



Ruling of the  
Inquiry Committee  
concerning  
the Hon. Lori Douglas  
with respect to the  
validity of Complaint 2  
and admissibility of certain  
computer discs

Décision du  
Comité d'enquête  
au sujet de  
l'hon. Lori Douglas  
concernant la validité  
de la deuxième plainte  
et l'admissibilité de certains  
disques informatiques

(v. originale en anglais)

22 June 2012

le 22 juin 2012

## **Ruling on Validity of Complaint 2 and Admissibility of Certain Computer Discs**

### **I. Introduction**

[1] On September 29, 2010, the Canadian Judicial Council received two discs labelled “Lori Douglas Webb Photos”, from an anonymous source, containing intimate sexual photographs of Associate Chief Justice Douglas (Judge), as well as intimate photographs of other women. These discs were treated by the Executive Director, and Vice-Chairperson of the Judicial Conduct Committee to whom the matter was referred, as an anonymous second complaint against the Judge (Complaint 2) in addition to the previous complaint against her from Alex Chapman (Complaint 1). This Inquiry Committee has not yet seen the material which comprises Complaint 2.

[2] In our Ruling on Preliminary Issues dated May 15, 2012 (Ruling), we observed at paragraph 100 that Complaint 2:

... was the subject of strenuous objections by Judge’s Counsel who refers to it as the “deemed complaint”. She questions whether it constitutes a valid complaint and says that it raises serious legal issues as well as serious personal implications for the Judge. Judge’s Counsel wants to make full submissions on these matters but argues that she is not able to do so until she receives the proposed notice of allegations that is being prepared by Independent Counsel. He fully supports her position on this issue. In these circumstances, the Committee will defer its consideration of this issue until after the notice of allegations has been distributed and further submissions are received.

[3] We ordered that written submissions by all parties with standing with respect to Complaint 2 would be due by June 7. We also ordered that the material that had initiated Complaint 2 was to be provided to Counsel to the Committee but would not be seen by him or by the Committee subject to the Committee’s ruling on this Complaint. We received submissions from both Independent Counsel and Judge’s Counsel on June 7. This is our Ruling on the status of Complaint 2.

[4] Judge’s Counsel submits that:

(a) Complaint 2 is not a valid complaint and is outside the Committee’s jurisdiction; and

(b) Even if Complaint 2 is ruled to be a valid complaint, it should be ruled inadmissible and excluded from the record of this inquiry.

[5] At the outset, the basic purpose and nature of this inquiry, as described in our Ruling, should be reiterated. Fairness to the judge who is the subject of an inquiry under the *Judges Act* is fundamental but there are also broader dimensions to this process. As the Supreme Court of Canada noted in *Ruffo v. Conseil de la magistrature et al.* [1995] 4 S.C.R. 267, the role of an inquiry committee investigating judicial conduct relates primarily “to the judiciary rather than to the judge affected by the sanction”. The basic objective is to reinforce public confidence in the judiciary. That includes confidence that any serious concerns about judicial conduct are investigated thoroughly and transparently. This aspect of the public interest provides the broad context for our analysis.

[6] For reasons that follow, we have concluded that Complaint 2 is a valid complaint and this Inquiry Committee has jurisdiction to consider it. In addition, we have concluded that, in order for this Committee to properly discharge its statutory obligations, Complaint 2 ought to be admitted in evidence in these proceedings for viewing by members of the Committee and its legal counsel. However, Complaint 2 will not be publicly disclosed unless expressly authorized by this Committee.

## **II. Why Complaint 2 is a Valid Complaint**

### **A. Issues Relating to Complaint 2**

[7] Judge’s Counsel submitted that Complaint 2 is not a valid complaint because:

- (a) it is not in “writing”;
- (b) it does not specify any allegations against the Judge; and
- (c) it does not fall within the scope of the statutory authority of the Canadian Judicial Council because the Council;
  - (i) does not have power to “deem” something to be a complaint;
  - (ii) lacks the authority to investigate the possible impugned conduct; and
  - (iii) lacks the authority to investigate allegations or complaints against a judge based on the conduct of others.

