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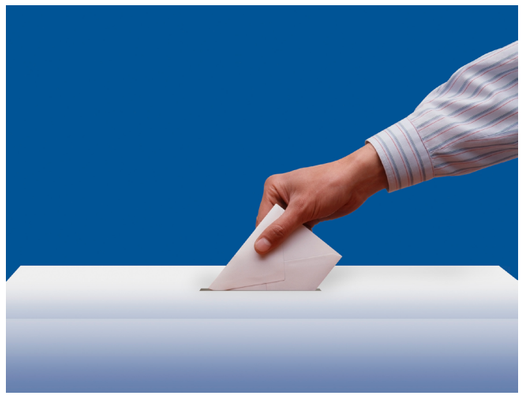
INQUIRY INTO FOREIGN INTERFERENCE WITH FEDERAL ELECTIONS GIVES STANDING TO 22 GROUPS, INDIVIDUALS

By Cristin Schmitz, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Justice Marie-Josée Hogue, the Quebec Court of Appeal judge who heads the commission of inquiry into foreign interference in federal electoral processes and democratic institutions, has green-lit 22 groups and individuals to participate as parties or interveners in the public inquiry, disclosing she also expects to issue a decision soon on requests for funding for lawyers applied for by some of those who were granted standing.



According to the commission of inquiry launched last September, it received 55 standing applications (four were later withdrawn) from citizens, associations, organizations, academics, politicians and political parties, of which 22 were granted standing, either as a party or intervener in the factual inquiry and/or standing in the policy phase of the inquiry.

Party status was granted to nine persons or entities: the government of Canada; the Office of the Commissioner of Canada Elections; Liberal MP Han Dong; former Ontario cabinet minister, Michael Chan; a media coalition comprising CBC, CTV, Global, TVA, QMI, *Toronto Star* and *La Presse*, and separately the Centre for Free Expression (the latter two groups' participation as parties is limited to special hearings to be held that will identify the challenges, limitations and potential adverse impacts associated with the disclosure to the public of classified national security information and intelligence); the "Human Rights Coalition" comprising seven groups working for the rights of diaspora communities that are viewed as particularly vulnerable to transnational repression, including the Uyghur Rights Advocacy Project, the Falun Gong Human Rights Group and Canada-Hong Kong Link; the Russian Canadian Democratic Alliance; and the Ukrainian Canadian Congress.

Intervener standing was granted to other politicians, political parties, diaspora groups and non-governmental/civil society groups, including Democracy Watch; the Raoul Wallenberg Centre for Human Rights; Sen. Yuen Pau Woo; former federal Conservative leader Erin O'Toole; and (separately) the federal Conservative and NDP parties.

"I am conscious that giving standing to a political party in a public inquiry should be done only after careful consideration and with the appropriate safeguards to ensure the inquiry does not become a platform for partisan talking points, grandstanding or scorekeeping," commissioner Hogue wrote in her 71-page standing **decision** issued Dec. 4.

"I will not permit the inquiry to become a platform for partisan debate," Justice Hogue said, admonishing that she can revoke a grant of standing "and will not hesitate to do so in appropriate circumstances."

"I hope that all the applicants concerned will cooperate so that the process will be efficient and allows as many people as possible to express their views, which I believe is in the public interest," she wrote.

Justice Hogue pointed out that those without standing or an opportunity to testify can still communicate their points of view and any relevant information to the inquiry during the

> “The primary purpose of these hearings is to foster transparency and enhance public awareness and understanding.”

commission’s public activities and information-gathering, which include a planned public consultation process.

Moreover, during the public hearings to be carried out at the start of the commission’s mandate to address questions about the disclosure to the public of classified national security information and intelligence, the commissioner will hear from a range of stakeholders, Justice Hogue remarked.

“The primary purpose of these hearings is to foster transparency and enhance public awareness and understanding,” she explained. “These hearings will also inform my general approach when I receive subsequent requests for confidentiality measures.”

Among those Justice Hogue declined to grant standing were five climate activists, including Green Party Leader Elizabeth May and Environmental Defence Canada, who sought to aid the commission in its inquiry into election interference by “non-state actors.”

“These applicants have interpreted this portion of the mandate as including foreign-owned or foreign-controlled oil and gas companies operating in Canada and carrying on political activities such as advertising, lobbying, and donating to political candidates,” Justice Hogue observed. “They wish to contribute to the commission’s work by presenting evidence of these companies’ political activities and their attempt to influence election outcomes. They have all applied for standing in both the factual and policy phases of the inquiry.”

Justice Hogue concluded that “the activities that these applicants describe, in my view, fall outside of the scope of my mandate.”

“Advertising spending, lobbying, and donating to political candidates in swing ridings are lawful, regulated political activities,” she remarked. “I accept that there may be a real question as to whether we should allow foreign-owned or foreign-controlled companies to take part in these political activities and, if not, how to prevent it. But those are policy questions that go beyond the scope of my mandate.”

