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March 21, 2014

Attention: Mr. Bruce Ralston, M.L.A.
Surrey-Whalley
Room 201, Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Ralston,

Re: Inquiry into circumstances surrounding explosion and fire at Babine Forest Products

We are in receipt of your letter dated March 14, 2014, wherein you set out the following three questions on which you seek our opinion:

1. Do the terms of reference proposed in the attached document fall within the jurisdiction of the *Public Inquiry Act*? In other words, can this be done?
2. Does the opinion of Mr. Doust, as set out in his letter of February 6, 2014, conclude that a public inquiry is not available in these circumstances?
3. Do the provisions of the *Coroners Act* allow for a coroner's inquest to address and canvass the same range of issues as proposed and contained in the suggested terms of reference?

In preparing our opinion, we have considered Mr. Doust's two-page letter of February 6, 2014 and the proposed terms of reference, copies of which are attached to this opinion.

Question 1

The proposed terms of reference fall within the jurisdiction of the B.C. *Public Inquiry Act*, [SBC 2007], Chapter 9 [*Public Inquiry Act*].

The criterion for establishing a commission of inquiry in British Columbia is set out at s. 2 (1) of the *Public Inquiry Act*:

2 (1) The Lieutenant Governor in Council may, by order, establish a commission to inquire into and report on a matter that the Lieutenant Governor in Council considers to be of public interest.

The wording of s. 2 (1) is extremely broad: it permits a commission of inquiry to be established where the Lieutenant Governor in Council considers the matter to be of public interest. As the Court of Appeal said in *Davies*¹, this legislation “is clearly designed to give the executive branch broad discretion to select any matter within provincial jurisdiction for study and report” (para. 67; emphasis added). A commission of inquiry based on the proposed terms of reference falls within this very broad definition.

Many commissions of inquiry have been established for the purpose of investigating tragic events. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 62, Cory J. observed that: “One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover “the truth.””

Indeed, in British Columbia, commissions of inquiry have often been established in these types of circumstances. The Missing Women Commission of Inquiry was created to, among other things, inquire into and make findings of fact, respecting the conduct of the missing women investigations. Similarly, the Braidwood Inquiry was established, in part, to make a complete report on the events and circumstances of and relating to Mr. Dziekanski’s death.

The proposed terms of reference fall within the jurisdiction of the *Public Inquiry Act* and are similar to the terms proposed in other commissions authorized in British Columbia in the recent past.

Question 2

The opinion of Mr. Doust, as contained in his letter dated February 6, 2014, addressed a narrow point as to whether a discrete issue could be canvassed at a public inquiry. It does not appear to us that Mr. Doust addressed the broad question that you have posed. Mr. Doust opined that a particular issue could not be the subject matter of a public inquiry (a view that we happen to share); not that a public inquiry was not generally available with the terms of reference suggested. Simply put, the opinion of Mr. Doust does not foreclose the establishment of a commission of inquiry in order to address the proposed terms of reference.

¹ *British Columbia (Ministry of Attorney General, Criminal Justice Branch) v. British Columbia (Commission of Inquiry into the Death of Frank Paul – Davies Commission)*, 2009 BCCA 337 [Davies].

Question 3

The proposed terms of reference fall within the jurisdiction of the *Public Inquiry Act* and would allow for an inquiry into a much broader range of issues than would be considered at a coroner's inquest under the *Coroners Act*.

A coroner's inquest, by its nature, is limited to determining facts related to a particular death. It is also circumscribed quite narrowly by the *Coroners Act*, [SBC 2007], Chapter 15 [*Coroners Act*]. While a jury in a coroner's inquest may make recommendations about matters arising out of the inquest, it is only expected to certify findings of fact respecting a narrow range of issues, namely:

- (a) who the deceased was,
- (b) how, when, where and by what means the deceased died, and
- (c) any other matter concerning the deceased that the coroner is required to report under s. 17 (2) (f) [particulars of deaths] of the *Vital Statistics Act (Coroners Act, s. 38)*.