### **B. Must a Complaint be in Writing?**

[8] The first objection to the validity of Complaint 2 is that it is not in writing. This argument is based on the proposition that section 2.2 of the Council’s *Complaints Procedures* requires that the complaint be in writing. That section states:

The Executive Director shall open a file when a complaint about a named, federally appointed judge made in writing is received in the Council office from any source, including from a member of the Council who is of the view that the conduct of a judge may require the attention of the Council. The Executive Director shall not open a file for complaints which, although naming one or more federally appointed judges, are clearly irrational or an obvious abuse of the complaints process.

[9] Judge's Counsel argues that the discs which apparently contain digital photographs and a website page cannot be understood to be in writing. Nor, she contends, is it sufficient that writing on each disc states: "Lori Douglas Webb Photos". In her view, Complaint 2 itself is not in writing and thus is not a valid complaint. This argument must be rejected.

[10] First, it assumes that a digital recording is not in writing. We do not agree. The phrase, "in writing", must be interpreted in light of current realities respecting the transfer and communication of information in the technological age. Writing communicates information but need not necessarily include letters of the alphabet. For example, one can "write music" consisting only of the symbols of notes. A disc containing digital photographs communicates specific information about a person especially where, as here, that person is identified by words on the cover of the disc. Viewed from this perspective, the discs constitute a form of digital "writing". Therefore, even if section 2.2 mandated that a complaint must be in writing, the subject discs would satisfy this requirement. This conclusion is a complete answer to the "must be in writing" argument.

[11] Second, the governing statutory provision, s. 63(2) of the *Judges Act*, does not impose a writing requirement. That section merely provides:

The Council may investigate any complaint or allegation made in respect of a judge....

As will be apparent, it places no limit on how a complaint or allegation may be communicated to the Council to authorize it to initiate the complaints investigation process. The Council's *Complaints Procedures*, as with its *Policies*, are based on the central premise that they cannot override the governing statute.

[12] Third, in any event, section 2.2 of the *Complaints Procedures* does not impose writing as an absolute requirement. It requires that a file be opened when a complaint is received in the circumstances specified but it does not preclude a file from being opened when a complaint is received in an otherwise acceptable form. The only circumstances in which a file "shall not" be opened are when complaints "are clearly irrational or an obvious abuse of the complaints process". Thus, the basis for opening a file is very broad. The reference to "writing" is intended to ensure that when a complaint is made in writing, it cannot simply be summarily dismissed unless it is clearly

irrational or an obvious abuse of the complaints process. However, it does not follow from this that where a complaint is not in writing, no file will be opened regardless of the circumstances.

[13] Fourth, sound policy reasons exist for giving a broad interpretation to the provisions conferring on Council the jurisdiction to consider complaints against a judge. The public interest can best be accommodated by being inclusive in receiving complaints and then meticulous in assessing and screening them. Many will originate from laypersons who may not be skillful in articulating their concerns about a judge's conduct. Others may come from anonymous sources. Section 2.3 of the *Complaints Procedures* states:

A complaint received from an anonymous source shall be treated to the greatest extent possible in the same manner as any other complaint.

This reflects Council's intention to treat all complaints seriously, from whatever source, and even when anonymous. A complaint, in whatever form, should not be treated as a legal document which strictly confines the scope of the review of the judge's conduct. Normally, the review will be confined to the scope of the complaint but, occasionally, other allegations may arise. The Council would be the subject of strong and justifiable criticism if it came to light that, in the course of reviewing the conduct of a judge, serious allegations of inappropriate conduct were ignored because they were not mentioned in an initial, perhaps infelicitously expressed, complaint.

[14] For these reasons, the argument by Judge's Counsel that Complaint 2 is not a valid complaint on the basis it is not in writing fails.

### **C. Must a Complaint Contain a Specific Allegation of the Impugned Conduct?**

[15] The second objection to the validity of Complaint 2 is that it does not specify any allegations. Judge's Counsel contends that a complaint must contain allegations, and, "at the very least, a complaint should contain an articulated expression of the impugned conduct". She adds that the *Judges Act* does not authorize the Council "to infer a complaint or allegations based on material submitted". In her view, Complaint 2 does not explain what conduct the anonymous complaint is concerned about or what the Council should investigate. This argument must also be rejected.

