

March 28, 2013

EMAIL

George K. Macintosh, Q.C.
Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3

Dear Mr. Macintosh:

Re: Lawyers' Weekly Request Re: Canadian Judicial Council Inquiry

This letter is in response to your March 25, 2013 email setting out Cristin Schmitz's request for access to material from the Inquiry Committee hearing regarding Associate Chief Justice Douglas.

Your email describes Ms. Schmitz's request as one for access to (1) the exhibits and any other material filed with the Committee, and (2) the transcripts of all testimony given in public at the hearing. You also noted that the Committee requested that Ms. Schmitz's request be kept confidential.

As you are aware, we object to the Committee proceeding in any manner while the judicial review as to whether its conduct thus far has raised a reasonable apprehension of bias is pending in Federal Court. A tribunal loses jurisdiction when a reasonable apprehension of bias arises. The Federal Court may find that this Committee lost its jurisdiction by reason of the conduct complained of in the judicial reviews. Until the Federal Court has had the opportunity to determine this, we ask the Committee no to make any further rulings regarding the conduct of the proceedings, including the further publication of evidence received to date. It is over this general objection to the Committee proceeding in any manner at this time that we make the following submissions specific to Ms. Schmitz's requests for transcripts and exhibits from the hearing.

Transcripts

The Committee ordered witnesses excluded from the hearing until they gave their evidence in the proceedings, and prohibited publication on the CJC website of the transcripts of the evidence until after all witnesses were heard. As I indicated in my submissions to the Committee before the order prohibiting publication of the transcripts was made, the proceedings were covered in detail by the media. Journalists were entitled to observe the hearing, were permitted to tweet from the courtroom as evidence was given, and reported on the oral evidence given by witnesses each day of the hearing. As such, the transcript publication ban did not prevent the media or the public from learning of the testimony before the Committee. Accordingly, we do not have any specific objection to the publication of the transcripts of evidence heard in public

before the inquiry hearing was adjourned. However, the status of all evidence received by the Committee is uncertain pending the determination of the judicial review applications.

Exhibits

We object to any further distribution of private material relating to Douglas, ACJ, including images filed as confidential exhibits over our objection at the hearing. Under no circumstances should the Committee, or any CJC actor, permit or facilitate the further dissemination of the intensely private material filed as confidential exhibits before the Inquiry Committee over our strenuous objections as counsel for Douglas, ACJ. Even before it admitted the material as confidential exhibits, the Committee explicitly provided in its ruling on the deemed complaint that private photographs, distributed without our client's consent, "will not be made public unless the Committee expressly orders otherwise." There are no grounds for permitting access to material in violation of ACJ Douglas's privacy and *Charter* rights. None of the confidential exhibits should be disclosed to Ms. Schmitz or to anyone else.

The admissibility, authenticity, and relevance of many non-confidential documents filed with the Committee during the hearing have not been established. As noted on the CJC website, the information contained in the record published by the Committee, including the Joint Document Brief, has yet to be proven. At the outset of the hearing, former Independent Counsel advised that counsel could not agree on the authenticity of a group of documents contained in that Brief. Additionally, approximately 12 exhibits were marked for identification only. These exhibits included notes of former independent counsel and the Review Panel's external counsel from their investigations and witness interviews. As their admissibility, authenticity and/or relevance had not been established by the time the hearing adjourned, further disclosure of many of the documents filed with the Committee would be inappropriate.

The Committee will recall that former Independent Counsel had proposed to adduce the evidence of several witnesses by way of written statement, rather than live testimony. The Committee did not determine whether those witnesses' evidence would be accepted in writing or whether they would be required to give live testimony. Approximately 8 witness statements were filed before the hearing adjourned, but the Committee did not rule on whether such statements were accepted into evidence. Those statements should not be disclosed to Ms. Schmitz.

Throughout these proceedings, on behalf of our client, we have argued that the privacy and *Charter* rights of the respondent judge should be safeguarded. In light of the fact that the Federal Court is to consider whether the Committee has any jurisdiction over these proceedings, the Committee should refrain from making any further orders in relation to the inquiry process, including Ms. Schmitz's request for access to transcripts and exhibits. In any event, under no circumstances should confidential, private material relating to Douglas, ACJ filed over our objection at the hearing be made available to the media, the public, or any other individual or body.

Yours Truly,



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