos such that no further inquiry was required. The fact the photos were distributed to *anyone* through *any medium* was a violation of Ms. Douglas' consent, autonomy, dignity, and privacy. Justice Freedman held this view when he concluded that Ms. Douglas was an innocent victim and had no reason to answer "yes" to the disclosure question on her application for judicial appointment.[82]

61. Allegations 1 and 2 are based on harmful and sexist stereotypes about women and premised on the concept of victim-blaming. The suggestion that Ms. Douglas' victimization

[82] Freedman evidence, p. 2453, line 3, - p. 2454, line 5, p. 2464, line 19 - p. 2465, line 15, Guest Affidavit, Exhibit "R", MR, Vol. 1, Tab 2R.

could reflect negatively on her or the judiciary and that she should be blamed for the public availability of the Photos will have an unequal chilling effect on female applicants. It is like blaming a rape victim for having been raped and shunning her thereafter for being "damaged goods" – a theory our law must not countenance.

62. The allegations shame Douglas ACJ for a series of events over which she lacked any control or influence. They are nothing more than a rehabilitation of "the twin myths" that have been "universally discredited" in Canadian law and society.[83] These myths suggest that a woman's credibility is impacted by her sexual experience and sexual reputation[84] and that it is appropriate to penalize or punish women who do not "fit the stereotype of the 'good woman.'"[85] Canadian jurisprudence has upheld legislative prohibitions of evidence that furthers these myths from being advanced in criminal trials.[86] Our courts recognize that "society has a legitimate interest in attempting to eliminate such evidence," which undermines the integrity of the justice system, discourages the reporting of crime, and invades unnecessarily upon victim's privacy interests.[87]

63. The allegations are also underpinned by discriminatory prejudices and a negative perception of women's sexuality and autonomy.[88] Inherent in Allegations 1 and 2 is the suggestion that women should not express themselves sexually through creating or sharing intimate images with a partner, that they ought to bear responsibility for the actions of the men who share such photos, or that they should not pursue professional or public ambitions for fear of reprisal. It diminishes the "grave and serious fear-inducing harm" experienced by a woman who has endured the non-consensual distribution of "her most private and intimate personal images," a harm which constitutes "a profound interference with her physical integrity and a devastating blow to her reputation and self-esteem." It ignores the perspective of women.[89]

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[83] *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 604, 612 [*Seaboyer*], BOA, Tab 4.
[84] *Ibid*. at 612, BOA, Tab 4.
[85] *Ibid*. at 605, BOA, Tab 4.
[86] *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46, BOA, Tab 5.
[87] *Seaboyer* at 605-606, BOA, Tab 4.
[88] Bailey Report, MR, Vol. 1, Tab 7, p. 2.
[89] *R. v. Korbut*, 2012 ONCJ 522 at para. 24, BOA, Tab 6.

64. It ought to be indisputable that the series of events that form the basis for Allegations 1 and 2 are events which caused Ms. Douglas to be a victim of a gendered form of abuse. These allegations refuse to recognize the abuse Ms. Douglas suffered as abuse, excusing the perpetrators while blaming and belittling her as the victim. Indeed, the NOA proposes that her victimization by others can support a recommendation to strip her of her constitutionally secure tenure. Judicial office is held during good behaviour. These allegations baldly assert that the victim of such abuse is guilty of bad behaviour.[90] Victim blaming is a phenomenon that has been overcome in many cases of gendered abuse, such as sexual assault and sexual harassment.[91] The view that women who are victimized in this fashion are somehow blame worthy is based on sexist attitudes. Professor Franks notes that "the social tendency to blame victims and excuse perpetrators of non-consensual [distribution] is only the most recent incarnation of sexist, moralistic, and hypocritical attitudes about women's bodies."[92]

PART III – ISSUES

65. The issues on this motion are whether the Inquiry Committee ought to dismiss Allegations 1, 2 and 3 without forcing this victim to endure a formal evidentiary hearing as was held by the prior Inquiry Committee.

66. Douglas ACJ's submissions with respect to Allegations 1 and 2 are set out in two parts:

(1) The first part outlines this Committee's jurisdiction to dismiss the allegations at this stage without such a formal evidentiary hearing;

(2) The second part explains the reasons the Committee ought to dismiss Allegations 1 and 2 summarily without such a hearing.

67. For reasons related to the submissions on Allegations 1 and 2, Douglas ACJ requests that this Committee declare that the Photos are inadmissible as evidence should a formal inquiry proceed and that all copies be returned to her.

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[90] Franks Report, MR, Vol. 1, Tab 6, p. 2.
[91] *Ibid*., MR, Vol. 1, Tab 6, p. 7.
[92] *Ibid*., MR, Vol. 1, Tab 6, p. 8.

68. Douglas ACJ submits that this Committee should dismiss Allegation 3 for three reasons:

(1) Allegation 3 is not a complaint that has proceeded through the multi-stage review process and been referred to the Inquiry Committee;

(2) Allegation 3 is not relevant to the allegations sent forward by the Review Panel nor is it relevant to evidence to be adduced before the Inquiry Committee; and

(3) In the alternative, even if the facts alleged in Allegation 3 were proved, they could not support a recommendation for removal on any of the grounds set out in s. 65(2) of the Judges Act on the evidence relied on in this motion.

69. Submissions related to the request to file the confidential medical evidence under seal will be delivered under separate cover.

PART IV – SUBMISSIONS

Submissions on Allegations 1 and 2

The Inquiry Committee has the jurisdiction to Dismiss Allegations 1 and 2 Summarily without a Public Hearing

70. The Inquiry Committee has the jurisdiction to grant this motion, because (1) it is "the master of its own procedure"[93], (2) there is no requirement for the Committee to conduct a formal evidentiary hearing before it prepares a report to Council setting out its findings and conclusions on whether or not a recommendation should be made for the removal of a judge from office, and (3) in light of the recent focus on proportionality in determining the appropriate forum for adjudication it would be in the public interest to dispense with a formal hearing.

As "master of its own procedure" the Committee can dispense with a formal hearing

71. While a tribunal's substantive jurisdiction is limited to the matters properly referred to it, it can, in the absence of statutory limitations, adopt such procedure as is "just and convenient in the circumstances of the case before it."[94] The Supreme Court has held that it is "important to

[93] CJC Policies Regarding Inquiries – Policy on Inquiry Committees, BOA, Tab 7.
[94] *Patchett v. Law Society (British Columbia) (No. 2)*, 101 D.L.R. (3d) 210, 12 B.C.L.R. 82 at para 5 (B.C. Sup. Ct.), BOA, Tab 8.

refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure."[95]

72. As "master of its own procedure" the Committee can dispense with a formal hearing. Indeed, this procedure has been commonly referred to as the *Boilard Rule* since the Council concluded that the Inquiry Committee in Justice Boilard's matter "ought to have acceded to the advice of Independent Counsel to deal with the issues as a preliminary matter."[96]

73. Use of the *Boilard Rule* was also confirmed by the Federal Court in *Cosgrove*. In that case, the Court confirmed the possibility that an Inquiry Committee could decide to summarily dismiss complaints if they are "obviously unmeritorious or [do] not disclose judicial conduct warranting removal from office."[97]

There is no legislative requirement for the Committee to hold a formal hearing

74. There is nothing in the *Judges Act* or the CJC's *By-laws* that makes a public evidentiary hearing or the allegations put forward by Independent Counsel mandatory. Nor is there anything in the legislative scheme that requires a Committee to conduct a formal hearing before it reports its conclusion to the Council. Rather, once an Inquiry Committee is constituted, it is subject to only two mandatory obligations: (1) to conduct a fair proceeding and (2) to submit a report to the Council setting out its findings and conclusions.

75. Moreover, the Federal Court has affirmed that the Inquiry Committee process is not a necessary precondition to Parliament removing a judge,[98] which supports the Inquiry Committee's discretion to discharge its mandate and provide Council with its report and conclusions without conducting a formal hearing.

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[95] *R. v. Quebec (Labour Relations Board)* (1967), [1968] S.C.R. 172, 1 D.L.R. (3d) 125 at 127, BOA, Tab 9; *S.I.U. v. Coastal Shipping Ltd.*, [2005] C.I.R.B. No. 309, 2005 CarswellNat 5948 at para. 12 (Canadian Industrial Relations Board), BOA, Tab 10.

[96] Report of the Canadian Judicial Council to the Minister of Justice under ss. 65(1) of the *Judges Act* concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec (Ottawa: Canadian Judicial Council, December 19, 2003) at 4 [Boilard CJC Report], BOA, Tab 11.

[97] *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103 at para. 80, BOA, Tab 12.

[98] *Gratton v. Canada (Judicial Council)*, 115 D.L.R. (4th) 81; 78 F.T.R. 214 (T.D.) at para. 46, BOA, Tab 13, affirmed by Sharlow J. in *Weatherill v. Canada (Attorney General)*, [1999] 4 F.C.R. 107 at paras. 85-86 (T.D.), BOA, Tab 14.

Proportionality and the public interest weigh in favour of dispensing with a formal hearing

76. The Canadian civil justice system is grounded upon the value that the process of adjudication must be fair and just. This principle is without exception.[99] In this case, the public interest demands that the Committee dispense with the need for a formal hearing of Allegations 1 and 2. It would serve the interests of justice and enhance public confidence in the judiciary for the Committee to summarily dismiss Allegations 1 and 2 without resorting to a formal evidentiary hearing.

77. The Supreme Court of Canada has recently confirmed the importance of the principle of proportionality, which "means that the best forum for resolving a dispute is not always that with the most painstaking procedure."[100] Where, as here, the matter to be resolved is one of judicial discipline, a second guiding factor for the determination of the appropriate forum must be ensuring public confidence in the judiciary and the administration of justice.[101] As Justice Sopinka noted in *Ruffo*: "[E]very judge, like every citizen, has the right to a hearing by a tribunal which inspires public confidence."[102]

78. In this case, as will be discussed below, in order to inspire public confidence in the judiciary and in order to follow the principle of proportionality, the Committee should dispense with the need for a formal evidentiary hearing and summarily dismiss Allegations 1 and 2.

