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Department of Justice Canada - Litigation Branch
Civil Litigation Section
234 Wellington St.
Ottawa, Ont. K1A 0H8

DELIVERED VIA EMAIL

ATTENTION: ALAIN PRÉFONTAINE

Dear Sir:

Re: MPCC 2008-042; Proceedings held October 7, 2009

As you are aware, my client Richard Colvin is a witness and takes no position on the motions brought before the Commissioner during the above-referenced proceedings last week. I have reviewed the transcript from the proceedings however, and feel compelled to address certain elements in your submissions as they relate to my client in order to provide clarity as this matter goes forward.

During last week's proceedings, Commission counsel confirmed that the purpose of pre-hearing meetings with subjects and witnesses is to narrow issues, eliminate the element of surprise, and address potential secrecy/security concerns. It was indeed on the basis of such understanding of the pre-hearing procedure that my client agreed to meet with Commission counsel and notified you of this decision on September 1, 2009. Your response, on September 4, 2009, was to warn my client that a Section 38 notice had been issued over his testimony, effectively forbidding him from meeting with Commission counsel. You did not specify who had made the notice.

You acknowledged in your submissions last week that pre-hearing interviews would dramatically mitigate the risk of inadvertent disclosure during public hearings of evidence covered by s. 38. While conceding that pre-hearing meetings would allow s. 38 concerns to be addressed, you stated that the pre-hearing meeting requires willingness of the individual concerned to participate in an interview with Commission counsel. We reiterate that Mr. Colvin is willing and ready to cooperate with the Commission in accordance with the Government's stated policy of full cooperation.

Your statements last week to the Commissioner regarding the reasons other Government servants have declined to cooperate belie the content of your earlier correspondence to such individuals. From our perspective the willingness of Crown servants to cooperate with the Commission has been a matter over which you exerted early and profound influence. This is in contrast to the submissions you made last week, wherein you advised the Commissioner that witnesses and subjects were simply exercising individual human rights in declining to cooperate. We are in fact concerned that your submissions on this issue may have had the effect of misleading the Commissioner.

Specifically, during proceedings last week, you stated that the decision whether or not to be interviewed was "entirely within the control of... the witnesses or the subjects..." You stated that: "...as counsel we have approached all of the witnesses that we represent and all of the subjects, none have seen fit to accept the Commission's offer." You went on to describe at length the right of those

summonsed to decide whether or not to participate, and stated, for example, that: "...the fact that witnesses have not seen that it was in their best interest to participate in this voluntary interview, is something that should be no occasion for comment..." You stated that the "offer was relayed" and "none of them accepted". Your emphasis in submissions was that these witnesses and subjects were simply exercising their individual rights in declining the Commission's offer to cooperate.

This description of your communications with Government servants on the pre-hearing interview process does not reconcile with the letter you delivered to 29 individuals summonsed, including my client, on July 28, 2009. I note you advised the Commissioner that communications with witnesses and subjects on pre-hearing proceedings are covered by solicitor-client privilege, but there is no valid claim for privilege over your July 28, 2009 letter in the case of my client, since you were never retained by him.

In your July 28 letter, under the heading, in bold, "What is at stake for you", you advised witnesses and subjects that their reputation was at stake. You cautioned that Government servants must appear before the Commission in public, and that "the Commission is actively seeking to publicize the hearings and the report". You advised that the interview would provide Commission counsel with two advantages, but that the only advantage to a witness or subject would be to "get to know his interrogator and feel more comfortable about the interrogation." You went on to state that: "There is no reason to believe the interview will allow you to convince her not to call you to testify..." You advised that the pre-hearing interview would allow Commission counsel to obtain testimony in advance, and that "she [Commission counsel] will commit you to that recollection..." You stated as follows:

In her mind, your appearance [at the hearing] will be the occasion to confirm what she believes she has already learned informally, not the occasion for you to stray from the predicted path. Departures from this path during the course of the hearings will lead her to question why you are not providing the same answers, thus putting your credibility in issue. Are you lying now or did you lie then? What portion of my questions did you not understand when we last met?

You warned that Military Police are at especially high risk of reputational damage, that they could be directly criticized by the Commission, and that this criticism could further "trigger a review process before the Military Police Credential Review Board." You stated that additional members of the Military Police could be served with a "notice of potential adverse findings" following certain procedural requirements. You warned, however, that "the level of observance by the Commission of this procedural safeguard is uneven". Finally, you stated that military commanders could become the "collateral casualties" of the hearing, and "the legality of their decision to transfer Afghan detainees will be the battleground on which the allegation of failure to investigate will be fought."

You closed the letter by "strongly" suggesting that witnesses and subjects obtain legal advice before deciding whether to be interviewed, and you directed them to named Department of Justice lawyers. You did not, as required by *Law Society* rules, advise that the Department of Justice was precluded by conflict of interest from simultaneously representing Canada, witnesses, and subjects, nor did you recommend Crown servants seek the advice of independent legal counsel.