The suggested terms of reference are broad in scope and would permit a commissioner to consider a wider range of issues in a greater level of detail than would be permitted in a coroner's inquest.

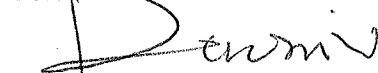
A coroner's inquest is also not designed to assign fault to individuals involved in the incident. Indeed, "the jury must not make, and the coroner must not accept, any finding of legal responsibility or express any conclusion of law" (*Coroners Act, s. 38 (3)*). A commissioner of a hearing commission, however, has, subject to the terms of reference, the express power to make findings of misconduct against individuals (*Public Inquiry Act, s. 21 (1) (d)*).

We trust that this opinion has addressed the questions set out in your letter of March 14, 2014. Should you require any clarification, please feel free to contact us.

Yours truly,

SUGDEN, McFEE & ROOS LLP

Per:



E. DAVID CROSSIN, Q.C.
EDC/ef

Appendix – Opinion from Len Doust QC

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February 6, 2014

**Attention: Mr. John Dyble,
Deputy Minister to the Premier**

Dear Mr. Dyble:

**Re: Review by Deputy Minister to Premier of the fact pattern related to the
Babine Mill explosion, and recommendations**

I understand that you have been asked by the Premier to provide a summary of the fact pattern regarding issues raised as a result of the investigation by WorkSafeBC (WSBC) into the January 20, 2012 explosion at the Babine Mill in Burns Lake, B.C. and the decision of the Criminal Justice Branch (CJB) not to approve regulatory charges against Babine Forest Products.

In addition, you have been asked to make recommendations to the Premier on actions arising from the lessons learned from the fact pattern.

You have provided me with a copy of your document entitled "*Babine Explosion Investigation: Fact Pattern and Recommendations*" and have asked that I independently confirm the correctness of the legal and constitutional context described in the document. This has involved consideration by me of the legal issues and opinions expressed in the document. I have paid most particular regard to the independent roles of Crown Counsel and WorkSafeBC in connection with an investigation into British Columbia and the decisions of Crown Counsel regarding regulatory charges founded on the investigation.

You have also asked me whether a public inquiry could result in a reconsideration of the decision by Crown Counsel not to approve the regulatory charges for prosecution. I can confirm, as you have indicated in your document, that there is very clear case law (see *Attorney General of British Columbia v. William H. Davies, Q.C., Commissioner 2009*, unanimous judgment of the British Columbia Court of Appeal) confirming that a decision of crown counsel to approve or not approve charges is not a proper subject for review in a public inquiry.

You have also recommended my being retained as an independent advisor to support the implementation of your recommendations and ongoing improvements in such manner as I see fit, I have confirmed that I will accept that retainer. You have advised

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that the purpose of this latter retainer is to ensure thorough implementation of the recommendations, as well as to enable me to provide advice on further improvements if required. To carry out the additional mandate you have asked, and I have agreed:

1. To review implementation of the recommendations made in this document with the Deputy Minister of Labour and Deputy Attorney General at a time to be agreed upon, and report back to you as appropriate; and
2. To advise you of other recommendations that may flow from implementation.

CONCLUSION

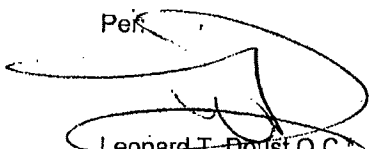
My conclusion after reviewing your document "*Babine Explosion Investigation: Fact Pattern and Recommendations*" is that it is accurate in the manner that it characterizes the roles of CJB and WSBC as well as in relation to the legal and constitutional context described in the document. In reaching this conclusion I have given consideration to the legal issues and opinions expressed in the document as well as the independent roles of Crown Counsel and WorkSafeBC in connection with an investigation in British Columbia and decisions regarding regulatory charges.

With respect to your recommendations and the role that you have asked that I take in implementation, I can confirm my view that the recommendations address the issues in an effective and appropriate manner.

Sincerely,

McCarthy Tétrault LLP

Per



Leonard T. Doust Q.C.

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