Allegation 1 and 2 ought to be Summarily Dismissed

79. There are three reasons why the Committee ought to dismiss Allegations 1 and 2 summarily at this stage. Proceeding to a formal evidentiary hearing would signal to the public that the CJC considers the allegations to be capable of supporting a recommendation for removal. This sends a message that the CJC considers Douglas ACJ to be responsible for her victimization. This message is contrary to the academic, legislative, and social recognition that women whose intimate images are distributed without their consent are victims who must be

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[99] *Hryniak v. Mauldin*, 2014 SCC 7 at para. 23, BOA, Tab 15.
[100] *Ibid*. at para. 28.
[101] *Ruffo v. Conseil de la magistrature et. al.* [1995] 4 S.C.R. 267 [*Ruffo*], BOA, Tab 16.
[102] *Ibid*. at para. 125 (dissenting on a different point).

protected. As a result of the nature of the allegations and the harmful stereotypes and victim blaming embedded in these allegations, conducting a public hearing into Allegations 1 and 2 would:

(1) threaten the constitutional principle of judicial independence;

(2) lessen public confidence in the judiciary and therefore undermine the goals of the CJC and the purposes of judicial discipline; and

(3) cause significant irreparable harm to Douglas ACJ.

1. Conducting a public hearing would threaten judicial independence

80. Judicial independence is an unwritten constitutional principle. The Supreme Court of Canada has long recognized the importance of both individual and institutional judicial independence. Judges must be free to operate without interference from the other branches of government and the parties that appear before them.[103] They must be able to function fearlessly and impartially in the advancement of justice.[104] It is equally important that the public perceives the judiciary to have this independence.

81. Judicial independence has three core elements: security of tenure; administrative independence; and financial security.[105] One of the characteristics of judicial independence is that judges cannot be appointed or dismissed for political or arbitrary reasons. Judges hold their position until retirement as long as they demonstrate good behaviour. The standard for removal of a judge from office is therefore high.[106] It "is not to be undertaken lightly", and the

[103] Canadian Superior Courts Judges Association and Canadian Judicial Council submission to the Judicial Compensation and Benefits Commission, 14 December 2007 at para. 61, BOA, Tab 17, citing the Report of the Second Judicial Compensation and Benefits Commission (Ottawa: Judicial Compensation and Benefits Commission, May 31, 2004) at 3-4.

[104] *Ibid.*

[105] *R. v. Valente*, [1985] 2 S.C.R. 673 at 694, 704, 708 [*Valente*], BOA, Tab 18; *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 99(1).

[106] *Re Therrien*, [2001] 2 S.C.R. 3 at para. 147, BOA, Tab 19 [*Re Therrien*].

misconduct must be of sufficient gravity to "justify interference with the sanctity of judicial independence."[107]

82. The concept of "good behaviour" was developed by the Inquiry Committee in the investigation into the Donald Marshall Prosecution. In the Committee's report it proposed this test:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[108](Emphasis added)

83. Similarly, in *Re Therrien*, the Supreme Court explained that removal is only warranted where the conduct is "so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of [her] office."[109]

84. The CJC's Ethical Principles explain that judges' conduct must be above reproach in the view of reasonable, fair minded and informed persons.[110] A judge has not committed misconduct if his or her actions are objectionable only to a small sect of Canadians with extreme beliefs. Nor can he or she be subject to censure on the basis of misinformation. Public confidence in the judiciary is measured by reference to right thinking members of society. Individuals who perceive bias where no reasonable, fair minded and informed person would are not entitled to special treatment for that reason.[111]

85. A review of the previous conduct that has warranted a recommendation of removal by Inquiry Committees further evidences the high threshold required for such a recommendation and demonstrates the lack of foundation for the allegations made against Douglas ACJ. For

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[107] Report to the Canadian Judicial Council of the Inquiry Committee established pursuant to ss. 63(1) of the *Judges Act* at the request of the Attorney General of Nova Scotia (Ottawa: Canadian Judicial Council, August 1990) at 25 [Marshall Inquiry Committee Report], BOA, Tab 20.

[108] *Ibid.* at 27, BOA, Tab 20.

[109] *Re Therrien* at para. 147, BOA, Tab 19.

[110] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004), pp. 13, 27, MR, Vol. 2, Tab 5M.

[111] *Ibid.*, p. 32.

example, an Inquiry Committee recommended removing Justice Bienvenu from office after he made comments minimizing the suffering of Jewish people during the Holocaust.[112] Another Inquiry Committee recommended the removal of Justice Cosgrove after he was found to have repeatedly "abused his powers as a judge" giving rise to a "reasonable and irremediable apprehension of bias".[113]

86. The above precedents demonstrate that a recommendation for removal must be based on conduct by a judge, not conduct against a judge. Even then, "inappropriate" or "unacceptable" conduct does not satisfy the high removal threshold.[114] Because of his "irreproachable career" and the "isolated nature of the incident," the Inquiry Committee in *Flynn* concluded that "inappropriate and unacceptable" comments to the media did not warrant removal of Justice Flynn.[115] Even the gratuitous, wrong and harmful comments made by the Nova Scotia Court of Appeal panel who heard the reference into the wrongful conviction of Donald Marshall – who had suffered as a victim of the justice system when he was wrongfully incarcerated for ten years – although drawing censure from the Inquiry Committee did not rise to the level of supporting a recommendation for removal.

87. In this light it is clear that conducting a public hearing into allegations premised on harmful, sexist stereotypes that do not involve any misconduct of the respondent judge would undermine the principle of judicial independence. It would signal to the public and the judiciary that complaints against judges that do not involve the judge's own conduct and are premised on actions that caused the judge to be a victim of gendered abuse *may* be serious enough to warrant removal. It places such allegations on an equal footing with allegations that a judge made racist comments in open court or so severely abused his powers that a reasonable apprehension of bias was raised.

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[112] Report to the Canadian Judicial Council of the Inquiry Committee appointed pursuant to ss. 63(1) of the Judges Act to conduct a public inquiry into the conduct of Mr. Justice Jean Bienvenue (Ottawa: Canadian Judicial Council, June 1996) at 57-58 [Bienvenue Inquiry Committee Report], BOA, Tab 21.

[113] Report to the Canadian Judicial Council of the Inquiry Committee appointed pursuant to ss. 63(3) of the *Judges Act* to conduct an investigation into the conduct of Mr. Justice Paul Cosgrove (Ottawa: Canadian Judicial Council, 27 November 2008) at para. 189, BOA, Tab 22.

[114] Report to the Canadian Judicial Council of the Inquiry Committee appointed pursuant to ss. 63(1) of the *Judges Act* to conduct an inquiry concerning Mr. Justice Bernard Flynn (Ottawa: Canadian Judicial Council, 12 December 2002) at paras. 76-77 [Flynn Inquiry Committee Report], BOA, Tab 23.

[115] Flynn Inquiry Committee Report at paras. 76-77, BOA, Tab 23.

88. Conducting a public hearing into Allegations 1 and 2 would also signal to the public and the judiciary that a way to remove a judge or, at least require a judge to endure a lengthy, formal disciplinary hearing, is to victimize the judge through the non-consensual distribution of intimate images. Sending this message is a serious threat to judicial independence. It empowers malicious, revenge-seeking individuals and wages war against judges who belong to vulnerable groups. This Committee must avoid sending a message to the public that it will treat privacy violations and abuse against women with indifference. This Committee should protect the rights of victims and avoid sending a message to the public that "women's basic rights of privacy and autonomy can be denied with impunity; that any woman, no matter how accomplished or successful, can be brought down on the basis of evidence that she engaged in sexual conduct."[116]

89. Further, in order to enhance judicial independence, where, as here, the allegations are not capable of supporting a recommendation for removal, the Committee should dismiss the allegations summarily in advance of a formal hearing. Allegations 1 and 2 are not capable of warranting a recommendation for removal, because the conduct and events impugned by these allegations are incidents of gendered abuse against Douglas ACJ.

The alleged facts supporting the allegations do not relate to Ms. Douglas' conduct

90. Of the seven alleged facts supporting Allegation 1 ("the Facts"), only two refer to any actual conduct by Ms. Douglas: that she met, on two occasions and to her surprise, with Mr. Chapman; and that she loaned a sum to her husband to enable him to fulfill a settlement agreement with Mr. Chapman, so he would agree to destroy the photos he obtained without her consent. Neither of these facts reflects negatively upon Ms. Douglas or the judiciary. Independent Counsel and the Committee have determined that there is no evidence to support the Chapman complaint. As a result, the fact that Chapman appeared while Ms. Douglas was having a drink with her husband at a public restaurant is not evidence of conduct that may warrant removal. None of the other Facts relate to Ms. Douglas' conduct or to events over which she had any control.

[116] Franks Report, MR, Vol. 1, Tab 6, p. 10.

91. Allegation 1 asserts that Ms. Douglas should have disclosed the conduct of others on her application for judicial appointment. Relevant disclosure on the Personal History Form[117] can only be asking about conduct by the judicial candidate. It cannot require a candidate to disclose information about the conduct of other individuals even if that conduct amounts to anti-social behaviour by a family member.

92. With respect to Allegation 2, the only conduct of Ms. Douglas' that is implicated is her consent to the taking of the photos for her husband's private use. The fact that the photos have been publicly available, the lynchpin of Allegation 2, relates to a series of events that led to Ms. Douglas being the victim of gendered abuse.

93. Any suggestion that Ms. Douglas is responsible for the public availability of the photos, because she consented to the taking of the photos for her husband's private use would run afoul of our law on sexual assault which is unequivocal: consent is context-specific.[118] However, this misconceived victim blaming is the basis for Independent Counsel's assertion that Allegation 2 is capable of supporting a recommendation of removal. This misconception about consent and the harms occasioned by the non-consensual distribution of intimate images suggests that Ms. Douglas' consent to the taking of the photos is to blame for their public availability. This suggestion is described by Professor Franks and Danielle Citron as follows:

> This disregard for harms undermining women's autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex. Some argue that a women's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public. Said another way, a victim's consent in one context is taken as consent for other contexts. <u>That is the same kind of dangerous mentality at work in sexual assault and sexual harassment</u> … While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.[119]

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[117] "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?", Notice of Allegations, para. 4.

