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PROTOCOL

ON THE APPOINTMENT OF JUDGES TO COMMISSIONS OF INQUIRY

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INTRODUCTION

Public inquiries are a unique institution that serve a special purpose in Canada's system of governance. Justice Antonio Lamer (as he then was) described them this way:

> *There is no doubt that commissions of inquiry at both the federal and provincial levels have played an important role in the machinery of government … [and] … in particular served to supplement the mainstream of institutions of government.*
>
> *Starr v. Houlden*, [1990] 1 S.C.R. 1366 at 1410.

When the government seeks to appoint a sitting judge as commissioner of a public inquiry that it proposes to establish, it is important for a Chief Justice and the judge being asked to undertake the inquiry to be able to refer to guidelines that address potential risks for public confidence in judges and their independence. While it is appropriate for the judiciary to respond positively to such requests, some caution is required. The *Protocol* developed by the Canadian Judicial Council aims at providing information and guidance for federally appointed judges and others interested.

1. REQUESTS FROM GOVERNMENT

There are a number of imperatives surrounding a request from government to appoint a judge to a commission of inquiry.

(A) The request by government to appoint a judge as commissioner of a public inquiry should be made in the first instance to the Chief Justice of the court on which the judge sits.

(B) The request should be accompanied by the proposed terms of reference for the inquiry.

(C) The Chief Justice should be advised if the request has previously been made to any other Chief Justice.

(D) The constitutional principle of judicial independence requires the approval of both the Chief Justice and the judge before the judge is appointed as commissioner. Therefore, the government should not approach an individual judge either directly or indirectly until the Chief Justice has had a chance to consider the request and discuss it with the judge. A judge who is approached directly must not accept an appointment and must advise the Chief Justice that he has been approached.

(E) The Chief Justice should be given sufficient time to fully consider the response. Even if a request is deemed extremely urgent, the government must respect the need for time to properly consider the request.

(F) The Chief Justice may wish to consult other Chief Justices who have received similar requests in the past, as well as other judges including those with relevant prior experience. The Canadian Judicial Council may wish to consider forming a resource group of judges with prior experience who could be available on short notice to give advice.

2. CONSIDERATIONS FOR THE CHIEF JUSTICE

Several fundamental considerations arise for a Chief Justice who receives a request from government to appoint a judge to a commission of inquiry.

(A) It is important that the Chief Justice be satisfied that the work of the court will not be impaired if the judge accepts the appointment. This requires a realistic estimate of the likely duration of the inquiry. In appropriate circumstances, the Chief Justice should consider whether it is necessary to create an additional judicial position to ensure that the court can continue to discharge its responsibilities. If this is necessary, it is best done at the time the government request is received.

(B) If the governement requests a particular judge, it is equally important to determine if he or she is an appropriate choice. While recognizing that judges across the country possess numerous qualities and attributes, heading an inquiry may involve special circumstances that require paying attention to additional considerations. While all judges are presumed to be respected members of the judiciary who demonstrate fairness, civility and firmness, inquiries can demand other qualities as well. Robust health and abundant energy are needed to cope with the prolonged pressure. Significant management skills are needed to administer an effective work plan, personnel and budgets measured in millions of dollars. The judge must be able to work effectively and efficiently in the glare of publicity, in an atmosphere which may be quite different from an adversarial contest between litigants. If recommendations are called for, the judge should be comfortable with policy issues. If the government's request for a particular judge raises concerns for the Chief Justice, absent unusual circumstances, the Chief Justice should discuss them first with the judge and then with the government so that an appropriate appointment can be made. A sound choice is very important for the government, the judiciary, and the public.

(C) Finally, the Chief Justice and the judge should consider whether the subject matter of the proposed inquiry is of sufficient public importance and of such a nature as to warrant the involvement of a judge. In addition, the Chief Justice and the judge should consider whether the inquiry involves issues of such a politically partisan nature that the involvement of a judge would compromise the independence of the judiciary. In particular, the Chief Justice and the judge should consider whether the inquiry essentially involves investigating the conduct of government agencies or establishing if certain individuals have committed a crime or a civil wrong, and whether – if the inquiry requires a legally-trained commissioner – the court should feel obliged to appoint a judge or if a senior lawyer could perform the function equally well.

3. CONSIDERATIONS FOR THE CHIEF JUSTICE AND THE JUDGE

If the Chief Justice agrees to appoint a judge to a commission of inquiry and a particular judge is identified, the government will invite that judge to accept the appointment. At that point, a number of additional considerations arise. While recognizing that calling an inquiry and setting its terms of reference are matters for the executive branch of government, it is important to carefully consider both the governing legislation authorizing the inquiry and the draft Order in Council containing the terms of reference.

The governing legislation deserves particular attention. Historically, public inquiries legislation, whether federal or provincial, has imposed few constraints on the conduct of these inquiries. That approach has served Canada well. Commissions of inquiry have been allowed to conduct full and independent investigations into events and circumstances, often involving the activities of government itself, that have led to their establishment. This independence has been essential in maintaining public confidence in public inquiries and in those, including judges, who conduct them. While the executive branch may seek to impose constraints on an inquiry through particular terms in the Order in Council, if the governing legislation allows it, such constraints should be of particular concern for judicial independence.

