



## CANADIAN JUDICIAL COUNCIL

### IN THE MATTER OF AN INVESTIGATION PURSUANT TO SECTION 63(2) OF THE *JUDGES ACT* REGARDING THE HONOURABLE ASSOCIATE CHIEF JUSTICE LORI DOUGLAS

**DATE: NOVEMBER 19, 2014**

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### **RULING OF THE INQUIRY COMMITTEE REGARDING THE DISCLOSURE OF CLINICAL NOTES PERTAINING TO ASSOCIATE CHIEF JUSTICE LORI DOUGLAS**

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#### **I. THE APPLICATION**

- [1] This ruling concerns the nature and extent of disclosure of the clinical notes of the psychologist and counsellor (“**Dr. A**”) who has treated Associate Chief Justice Lori Douglas (“**ACJ Douglas**”) since November 1, 2010.
- [2] What precipitates this application is a report written by Dr. A dated September 30, 2014, on behalf of ACJ Douglas which primarily addresses his opinion as to her psychological state in 2012 when some of the events comprising Allegation #3 occurred.
- [3] Allegation #3 is set out in the Notice to Associate Chief Justice Lori Douglas (“**Notice of allegations**”) dated August 20, 2014, provided to ACJ Douglas by Independent Counsel and reads as follows:

**(3) Alleged Failure to Fully Disclose Facts to former Independent Counsel**

9. Upon being advised of the complaint by Mr. Chapman and the initiation of an investigation by the Canadian Judicial Council, ACJ Douglas modified a personal diary that described an encounter with Mr. Chapman which she knew or ought to have known was relevant to the CJC's investigation. ACJ Douglas subsequently made incorrect representations to former Independent Counsel about that modification.

10. This allegation, if accepted by the Committee, 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.

- [4] Counsel for ACJ Douglas has tendered the report, under seal, in support of her preliminary motion which was determined earlier by this committee in a ruling dated November 4, 2014. ACJ Douglas also proposes to tender the report at the upcoming hearing as ameliorative evidence of her conduct in allegedly misleading former Independent Counsel by providing what Dr. A characterizes as "an answer that was not precise". The Inquiry Committee ("Committee") has not yet ruled on the admissibility of this report.
- [5] This application is brought by Independent Counsel, Ms. Suzanne Côté, who seeks the disclosure of the clinical notes of Dr. A to enable a psychologist retained by her ("Dr. B"), to opine on Dr. A's report and his conclusions.
- [6] Counsel for ACJ Douglas acknowledges that by putting her psychological state in issue, in respect of Allegation #3, ACJ Douglas has triggered the need for some degree of disclosure to enable Independent Counsel to obtain a responsive report.
- [7] In a letter dated November 17, 2014, counsel for ACJ Douglas takes the position, however, that the disclosure of Dr. A's clinical notes should be confined temporally to all his notes from the beginning of his treatment "in September 2010 to the spring of 2012" when ACJ Douglas' impugned discussion with former Independent Counsel took place. Counsel for ACJ Douglas also takes the position that those notes should be provided only to Dr. B who "may consult with Independent Counsel regarding the content of particular notes he relies on" and "may relay the content of such notes to Independent Counsel where the notes are relevant to his opinion on [Dr. A]'s report of Douglas' ACJ's medical condition in 2012."