[118] West Coast LEAF's Submission to the Standing Committee on Justice and Human Rights on Bill C-13 (Submitted to the Standing Committee, May 13, 2014) [unpublished], p. 5, MR, Vol. 1, Tab 2Q.

[119] Danielle Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L.R. 345 at 348, MR, Vol. 3, Tab 3N (emphasis added).

94. Similarly, the statement in Allegation 1 that the photos could be seen as "demeaning to women" ignores the constitutionally protected right to expression, underlying sexual expression, including the taking of photographs of a sexual nature in private.[120] Such photographs are not pornography. Private photographs depicting sexual acts are only fairly characterized as pornography when they are disclosed to anyone other than the intended audience.[121] The assertion that the photos could be seen as demeaning to women is irrelevant and invalid. The nature or content of photos taken with the expectation of privacy within a marriage are irrelevant to any consideration of whether the victim of non-consensual distribution of those images should be punished. It is not for the CJC to make a subjective determination of the content of photos that should never have been disclosed.

Past victimization cannot reflect negatively on a judicial candidate or the judiciary nor does it render a judge "incapacitated or disabled from the due execution of the office of judge"

95. Non-disclosure of victimization is not misconduct, and it does not reflect negatively on the judiciary. Allegation 1 is premised on the untenable claim that Ms. Douglas' non-disclosure of the Facts surrounding her victimization is capable of supporting a recommendation for removal.[122] However, it is inconsistent with Canadian law, policy, and social values to subject a victim to a public inquiry aimed at disciplining her by determining that the circumstances of her victimization would reflect negatively on her.

96. Just as an applicant to the judiciary is not required to disclose the fact that she was sexually assaulted, an applicant cannot be required to disclose the fact that she has been the victim of the non-consensual distribution of intimate images. Being a victim of this moral outrage that will soon be a crime in Canada cannot reflect negatively upon either Douglas ACJ or the judiciary. As Dean Sossin notes, "No person intends to be the victim of a crime or harassment and it would be particularly inappropriate to suggest a woman whose privacy has

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[120] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 at paras. 109-110 [*Sharpe*], BOA, Tab 24.

[121] Franks Report, MR, Vol. 1, Tab 6, p. 4.

[122] Notice of Allegations, para. 6.

been violated through posting images of her without her consent has engaged in unethical conduct."[123]

97. Public knowledge that a judge has been the victim of a crime or cyberbullying would likely enhance public confidence in the judiciary. People who have persevered through such ordeals may bring additional insight, compassion, empathy and depth to their adjudicative activities because of such experiences. The Canadian Bar Association and the Federal Government have both recognized that these qualities are desirable in judicial appointees.[124]

98. Judges are people. Like all people, they bring with them into their professional lives their histories and experiences. The requirement for judicial neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes; in fact, these experiences are to be applied with sensitivity and compassion to the cases that they hear.[125] This position is one which has been affirmed by both the Canadian Judicial Council and by the Supreme Court of Canada.[126] Indeed, as the Supreme Court has noted, "The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging."[127]

99. As Dean Sossin explains in his expert report, "Public confidence in the judiciary cannot reasonably be lessened by the disclosure that a judge has been the victim of criminal or harassing conduct."[128] The fact that certain segments of the population might disapprove of the events alleged in the Facts is not relevant to the question of public confidence.[129]

100. In any event, Ms. Douglas' decision not to disclose the Facts on her application form was not done to conceal anything. Ms. Douglas was aware that the Facts were known in the Manitoba legal community and in light of the fact that her colleagues and the judiciary continued to treat her with respect following her victimization she knew the harms occasioned to her could not

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[123] Sossin Report, MR, Vol. 1, Tab 5, para. 18.

[124] Sossin Report, MR, Vol. 1, Tab 5, para. 16.

[125] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 119, BOA, Tab 25.

[126] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004), p. 15, MR, Vol. 2, Tab 5M; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 119, BOA, Tab 25.

[127] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 119, BOA, Tab 25.

[128] Sossin Report, MR, Vol. 1, Tab 5, para. 15.

[129] Bienvenue Inquiry Committee Report at 57-58, BOA, Tab 21.

reflect negatively on herself or the judiciary. She knew that right thinking people do not hold victims of unconscionable misconduct *responsible* for the perpetrators' actions.

101. Freedman J.A. testified before the Inquiry Committee in July 2012 that, in his view, there was no reason for Ms. Douglas to answer "yes" to the disclosure question on her application, because she was an innocent victim. He also explained that the then Chief Justice of the Manitoba Court of Queen's Bench was aware of the Facts and nonetheless supported that Ms. Douglas' application go forward.

102. Justice Freedman explained to the Inquiry Committee that the JAC needed to confirm its understanding that Ms. Douglas was an innocent victim and therefore it had Ms. Jamieson call her to confirm. When Ms. Jamieson telephoned Ms. Douglas to confirm the Facts and the JAC's understanding that Ms. Douglas was an innocent victim, Ms. Douglas answered all of her questions truthfully and did not evade any disclosure of the Facts.

103. Accordingly, even if disclosure of past victimization was required for judicial appointment – which is denied – the Facts alleged were disclosed. The CJC's statutory mandate is not to retroactively review informed decisions of the JAC and Minister of Justice. Allegation 1 cannot support a recommendation for removal. It would infringe judicial independence if Douglas ACJ is drawn through an evidentiary hearing on an allegation that neither relates to her conduct nor falls within the scope of the CJC's mandate.

2. Conducting a public hearing would undermine public confidence in the judiciary

104. Public confidence in the judiciary and the administration of justice is crucial to the existence and proper functioning of the justice system.[130] It ensures the continuity of the rule of law.[131] As the Supreme Court has warned, "[I]f a judicial system loses the respect of the public, it has lost its efficacy."[132]

[130] *R. v. Lippé*, [1991] 2 S.C.R. 114 at 141 [*Lippé*], BOA, Tab 26.
[131] *Ruffo* at para. 109, BOA, Tab 16; *Re Therrien* at para. 110, BOA, Tab 19.
[132] *Lippé* at 141, BOA, Tab 26.

105. At its core, public confidence in the judiciary means the perception that justice will be done in individual cases.[133] It requires that judges must be among the foremost defenders of individual freedoms and human rights and the guardians of the values of the *Charter*.[134] Both individual judges and the judiciary as an institution must be independent and impartial, and they must uphold values that include democratic access to justice and equality before the law.[135] In order to maintain public confidence in the judicial system, the processes by which judicial complaints are addressed must embody these values.

106. Maintaining public confidence in the judiciary and the judicial system through a fair, transparent and efficient process is a fundamental goal of the Canadian Judicial Council. The Council and its sub-delegates, including Inquiry Committees, must ensure that judicial discipline proceedings enhance public confidence in the judiciary. This is done by ensuring that the proceedings respect the rights and freedoms our justice system is designed to promote and protect.

107. Conducting a formal hearing into allegations that are premised on assumptions and stereotypes that are inconsistent with the fundamental values of our justice system would undermine public confidence in the judiciary. Conducting a formal hearing signals to the public that there is some merit to the allegations being investigated and that the allegations may be capable of supporting a finding that Douglas ACJ is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the *Judges Act*. Summary dismissal is appropriate because the issue is not whether the Facts alleged can be proved by Independent Counsel. Rather, even if the Facts are proved, it would shatter the foundation of the justice system to discipline a woman for her abusers' conduct. All the more so when this is done at the hands of the Canadian Judicial Council.

108. The Supreme Court of Canada has confirmed that one of the judiciary's roles is to ensure that sexist stereotypes and assumptions are eradicated from our laws.[136] Conducting a hearing

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[133] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3 at paras. 9-10, BOA, Tab 27.

[134] *Re Therrien* at para. 108, BOA, Tab 19.

[135] *Lippé* at 141, BOA, Tab 26; *Valente*, BOA, Tab 18.

[136] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 95, BOA, Tab 28.

into allegations that are premised on such stereotypes would therefore threaten public confidence in the judiciary, because the CJC would be seen to be perpetuating such myths instead of denouncing them.

109. Signalling that there is any merit to Allegations 1 and 2 through the conduct of a formal hearing would severely compromise the public's confidence in the judiciary, because these allegations are fundamentally inconsistent with the following basic values of our justice system:

(1) The innocent must not be punished;

(2) Victims are worthy of the law's protections, including the protection of their dignity and privacy rights, and must not be blamed for their perpetrators' actions;

(3) Women are entitled to participate equally in society and are entitled to be afforded the equal protection of our laws, including the right to security of the person and the right to privacy.

Canadian law does not punish the innocent

110. In the early formulations of section 7 of the *Charter* and the development of the principles of fundamental justice, Justice Lamer explained that "[i]t has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law."[137]

111. Protecting the innocent from punishment is a "bedrock principle of fundamental justice." The principle reflects a basic understanding that the justice system must be fair and just. It "stands for an abiding commitment that our justice system will take all reasonable precautions to prevent and remedy miscarriages of justice."[138]

112. Conducting a public hearing into Allegations 1 and 2 suggests that although Ms. Douglas was a victim of the facts that led to those allegations, she is somehow responsible for those facts

[137] *Reference re Motor Vehicle Act (British Columbia) s. 94*, [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73 at para. 69, BOA, Tab 29.

[138] Kent Roach, The Protection of Innocence under Section 7 of the *Charter*, *Supreme Court Law Review*, (2006) 34 S.C.L.R. (2d) 249 at 250, BOA, Tab 30.

and may need to be removed from office. A decision to hold a formal hearing into Allegations 1 and 2 sends the message that Ms. Douglas could be held culpable professionally for her decision to engage in consensual private sex with her husband or for her expectation that her victimization would not reflect negatively on her or the judiciary. No evidence could be adduced in an inquiry that would justify a recommendation for removal on that basis.

113. Punishing a victim for the non-consensual distribution of her intimate images is equivalent to punishing a women for being the victim of a sexual assault. Holding a formal hearing into Allegations 1 and 2 would be inconsistent with the basic tenet of our justice system that the innocent not be punished or held to be morally culpable.