She determined that the commission’s terms of reference, read as a whole, suggest that “non-state actors” under the commission’s mandate should be limited to non-governmental entities that are directed by, or effectively acting as proxies for, a foreign state.

If the commission were to obtain information, during its investigations, that one or more oil and gas companies are engaged in clandestine, deceptive or threatening activities in concert with foreign states, or are directed or effectively acting as proxies for foreign states, the commissioner said she could revisit “whether it is appropriate for one or more of the above-noted applicants to participate in the inquiry.”

Justice Hogue noted she hopes to release “soon” her decision on requests from some of those who were granted standing asking her to recommend to the clerk of the federal Privy Council that they receive funding to participate in the inquiry.

Those who requested funding are: Chan, O’Toole, the Centre for Free Expression, Democracy Watch, Iranian Justice Collective, Justice for All Canada, the Human Rights Coalition, the Russian Canadian Democratic Alliance, the Chinese Canadian Concern Group and the Pillar Society.

The federal government announced the Foreign Interference Commission Sept. 7, 2023, in response to concerns and issues raised about foreign interference in the 2019 and 2021 federal elections.

The commission of inquiry will, among other things: examine the flow of information within the federal government in relation to foreign interference issues; evaluate the actions taken in response; assess the federal government's capacity to detect, deter and counter foreign interference; and make recommendations.

In a Dec. 4 press release, the commission said it will complete its interim report due by Feb. 29, 2024, and deliver its final report by Dec. 31, 2024.

DEAF SIGN LANGUAGE USERS AND CRIMINAL JUSTICE SYSTEM: A HUMAN RIGHTS, SOCIAL JUSTICE ISSUE

By Tracey Bone, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Clear two-way communication is the foundation for any effective relationship. Yet many Deaf or hard of hearing people involved in the criminal justice system, whose first language is Sign Language, are denied their basic rights to communication due to misunderstanding and inadequate communication accommodations.

The most appropriate conduit for clear communication between a Deaf person whose first language is Sign Language and a hearing person whose first language is spoken English is through a certified English/Sign Language interpreter.

The Canadian Association of the Deaf (CAD) clarifies that people who are Deaf ("big-D – Deaf"), hard-of-hearing (formerly referred to as "hearing impaired", the term is considered offensive and should be avoided), and late-deafened are distinct groups of people. It is imperative that professionals understand the identity of their client, as each group has different communication needs.

In general, people who are hard of hearing ("small-d" deaf) have little or no functional hearing, view their hearing loss as a disability, and communicate through spoken English using hearing assistive devices. Those who are Deaf are individuals who are medically deaf or hard of hearing but who view their deafness as part of their identity, not a disability. They identify as a member of the collectivist Deaf community, with a shared culture, values, society, and a common language, namely a signed language.

Around the world there are approximately **300** different Sign Languages, all visual languages with unique rules of grammar, syntax, and word order (NAD, 2024). In Canada, the ***Accessible Canada Act*** (Bill C-81) recognizes American Sign Language (ASL), Quebec Sign Language, known in French as *Langue des signes du Quebec* (LSQ), and Indigenous Sign Languages as the primary languages for communication with Deaf persons in Canada.

The most effective conduit of communication between a Deaf Sign Language user and a spoken English-language user is through a certified English/Sign Language Interpreter. **The Canadian Association of Sign Languages Interpreters** and its members "uphold the highest standards of professional integrity, competence, and ethics."

They strive to ensure all parties in the conversation receive full access to the conversation. It is not sufficient or appropriate to invite a family member, friend or other inmate to serve as an informal interpreter for any Sign Language user at any stage of the criminal justice process, from engagement with law enforcement, in prisons, with one's lawyer, in courtrooms, during incarceration and upon conditional release. Most family members, friends and fellow inmates lack the high-quality skills necessary to ensure the language rights of the Deaf person are met. More importantly, to engage the services of a family member, friend or inmate violates the confidentiality of communication between professional and client.

The youngest sister of a Deaf adult, I learned Sign Language initially through my brother, and later through formal training. Conversationally fluent in ASL, I engaged with Deaf offenders directly in Sign Language during my 28-year employ with the Correctional Service of Canada. In one case, I supervised a Deaf offender from an isolated community.

The only Deaf person in the community, with no opportunity for employment and little opportunity for social engagement, he developed a significant alcohol problem. Most of his 45-plus convictions were offences against policing authorities who approached him from behind when attempting to intervene in his erratic, alcohol-fueled behaviour in the community. His final sentence was a federal one.

As an ASL interpreter was not made available during incarceration, he was not able to attend programming to reduce his risk of reoffending. Denied all forms of earned release, he was released on statutory release and assigned to the writer for supervision.

While his release was not without challenges, he and I were able to communicate in his first language of ASL and resolve issues before they resulted in problematic or criminal behaviour. Successful two-way communication allowed him to successfully complete his sentence under supervision.

