



Debate grows over whether sitting judges should accept inquiry appointments

Janice Tibbetts
Canwest News Service



Sunday, November 02, 2008

OTTAWA - An Indian residential schools probe has deteriorated into a mess after the commissioner quit.

The judge who led the federal sponsorship inquiry received a sharp rebuke from the Federal Court. And a public inquiry into an alleged pedophile ring in eastern Ontario has been ordered to a halt because it has dragged on too long.

Canada's passion for public probes has taken a beating in recent months, reviving a dormant debate over whether sitting judges should accept inquiry appointments, particularly when they risk being dragged into the political realm, or relinquish control over the process and jeopardize their independence.

"There are clearly examples, with the wisdom of hindsight, it might have been better if the judge had simply said no," said Richard Scott, Manitoba chief justice and head of the conduct committee for the Canadian Judicial Council.

The recent resignation of Justice Harry LaForme as head of the Truth and Reconciliation Commission on abuse at Indian residential schools should serve as a wake-up call for judges to think twice before agreeing to take part in government-sponsored probes, say legal analysts.

LaForme quit suddenly after citing "incurable structural defects" and the "paralyzing conduct" of the other two commissioners, whom he denounced for not respecting his authority. He also expressed fear last summer the commission was too closely tied to government and that the other commissioners were influenced by the Assembly of First Nations, an accusation the group, which represents Indian chiefs, denies.

Scott, while refusing to cite specific examples of inquiries gone wrong, hinted LaForme would have been better off to decline the five-year appointment, a position he accepted six months ago that put him on leave from the Ontario Court of Appeal.

"We need to be so careful about whether we say yes or no," said Scott. "It's a little hard to back away and say 'Gee, the heat's a little too hot in the kitchen, I think I'll leave when you're six months or a year into the process.' "

LaForme's departure came only months after a Federal Court judge gave Justice John Gomery a stern dressing down, ruling he was biased against former prime minister Jean Chretien in a report on the federal sponsorship probe in Quebec. Gomery retired almost two years after he issued his November

2005 report.

Adam Dodek, a University of Ottawa law professor, said the sponsorship inquiry, called to probe misspent millions in federal money earmarked to raise the federal profile in Quebec, was a prime example of the type of inquiries that sitting judges should avoid.

"The problem I have is there is this idea that governments use judges to cast a cloak of independence and depoliticize hot political issue," said Dodek. Sometimes a judge pulls it off . . . and sometimes a judge makes it worse and I think that's Judge Gomery."

In Canada, almost all public inquiries are chaired by sitting judges, unlike Britain, the U.S., and Australia. In Australia's Victoria state, for instance, judges refuse to serve on the grounds it is not their job and they must avoid issues that might later come before them in court.

It is tradition in Canada for judges, with their reputation for independence and impartiality, to head commissions because the job is often closely aligned to what they do on bench - hearing evidence and drawing conclusions based on testimony.

Many judges accept appointments because they are public servants and they feel a duty to serve, said Scott, adding there are plenty of examples of successful inquiries where the judge's findings have made a significant contribution to public policy.

The gold standards include the Walkerton inquiry into tainted water, led by Justice Dennis O'Connor, and the recently concluded Goudge inquiry into Ontario's scandal-plagued pediatric forensic pathology system.

Another ongoing inquiry, however, has been marked by disarray and delay - Justice Normand Glaude's probe into an alleged pedophile ring in Cornwall, Ont. The Ontario government recently ordered the inquiry to shut down in the new year and told Glaude to produce a report by July 2009.

There is also a highly charged political inquiry on the horizon, to be led by Justice Jeff Oliphant of the Manitoba Court of Queen's Bench, who will probe business dealings between former prime minister Brian Mulroney and German-Canadian businessman Karlheinz Schreiber.

Dodek said the Mulroney-Schreiber inquiry risks disintegrating into a partisan affair and that Oliphant should have considered giving the appointment a pass.

A Canadian Judicial Council protocol requires judges to consider whether the inquiry is "essentially partisan in nature" before accepting an appointment.

"The closer you get into getting into the political arena, the more cautious judges should be," warned Scott.

Retired judges, on the other hand, are a natural choice to lead inquiries and commissions because they do not have to return to the bench afterwards, he said.

Lorne Sossin, a law professor at University of Toronto, said that the council, comprised of Canada's chief justices, should spell out more clearly its guidelines.

"The problem is it's often in hindsight that we look back and say that inquiry was just partisan," said

Sossin.

There should be a checklist of sorts to ensure judicial independence and a credible inquiry, he said. The list could include things such as who controls the hiring of commission staff and how the inquiry's terms of reference are set.

"Sometimes these things are put together in such a hurry and in such a political firestorm that people aren't thinking as clear-headedly as they should," Sossin said.

© Canwest News Service 2008

CLOSE WINDOW

Copyright © 2008 CanWest Interactive, a division of CanWest MediaWorks Publications, Inc. All rights reserved.
CanWest Interactive, a division of CanWest MediaWorks Publications, Inc. All rights reserved.