



City of Mississauga Judicial Inquiry

The Honourable J. Douglas Cunningham, Commissioner

Decision of Commissioner Cunningham

Motion by Citizen Journalists for Permission to Record Inquiry Hearings

The open court principle is a “hallmark of a democratic society”¹. Public access to our courts allows all those who are interested to see that justice is administered in a non-arbitrary manner and according to the rule of law. As Mr. Downard explained in his submissions as *amicus curiae*, it enables justice to be done, and to be seen to be done. This principle is particularly important for public inquiries: open and public hearings instill confidence in the fact-finding, thoroughness and objectivity of a judicial inquiry.

While all who are interested can enter an open court, the reality is that most people will not be able to attend in person. This Inquiry will occupy many weeks and hearings will be held during regular business hours, making it prohibitive for the majority of people to observe the testimony themselves. As a result, they will depend on news organizations to report on the Inquiry’s events and progress.

Representatives of a range of accredited media organizations have attended and reported on the preliminary hearings to date. In addition, two Mississauga residents have been attending and reporting on the Inquiry. Donald Barber of the Democratic Reporter and Ursula Bennett of Mississauga Watch have demonstrated an interest in following and reporting on the Inquiry.

Non-accredited “citizen journalists” can play an important role in the reporting and analysis of events. As both Mr. Downard and Commission Counsel Mr. McDowell explained, the advent of social media and the proliferation of blogs have expanded the role of non-traditional journalists. Indeed, in 2007, the Supreme Court of Canada noted that in this age of electronic media and the blogosphere, it has become increasingly difficult to distinguish between media representatives and ordinary citizens.² I recognize, of course, that this development is not without its dangers.³

The question before me today is whether, as citizen journalists, Mr. Barber and Ms. Bennett should be permitted to videotape the Inquiry proceedings. To date, Inquiry staff have arranged for Rogers Communications to videotape the entire Inquiry, on the condition that it provides feed to all journalists and media representatives with access to the media room.

¹ *Vancouver Sun (Re)* [2004] 2 S.C.R. 332 at para. 23.

² *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 252 at para. 153 (in dissent).

³ See, e.g., *Crookes v. Wikimedia Foundation Inc.*, 2009 BCCA 392.

In light of this, and in response to the request from Mr. Barber and Ms. Bennett, I must answer two questions. First, should Mr. Barber and Ms. Bennett be permitted to tape the Inquiry? Second, if not, should they be provided access to the Rogers feed? I answer these questions pursuant to the *Rules of Procedure* for the Inquiry, which provide that television cameras or other recording electronic or photographic equipment are permitted in the hearing room at my discretion.

The courts have identified three interests that I must balance to decide whether citizen journalists can record the proceedings. First, the interest in freedom of expression; second, the interests of the individuals directly involved in the proceedings; and third, the integrity of the process itself.

Freedom of expression includes the freedom to know what is happening in public proceedings, and to communicate about them. As well, as Mr. Barber noted in his submissions, for freedom of expression to be meaningful, members of the public should have access to a broad range of opinions and coverage. To ensure that a variety of perspectives is presented, journalists should have access to the raw footage of the Inquiry, and not only to edited videos.

Second, I must consider the interests of the individuals directly involved in the process. A public inquiry puts individual reputations at risk, and the procedures following at the Inquiry should manage these risks. Personal dignity and privacy should be protected. For example, while a witness' evidence is a key part of the Inquiry and should be accurately recorded, it is not necessary to record that witness' facial reactions throughout the other weeks of testimony.⁴

The third interest is the integrity of the inquiry process itself. This is a legal process, requiring appropriate decorum. Witnesses should not feel targeted or intimidated, and counsel's written and oral communications should remain privileged. Our procedures should strive, to the extent possible, to prevent even inadvertent capturing of documents or conversations.

In balancing these three considerations, I conclude that citizen journalists should have access to unedited, raw footage of the Inquiry proceedings. This access will promote freedom of expression, and allow Mr. Barber and Ms. Bennett to report on aspects of the Inquiry that may not be covered by the accredited media. While the transcripts for each day's proceeding will be posted on the Inquiry website, usually within five hours of the conclusion of that day's hearing, I recognize that video footage is often more compelling and journalists have a legitimate interest in accessing it.

Citizens journalists will not, however, be permitted to record the proceedings with their own devices. Rogers has experience recording judicial inquiries, and is familiar with the protocols for doing so. As an accredited news organization, Rogers will be held to the standards of decorum and journalistic integrity that must govern the recording of any inquiry.

⁴ In this regard, see Justice Sopinka's analysis in *New Brunswick Broadcasting Co. v. Nova Scotia*, where the Court upheld a restriction on hand-held cameras in the Nova Scotia legislature's public gallery although the restriction may "on occasion detract from the atmosphere of what is going on and no doubt may from time to time deprive the public of a considerable source of amusement". *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319 at para. 163.

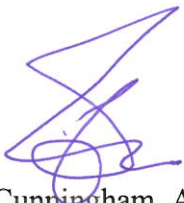
Mr. Barber and Ms. Bennett, the only two citizen journalists who requested permission to record these proceedings, are to be granted access to the media room and to the Rogers feed. They will make arrangements with Rogers to accept the raw footage, and they are encouraged to contact the Inquiry Communications Officer, Peter Rehak, for assistance with the technological requirements.

Rogers will provide its feed to the media room. All accredited news organizations, Mr. Barber and Ms. Bennett will have access to the media room and to the feed. For all news organizations and journalists, this privilege is subject to the following restrictions:

1. All journalists and news organizations must comply with the Inquiry rules and with rulings that I may make during the course of the proceedings, including publication bans.
2. Mr. Rehak will arrange an official photographing opportunity. Photographs are not to be taken in the Inquiry courtroom at any other time.
3. No video recordings may be taken in the courthouse hallways, nor of individuals entering and exiting the courthouse.
4. It is my hope that all journalists will report on the Inquiry in a fair and accurate manner. Our courts have developed guiding principles for responsible publication, and I encourage anyone not familiar with these principles to learn about them. By way of example, I note that to be protected under our law of defamation, a fair and accurate report must be balanced and must reflect both sides of an issue. It cannot leave out important information that would give a different view of what transpired, embellish with circumstantial detail or select only fragments of material for their "spiciness". While I cannot prevent biased reporting, it is not protected by our law of defamation, and will not be condoned in this Inquiry.

If any citizen journalist or news organization fails to abide by these restrictions, I will entertain submissions as to whether I should cancel their access to the media room and the Rogers feed. (Of course, I recognize that individuals could record from the Rogers feed at home, albeit without the sanction of the Commission.)

It is a privilege to conduct this Inquiry in a democracy where citizens are engaged and eager to report on the events. I am grateful for the interest and involvement of citizen journalists, and believe that this ruling strikes an appropriate balance of the interests at stake.



Cunningham, A.C.J.O. (Commissioner)
April 26, 2010