Blaming a victim for her perpetrators' conduct is inconsistent with our laws that protects victims' rights

114. Canadian law and policy supports victims' rights and interests. This support is evidenced in:

(1) our jurisprudence which promotes legal procedures that avoid furthering the trauma experienced by victims;

(2) the victims' rights legislation that has been enacted in every Canadian jurisdiction to ensure that victims are treated with courtesy, compassion, and respect; and

(3) reforms to the *Criminal Code* designed to protect the dignity and privacy of complainants.

115. Conducting a formal hearing into Allegations 1 and 2 would directly oppose these goals and the protection of victims' rights.

116. ***The jurisprudence promotes the protection of victims***. The Supreme Court of Canada has repeatedly recognized the role of the legal system in ensuring that victims do not face undue incursions into their private affairs.[139] This includes prohibiting the reporting of irrelevant aspects of their intimate lives as a means of casting doubt upon their character and credibility.

[139] See *R. v. Quesnelle*, 2014 SCC 46 [*Quesnelle*], BOA, Tab 31.

Recently, the Supreme Court of Canada confirmed that "the disclosure of police occurrence reports that contain intimate personal information – such as details of previous allegations of sexual assault – may do particularly serious violence to the dignity and self-worth of an affected person."[140]

117. Even where an accused's right to a fair trial is at issue, the Supreme Court has recognized that proceedings "need not and should not become an occasion for putting the complainant's lifestyle and reputation on trial."[141] An inquiry into Allegations 1 and 2 would produce precisely such an occasion.

118. The prevailing jurisprudence recognizes that protecting victims against unnecessary disclosure enhances "the personal security of women and their right to equal benefit and protection of the law."[142] The Supreme Court of Canada has frequently affirmed the interests of victims, particularly where, as here, the privacy interests of individuals who have experienced incursions upon their sexual integrity are engaged.[143]

119. Victims' rights must be protected to prevent re-victimization and encourage the reporting of crimes like sexual assault. L'Heureux-Dubé J. has explained that women may not report actions crimes against them for "fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and lack of desire to report due to… depression, self-blame or loss of self-esteem."[144] A reason many women do not report sexual assaults is due to "women's fear of further victimization at the hands of the criminal justice system" and their concern that their participation in the trial process will be "yet another experience of trauma."[145]

120. ***Victims' Rights Legislation***. Support for the protection of victims' interests is evidenced by compensation schemes established for victims of crime, support services developed to assist

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[140] *Quesnelle* at para. 34, BOA, Tab 31.

[141] *R. v. Osolin*, [1993] 4 S.C.R. 595 at 672 [*Osolin*], BOA, Tab 32.

[142] *Seaboyer* at 627, BOA, Tab 4.

[143] See e.g. *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, BOA, Tab 33; *A.B. v. Bragg Communications Inc*., 2012 SCC 46, [2012] 2 S.C.R. 567, BOA, Tab 1.

[144] *Seaboyer* at 649-650, BOA, Tab 4.

[145] *Osolin* at 628, BOA, Tab 32.

victims through the criminal process, and efforts to reduce the risk of secondary victimization arising from the criminal process.[146]

121. These goals – promoting privacy, avoiding re-victimization, encouraging the reporting of crime – are further supported by the victims' rights legislation that has been passed in every Canadian province.[147] In Manitoba, Douglas ACJ's home province, this legislation affirms that victims should be treated with courtesy, compassion and respect, and that the needs, concerns and interests of victims deserve consideration.[148]

122. Parliament has put forward its own Victims Bill of Rights legislation. Prime Minister Stephen Harper confirmed that the introduction of *Bill C-32 An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts* signalled the Federal Government's commitment to protecting victims of crime: "Our Government wants victims of crime across this country to know that we have listened to their concerns and that we are squarely on their side."[149]

123. ***Reforms to the Criminal Code.*** Certain provisions of the *Criminal Code* protect victims' rights and seek to minimize any re-victimization when victims are witnesses in criminal proceedings. Witnesses have statutory participatory rights in aspects of the proceedings that impact their privacy interests.[150] They may also request a support person to be present and close to them while testifying and to testify outside the court room or behind a screen that would protect them from being seen by the accused.[151] These provisions help to minimize the re-

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[146] Joan Barrett, "Expanding Victims' Rights in the Charter Era and Beyond" (2008), 40 S.C.L.R. (2d) 627 at 628, BOA, Tab 34.

[147] *Victims' Bill of Rights*, 1995, S.O. 1995, c. 6; *The Victims' Bill of Rights*, C.C.S.M. c. V55; Victims of Crime Act, R.S.A. 2000, c V-3; Victims of Crime Act, R.S.B.C. 1996, c. 478; Victims Services Act, S.N.B. 1987, c. V-2.1; Victims of Crime Services Act, R.S.N.L. 1990, c. V-5; Victims' Rights and Services Act, S.N.S. 1989, c. 1; Victims of Crime Act, R.S.P.E.I. 1988, c. V-3.1; An Act Respecting Assistance for Victims of Crime, C.Q.L.R. c. A-13.2; The Victims of Crime Act, 1995, S.S. 1995, c. V-6.011; Victims of Crime Act, R.S.N.W.T. 1988, c. 9 (Supp); Victims of Crime Act, R.S.N.W.T. (Nu) 1988, c. 9 (Supp); Victims of Crime Act, S.Y. 2010, c. 7.

[148] *The Victims' Bill of Rights*, C.C.S.M. c. V55, Preamble.

[149] Office of the Prime Minister of Canada, News Release, "PM Announces Historic Legislation to Create a Canadian Victims Bill of Rights" (3 April 2014), online: Prime Minister of Canada, <http://www.pm.gc.ca>, BOA, Tab 35.

[150] *Criminal Code*, R.S.C. 1985, c. C-46, s.278.4(2) (production of private records), ss. 486.4-5 (requests for publication bans).

[151] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 486.1-2.

traumatization of victims that can occur through their participation in legal proceedings and are a clear indication of Parliament's intent to protect the rights of victims.[152]

124. Requiring the disclosure of sensitive personal information relating to an experience of victimization has an impact on a person's privacy and dignity. Parliament recognized this concern in the preamble to Bill C-46, which amended the Criminal Code to set out a procedure for the production of records relating to complainants in sexual offence proceedings.[153]

125. By enacting Bill C-46, Parliament intended to "promote and help to ensure the full protection of the rights guaranteed by the Canadian Charter of Rights and Freedoms for all… within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons." In particular, Parliament recognized the negative impact of compelled production of personal information, "that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny." Compelled production – or the risk thereof – could deter reporting of offences or deter complainants from seeking necessary treatment, counselling or advice.[154]

126. The legislation protects against the unnecessary disclosure of intimate personal information, particularly where a victim's equality and security of the person interests are at stake.

127. Protection of victims is thus an ongoing and developing theme in Canadian case law, legislation, and literature. As Dean Sossin notes, "To hold a judge who was the victim of the posting of pictures or information about the judge, and dissemination through social media, by a

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[152] See e.g. Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Sess., 35th Parl., 1996-7, Preamble, BOA, Tab 36. The constitutionality of the Bill C-46 Criminal Code amendments was upheld in *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*] and Parliament's intent was affirmed at para. 59, BOA, Tab 37.

[153] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.1-278.9.

[154] Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Sess., 35th Parl., 1996-7, Preamble, BOA, Tab 36, constitutionality upheld in *Mills* and Parliament's intent affirmed at para. 59, BOA, Tab 37.

third party without her or his consent accountable for an ethical violation would be contradictory to these trends and the logic underlying these statutory, policy and legal developments."[155]

Punishing a victim is inconsistent with the value of equality under the law

128. When intimate images are shared outside of the context in which they were consensually created or provided, there is a violation of sexual consent. The law on sexual assault is unequivocal: consent is context-specific, and consent to sexual activity must be ongoing and conscious.[156] When a sexual act without active consent "is inflicted on an individual's physical body, it is considered rape or sexual assault. The fact that non-consensual pornography does not involve physical contact does not change the fact that it is a form of sexual abuse."[157] Like other forms of sexual abuse, it is disproportionately targeted at women and has severe effects on both individual victims and on women as a group. It can leave physical, psychological and financial scars.[158] This is the context in which Allegations 1 and 2 must be understood.

129. The fact that the non-consensual distribution of intimate images is an abuse that is inflicted most often against women and girls means that it has a disadvantageous impact on women's equal participation in society and on their rights to security of the person, privacy, and equal benefit of the law.[159] Women fear sexual assault, and they "govern their conduct because of that fear."[160] They also fail to report to police "because they have concern about the attitudes of the police or courts to this type of incident."[161] The legal system has worked to improve this treatment, "debunking the stereotypes that have been so damaging to women and children," but the problem is ongoing.[162]

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[155] Sossin Report, MR, Vol. 1, Tab 5, para. 14.

[156] *R. v. J.A.*, 2011 SCC 28, [2011] 2 SCR 440 at para. 3, BOA, Tab 38.

[157] Danielle Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L. Rev. 345 at 363, MR, Vol. 3, Tab 3N.

[158] Franks Report, MR, Vol. 1, Tab 6, para. 7.

[159] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 48, BOA, Tab 37.

[160] *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 160 D.L.R, (4th) 697 at para. 9 (Ont. C.J.), BOA, Tab 39.

[161] *Ibid.* at para. 10, BOA, Tab 39.

[162] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 58, BOA, Tab 37; See also *R. v. N.S.*, 2012 SCC 72 at para. 37, BOA, Tab 40.

130. The costs sustained by women and girls as a result of gendered abuse "sustain and exacerbate gender inequality."[163] Gendered abuse validates and promotes views of male superiority, male sexual entitlement, and female subordination.[164]

131. By pursuing Allegations 1 and 2, the Inquiry Committee would be undermining the confidence of the public in its justice system by revitalizing stereotypical social attitudes about sexual privacy and autonomy. Suggesting that a female candidate for judicial office ought to have characterized an event in her past in which she survived a violation of sexual consent and privacy as one that would reflect negatively on her and the judiciary contributes to the problem. It models behaviour that both Parliament and the courts have warned against and undermines women's ability to participate as equals.