[16] First, the nature of the material in Complaint 2 was sufficient in itself to require an investigation into the Judge's potential misconduct. A "complaint" does not have to be sophisticated or well-expressed. It need not contain legal argument. It need only indicate a fact or contain information that might raise concerns about the conduct of the judge. The key question is whether the information provided is sufficient to enable the person receiving it to understand the fact or circumstance as being something that could reasonably be said to be alleged or complained about. The fact that the two discs labelled "Lori Douglas Webb Photos" include not only photographs of a sexual nature but a reference to an Internet website page is, in this case, sufficient to justify the Council's treating it as a complaint and investigating it further.

[17] Second, when the subject discs were received by Council, they appeared to be related to Complaint 1. When the Council receives significant information about a judge who is already the subject of an investigation, it cannot simply ignore it. The information may be dealt with as a part of the file that has been opened in relation to the existing investigation. Or it may be dealt with as a separate file. In this case, the discs were dealt with as a separate file and subjected to all of the interconnected and incremental stages that are required in the course of an investigation established under s. 63(2) of the *Judges Act*. The critical point is that in dealing with this information, the Council also had a responsibility to take into account the relevant surrounding factual context including a subsisting and apparently related complaint against the Judge.

[18] Third, the argument that Complaint 2 is not sufficiently specific ignores the fact that the investigatory process under the *Judges Act* is an evolutionary one that is not driven by the precise wording of the initial complaint or allegation. That is made clear by the *Complaints Procedures*. They reflect the process of an ongoing and incremental investigation by the reference to the opening, progression, and possible closing of “the file”. For example, section 4.1 refers to seeking comments from the judge and the judge’s chief justice. Section 5.1 contemplates that “other relevant material” may be received as part of the response. Under section 5.1(c), the Chairperson may “ask Outside Counsel to make further inquiries and prepare a report”. Under section 5.1(d), the Chairperson may “refer the file to a Panel”. Under section 9.6, a Panel reviews “the file”, including any written submissions from the judge and may, amongst other options, “close the file” or decide that an inquiry committee “shall be constituted . . . because the *matter* may be serious enough to warrant removal”. [Emphasis added]

[19] Moreover, once a file has been opened, the complainant has no authority to withdraw the complaint. Section 3.4 of the *Complaints Procedures* provides that if the complainant sends a letter to the council seeking to do so, the Chairperson still may: “proceed with consideration of the complaint on the basis that the public interest and the due administration of justice require it.” This too clearly establishes that the ensuing investigation is not dependent on the initial complaint.

[20] The evolutionary nature of the investigatory process is also reflected in s. 64 of the *Judges Act*. It provides that, when a hearing is to be conducted by an inquiry committee, the judge “shall be given reasonable notice of the *subject-matter* of the inquiry or investigation and of the time and place of any hearing”. [Emphasis added] This section does not refer to the initiating “complaint or allegation”. It recognizes that, as a complaint or allegation proceeds through the process, it may well evolve based on the information obtained as part of the investigatory process. In other words, it is “the subject-matter” of the judge’s conduct rather than the specific wording of an initial “complaint” that is to be the focus of an inquiry if a review panel of Council determines that an inquiry committee should be appointed to assess the issue of possible removal from the bench.

[21] Subsection 1.1(3) of the Council’s *Inquiries and Investigations By-Laws* also refers to “the matter”: “The Review Panel may constitute an Inquiry Committee in any case where the matter may be serious enough to warrant removal”. Subsection 5(1) authorizes an inquiry committee to “consider any relevant complaint or allegation pertaining to the judge that is brought to its attention”. However, as with the *Complaints Procedures*, this provision imposes no restriction on the source or

timing of such complaints or allegations. It authorizes additional aspects of the judge's conduct to be taken into account provided they are "relevant". Relevant in this context means relevant to the ultimate issue of possible removal from office. In other words, an inquiry committee is entitled to consider complaints or allegations that come to light in the course of the investigatory process that are relevant to this ultimate issue.

[22] All this compellingly demonstrates that while an initial complaint may trigger an investigation against a judge, it is not required to define, as a condition precedent to the Council's investigation of the complaint, the precise parameters of the ultimate allegations against a judge. A suggestion to the contrary overlooks the evolutionary nature of the investigatory process which is firmly rooted in the public interest and maintaining public confidence in the judiciary.

[23] Fourth, the investigatory process under the *Judges Act* is designed to ensure that it complies with the principle of fairness vis à vis the judge. We do not accept that a judge is somehow deprived of the right to prepare a defence unless details of all specific allegations against the judge that might become the subject of an inquiry were outlined in the initial complaint.