- [8] Counsel for ACJ Douglas notes that they have not been provided with the notes, nor will they be reviewing them and submits it is not necessary to review her private medical records. ACJ Douglas relies on authorities which endorse a minimally intrusive method of proceeding where a party's medical records are sought.
- [9] Counsel for ACJ Douglas emphasizes that Dr. A's report addresses only Allegation #3 and any attempt by Independent Counsel to use his underlying clinical notes to "troll for information or evidence concerning the other allegations in the Notice of Allegations, is to engage in a fishing expedition at the expense of ACJ Douglas' legitimate interest in maintaining her privacy and the integrity of her relationship with her counsellor.
- [10] Independent Counsel takes the position that the circumstances at issue bring this application within the scope of jurisprudence entitling full disclosure of the clinical notes.
- [11] Independent Counsel also takes the position that the potential relevance of the clinical notes is not confined to the ACJ Douglas' 2012 statement to former Independent Counsel, but may, as well, bear on Allegation #1 and the other aspects of Allegation #3 relating to ACJ Douglas' modification of her diary. Independent Counsel submits no restriction should be placed on the disclosure of the clinical notes or their use in that regard.
- [12] Independent Counsel submits that the following process should be incorporated into any order made by the Committee (in keeping with a proposal which she made on November 17, 2014 to Counsel for ACJ Douglas):
1. *[Dr. A] will communicate the entirety of his clinical notes to [Dr. B], without providing Independent Counsel with a copy.*
  2. *[Dr. B] will determine what is relevant, regarding Allegation #1 and Allegation #3, for the purpose of assessing [Dr. A]'s report.*
  3. *[Dr. B] will be entitled to communicate to Independent Counsel the notes which are relevant to Allegations #1 and #3 such as, but without limitation, any such notes relating to Justice Douglas' meetings of May 2003 with Mr. Chapman, to the diary modification in September 2010, and to Justice Douglas' 2012 representations to Independent Counsel.*
  4. *Where [Dr. B] is not in a position to assess the relevancy of any particular note, he will not be entitled to disclose such note to Independent Counsel without first providing a summary of what the note in question pertains to, which summary shall not disclose the content of the note, and which shall be used to*

*obtain directions from the Inquiry Committee regarding the disclosure of such a note to Independent Counsel.*

5. *[Dr. B's report, and any clinical notes of [Dr. A], shall be filed confidentially.]*
- [13] Independent Counsel also seeks an order that should the notes not be disclosed in the manner sought, the report of Dr. A should be ruled inadmissible.
- [14] For her part, ACJ Douglas reserves her right to elect not to tender Dr. A's report depending on the outcome of this application.

## **II. DECISION**

- [15] We conclude that in the circumstances of this case where Dr. A's report and the notes at issue are from ACJ Douglas' treating psychologist and where the report is intended to be limited in its focus to Allegation #3, in light of the need to minimize intrusion into ACJ Douglas' privacy and the ongoing need to preserve the integrity of her relationship with her therapist, that some restrictions on disclosure ought to be imposed.
- [16] Accordingly, we conclude that Dr. A should provide all of his clinical notes to Dr. B from the commencement of his treatment of ACJ Douglas to the spring of 2012 when the impugned statement was made.
- [17] There is, however, no basis to conclude that there are no clinical notes made after that time that relate to Allegation #3. Accordingly, we conclude that Dr. A should also provide to Dr. B any clinical notes that bear on the issue of ACJ Douglas' psychological state or actions in relation to Allegation #3 up to the time of his report of September 30, 2014. It is our view that the issue of the modification of the diary and the alleged misleading of former Independent Counsel in connection with that event are inseparable and it follows that any clinical notes pertaining to one of those events is legally and logically probative of the other and should be included in what is forwarded to Dr. B.
- [18] Thereafter, we conclude that Dr. B should be able to consult with Independent Counsel regarding the content of the clinical notes which he relies on to assess Dr. A's opinion and to form his own. As well, we conclude that Independent Counsel should be provided copies of the clinical notes which form the basis of Dr. B's assessment and opinion. In our view it would be arbitrary and unnecessarily cumbersome for Dr. B only to "relay the content of such notes" which are relevant to his opinion without being able to simply

provide Independent Counsel with copies of those notes with any necessary redactions to irrelevant references.

- [19] It is the Committee's view that the clinical notes, presumptively, should be confined to use in exploring Dr. A's opinion and providing a basis for that of Dr. B. In the event that Independent Counsel wishes to utilize them in any other fashion, it will be necessary for her to provide a summary of the salient notes and their intended purposes to counsel for ACJ Douglas and to the Committee and to seek the direction of the Committee as to their potential use.
- [20] Dr. B's report and any clinical notes of Dr. A will be filed confidentially in accordance with s. 63(5) of *Judges Act*.

(*Signed "François Rolland"*)

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Chief Justice François Rolland (Chair)

(*Signed "A. Cullen"*)

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Associate Chief Justice Austin F. Cullen

(*Signed "C. Brothers"*)

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Ms. Christa M. Brothers, QC

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