132. Requiring disclosure of this nature would place an unequal and onerous burden on women and other historically disadvantaged groups in their applications for judicial office. This unequal burden is a violation of women's right to equal benefit under the law. Requiring this disclosure would also have a chilling effect on women's willingness and interest in applying for positions on the bench. As Dean Sossin points out:

> [W]omen have long been, and continue to be, under-represented on almost every court in Canada, despite the recognition decades ago that the judiciary should represent a broad cross-section of society including women and cultural minorities… To apply ethical standards for judges in a way that creates hurdles to judicial appointment (or more onerous disclosure obligations) for women who have been subject to cyberbullying or harassed online creates additional gendered barriers for potential women judges.[165]

133. Expert evidence supports the chilling effect that requiring disclosure of intimate information can have on women and other equity-seeking groups. Requiring such disclosure teaches "girls and women that they must be on their guard even in intimate moments with trusted partners", and "instructs them to fear that any success or accomplishment they might achieve will draw the wrath of a vengeful ex-partner or resentful peer."[166] Professor Franks cautions that

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[163] Franks Report, MR, Vol. 1, Tab 6, para. 9.

[164] Franks Report, MR, Vol. 1, Tab 6, para. 8.

[165] Sossin Report, MR, Vol. 1, Tab 5, para. 13, citations omitted.

[166] Franks Report, MR, Vol. 1, Tab 6, para. 22.

girls today are "already deciding to play it safe… so that they can reduce their chances of having their most vulnerable intimate moments splashed across every website and tabloid."[167]

134. Professor Bailey notes that because *young* Canadians live a "particularly seamless integrated online/offline existence, which incorporates all aspects of their lives (including expressions of sexuality" and because women and girls are targeted by the non-consensual disclosure of intimate images, punishing these victims disproportionately threatens the ability of women and members of the LGBTQ community to be future leaders of our public institutions.[168] Surely this is not the message this Committee or the CJC intends to send to aspiring female judges and leaders.

3. Conducting a public hearing would cause irreparable harm to Douglas ACJ

135. Douglas ACJ's victimization and the violations to her privacy, consent, and trust unfortunately follow the classic pattern of revenge, extortion, and intentional infliction of harm that is discussed in the academic literature on the non-consensual distribution of intimate images. The harms she has suffered are consistent with the harms described by victims and their families in submissions to the Standing Committee on Justice and Human Rights, in research, and in media articles.

136. Proceeding with a formal evidentiary hearing into allegations that are premised on the victimization that has already wreaked havoc on Douglas ACJ's life would simultaneously ignore and compound the harms she has already suffered, re-victimize her through a formal hearing that probes details of the acts she was victim to, and cause additional irreparable harm. This Committee ought to take the opportunity to acknowledge the harms she has endured and send a message to perpetrators that intentional infliction of harm on female judges will not be permitted or empowered.

Ms. Douglas was a victim of revenge, extortion, and the intentional infliction of harm

137. The Photos were removed from the internet and destroyed by King in 2003. The Photos only re-appeared on the internet when Chapman first decided to seek revenge against a system of

[167] Franks Report, MR, Vol. 1, Tab 6, para 22.
[168] Bailey Report, MR, Vol. 1, Tab 7, para. 4.

justice he thought was treating him unfairly and second attempted to extort King after Chapman's 2010 lawsuit was dismissed on summary judgment. In each case, Chapman's lashing out against the system and Mr. King were inflicted on the most vulnerable person he had an ability to harm: Douglas ACJ.

138. There is no evidence that the Photos were on the internet at any time between June 2003 when Mr. King had them removed and August 2010 when Chapman had them re-posted. Independent Counsel has provided no disclosure to suggest that anyone other than Chapman was responsible for the Photos' re-appearance on the internet in 2010.

139. The disclosure Independent Counsel provided from Mr. Fineblit, the CEO of the Manitoba Law Society, explains that Chapman's complaints to the Law Society and the CJC against Douglas ACJ were motivated by his anger over the way in which he perceived a pre-trial in front of Joyal ACJ to be biased against him. Chapman did not complain about Ms. Douglas' conduct in 2003 when he complained to TDS about Mr. King.[169] Only in 2010 did he lash out against her in an attempt to seek revenge on Joyal, ACJ. His lashing out was done with an intention to embarrass and humiliate her in front of her colleagues; he sent an anonymous disc of the Photos he had contracted to destroy to the CJC and provided a similar disc to the CBC and King's lawyer.

140. With respect to Chapman's intentional posting of the Photos on the internet in 2010, the evidence from Mr. Gange explains that Chapman's motivation for this was an attempt to extort King not to seek a cost award against him following the dismissal of his lawsuit.[170]

141. The academic research in this area demonstrates that revenge, extortion, and the intentional infliction of harm are common motivations for perpetrators.[171] This Committee should not empower or encourage this misconduct by pursuing allegations of conduct by others that was motivated by revenge, extortion, and the intentional infliction of harm. Judicial independence would be imperilled if female judges fear that intimate images of themselves (or fabrications of such photographs) might end up on the internet if they rendered an unfavourable

[169] Guest Affidavit, MR, Vol. 1, Tab 2, paras. 5-6.
[170] Gange Affidavit, MR, Vol. 1, Tab 3, paras. 18-19.
[171] Franks Report, MR, Vol. 1, Tab 6, para. 9.

decision in the eyes of a vengeful litigant, and that they may be removed from judicial office as a consequence.

Douglas ACJ has already suffered irreparable harm

142. The CJC's process has caused Douglas ACJ tremendous stress as a result of her job loss, tremendous public humiliation, and living for years in a climate of ongoing uncertainty and insecurity.[172] In granting a stay of proceedings pending Douglas ACJ's application for judicial review, Justice Snider recognized the irreparable harm Douglas ACJ has already suffered as a result of the CJC's process.[173]

143. The harms occasioned to Douglas ACJ have been particularly isolating and traumatizing as a result of the decision by the first Inquiry Committee to admit the Photos into evidence. In particular, it leaves her abandoned by her court and repeatedly violated and traumatized as a result of the continued argument that the distribution and viewing of the photographs is germane to a clearer understanding of this case and necessary in order for justice to be explored and served.[174]

144. Douglas ACJ has experienced tremendous humiliation the effects of which have been described as a "rape".[175] Consistent with the symptoms experienced by other victims of this abuse, she has suffered stress reactions in response to the chronic and unrelenting nature of this stress, which are described in the confidential report filed with the Committee.[176] While the evidence supports Douglas ACJ's full recovery once the trauma of this proceeding is resolved, her condition is one that is typical for victims of this kind of violation.

145. It is clear that the CJC's own process has been a major contributing factor to Douglas ACJ's stress. The suggestions that she is culpable for her victimization and that her victimization

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[172] Confidential Medical Report, MR, Vol. 6, para. 4.
[173] *Douglas v. Canada (Attorney General)*, 2013 FC 776 at para. 21, BOA, Tab 41.
[174] Confidential Medical Report, MR, Vol. 6, para. 5.
[175] *Ibid*., MR, Vol. 6, para. 11.
[176] *Ibid*., MR, Vol. 6, paras. 9, 10.

might cause her to lose her constitutionally secured tenure understandably cause humiliation and weariness.[177]

A formal hearing would cause further irreparable harm

146. A formal hearing into Allegations 1 and 2 would cause significant further irreparable harm to Douglas ACJ. This Committee should summarily dismiss Allegations 1 and 2 and follow the clear guidance from Parliament: women whose intimate images are distributed without their consent are victims who must be protected and not punished. This Committee should accept the advice of given to Parliament at the Committee hearings on Bill C-13 and "stop treating the victim like they are part of the problem."

The Photographs are Inadmissible and Ought to be Returned to Douglas ACJ

147. In the event that this Inquiry Committee determines that these proceedings should continue to a hearing, Douglas ACJ requests an order from the Committee that the Photos be returned to her and deemed inadmissible in these proceedings. Douglas, ACJ relies on the foregoing submissions with respect to Allegations 1 and 2 in support of this request. In addition, the Photos are not probative of any fact in issue and are highly prejudicial both to the Inquiry Committee's ability to render a fair recommendation and to Douglas ACJ's ability to return to the bench. Further, admitting them into evidence in the absence of a compelling reason to do so would inflict further unnecessary harm on Douglas ACJ.

The Photographs are not Probative of Any Issue

148. The photographs are not probative of any issue before this Committee, and ought to be excluded on that basis alone. While the strict rules of evidence are not necessarily binding on the Inquiry Committee, it has the discretion to exclude evidence that is not probative of any issue (or, as discussed in more detail below, where the probative value of the evidence is outweighed by its prejudicial effects).[178]

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[177] Confidential Medical Report, MR, Vol. 6, para. 12.

[178] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis, 2014) at 54-57, and esp. §2.53, BOA, Tab 42.

149. In order to present any probative value to the Committee, the Photos must make one of the facts in issue more or less true. The Photos demonstrate that Douglas ACJ and her husband engaged in lawful, consensual, sexual activity. None of these facts are in dispute. In fact, the allegation that the Photos existed on the internet in 2003, were removed within 2003, and re-appeared in 2010 when Chapman sought revenge and attempted to extort King has never been denied. There is similarly no dispute that the Photos are of a sexual nature. The specific content of the Photos has no bearing on the question of whether or not Douglas ACJ has become incapacitated or disabled from the due execution of her office. As a result, the Photos are of no probative value to the allegations raised.

150. The previous Inquiry Committee's ruling on the admissibility of the Photos was fraught with stereotypes about women's sexuality, suggesting that the Committee and the community is the arbiter of those sexual activities to which women may or may not consent, and that the Inquiry Committee can determine which lawful, consensual sexual activities are permissible. The ruling ignores the constitutionally protected right to expression underlying sexual expression, including the taking of photographs of a sexual nature in private.[179] It also ignores the Supreme Court of Canada's acknowledgment that consensual sexual conduct can "hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society."[180]

151. Viewing the Photos cannot "bear directly on the issue whether they are of such a nature that they should be disclosed [in an application for judicial appointment]."[181] Once it is clear that the Photos depict lawful, consensual sexual activity between the Judge and her husband in private, the images of that lawful, consensual activity are manifestly irrelevant to the question of whether applicants for judicial appointment must disclose that they have taken such private photographs.

