THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

March 17, 2010

Canadian Judicial Council
Ottawa, ON K1A 0W8

Attention: The Honourable Dennis O'Connor
Chair, Judicial Independence Committee

Dear Justice O'Connor:

Re: Protocol on the Appointment of Federally Appointed Judges to Commissions of Inquiry

Thank you for your letter of February 1, 2010. I am pleased to respond on behalf of the Canadian Bar Association to your request for comments on the draft Protocol on the Appointment of Federally Appointed Judges to Commissions of Inquiry (Protocol).

As the Supreme Court of Canada has stated, an independent judiciary is "the lifeblood of constitutionalism in democratic societies."[1] "Judicial independence serves not as an end in itself, but as a means to *safeguard our constitutional order and to maintain public confidence in the administration of justice*."[2] More recently, the Court explained:

> Independence [of the judiciary] is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process.[3]

Thus, as commented in one CBA report, "The principle of the independence of the judiciary does not exist to serve the judiciary or lawyers. It exists solely to serve the public."[4] The Canadian Judicial Council also recognized this principle in its *Ethical Principles for Judges.*[5]

We are aware of increasing concerns about how judicial involvement with commissions of inquiry has affected public perception of judicial independence in Canada. We share those concerns. The CBA's perspective on judges sitting on commissions of inquiry is expressed in its 1985 Committee

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1 *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70.

2 *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29.

3 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para 4.

4 *The Independence of Federal Administrative Tribunals and Agencies in Canada* (Ottawa: Canadian Bar Association, 1990) at 36.

5 (Ottawa: Canadian Judicial Council, 1998) at 8.

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report entitled, *The Independence of the Judiciary in Canada* (the de Grandpré Report). The de Grandpré Report indicates that, generally speaking, there are benefits to judges sitting on commissions of inquiry, including that they lend an aura of reliability and impartiality to the inquiry. However, justification as to why it is necessary for a judge to sit in the inquiry is required (in the words of the Report, it must be that "the nature of the matter under investigation makes the choice of a judge particularly appropriate"). This is due to the serious risk to judicial independence both for the individual judge and the bench generally, given the contentious issues often involved in commissions of inquiry.

In our view, adequate justification for involving a judge in a commission of inquiry, in the sense meant by the de Grandpré Report, requires adherence to the following principles:

- There are sufficient institutional and procedural safeguards within the commission structure that foster both the reality and public perception of judicial independence;
- There are appropriate ethical guidelines for judges specifically relating to their participation on commissions of inquiry;
- There is an independent assessment, separate from the executive and any particular judge named, that: (a) there is a particular benefit to having a judge as a commissioner (as opposed to another distinguished person who is legally trained or has specialized knowledge of the subject-matter); (b) the subject-matter of the inquiry does not pose any significant risk to judicial independence; and (c) the benefit to the public in having a judge preside over the inquiry outweighs any risk to judicial independence.

We believe the Protocol is generally consistent with these principles. It is appropriate that the government not approach any individual judge directly and that all requests be directed through the Chief Justice of the court from which the judge would come. This is not only so the Chief Justice may consider any impairment of the appointment on the work of the court (an important consideration for the timely administration of justice), but also to avoid the perception that government is "hand picking" a particular judge as commissioner to assure a certain outcome. As indicated in the Protocol, the Chief Justice would provide their own assessment of whether, if a particular judge is requested, the judge is an appropriate choice.

We suggest the Protocol could be strengthened in the following ways:

- The CJC might establish a committee to advise Chief Justices on all requests for a federally-appointed judge to hear a public inquiry.

  The Protocol would require the Chief Justice to consult this committee and receive its opinion prior to deciding whether to agree to the appointment.[6] The committee would apply the principles outlined above in providing its opinion, which would not be binding on the Chief Justice. Currently, the Protocol states only that the Chief Justice "may wish" to consult other Chief Justices, and the CJC "may wish to consider identifying a resource group of members of the judiciary with prior experience who could be available on short notice to give advice." Given the larger implications for the independence of the Canadian judiciary as a whole, consultation with the CJC, through a committee established specifically for this purpose, should be considered as a requirement within the Protocol.

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[6] This is similar to the recommendation of Professor Adam Dodek in his chapter, "Judicial Independence as a Public Policy Instrument," forthcoming in the book *The Future of Judicial Independence,* edited by Adam Dodek & Lorne Sossin (Toronto: University of Toronto Press, forthcoming). Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338285, at 48.

- In accordance with the third principle above, the Protocol might explicitly state that if an appointment to a commission does not appropriately balance the public interest in involving a judge with the risk to judicial independence, then the Chief Justice should not agree to the appointment. We recommend that the language could be strengthened from the current statement in the Protocol regarding the factors the Chief Justice "should consider" in this balancing.[7]
- Under point three, "Considerations for the Chief Justice and the Judge," the draft Order-in-Council should be submitted to the CJC advisory committee for consideration in providing its opinion. Further, we recommend replacing the language of "consideration should be given" in clauses (B) and (D) in favour of a statement that the Chief Justice and judge should be assured that the proposed process (including any proposal that non-judges sit as commissioners along with the judge, and that the inquiry be conducted in private) would not have a negative effect on judicial independence.
- In addition, the Protocol might include under point three, "Considerations for the Chief Justice and the Judge," a statement that where an individual judge declines an appointment as a commissioner, their reasons for so doing shall be held in strict confidence by their Chief Justice and not disclosed to the government.

We agree wholeheartedly with the addition in the Protocol that the government must agree, before the commission commences, to provide any legal representation for the judge arising out of their work as commissioner. Particularly where the commission's recommendations are critical of the government, it is important that legal protection for the integrity of the process not depend on government discretion, nor should a judge be put in the position of having to speak publicly to defend the commission's work.

Finally, the CJC may wish to consider, in light of the new Protocol, reviewing its *Ethical Principles for Judges* to determine whether there should be greater details regarding the situation of judges acting as inquiry commissioners (e.g. commentary D regarding "Political Activity" under Chapter 6, "Impartiality"). Greater specificity in the *Ethical Principles* would recognize the unique (but increasingly common) situation of judges who are performing public service outside their judicial role by sitting on commissions of inquiry, and in turn provide greater guidance to judges on how to navigate the risks to judicial independence posed by this endeavour.

Once again, thank you for the opportunity to comment on the Protocol. We hope that our suggestions are helpful, and look forward to receiving the final version once passed by the CJC.

Yours truly,

(Original signed by D. Kevin Carroll)

D. Kevin Carroll, Q.C., L.S.M.

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7 Under point 2 of the Protocol, "Considerations for the Chief Justice."