[24] Compliance with the principle of fairness must be assessed in the context of the entire investigation that is authorized by s. 63(2) of the *Judges Act*. One must have regard to the requirement of fairness as it applies at each stage of the proceedings. For example, the starting point of opening a file in a regime of gradual and incremental internal stages is very different from specifying the case which must be answered prior to the start of a formal inquiry hearing. The requirements of notice to the judge, as specified in s. 64 of the *Judges Act* and in subsection 5(2) of the *By-laws*, ensure that as the nature and specifics of the initiating complaint evolve, the judge will be given the opportunity to respond fully to those evolving allegations.

[25] As we pointed out in paragraph 27 of our Ruling, the principle of fairness is respected at every stage of the investigation process:

In fact, the Complaints Procedures, sections 3.5(c), 4.1, 7.2, 9.4, 9.5 and 9.9 recognize the importance of keeping the judge informed of what has been alleged against him or her during the investigation of the matter by the Chairperson of the Judicial Conduct Committee and by the review panel.

[26] There can be no doubt that the Judge has received complete and timely notice of the "subject matter" of the entire investigation. However vague as to meaning and intent one could characterize Complaint 2 at the time it was received, the allegations against the Judge are now very specifically and precisely stated and described in the Notice of Allegations. Thus, the Judge is well aware of the case that she must meet.

[27] Judge's Counsel asserts that *Mackin v New Brunswick*, [1987] N.B.J. No. 923 (NB CA) supports her view on what the allegations must contain. However, because of the different statutory schemes and broader powers of the Committee and Council under the *Judges Act*, that case is not

determinative on this point. In addition, the factual circumstances involved in that case were also different from the case before this Committee. There, the majority found that a letter written by the Attorney General did not allege anything against the judge. That is not so here. Further in *Mackin*, the majority held that the jurisdiction to inquire into the matter was limited to an inquiry into the original complaint and not the report that was required, by statute, to be made by another designated investigating judge which triggered the inquiry. Again, that is not so here. Our Ruling makes it clear that it is the Review Panel Decision which provides the foundation for the Committee's jurisdiction. This Committee has been constituted as a result of the Review Panel Decision that the matter, which includes the continued availability of sexual photographs of the Judge on the Internet, may be serious enough to warrant removal from the bench. This necessarily means that the initiating Complaint 2 is not the controlling factor in determining the scope of the inquiry.

[28] Finally, the photographs and website page in Complaint 2 are cogent and relevant to the first three allegations in the Notice of Allegations. They raise questions: as to the degree of intentional involvement the Judge may have had in the sexual harassment outlined in Complaint 1; as to whether the degree of disclosure by the Judge on her judicial appointment application was adequate; and as to whether pre-judicial conduct, once disclosed publicly, may affect her continuing ability to sit as a judge.

[29] For these reasons, in the context of this entire investigation process, we are of the view that there is no merit to the argument that Complaint 2 is not sufficiently specific about what is being alleged against the Judge to permit it to be treated as a complaint under the *Complaints Procedures*. This argument also fails.

#### **D. Does the Complaint Fall Within the Scope of the Council's Statutory Authority?**

[30] The third objection by Judge's Counsel to Complaint 2 is that the complaint does not fall within the scope of the Council's statutory authority.

[31] Judge's Counsel submits that Council has no authority to "deem" something a complaint. In our view, little turns on the word "deem". The word, in this context, simply means "to treat or consider as". The Council received what appeared to be anonymous information about a judge who was already the subject of an investigation. Every time material is received by the Council, someone has to make a judgment as to whether it is of such a nature that it should be regarded as a complaint, whether from a specific person or an anonymous source. That was what was done in this case. The Executive Director decided to characterize the discs as a separate anonymous complaint and to open a separate file to process that information rather than deal with it in relation to the existing file. He could have simply added this to Complaint 1 given what appeared to be linkage between the two. The treatment of Complaint 2 clearly was within the Council's statutory authority as reflected in its *Complaints Procedures*.

[32] Judge's Counsel also submits that the Council's authority does not extend to investigating "highly personal, constitutionally protected and lawful acts between the judge and her husband". Judge's Counsel speculates about the inferences that might be drawn from the pictures displayed on

the two discs. She then submits that the Council has no authority to inquire into the Judge's lawful sexual conduct or the wrongful conduct of other people that might impact on her. The Committee does not consider it appropriate to engage in speculation about the potential scope of Complaint 2 but will await the evidence and submissions that are presented at the hearings. It is inappropriate, and indeed would be contrary to our duty, to prejudge anything at this stage.