As a senior Department of Justice lawyer, you have a duty to fairly and impartially describe MPCC procedures to Government employees, who may have no understanding of the process, and who are relying on your description. To such Government employees, you portrayed the pre-hearing interview as a hostile process whereby an "interrogator" would be given the upper hand in screening evidence and entrapping witnesses into an evidentiary script. According to your letter, as a result of

participating in pre-hearing interviews, Government servants might face accusations of lying during public hearings, face greater risk to reputation, and carry the potential moral burden of unwittingly exposing military and other colleagues and peers to disciplinary penalties. You also cautioned that the Commission might commit procedural violations, to the detriment of subjects and other Military Police, on the “battleground” of the hearings. We expect that such a description of the pre-hearing interviews would unnerve even the most cooperative Government employee, and it is thus hardly surprising that only one witness – my client - has agreed to navigate the minefield you describe. He is in a position to do so only through access to legal advice provided by non-Government legal counsel. One must question whether other Government servants would be similarly willing to cooperate if they had the benefit of independent legal counsel. With independent legal advice, other Government servants might also overcome – as Mr. Colvin did – the chilling effect of your July 28 letter. If other witnesses had agreed to cooperate, my client would not now be uncomfortably alone among witnesses.

The right to unbiased, independent, good-faith legal advice is fundamental to Canada’s legal system and encoded in *Law Society* rules. Where there is a conflict of interest or where a Crown servant is charged with an offence, the Government’s own policy also requires that Crown servants should have access to independent legal counsel. Crown servants may apply for private legal counsel through the *Treasury Board Policy on the Indemnification of and Legal Assistance for Crown Servants*. However, under the policy the Department of Justice decides whether an individual Crown servant is entitled to legal representation. While this procedure would seem proper in cases where legal risk is presented from *outside* parties, in this case, where Government has such a compelling interest in protecting its reputation, it is inappropriate for the Department of Justice to urge Crown servants to retain the Department of Justice as legal counsel. It is also improper that the Department of Justice be empowered to grant or deny the application of a Crown servant for independent legal counsel.

Furthermore, in the case of my client, your legal colleagues within Government made misleading and inaccurate descriptions of what constitutes “conflict of interest” under Treasury Board policy. Conflict of interest must be established before the Government will authorize independent legal counsel for a Crown servant. In April 2009, your colleagues advised my client that a “conflict of interest” exists only where a Crown servant finds himself or herself so strongly opposed to Government policy for reasons of conscience or similar reasons, that such servant is unable or unwilling to implement Government policy and thus fulfill his or her duties. You advised that only in such cases would such individual be entitled to independent legal representation by lawyers outside the Department of Justice.

This is in stark contrast to the proper *Law Society* definition of “conflict of interest”, which is focussed on the competing interests on the part of the *lawyer* and not the client’s personal feelings about Government policy or their duties. Under the rules of the *Law Society of Upper Canada*, a lawyer is prohibited from representing more than one side of a dispute. A lawyer must also cease acting where conflict of interest is likely unless, after disclosure adequate to make an informed decision, the client or prospective client consents. Under the *Law Society* rules a lawyer is in a conflict position whenever: (a) a competing interest would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client; or (b) whenever such lawyer might be prompted to prefer the interests of one client over that of another client or prospective client. In this case, you represent Government, and have an interest in protecting that client from embarrassment. You also represent Military Police subjects, and have an interest in suppressing or reframing any evidence detrimental to these individuals. You represent military commanders, who have an interest in avoiding blame or legal consequences for detainee policies and practices in Afghanistan. You represent witnesses, who might introduce evidence harmful to Government, the Military Police and commanders. You also purport at times to represent the Attorney General, who has an interest in blanketing evidence under s. 38. With

these disparate and competing roles you perform, we question whether your clients are evenly served, and whether the interests of certain of your clients are placed above the interests of others.

Aside from breaching *Law Society* rules, your multi-party representation has caused confusion in the Commission's proceedings. During your submissions last week, at one point you stated: "this is the Government of Canada speaking", while at another point, the Commissioner specified: "Mr. Préfontaine, you're representing not the Government of Canada here today but, if I can remind you, the seven subjects." In the transcript from last week's proceedings, you are listed as counsel for the Attorney General.

If other Government servants – subjects and witnesses – had been given correct information on their right to legal counsel, an accurate explanation of "conflict of interest", and a fair and unbiased description of pre-hearing interviews, we doubt whether my client would now be in the position of facing unwelcome public glare as the sole cooperative witness. We question whether his colleagues and peers in DFAIT and other parts of Government would refuse to cooperate without such historical and ongoing misrepresentations and ethical violations by the Department of Justice.

On a final note, we have learned that Department of Justice lawyers have instructed Mr. Colvin's DFAIT colleagues on internal communications with him. As first raised in my letter to you of September 15, 2009, we again remind you that legal issues related to the *Afghanistan Public Interest Hearings* should not be brought to bear upon Mr. Colvin in the performance of his duties, or in his relations with colleagues. To restrict communications between my client and his DFAIT colleagues is an improper exertion of litigation strategy by the Department of Justice, and an inappropriate interference in internal DFAIT operations. This event is more than can be abided, and we ask you again to kindly contain legal issues in this matter within the legal framework.

Respectfully yours,

LORI G. BOKENFOHR
c.c. Freya Kristjanson
Paul Champ
Mark Wallace
Client