

PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION

JOINT NOTE BY SENIOR AND JUNIOR COUNSEL

for the Respondents in the Petition of Alex Salmond, Petitioner, for Judicial Review

- 1 We write further to recent events. With regret, our dismay at this case deepens yet further.
- 2 We will not rehearse the regrettable way in which document disclosure has unfolded. Suffice to say that we have each experienced extreme professional embarrassment as a result of assurances which we have given, both to our opponents and to the court, which assurances have been given on instructions, turning out to be false as a result of the revelation of further documents, highly relevant yet undisclosed. We, of course, required to consult at 9.15pm last night to discuss the ramifications thereof.
- 3 This morning, the first part of the commission began. The inevitable result of the last minute disclosure of the additional documents was that the commission required to be adjourned. The havers now cited for Friday can expect a torrid time in the witness box given the late disclosures. That comment applies in particular to the IO, for the reasons which follow.
- 4 All of that is bad enough. However, it pales beside the revelation in the course of this morning of two further documents. These give rise to the same two concerns discussed in the consultation last night: (i) the late nature of their revelation; and (ii) their content. Each document comes from the IO.
- 5 As to the late nature of the revelation, this is unexplained, and frankly inexplicable. Given the nature of the searches described by [Redacted] as having been undertaken, we regret that we simply cannot understand why these documents have been made available only now. The IO should be warned that she will be pressed on why these documents, and indeed the OneNote extracts provided yesterday, were not both discovered and disclosed long before now.
- 6 As to their content, the two documents now made available cause us both real concern.
- 7 The first is a letter from the IO to Ms A. It is dated 17 January 2018. It begins as follows:
- “We met on 16 January 2018 to discuss your experience about the alleged misconduct of a former minister. Following this meeting you submitted a formal written complaint... I have been designated at the IO.... The purpose of this letter is to invite you to a meeting to discuss your complaint in more detail... As you have indicated your availability, the meeting will take place ... on 17 January 2018 at 2pm.”
- 8 This letter gives rise to various concerns, which we set out on an escalating basis as follows:

- 8.1 As the letter is dated the same day as the meeting, this must have been sent by email. Where is the email?
- 8.2 This letter suggests that there must have been other communications with Ms A in advance of the meeting of 16 January – or how would the meeting have been arranged? No documents in this regard have been forthcoming.
- 8.3 It will be recalled that, following Ms A's submission of the complaint on 16 January 2018 at 12.19pm, the IO was appointed as such by email of the same date at 12.45pm. The email reads as follows:
- 8.3.1 "I have received this formal complaint from Ms A and I am appointing you as the Senior IO. Would you be able to review this and get the investigation underway? I have thanked Ms A and said you will be in touch."

There is little doubt that it will be contended that this email is disingenuous in suggesting that the complaint will be "news" to the IO. We have certainly presented it in that way.

- 8.4 This revelation causes acute difficulties regarding the way in which we have, again on instructions, pled this case. Looking to the Record as it stands:
- 8.4.1 The Petitioner avers in STAT. XIX:
- 8.4.1.1 At p.69D: "Ms A emailed the IO on 19 December 2017 (7/34 of process) informing her that she was minded to pursue a formal complaint against the petitioner. The complainer requested a meeting to discuss the practicalities of this. **The respondents are called upon to aver whether and if so when that meeting took place and if it did what was discussed and/or agreed.**"
- 8.4.1.2 At p.70E: "The respondents are called upon to aver the full extent of the IO's involvement prior to her appointment..."
- 8.4.2 On instructions, we have answered those averments as follows:

- 8.4.2.1 At p.76C-D: "The IO emailed Ms A on 19 December 2017 in response to queries raised by her about the implications of making a complaint That email is produced. **There was no further meeting with Ms A prior to 16 January 2018 when she made her formal complaint.**"

We cannot suggest that the highlighted averment in the Answers discloses a meeting on 16 January, **before** the complaint was submitted. That is not what the averment says. Rather, in order to address the complaint of prior involvement, we have averred that there was no further meeting with Ms A before she made her complaint. That is, it would now appear, plainly and demonstrably untrue.

8.5 We have been given two draft affidavits from the IO. Mercifully, neither has yet been lodged. The first (13 December) contains the following:

8.5.1 "14. On 16 January 2018 Ms Richards emailed to inform me that she had received an official complaint from Ms A, with the written complaint attached. In the email she stated that she was appointing me IO. She informed me that she had told Ms A that I had been appointed IO and that I would be in touch. I contacted Ms A to arrange the next steps."

The lack of any mention of the meeting of 16 January 2018 in what is meant to be a sworn affidavit for use in Court is, frankly, alarming.

8.6 [Redacted]

8.6.1 [Redacted]

[Redacted]

8.7 This letter indicates that the prospective IO (there could be no actual IO until a complaint was made) met with Ms A **immediately before** the complaint was submitted, and that **immediately thereafter** the prospective IO was made the actual IO to investigate the complaint she had just met with Ms A to discuss. We trust that we do not need to say any more about how that appears.

9 The second document now disclosed is an email chain, some of which has been seen before. It starts with the IO's email to Ms B of 8 December 2017, setting out her options. There is next the email of 24 January 2018 at 1:56pm, from Ms B to the IO, making her complaint. Thus far, we have seen these emails.

10 What is yet more alarming, however, is what follows in the email chain. By response of the same date at 2.23pm – i.e. less than half an hour later – the IO responds saying that she has [Redacted] and will be meeting her the following day. Allowing for a need for haste, questions will inevitably arise from this:

10.1 Plainly there must have been further contact – undocumented – in which the IO agreed to meet Ms B. It is unclear whether this preceded or post dated the making of the complaint.

10.2 The complaint had only just been made. No one had appointed an IO for this complaint. The IO has effectively appointed herself in that regard.

10.3 It seems inevitable, unless very prompt action indeed had been taken, [Redacted] see Ms B [Redacted] **before** the complaint was actually made, and accordingly before the IO could have had any legitimate interest in speaking to Ms B.

11 All of this gives rise to two concerns.

12 First, we are now in a position where we think that maintaining a defence of the appointment of the IO may be unstatable. Given the timescales we are reluctant to take a final view on this, but there is a real risk that we so conclude.

13 Second, we are each in a position which is, so far as dealings with the other side and the court are concerned, close to untenable. Again, given the timescales we are reluctant to take a final view on this, but there is a real risk that we so conclude.

14 We are to meet with the Lord Advocate at 4pm. This note has been prepared in haste to allow him to consider same in advance thereof. We will leave further comment to that meeting.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

19 December 2018