### **III. Why the Discs Are Admissible in Evidence**

#### **A. Issues Relating to Admissibility of the Discs**

[33] Judge's Counsel submitted that even if the discs constitute a proper complaint and even if they would be relevant evidence before the Committee, they should not be admitted into evidence and should not form part of the record before this inquiry. The basis for her position can be summarized under two broad propositions. The first is that the Committee is aware that the discs contain nude photographs of the Judge and that they have been made available on the Internet. In her view, that is sufficient evidence to allow the Committee to fulfill its mandate. The second proposition is that even if they have some probative value as relevant evidence, it is outweighed by their prejudicial nature and should be excluded on that basis.

[34] Before addressing each of these propositions, we observe that normally rulings on admissibility require full knowledge of the exact nature of the evidence in question. Otherwise, how is a party charged with deciding this issue to exercise its discretion when it does not have a complete picture of what the evidence is? And yet, that is the situation we are in given the position taken by both Judge's Counsel and Independent Counsel that we not see Complaint 2 even for this purpose. In any case, as we have explained below, the relevance and admissibility of the challenged evidence is so demonstrable that we have been able to rule on the admissibility issue without first viewing that evidence.

[35] We now address each of the two propositions in turn.

#### **B. The Sufficient Information Argument**

[36] The argument of Judge's Counsel is that the exact nature of this evidence need not be known, either for the purpose of ruling on its admissibility or for dealing with any facts at issue in this inquiry. In her view, all the Committee needs to know in order to be able to fulfill its responsibility of conducting this inquiry and reporting to the Council is that the discs contain "intimate sexual photographs" involving the Judge and her husband.

[37] With respect to the Committee's role, section 8(1) of the *By-Laws* provides that:

The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.

The Council's Policy on Inquiry Committees states that "the Canadian Judicial Council relies upon the Committee for a complete report. One of the key functions of the Committee is to make findings of fact". In this regard, the Committee must take full responsibility for fact-finding and cannot delegate this function to anyone else.

[38] The third allegation in the Notice of Allegations is described as "Alleged Incapacity as a Result of the Public Availability of the Photos". Independent Counsel elaborated as follows:

Since 2002, photos of a sexual nature of [the Judge] (including alterations thereof) have been (and continue to be) available on the internet from time to time. These photos 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.

This allegation arguably engages s. 65(2)(d) of the *Judges Act* which includes as a ground for removal "having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution" of the office of judge. The use of the words "or otherwise" arguably could encompass events or situations not of the judge's own making.

[39] The exact nature of the photographs in Complaint 2 is at the very core of this allegation. These photographs clearly are relevant and probative evidence. It is difficult to appreciate how the Committee could make the required findings of fact and recommendations for "a complete report" to the Council without viewing that evidence. The Committee's failure to examine the most important evidence on this issue would understandably raise serious questions about the credibility of the Committee's report in the eyes of the public, no matter what recommendation the Committee might make.

[40] The second allegation is described as "Alleged Failure to Disclose in the Applications Process". Independent Counsel elaborated as follows:

On December 17, 2004, Ms. Douglas completed a Personal History Form ("Form") in connection with an application for judicial appointment. One of the questions on the Form was: "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?" Ms. Douglas answered "No".

Independent Counsel alleges that at the time, she knew or ought to have known that: In 2002 and 2003, graphic sexual photographs of her were available on the Internet and some of these could be seen as demeaning to women; In 2003, her husband had referred Mr. Chapman to the photographs on the Internet and sent him others; Some of these facts were widely known in the Manitoba legal community; These facts could be relevant to her application and should have been disclosed.

[41] The exact nature of the photographs is also highly relevant to this allegation since they bear directly on the issue of whether they are of such a nature that they should have been disclosed and, if so, what precisely should have been disclosed as well as the potential seriousness of any non-disclosure. In other words, they would assist in providing a frame of reference for the Committee to assess the significance of any non-disclosure by the Judge, if proven, and also to assess whether any disclosure made by the Judge was sufficient to meet the required standard.