152. The most problematic aspect of the previous Inquiry Committee's ruling is that it ignores the fact that the Photos were only made public through Douglas ACJ's victimization. Admitting

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[179] *Sharpe* at para. 210, BOA, Tab 24; *R. v. Labaye*, [2005] 3 S.C.R. 728 at paras. 48, 71 [*Labaye*], BOA, Tab 43; Franks Report, MR, Vol. 1, Tab 6, paras. 9-10.

[180] *Labaye* at paras. 48, 71, BOA, Tab 43.

[181] Ruling of the Inquiry Committee concerning the Hon. Lori Douglas with respect to the validity of Complaint 2 and admissibility of certain computer discs, 22 June 2012 at para. 41, BOA, Tab 44

the Photos into evidence or even rendering a decision that this Committee must view the Photos will, as discussed in greater detail below, re-victimize Douglas ACJ.

153. The task of this Inquiry Committee is not to determine what forms of sexual expression are permissible within a marriage for persons who aspire to or will later become judges. The Photos relate only to that improper inquiry. Further, as set out in detail below, admitting the photographs can only prejudice this Committee's ability to effectively discharge its mandate and would cause further irreparable harm to Douglas ACJ.

The Photographs are Highly Prejudicial

154. Any probative value the Photos may have is significantly outweighed by their prejudicial effects. The Photos threaten to prejudice both the Committee's ability to render a fair and just recommendation at the conclusion of the Inquiry and Douglas ACJ's ability to continue to sit as a judge in the event the CJC determines that removal is not warranted. Further, the admission of the Photos would inflict further irreparable harm on Douglas ACJ without assisting the Committee on any relevant issue.

155. This Inquiry must be conducted "in accordance with the principle of fairness"[182] and in accordance with *Charter* values.[183] The Supreme Court of Canada has stated that that which is gravely prejudicial to the accused and of tenuous admissibility should not be admitted into evidence on the basis that the evidence may "operate unfairly".[184] The highly prejudicial and inflammatory character of intimate photographs weighs heavily against admitting them into evidence.

156. ***The Photos are prejudicial to the Inquiry.*** As set out above, the Supreme Court of Canada has repeatedly emphasized that the legal system should not cause undue incursions into the private affairs of victims, including reporting irrelevant aspects of their intimate lives in order to call into question their character and credibility.[185] The Photos are an example of such highly

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[182] *CJC Inquiries and Investigation By-Laws*, SOR/2002-371, s. 7.
[183] *Slaight Communications Inc v. Davidson*, [1989] 1 S.C.R. 1038, BOA, Tab 45.
[184] *R. v. Wray*, [1971] S.C.R. 272 at 293, BOA, Tab 46.
[185] See *Quesnelle*, BOA, Tab 31.

prejudicial incursions into Douglas ACJ's private life and are more likely to derail rather than to advance the truth-seeking process.[186]

157. By including Photos in its analysis of whether or not to recommend removal, the Committee risks importing subjective evaluations of the specific consensual activities depicted into the Inquiry's proceedings. As the Supreme Court of Canada has noted in the context of rejecting a community standards test for acts of indecency, those personal, subjective evaluations are often difficult to set aside:

> In the end, the question often came down to what they, as individual members of the community, would tolerate. Judges and jurors were unlikely, human nature being what it is, to see themselves and their beliefs as intolerant. It was far more likely that they would see themselves as reasonable, representative members of the community. The chances of a judge or juror saying, "I view this conduct as indecent but I set that view aside because it is intolerant", were remote indeed."[187]

158. Sexual expression is an intensely personal matter.[188] As set out above, subjective evaluations of what is "normal" or "acceptable" consensual, lawful sexual expression have no place in this Inquiry and this Committee's recommendation to Council.[189] The Inquiry Committee's task is not to determine which lawful consensual sexual activities are appropriate for judges and candidates for judicial office, and it ought not be diverted to that end by viewing photographs to see the *nature* of the lawful, sexual activity depicted therein.

159. Lawful intimate images that were intended to be private should not be viewed in this matter. No right thinking person would view these Photos. Anyone who does is morally culpable now, and in the future will be guilty of a crime.

160. ***The Photos are prejudicial to the Judge***. Further, admitting the Photos into evidence would prejudice Douglas ACJ's ability to return to the bench. The effect of admitting the Photos into evidence is that they would be further disseminated to and viewed by Douglas ACJ's colleagues. It is a recognized form of harm that the dissemination of these private images to her

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[186] *Quesnelle*, BOA, Tab 31*; R. v. O'Connor,* [1995] 4 S.C.R. 411at para. 112 [*O'Connor*], BOA, Tab 47.
[187] *Labaye* at para. 18, BOA, Tab 43.
[188] *Ibid.* at para. 41, BOA, Tab 43.
[189] *Ibid.* at para. 18, BOA, Tab 43.

co-workers and colleagues causes Douglas ACJ anxiety, distress and embarrassment.[190] This anxiety, distress, and embarrassment risks diminishing her ability to rejoin those co-workers and further isolates her from her colleagues on the bench.[191] As the Policy on Independent Counsel acknowledges, the Inquiry Committee proceedings should not proceed in a way which prejudices the Judge's ability to return to the bench if no recommendation for removal results from these proceedings.[192]

Viewing the Photos Causes further Irreparable Harm

161. Douglas ACJ has never consented to the release of the Photos. The Photos were only released to Chapman through breaches of her privacy, consent, and trust by her husband, and further disseminated only because of Chapman's subsequent breach of his agreement with King in his attempt to seek revenge against the justice system and to extort King.

162. As set out above, the betrayal and public dissemination of these Photos has caused Douglas ACJ distress, humiliation, and embarrassment. The CJC's process has similarly caused Douglas ACJ tremendous stress.[193] The Federal Court acknowledged that the dissemination of Douglas ACJ's private information (including the Photos) that has resulted from the CJC proceedings has caused Douglas ACJ irreparable harm.[194] This Inquiry Committee should not do further irreparable harm to Douglas ACJ by permitting the further dissemination of the Photos which would, as discussed below, constitute an extreme invasion of Douglas ACJ's right to privacy.

163. ***Viewing the photographs is a violation of Douglas ACJ privacy right.*** An individual's right to privacy "is grounded in man's physical and moral autonomy" and "is essential for the well-being of the individual."[195] The Supreme Court of Canada has held that the right to privacy is an independent right held by all citizens and is protected by the *Charter*.[196] Information deserving protection includes "information which tends to reveal intimate details of the lifestyle

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[190] Franks Report, MR, Vol. 1, Tab 6, paras. 10-12.
[191] *Ibid.*; Confidential Medical Report, Vol. 6, paras. 11-12, 23-25.
[192] CJC Policies regarding Inquiries – CJC Policy on Independent Counsel, BOA, Tab 48.
[193] Confidential Medical Report, MR, Vol. 6, para. 4.
[194] *Douglas v. Canada (Attorney General)*, 2013 FC 776 at para. 29, BOA, Tab 41.
[195] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427, BOA, Tab 49.
[196] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 158-159, BOA, Tab 50.

and personal choices of the individual."[197] The Ontario Court of Appeal has acknowledged a civil right to privacy in the recognizing the tort of intrusion upon seclusion in *Jones v. Tsige*.[198]

164. What is revealed by the Photos – the details of Ms. Douglas's sexual activity before her appointment – could not be more personal and intimate. The activities were engaged in and the Photos were taken at the request of her husband and for his individual use alone, and were never intended to be shared with anyone.[199] These factors justify a high expectation of privacy in the images. This Committee must therefore have a particularly compelling reason to justify the interference with that right.[200]

165. Admitting the Photos will do no more than confirm what is not in dispute. By contrast, the distribution and viewing of the Photos is an extreme violation of Douglas ACJ's privacy an inflicts grievous harm on an innocent victim. The additional distribution and viewing of these Photos by this Committee or Douglas ACJ's colleagues will cause devastation to Douglas ACJ through further humiliation and embarrassment. As the Supreme Court of Canada has acknowledged, such violations of privacy constitute "an invasion of the dignity and self-worth of the individual."[201]

166. The stated objective underlying these proceedings (and the subsequent intrusion into Douglas ACJ's private affairs) is a desire for Committee to conduct its proceedings in order to enable the CJC to carry out its mandate in accordance with the public interest. Viewing the Photos will in no way enhance the Committee's ability to carry out this task. As a state body tasked with a truth-seeking function, this Committee should not condone Douglas ACJ's unjustified re-victimization by admitting the Photos into evidence.[202]

The Photos Should be Returned to Douglas ACJ

167. As set out above, Douglas ACJ never consented to the release of the Photos. Serious breaches of privacy, consent, and trust are the only reasons the Photos were published on the

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[197] *R. v. Plant*, [1993] 3 S.C.R. 281 at 293, BOA, Tab 51.
[198] 2012 ONCA 32, BOA, Tab 52.
[199] *O'Connor* at para. 112, BOA, Tab 47.
[200] *Ibid.* at para. 117, BOA, Tab 47.
[201] *Ibid.* at para. 119, BOA, Tab 47.
[202] *Ibid.* at para. 120, BOA, Tab 47, Bailey Report, MR, Vol. 1, Tab 7, para. 41.

internet. Indeed, the only reason that the previous Committee, Independent Counsel and the CJC have had occasion to access the photographs is because of morally reprehensible conduct that will soon be a crime.[203]

168. In these circumstances, the only appropriate course of action is to return the Photos to Douglas ACJ.

Submissions on Allegation 3

No Jurisdiction to Inquire into Allegation 3

Allegation 3 is not a complaint that has been referred to the Inquiry Committee

169. This Inquiry Committee has no jurisdiction to consider Allegation 3 as it is neither a complaint by an Attorney General nor a complaint that has proceeded through the multi-tiered complaint review process. In fact, no complaint has been submitted to the CJC with respect to the facts alleged in Allegation 3. Neither the Executive Director of the CJC, the Chair of the Judicial Conduct Committee, nor a Review Panel has reviewed the Allegation. There has been no determination that the matter may be serious enough to warrant removal of Douglas ACJ such that it should be investigated by Independent Counsel or the Inquiry Committee.