Any constraints should be carefully examined to see if legislation that seeks increased accountability may, by doing so, make it politically easier for the executive branch to curtail the independent conduct of inquiries through terms in the Order in Council that may be required or permitted by that legislation.

The greater the constraints in the governing legislation and/or the Order in Council, the more care should be taken. Because of concerns for judicial independence, more constraints will undoubtedly mean more reluctance on the part of the Chief Justices to agree that judges be appointed to commissions of inquiry.

The following are examples of constraints that may be imposed in the governing legislation and/or the Order in Council and that would raise concerns for judicial independence:

- Where the legislation provides that the Order in Council establishing the inquiry must set a date for delivering the report, with no requirement to consult the judge conducting the inquiry and no mention of the possibility of extending the deadline.
- Where the legislation requires that the inquiry be conducted according to broad and undefined principles, which would make it possible for the executive branch to interfere based on its view of these principles and for any participant to request a judicial review.
- Where the legislation limits the power of the commission of inquiry to hold public hearings.
- Where the legislation does not allow the commission of inquiry to establish a budget based on the needs of the inquiry.

- Where the legislation allows the Minister to publish unfinished works of the commission of inquiry as if they had been published by the commission itself.
- Where the legislation requires the executive branch to assign roles and responsibilities to individual members of a commission of inquiry, if several members are appointed.

The draft Order in Council also deserves careful attention, particularly by the judge who will be conducting the inquiry. The judge – perhaps through the office of his or her Chief Justice – should feel free to suggest appropriate changes to the draft Order in Council before it is adopted. It may be useful to consult with other Chief Justices or the resource group referred to earlier. Even in the face of perceived urgency, taking the time to structure the inquiry properly is important for the government, the judiciary and the public interest.

(A) In considering the draft Order in Council, a judge and his or her Chief Justice should bear in mind that the mandate of the commission of inquiry is important. It should not be so broad and general that the inquiry cannot be done effectively. Nor should it exclude issues that the public will expect to be investigated, if the inquiry is to be full, independent and objective.

(B) If the government proposes that multiple commissioners sit with the judge, consideration should be given to whether having more than one commissioner will impair the judge's independence and fact finding ability.

(C) If the government proposes to limit the duration of the inquiry, this should be done at the beginning rather than during the inquiry. If a time limit is proposed, consideration should be given to whether the mandate can be properly discharged within that time, keeping in mind the government's need for expeditious policy recommendations and the usefulness of time limits in allowing the judge to proceed efficiently. Ultimately the judge will wish to be assured that the proposed time limit is realistic and will enable the commission to discharge its responsibilities in a timely, effective and orderly manner and in accordance with the public interest, and that, if necessary, it would be possible to extend the proposed time limit.

(D) If the government proposes that all or most of the inquiry be conducted in private, consideration should be given to whether doing so would have a negative impact on the public's confidence in the judge or the judiciary.

(E) If the commission of inquiry is charged with investigating a part of the government itself, consideration should be given to including in the Order in Council a clear and explicit commitment by the government to fully cooperate with the work of the commission.

(F) The judge must be assured of having sufficient administrative independence from government to allow the commission of inquiry to properly discharge its mandate. This should include a method of setting the budget for the inquiry that is satisfactory to both the government and the judge. The judge should exercise caution before agreeing to take on responsibility for funding provided to parties with standing. The judge should also have complete independence in selecting his or her staff, in particular the commission counsel and the commission Secretary or Executive Director.

(G) The judge must be assured that once the inquiry is established, the Order in Council will not be changed without consulting the judge and the Chief Justice.

(H) It must be clear to all from the beginning that judicial independence requires that once the commission of inquiry has submitted its report, the judge cannot engage in public debate about the inquiry or the report. Assuming such a partisan role could reflect adversely on judicial independence. The judge's findings and recommendations to government should speak for themselves.

(I) The Chief Justice and the judge should determine if there are other ongoing processes, including any criminal investigation relating to the subject matter of the inquiry, and if so, how those processes might affect the conduct of the inquiry.

(J) It is recognized that the appointment of a judge to a commission of inquiry is not incompatible with the judge's duties under the *Judges Act*. However, since the judge is not exercising normal judicial functions, the government must take steps to provide the judge with legal representation – possibly through the Office of the Commissioner for Federal Judicial Affairs – should that be necessary as a result of the judge serving as commissioner. In conducting an inquiry, a judge should always strive to attain the high standards described in *Ethical Principles for Judges*.

(K) The Canadian Judicial Council may establish a database of best practices and terms to be included in an Order in Council. This could address such subjects as budget independence, free choice of commission counsel, and full government cooperation. Such a data base could be easily consulted when a Chief Justice and a judge are considering a government request to appoint a judge to a commission of inquiry.

CONCLUSION

Public inquiries chaired by judges play a very valuable role in Canada. They do, however, present risks to the judiciary. The objective of these guidelines is to ensure that the judiciary can continue to serve the public interest in this important way when asked to do so, while at the same time maintaining public respect and confidence for the judicial office and the independence of the judiciary.