In addition to a certified ASL Interpreter, additional factors are necessary to facilitate communication. This includes room layout (i.e., the ASL interpreter sits beside the speaking person so that the Deaf person can view both the ASL interpreter and speaker at the same time); and adequate lighting (i.e., the room should be sufficiently lit but not overly bright as this can cause eye strain).

A Deaf person with low literacy in Sign Language may also require a Deaf interpreter (DI). The DI adjusts the communication of the ASL English interpreter to the skill level of that Deaf person, facilitating effective communication across skill level.

> “Legal professionals throughout the criminal justice system have a responsibility to seek training as necessary and incorporate effective strategies to ensure Deaf and hard of hearing offenders have access to communication that meet their basic human rights and facilitates social justice.”

In all cases when an interpreter is involved during legal matters, the professional should direct their conversation to the Deaf client themself, not the interpreter. To direct the conversation to the Interpreter marginalizes the Deaf person and excludes them from the conversation.

Failure to ensure effective communication between a hearing and Deaf Sign Language user violates that Deaf person’s basic rights to communication. In 1998, I explored the barriers for Deaf offenders in the hearing criminal justice system. In 2018, a report for Justice Canada found identical barriers and gaps.

In 2024, these barriers continue to exist. Deaf and hard of hearing offenders have constitutional rights to access. Legal professionals throughout the criminal justice system have a responsibility to seek training as necessary and incorporate effective strategies to ensure Deaf and hard of hearing offenders have access to communication that meet their basic human rights and facilitates social justice.

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VIRANI FINDS LIKELY MISCARRIAGE OF JUSTICE IN 40-YEAR-OLD N.B. MURDER CONVICTIONS; ORDERS NEW TRIAL

By Cristin Schmitz, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Four years after asking that their second-degree murder convictions be examined under the conviction review provisions of the *Criminal Code*, two New Brunswick men found guilty of murder 40 years ago successfully persuaded, with the help of Innocence Canada, the federal justice minister to reopen their case.

After what Justice Minister Arif Virani said was an "extensive" and "thorough" review of the pair's December 2019 applications, he announced Dec. 22, 2023 that he ordered a new trial under s. 696.1 of the *Criminal Code* for Robert Mailman and Walter Gillespie of Saint John, N.B. who are out of custody on parole, but who were sentenced in 1984 to life in prison, without parole eligibility for 18 years.

According to the Canadian Press, 75-year-old Robert Mailman, who is ill with cancer, and Walter Gillespie (about age 80) were scheduled to appear in the New Brunswick Court of King's Bench on Jan. 4, in Saint John, represented by lawyers working with Innocence Canada, an organization that has successfully fought to overturn many wrongful convictions.

(As of Dec. 27, 2023, The Canadian Registry of Wrongful Convictions lists on its website 89 publicly documented cases in Canada where a criminal conviction was overturned based on new matters of significance related to guilt not considered when the accused was convicted or pled guilty.)

Mailman and Gillespie have always insisted that they did not kill a local plumber in Saint John who was beaten to death, drenched with gasoline and set alight in 1983.

Working for many years to help the pair clear their names, Innocence Canada applied for conviction review on their behalf, based on allegations that included police misconduct and false testimony from witnesses in the investigation, which the pair said amounts to a miscarriage of justice.

Virani, a human rights lawyer, agreed the convictions should be revisited.

"There is a reasonable basis to conclude that a miscarriage of justice likely occurred" as a result of "the identification of new and significant information that was not submitted to the courts" at the time of Mailman and Gillespie's trials or at the time of their unsuccessful appeals to the New Brunswick Court of Appeal in 1988, "calling into question the overall fairness of the process," the Department of Justice (DOJ) said in a press release.

Gillespie's leave to appeal application to the Supreme Court of Canada was dismissed in 1994.

Section 696.1 of the *Criminal Code* enables a person convicted of an offence, and who has exhausted all rights of appeal, to apply to the federal justice minister to review the conviction.

Before ordering a new trial or appeal, the federal justice minister must be satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

> "Innocence Canada applied for conviction review on their behalf, based on allegations that included police misconduct and false testimony from witnesses in the investigation, which the pair said amounts to a miscarriage of justice."

"This determination involves a close examination of information initially submitted in support of the application, followed by an in-depth investigation," the DOJ said. "A key consideration is whether the application is supported by new matters of significance, such as new information that has surfaced since the trial and appeal."

The group within the DOJ dedicated to criminal conviction reviews investigates applications on behalf of the justice minister; however, the process usually takes years.

A Liberal government bill (C-40), introduced Feb. 16, 2023 and currently before the House of Commons justice committee, aims to greatly speed up reviews of alleged miscarriages of justice. The proposed *Miscarriage of Justice Review Commission Act* (David and Joyce Milgaard's Law) would amend the *Criminal Code* to establish an independent commission to review, investigate and decide which criminal cases should be returned to the justice system due to a potential miscarriage of justice.

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