170. Independent Counsel does not have the authority to make that determination herself or to rely on determinations of the previous Inquiry Committee or Independent Counsel similarly made without authority. To do so would be to circumvent the legislative process and the institutional structure created by the CJC. Such an approach would ignore the distinction Parliament drew between complaints submitted by attorneys general under s. 63(1) of the *Judges Act* and complaints submitted under s. 63(3).

Further Investigation of Allegation 3 would violate the Statutory Scheme

171. Section 5(1) of the *By-laws* does not authorize this Committee to consider any allegation related to Douglas ACJ beyond the scope of the complaint which was considered in the initial

[203] Bill C-13, *An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, 41st Parl., 2nd Sess., 2013, Sossin Affidavit, Exhibit "C", MR, Vol. 2, Tab 5C.

stages of the CJC's investigation and which led to the constitution of the Committee. Section 5(1) states as follows:

> **5.** (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

172. The expression "complaint or allegation . . . that is brought to its attention" must refer to only those complaints or allegations that have worked their way through the multi-tiered process set out at ss. 1.1-3 of the *By-laws*. This "screening process" includes: (1) receipt of a complaint in writing and file opening by the Executive Director of the CJC; (2) review by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee; (3) consideration by the JCC of the response of the Judge, comments from her Chief justice and any other information received such as a report by outside counsel; and (4) consideration by a Review Panel prior to any decision that an Inquiry Committee be constituted on the basis that the matter is potentially serious enough to warrant removal.[204]

173. Section 63 of the *Act* and ss. 1.1-3 of the *By-laws* expressly tie the CJC's jurisdiction to a "complaint or allegation" rather than to the particular judge being investigated. Section 5(1) of the *By-laws* does not permit the Committee to consider any complaint that is relevant to Douglas ACJ generally. Any assessment of relevance requires a referent. Under a plain reading of the *Act* and the *By-laws*, that referent is not the judge under investigation, but the complaint for which the Inquiry Committee was constituted. The Inquiry Committee does not have discretion to investigate other allegations about the respondent judge that did not go through the multi-tiered screening process laid out in the *By-laws*. As Douglas ACJ has previously submitted to this Committee, this interpretation is required in light of three well-established principles of statutory interpretation.

174. First, under the modern approach to statutory interpretation, which has repeatedly been endorsed by the Supreme Court of Canada, the words of an Act are to be read in their entire context, in the grammatical and ordinary sense harmoniously with the scheme of the Act, the

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[204] Decision of the Inquiry Committee on motion for directions on notice of allegations, September 30, 2014 ["NOA Decision"], para 8, BOA, Tab 53.

object of the Act, and the intention of Parliament.[205] Regulations, too, are to be interpreted according to the modern approach.[206]

175. Second, regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provision. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*,[207] the Supreme Court of Canada rejected the "plain meaning" of a provision of the *Patented Medicines (Notice of Compliance) Regulations* in favour of an interpretation that harmonized the regulatory provision with the *Patent Act* as a whole. This point is emphasized by Ruth Sullivan: "Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read."[208]

176. Third, there exists a presumption that regulations and statutes are coherent and not inconsistent, both among themselves and as concerns one another. The Court must seek to avoid a conflict between statutory and regulatory provisions. Where a conflict is unavoidable, the statutory provision prevails.[209]

177. Applying the above interpretive principles, s. 63(2) of the *Judges Act* authorizes the CJC to investigate a "complaint or allegation." The subject matter of the CJC's jurisdiction is the complaint or allegation, not the judge herself. Section 63(3) gives the CJC a limited subject matter jurisdiction, not a general warrant to investigate the judge about whom a complaint was made. The CJC may only constitute an inquiry committee for the purpose of looking into <u>specific</u> complaints or allegations. The authority of this Committee is therefore linked to the allegations that have been sent forward through the screening process to the inquiry stage.

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[205] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, BOA, Tab 54; *Barrie Public Utilities v. Canadian Cable Television Assn*., 2003 SCC 28, BOA, Tab 55; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, BOA, Tab 56; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, BOA, Tab 57; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, BOA, Tab 58.

[206] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at para. 36 ("Regulations and orders in council must be interpreted in accordance with the modern principle of statutory interpretation."), BOA, Tab 59.

[207] 2005 SCC 26, BOA, Tab 60.

[208] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 368, BOA, Tab 61.

[209] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, BOA, Tab 62.

178. The CJC Policy on Independent Counsel cannot contradict the statutory scheme developed by Parliament by authorizing Independent Counsel to consider the relevance of any other complaints or allegations against the judge, beyond the scope of the complaint for which the Committee was constituted. The *Judges Act* provides only one avenue for a complaint to by-pass the multi-tiered screening procedure and go directly to an Inquiry Committee: complaints made by the Minister of Justice or the attorney general of a provinces under s. 63(1). Independent Counsel, being neither the Minister of Justice nor the attorney general of a province, is not entitled to forward a complaint directly to the Committee for its consideration. The CJC's Policy on Independent Counsel does not have the force of law. Where it is in conflict with the *Judges Act* or with regulations promulgated under that *Act*, the terms of the Policy must yield.

179. The *By-laws* complete and implement the statutory scheme set out at s. 63 of the *Act*. The *By-laws* interpose intermediate steps between the making of a complaint and the investigating of it: screening by the Judicial Conduct Committee and the Review Panel. To dispense with these critical procedures aimed at determining whether a complaint may be serious enough to warrant removal before proceeding to the inquiry stage would "defeat the whole purpose of the legislative scheme."[210] The screening process is essential to maintaining public confidence in the administration of justice, and to protecting Douglas ACJ's rights of procedural fairness.

Further Investigation of Allegation 3 would violate Douglas ACJ's Procedural Fairness Rights

180. The judicial discipline scheme set out in the *Judges Act* and *By-laws* exists amid the guiding principles of judicial independence and public confidence in the justice system. It would be inconsistent with those principles to interpret the scheme so as to open the floodgates once there exists one complaint that is serious enough, if proved, to warrant the removal of a judge, to any other allegation that Independent Counsel articulates, even those that are not and have not been found by a Review Panel to be serious enough to warrant the removal of the Judge if proved.

181. The consequences of piling on un-vetted allegations would be harmful both to the Judge and to the public's confidence in the administration of justice. In the case of Allegation 3, the

[210] *Hryciuk v. Ontario (Lieutenant Governor)* (1996), 31 O.R. (3d) 1 (C.A.), BOA, Tab 63.

facts asserted in the NOA are not even within Independent Counsel's knowledge but are merely a repetition of the allegation ordered included by the previous Inquiry Committee, who wrongly ordered that the strongest case possible against the judge be pursued by previous Independent Counsel. That approach should not be mirrored in these fresh proceedings. If an inquiry committee were permitted to add to the scope of its inquiry any allegation that came to its attention, disgruntled litigants could abuse the process to air their grievances about the judge or the justice system without any protection for the judge's reputation or respect for the CJC's mandate. Furthermore, if the Committee has discretion to determine which complaints may come before it, then the Committee truly is the judge in its own cause.

182. As with Independent Counsel's motion to include the "Joyal Complaint" in the Notice of Allegations, this Committee is in danger of being both the prosecutor and judge of Allegation 3. There is no guideline as to what standard of review ought to apply to this Committee's own determination of whether to consider Allegation 3 in the inquiry. This void is indicative that Parliament did not intend, under the *Judges Act* and *By-laws*, to permit inquiry committees to add unscreened allegations to their investigations. It is not clear how this Committee could maintain its impartiality to adjudicate whether Allegation 3 warrants a recommendation for removal after having made the decision to include the complaint within the scope of its inquiry.

183. Section 7 of the *By-laws* requires that the Inquiry Committee conduct its investigation in accordance with the principle of fairness. Douglas ACJ is entitled to expect that the scope of this Committee's investigation will be limited to complaints that are properly before this Committee, *i.e.* those that have made their way through the mandatory screening process. An unjustified departure from an established procedure can amount to a breach of procedural fairness.[211]

184. The fact that the previous Committee instructed previous Independent Counsel to bring the strongest case possible against the Judge and he then added Allegation 3 to his Notice of Allegation is not a basis to include it in this proceeding. If anything, it militates against accepting Allegation 3 for further inquiry. Any reliance on the previous Inquiry Committee's approach, framed in the context of the instruction to Independent Counsel to present the "strongest case possible in support of the allegations against the judge" would raise serious procedural fairness

[211] *Black v. Advisory Council for the Order of Canada*, 2012 FC 1234 aff'd 2013 FCA 267, BOA, Tab 64.

concerns. Both new Independent Counsel and this Committee have emphasized that this is a fresh proceeding based on a fresh investigation. Allegation 3 bears no relevance to the matters sent forward by the Review Panel. It relates to a diary entry of no relevance to those matters. The diary is not evidence in this proceeding, nor is the telephone interview between previous Independent Counsel and Douglas ACJ evidence in, or related to, this proceeding. Allegation 3 is beyond the Committee's jurisdiction to and irrelevant to its proper scope of authority.

185. The purpose of the multi-tiered process under the *Act* and the *By-laws* is to maintain public confidence in the administration of justice and the judiciary.[212] The multi-tiered regulatory procedure set out in the *By-laws* ensures that unmeritorious complaints are resolved early, without subjecting the respondent judge to unnecessary reputational harms.[213] These important protections of procedural fairness and the administration of justice would be infringed if Allegation 3 was permitted to proceed to an evidentiary hearing.

Allegation 3 is Irrelevant to the Matters Screened by the Review Panel

186. Even if the statutory scheme, properly interpreted, permitted this Committee to consider Allegation 3, it should exercise its discretion to refuse to inquire into the Allegation in this proceeding. Allegation 3 alleges that Douglas ACJ knew or ought to have known that her private diary entry was relevant to the CJC's investigation. The diary entry subject to Allegation 3 is not evidence in this Inquiry Committee proceeding and is not evidence related to Allegations 1 or 2. The diary has not even been subpoenaed by Independent Counsel. The Notice of Allegations does not explain why or how the entry could be relevant to Allegations 1 or 2.