[42] The first allegation is described as “Alleged Sexual Harassment of Alex Chapman”. Independent Counsel includes in his elaboration of this allegation that Mr. King directed Mr. Chapman “to a website where Mr. King had posted graphic photos of a sexual nature of Ms. Douglas, together with two ads soliciting black sexual partners for Ms. Douglas”. In addition, “Mr. King emailed graphic photos of a sexual nature of Ms. Douglas to Mr. Chapman.” They certainly are relevant to this allegation and ordinarily would be required to be adduced in evidence in other proceedings dealing with such an allegation.

[43] Independent Counsel takes the position that the photographs are “highly relevant” to all three of the allegations. We agree for the reasons given. He also took steps to demonstrate that the photographs contained in Complaint 2 were not unlawfully obtained, as argued by Judge’s Counsel. He concluded that there were “no legal impediments to the Committee reviewing and admitting into evidence the photos comprising Complaint 2”.

[44] For these reasons, we reject the argument that this Committee has sufficient information to be able to properly decide the issues before us without viewing Complaint 2.

### **C. The Prejudicial Effects Argument**

[45] Judge’s Counsel asserts that Complaint 2 should be excluded because its probative value is outweighed by its prejudicial effects and that this approach is grounded in the principle of fairness. She cites *R. v. Wray* [1971] S.C.R. 272, at 293. This authority does not support her position. The following excerpts are from the judgment of Martland J, with whom the majority of the Court agreed:

The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly. (p. 293)

This decision reflects the common law. Different exclusionary aspects have been introduced by the Canadian *Charter of Rights and Freedoms*. While Judge’s Counsel makes reference to the Judge’s

“Charter rights”, she does not provide authority to identify any specific *Charter* breach or remedy that would warrant the exclusion of this highly relevant evidence in this case.

[46] The argument by Judge’s Counsel about prejudice is based on the incorrect premise that “prejudicial” in this context means hurtful to the Judge. Its proper usage means circumstances that could prevent a fair hearing. One example is where evidence could be misused by the trier of fact because the trier will be improperly influenced by that evidence and fail to weigh all the evidence fairly. Thus, especially in criminal jury trials, courts anxious to protect an accused’s right to a fair trial, will sometimes refuse admission of inflammatory photographs into evidence where their prejudicial effect is considered to exceed their potential probative value. However, where the photographs are “necessary to understand other evidence” (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3<sup>rd</sup> ed. (Markham, Ont: LexisNexis, 2009), p. 1251) or are “necessary to establish a link” between two events or things and therefore have probative value (*R. v. Wildman* (1981), 55 N.R. 54 (Ont.C.A.); rev’d on other grounds [1984] 2 S.C.R. 331), they will generally be admissible. Here, the photographs in Complaint 2 are even more relevant as direct evidence on central issues in this inquiry.

[47] The main objection to the Committee’s viewing the photographs contained in Complaint 2 appears to be that doing so will exacerbate the pain that the Judge is experiencing from the knowledge that others and, particularly, some of her colleagues on the Council, have viewed these photographs in discharging their role in the investigatory process. The submissions of Judge’s Counsel refer to the threat of the Judge’s “physical deterioration based on fear, panic, humiliation and further isolation from her colleagues”. She warns that to rule that the discs are admissible into evidence would “re-victimize” the Judge “since each instance of the photographs being viewed amounts to a horrific violation of her privacy, a stripping away of her dignity and integrity and what feels like a ‘rape’.”

[48] These descriptions of the potential reaction of the Judge to this matter illustrate the difficult task faced by the Committee in carrying out its responsibilities. It is the kind of burden all judges experience in fulfilling their duties. The anxiety, embarrassment and humiliation felt by parties and witnesses when matters of a relevant but highly sensitive and personal nature are disclosed in the course of litigation are often a regrettable by-product of a judicial system that operates under public scrutiny. While steps may be taken to minimize adverse effects by, in appropriate cases, making sealing orders, publication bans and holding *in camera* hearings, rarely will a litigant’s privacy interests justify rejecting otherwise relevant and admissible evidence outright. Privacy interests must give way to the public interest in conducting an open and transparent hearing process.

[49] We have already discussed above the significant probative value of the subject photographs on the discs. Further, it would be unreasonable if the body expressly charged with the responsibility of determining the facts relating to whether a recommendation should be made for removal from the bench was the only body in the whole process that did not view those photographs. Accordingly, having regard to all the circumstances, the Committee sees no reasonable alternative but to rule that the two discs must be introduced into evidence before the inquiry. This does not mean that the

evidence will be released publicly. Whether the photographs should be made public in the course of the hearings is a separate issue.

