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律政司
國際法律科
香港金鐘道66號
金鐘道政府合署高座47樓
圖文傳真: 852-2877 2130
電郵地址:ianwingfield@doj.gov.hk
網站:http://www.doj.gov.hk

DEPARTMENT OF JUSTICE
International Law Division
47/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong
Fax: 852-2877 2130
E-mail Address : ianwingfield@doj.gov.hk
Web Site : http://www.doj.gov.hk

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電話號碼 Tel. No.: 2867 4343

7 April 2006

Hon Ronny Tong, QC SC
Legislative Councillor
Room 601, Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Ronny,

Re Covert Surveillance

Thank you for your letter dated 6 March 2006 with the authorities mentioned by you at the Security Panel meeting on 2 March 2006.

As you will appreciate, in drafting the Interception of Communications and Surveillance Bill, the Government has accepted that the approving authority for interception and more intrusive covert surveillance should be judicial rather than executive. In making its proposals the Government is concerned to ensure that the independence of the Judiciary is not compromised and that the essential conditions for judicial independence are met.

The Government does not dispute the principles laid down in the Canadian cases of *R* v. *Valente* and *R* v. *Beauregard* but, as you have noted in relation to the third case to which you have referred me, the application of those principles must have regard to the particular context. We believe that the proposal of the Interception of Communications and Surveillance Bill for the appointment by the Chief Executive, on recommendation of the Chief Executive, a panel of Court of First Instance judges to consider applications for interception and more intrusive surveillance operations is consistent with the principles so applied.

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We note from paragraph 4.1 of its Report on Covert Surveillance that the Law Reform Commission recommends a similar arrangement.

Security of tenure

In *R* v. *Valente* the challenge was based on a submission that a judge of the Ontario provincial court was not an independent tribunal within the meaning of section 11(d) of the Canadian Charter. Section 11(d) gives any person charged with an offence the right to be presumed innocent until proved guilty according to law, in a fair and public hearing by an independent and impartial tribunal. In paragraph 31 of the judgment of the court, Le Dain J stated that –

> "The essence of security of tenure for purposes of section 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."

Under the Bill, appointment as a panel judge does not in any way affect the tenure of a judge of the Court of First Instance. Appointment to the panel is on the recommendation of the Chief Justice and the judge may only be removed from the panel for good cause on the Chief Justice's recommendation.

The provision allowing a panel judge to be re-appointed is to give the Chief Justice flexibility in the allocation of judicial work. An eligible judge will remain eligible despite having previously served as a panel judge. Any re-appointment would still be on the recommendation of the Chief Justice.

The context is clearly very different from that in relation to the appointment of lay members to an employment tribunal in the UK which was described in Scanfuture (UK) Ltd. Lay members appointed to the tribunal do not otherwise hold judicial office so both their security of tenure and their remuneration is dependent upon continuing in office.

Financial security

A panel judge will receive no additional remuneration for his service as such, but will continue to be entitled to all salary, benefits and conditions of service from his appointment as a judge of the Court of First Instance. His financial security will therefore be unaffected by whether or not he is re-appointed as a panel judge.

Institutional independence

In paragraph 47 of the Supreme Court of Canada's judgment in *R* v. *Valente* Le Dain J noted that judicial independence for the purposes of section 11(d) of the Canadian Charter required institutional independence with respect to matters of administration bearing directly on the exercise of judicial function but stated (at paragraph 52) that although the increase in the measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may be highly desirable, it cannot be regarded as essential for the purposes of section 11(d) of the Charter.

Under the Bill, a panel judge will not be exercising an adjudicative function so the test for the purposes of section 11(d) of the Canadian Charter may not be entirely relevant. Nonetheless, once a panel judge has been appointed, the executive authorities have no involvement in the allocation of his duties as a panel judge. The procedures for consideration of applications by panel judges are set out in Schedule 2 to the Bill and the application and all other documents relating to the performance of a panel judge are to be kept subject to his order. The provisions ensure that the institutional independence of the panel judges is safeguarded and that they can exercise their functions free from any interference by the executive.

It is not suggested in the three cases that institutional independence is compromised by appointment to judicial office being made by the executive. That is the common practice in almost all common law jurisdictions and reflects the provisions of the Basic Law and all Hong Kong statutes governing the appointment of judges and judicial officers both on first appointment

and on subsequent appointments within the Judiciary.

Having considered the cases carefully, I remain of the view that the present proposal for the appointment of a panel of Court of First Instance judges for the purposes of the Bill is consistent with the essential conditions for judicial independence referred to in the cases and does not in any way compromise the independence of the Judiciary or the rule of law.

Yours sincerely,

IAN

(Ian Wingfield)
Law Officer (International Law)