187. At the time of the modification to the private diary entry, the diary was not evidence in any CJC proceeding and there was no reasonable anticipation that Douglas ACJ's personal diary would subsequently be subpoenaed, disclosed to Independent Counsel, the former Inquiry Committee and the CJC and posted publicly by the CJC on its website. Douglas ACJ wrote over part of an entry in a different coloured pen in a fit of pique when she reviewed the entry and was reminded of the victimization she suffered from Chapman and her husband's betrayal of her trust. She had no reason to think her privacy would be further infringed over one year later by the

[212] *Hryciuk v. Ontario (Lieutenant Governor)* (1996), 31 O.R. (3d) 1 (C.A.), BOA, Tab 63.
[213] *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103 at para. 76, BOA, Tab 12.

CJC's subpoenaing this personal journal for the purposes of the previous Independent Counsel's investigation into the Chapman complaint.

188. As this Committee has previously summarized it, the content of the Notice of Allegations relates to:

(a) an alleged failure to disclose relevant facts in the application process;

(b) an alleged resulting incapacity as a consequence of the public availability of intimate graphic photographs of a sexual nature of ACJ Douglas; and

(c) an alleged failure to fully disclose facts relating to the two allegations above to former Independent Counsel in the context of his investigation.

189. However, the facts set out in support of Allegation 3 are not related – or relevant – to the two allegations sent forward by the Review Panel.[214]

190. Douglas ACJ's decision in 2010 to write over an entry in her personal diary does not relate to her level of disclosure about her victimization during the 2004-2005 judicial application process. Nor does it have any bearing on the public availability of photos posted online without Douglas ACJ's consent. Allegation 3 is accordingly not "relevant" within the meaning of subsection 5(1) of the By-laws. Thus, even if Allegation 3 had been the subject of a complaint and properly screened by the CJC process, it would be within the Committee's proper exercise of discretion to refuse to consider it further.

191. As this Committee has previously noted, a relevant factor in the exercise of its discretion over the content of the NOA is that Allegation 3 is remote not only in substance, but also in terms of time from the allegations which led to the constitution of the Inquiry Committee.[215] Douglas ACJ has a legitimate expectation that she will not be subjected to a public evidentiary hearing on allegations that have not been screened by the CJC process and bear no relevance to those matters that were referred by the Review Panel.

[214] NOA Decision at para. 10, BOA, Tab 53.

[215] NOA Decision at paras. 21-23, BOA, Tab 53.

192. This Committee should not permit new allegations to be added in complete disregard for the legislated institutional structures that have been put in place by the CJC to ensure that only sufficiently serious complaints are considered at the public Inquiry Committee stage. It should seek to avoid any appearance of unfairness by respecting its limited subject matter jurisdiction and the limitations on relevance set by the Review Panel decision.

Allegation 3 Could Not Support a Recommendation for Removal

193. In the alternative, if this Committee dismisses the above arguments as to its lack of jurisdiction and its discretion to refuse to inquiry into Allegation 3, the Allegation should be summarily dismissed at this stage on the basis that there is no need for a formal evidentiary hearing. The facts underlying Allegation 3 - that Douglas ACJ wrote on an entry in her personal diary that was not evidence and that she suffered effects of her medical condition when questioned by surprise by former Independent Counsel on intrusive personal matters - could not support a recommendation for removal on any of the grounds set out in s. 65(2) of the *Judges Act*.

194. The facts alleged in Allegation 3 do not support a finding of incapacity within the meaning of the *Judges Act*. Douglas ACJ did not demonstrate any conduct inconsistent with the requirements of good behaviour when she chose to keep a personal diary that reflected gardening conditions and recorded some events in her personal life. Nor did she commit any misconduct when – in contemplation of an entry that reminded her of the terrible breaches of privacy and trust she suffered in 2003 – she wrote over an entry in that personal diary. When her diary was subpoenaed by previous Independent Counsel more than one year after she made that change, she cooperated with the investigation and complied with the instruction to produce this personal record.

195. Douglas ACJ continued to cooperate with Independent Counsel when she was questioned about multiple personal entries in that diary – some relevant to the investigation and many others that bore no relevance to the matters referred by the Review Panel but which reflected details of her marriage and family relationships. As the confidential medical evidence indicates, she felt violated by these intrusions but nonetheless did her utmost to cooperate with the investigation.

196. Further, the medical evidence filed under seal adds context to the telephone conversation referenced in Allegation 3. Douglas ACJ was not giving evidence under oath on the call. She understood that the call was for the purposes of clarifying matters previously discussed with Independent Counsel to allow him to conclude his investigation. She was taken by surprise at the further intrusive questioning about her diary entry and reacted in a manner common among women who experience stress triggers related to previous incidents of victimization. When Douglas ACJ recovered from this stress, she immediately sought to clarify the answers given in the midst of that trauma to ensure previous Independent Counsel had accurate information. This course of conduct is not indicative of misconduct. Rather, it is indicative of Douglas ACJ's consistent efforts to cooperate with the CJC and its actors throughout this lengthy process, even at the expense of her well-being and rights to privacy and dignity.

197. At the very least, all of the evidence relating to Allegation 3 (including the confidential evidence) should be made available for consideration by a Review Panel investigating a proper complaint; which is a private stage of the CJC screening process, before being sent forward for inquiry. No complaint regarding Allegation 3 has been made or considered by the Judicial Conduct Committee or a properly constituted Review Panel.

198. As set out above, this Inquiry Committee is "the master of its own procedure"[216] and is not obliged to conduct a formal evidentiary hearing before it prepares a report to Council if the matter is "obviously unmeritorious or does not disclose judicial conduct warranting removal from office."[217] In exercising its discretion to decline to consider Allegation 3, the Inquiry Committee should consider whether it would be consistent with the best interest of justice and its sound administration to subject Douglas ACJ to an evidentiary hearing about a diary entry unrelated to the matters referred by the Review Panel and a telephone conversation in the previous proceeding that cannot support a finding of misconduct.[218]

199. Victims of wrongful conduct are entitled to the protection of their dignity and privacy rights, including by way of the promotion of legal procedures that avoid furthering the trauma experienced by victims and avoid unnecessary disclosure of intimate personal information.

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[216] CJC Policies Regarding Inquiries – Policy on Inquiry Committees, BOA, Tab 7.
[217] *Cosgrove*, 2007 FCA 103 at para. 80, BOA, Tab 12.
[218] NOA Decision, para. 24, BOA, Tab 53.

Although Douglas ACJ has filed confidential medical information in support of her motion to dismiss Allegation 3, her diagnosis arising from her victimization by the non-consensual distribution of her images and the lengthy CJC process to date should not itself become the subject of inquiry by this Committee.

200. To conduct an inquiry hearing on Allegation 3 in these circumstances would be a waste of judicial resources. A formal hearing on this Allegation is inconsistent with the public interest, and contrary to the rights of the respondent Judge. A hearing would not promote the fair, expeditious and most cost-effective resolution of previous CJC proceedings.

PART IV – CONCLUSION

201. Douglas ACJ respectfully requests that:

(1) Allegations 1, 2 and 3 be summarily dismissed without a formal evidentiary hearing;

(2) In the alternative, if a formal evidentiary hearing is to be held, that the Photos be ordered inadmissible in any further proceedings before the Inquiry Committee and that all copies be returned to Douglas ACJ.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 15th day of October, 2014.

Sheila Block

Sheila Block

Molly M. Reynolds

Sarah Whitmore

Counsel to Associate Chief Justice Lori Douglas

Appendix A

Statutory Provisions

The Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 99(1)

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

The Victims' Bill of Rights, C.C.S.M. c. V55, Preamble

WHEREAS victims of crimes and other offences have needs, concerns and interests that deserve consideration in addition to those of society as a whole;

AND WHEREAS all victims should be treated with courtesy, compassion and respect;

AND WHEREAS victims should have access to appropriate protection and assistance, and should be given information regarding the investigation, prosecution and disposition of crimes and other offences;

AND WHEREAS it is in the public interest to give guidance and direction to persons employed in the justice system about the manner in which victims should be treated;

AND WHEREAS persons employed in the justice system should consider the rights and views of victims in a manner that does not unreasonably delay or prejudice investigations or prosecutions, that is consistent with the law and the public interest, and that is reasonable in the circumstances of each case;

Criminal Code, R.S.C. 1985, c. C-46, ss.278.1-9, ss. 486.1-2, ss. 486.4-5

278.1 For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of

> (a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

(b) an offence under section 144, 145, 149, 156, 245 or 246 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.

(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents

278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

(3) An application must be made in writing and set out

(a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) that the record relates to the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

278.4 (1) The judge shall hold a hearing in camera to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(a) the application was made in accordance with subsections 278.3(2) to (6);

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

(2) The judge may hold a hearing in camera if the judge considers that it will assist in making the determination.

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2).

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:

(a) that the record be edited as directed by the judge;

(b) that a copy of the record, rather than the original, be produced;

(c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

(d) that the record be viewed only at the offices of the court;

(e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

486.1 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.

(3) In making a determination under subsection (2), the judge or justice shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant.

(4) The judge or justice shall not permit a witness to be a support person unless the judge or justice is of the opinion that doing so is necessary for the proper administration of justice.

(5) The judge or justice may order that the support person and the witness not communicate with each other while the witness testifies.

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.

(3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).

(4) Despite section 650, if an accused is charged with an offence referred to in subsection (5), the presiding judge or justice may order that any witness testify

> (a) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and
>
> (b) outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.

(5) The offences for the purposes of subsection (4) are

> (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization;
>
> (b) a terrorism offence;
>
> (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the Security of Information Act; or
>
> (d) an offence under subsection 21(1) or section 23 of the Security of Information Act that is committed in relation to an offence referred to in paragraph (c).

(6) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) or (4) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

(7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

(8) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

(4) An applicant for an order shall

> (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
>
> (b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;
>
> (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) society’s interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

CJC Inquiries and Investigation By-Laws, SOR/2002-371, s. 7

7. The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principle of fairness.