Liz Taylor

From: Cristin Schmitz
Sent: April 24, 2013 8:19 AM
To: George Macintosh
Subject: Lawyers Weekly reply to counsel submissions on Douglas Inquiry access

Re: Canadian Judicial Council Inquiry Committee regarding Hon. Lori Douglas

In consultation with our counsel Brian MacLeod Rogers, this is our response to submissions made by Sheila Block, Rocco Galati and Suzanne Coté on behalf of their clients in respect of my request, on behalf of *The Lawyers Weekly,* for access to transcripts of all public testimony given at the Inquiry Committee's hearing and to exhibits and other materials filed with the Committee.

1. Transcripts

The only basis for denying me access to the public hearing transcripts appears to be a concern that the Committee's order excluding witnesses would be undermined, according to Mr. Galati and Ms. Cote. As Ms. Block points out, the public hearings have been extensively covered in the media. While Ms. Cote suggests that is a reason not to permit media access to the transcripts, the previous coverage also makes it unlikely that any additional coverage that might be provided by *The Lawyers Weekly* will add much to the record already available to prospective witnesses.

In any event, I expect that potential witnesses have been instructed by the Committee, and counsel involved, not to read media coverage of evidence that may relate to their testimony. Certainly, the real focus of any concern for the Committee's process should be on that very small number of witnesses. Such concerns have nothing to do with all the other potential readers and listeners of media coverage of these public proceedings. After all, this issue is faced at virtually every trial, both civil and criminal, because orders excluding witnesses are so commonplace. To prevent media coverage on that basis would be to effectively deny the open court principle, both in law and in practice. Suffice it to say that such exclusion orders have never been accepted as a basis for limiting media access or coverage during proceedings.

Presumably, the decision not to put the public hearing transcripts on the Inquiry website was made out of a concern that prospective witnesses would ignore any admonition and would succumb to the temptation of reviewing the transcripts in detail to help tailor their own testimony. *If* this is a concern, I suggest this may be best addressed in a focused manner. The Committee can make access to these transcripts available to me to use as background and to be quoted in stories, on the condition that we do not publish in full the transcripts we receive from the Committee in accessible electronic form (i.e. on our website) or provide the transcripts in any other manner to prospective witnesses. If required, I would be prepared to make an undertaking to that effect with respect to those transcripts.

I trust the Committee understands that even national publications such as *The Lawyers Weekly* have very limited budgets to send journalists to cover proceedings across the country, even ones that involve matters of national concern such as this Inquiry. The only realistic way for

The Lawyers Weekly to provide comprehensive coverage of the proceedings is for access to be made available, in some form, to the transcripts of the public hearings.

2. Exhibits and Other Materials

I wish to make it clear that I am not seeking access to confidential exhibits that are subject to a sealing order by the Committee. I am only seeking access to exhibits and the kind of documents and written materials that would be routinely accessible in any court proceeding, as part of the court file. Access to these is an integral part of the open court principle, and essential for comprehensive and accurate media coverage of such proceedings. Most recently, this point has been clearly established in a decision in the Ontario Court of Appeal in *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726. This involved media access to exhibits from a preliminary inquiry over charges relating to the death Ashley Smith while in custody. The application was made after the charges had been dropped. The Court of Appeal relied on the well known *Dagenais/Mentuck* test formulated by the Supreme Court of Canada and held at para's 21 to 24 that:

> While the *Dagenais/Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun (Re)* [citation omitted]
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> The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi judicial acts pre-dates the *Charter*: *A.G. (Nova Scotia) v. MacIntyre* [citation omitted] … "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of super-ordinate importance."
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> Now recognized as a fundamental aspect of the rights guaranteed by s.2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (AG)* [citation omitted].
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> The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in

> order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* [citation omitted].

While further reference to *R. v. Canadian Broadcasting Corp.* could be made, I simply refer the Committee to this important authority, which is consistent with "more than two decades of unwavering decisions" from the Supreme Court of Canada and Courts of Appeal.
To provide complete and accurate coverage of the hearing, it is critical to have access to exhibits filed as part of the public hearings of the Committee, including will-say statements and written witness statements.
My request is being made solely with a view to providing accurate and comprehensive coverage in *The Lawyers Weekly* of the Committee's proceedings. Both as background and for-publication, access to the transcripts and exhibits is critical for me to provide that coverage on behalf of a national publication dedicated to providing information to the legal community.

Thank you for your early consideration of this important matter.

Sincerely, Cristin Schmitz
The Lawyers Weekly
Ottawa bureau chief