[50] While taking the position that the discs comprising Complaint 2 are relevant and admissible as evidence in the inquiry, Independent Counsel nevertheless expressed concern about protecting, to the extent possible, the privacy interests of the Judge. He suggested a compromise position whereby the entire Committee would not have to view the photographs. Instead, he suggested that "... the Committee should consider designating a single member of the Committee (perhaps a female member) to view the photos to ensure that written descriptions would be sufficient".

[51] The Committee has carefully considered this proposal but has concluded that it would not permit the Committee to fulfill its responsibility under subsection 8(1) of the *By-Laws* and related *Policies*. We offer five reasons for this conclusion. First, the Committee has no authority to delegate its responsibility for fact-finding, even to another member of the Committee itself. Second, any written description of the subject photographs would be an indirect account only. That description would be open to various interpretations by the members of the Committee, leading in turn to no common understanding amongst Committee members with respect to the factual underpinnings in issue. Third, it is illogical to suggest that members of the Committee should be required to decide whether photographs of a judge on the Internet could or should result in a recommendation for removal from the bench without the Committee having first seen the best available evidence. Fourth, the subject photographs lie at the heart of whether the Judge made the required disclosure during the judicial application process. Fifth, delegating to someone on the Committee the responsibility for describing the photographs would avoid the responsibility of all members of the Committee to contribute directly to its ultimate findings and report.

#### **IV. Timing of Viewing of Complaint 2 by the Committee**

[52] Judge's Counsel also requests that if the discs are ruled to be a valid complaint and admissible in evidence, "the Committee or anyone else connected to the Inquiry, refrain from viewing the photographs unless and until all of [the Judge's] legal rights regarding the photographs have been finally adjudicated by the courts." The Committee cannot accede to this request.

[53] The Judge received notice of Complaint 2 from the Council on October 21, 2010, together with an explanation from the Executive Director of its nature and its treatment as a complaint. Judge's Counsel submits that: "From the outset, Counsel for [the Judge] has strenuously objected and continues to object to the discs being characterized as a complaint". The Judge has received ongoing notice at every subsequent stage of the process in which the discs have been treated as a complaint and viewed by those directly involved in the process. These include the stage at which the Vice-Chairperson referred it to a review panel and then the stage at which the Review Panel considered it and decided that an inquiry committee would be constituted. In other words, the Judge has had ample opportunity to bring this issue before the courts since October, 2010. No such steps were taken. This being so, the Committee sees no reason to delay the implementation of this ruling on the eve of the commencement of the hearings on the merits.

[54] In addition, in the event that this ruling related to Complaint 2 should be successfully challenged on judicial review, the Committee is satisfied that no prejudice would be experienced by the Judge as a result of its viewing the photographs pursuant to this ruling. In this respect, we refer to the following passage from our previous Ruling at paragraph 96:

The inquiry committee is not a jury. Its members are judges and senior lawyers who are quite capable of avoiding any “predetermination” despite having seen such a document. Judges frequently review documents and rule them inadmissible before hearing evidence on the same matter.

Similar considerations apply to the Committee's viewing the photographs in question.

### V. Order

[55] Complaint 2, consisting of two discs containing photographs and a website page, is, and will continue to be treated as, a valid complaint under s. 63(2) of the *Judges Act* and the *Complaints Procedures* in accordance with the notice provided to the Judge on October 21, 2010 and in accordance with subsequent notice received by her throughout the entire investigation.

[56] In addition to their status as a complaint, these discs are admitted into this inquiry as evidence that is relevant to allegations 1, 2 and 3 of the Notice of Allegations prepared by Independent Counsel. While they are part of the record, they will not be made public unless the Committee expressly orders otherwise.

Issued this 22nd day of June, 2012.

*(Signed) "Catherine Fraser"*

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Chief Justice Catherine Fraser, Chair

*(Signed) "J. Derek Green"*

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Chief Justice Derek Green

*(Signed) "Jacqueline Matheson"*

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Chief Justice Jacqueline Matheson

*(Signed) "Barry Adams"*

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Mr. Barry Adams

*(Signed) "Marie-Claude Landry"*

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