



Personal and Confidential

CJC File: 22-0116

June 23, 2022

Ms. Leslie J. Smith

By email: leslie@lesliesmithlaw.com

Dear Ms. Smith et al.:

I am responding to your correspondence of May 16, 2022, in which you make a complaint against the Right Honourable Richard Wagner, Chief Justice of the Supreme Court of Canada.

The mandate of the Canadian Judicial Council (Council) in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations where a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

Your complaint relates to the “Truck Convoy 2022” and a related article published in *Le Devoir* on April 9, 2022 where some comments were attributed to Chief Justice Wagner. Based on what you read in the article, you allege reasonable apprehension of bias against Chief Justice Wagner. Specifically, you write that:

- Within the context of four (4) Notices of Application filed with the Federal Court, all matters related to the Truck Convoy, including but not limited to its objectives, methods, processes and the actions of the participants (referred to in the *Le Devoir* article), will be reviewed to determine whether the invocation of the *Emergencies Act* was justified in the circumstances.
- It is conceivable that one or more of those Applications may eventually be heard by the Supreme Court of Canada, before the Chief Justice, and that the Chief Justice's

views expressed in *Le Devoir* article fit within the legal definition of a reasonable apprehension of bias and an appearance of partiality.

- The Chief Justice's remarks will undermine Canadians' confidence in the independence of the Supreme Court of Canada in particular, and in the judiciary, generally. The confidence of the litigants in the capacity of the judicial system to impartially and fairly determine the issues raised in the four (4) Notices of Application filed, plus any other Notices of Applications to be filed, will be undermined.

Your allegations are based on: 1) four Notices of Applications and unsupported allegations in relation to what you deem those Notices to be about; 2) their hypothetical outcome before a trial court and an appellate court; and 3) the hypothetical scenario that the matter might end up before the Supreme Court of Canada, in which case you allege that the attributed comments to Chief Justice Wagner in a news article demonstrate apprehension of bias.

You raise a hypothetical scenario and base the attributed comments in the news article as evidence of impartiality and apprehension of bias. In the event one or more of those applications ends up before the Supreme Court of Canada, Chief Justice Wagner may not participate in the hearing of any of those applications; indeed, on appeals, the minimum number of judges is five, though more often seven or nine judges hear a case. You do not specify in your complaint if you are involved in those four applications you mention. However, in the event one or more of those applications were to be heard before the Supreme Court, it would then be up to the parties that have standing before the Court to raise any concerns of bias, and it would be during the proceedings to rule on said objection.

Continuing with this hypothetical scenario, in the event of an application for recusal before the court from a party, a judge can recuse himself/herself if they believe it is best to do so. Recusal, however, is not automatic or absolute. There are circumstances where recusal is not appropriate, such as if the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favor of recusal. If the potential for conflict of interest exists, the matter must be reviewed by the judge and it is for the judge to decide whether recusal is appropriate. Such determination does not fall within the mandate of the Council.

With regard to your allegation of reasonable apprehension of bias and impartiality, you cite the 2021 *Ethical Principles for Judges*. The *Ethical Principles* provide that there are limited circumstances in which a judge may make public statements and properly speak out about a

matter that is publicly controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. The *Ethical Principles* also recognize that Chief Justices have particular responsibilities in this regard (*Ethical Principles for Judges*, 5.B.6 page 44). We note that the news article that is the base of your complaint alleges that parties to the convoy had blocked access to the Supreme Court. In the circumstances, and as provided by the *Ethical Principles*, it was Chief Justice's Wagner responsibility to speak on the matter, despite the potential nature of the matter to be controversial, which directly affected the operation of the Court.

It is important to note that the Supreme Court of Canada has indicated more than once that impartiality is the fundamental qualification of a judge and a core attribute of the judiciary. It is key to our judicial process, and it is presumed. This presumption of impartiality carries considerable weight. When acting in the course of judicial duties, a judge is presumed, unless the contrary is demonstrated, to have acted in good faith and with due and proper consideration of the issues before him or her. As noted by the Supreme Court in *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259: "...A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias...". Council's publication *Ethical Principles for Judges* (2021) provide that:

...The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person...

As a last point, you submit that the alleged Chief Justice's remarks will undermine Canadians' confidence in the independence of the Supreme Court of Canada in particular, and in the judiciary, generally. You further submit that the confidence of the litigants in the capacity of the judicial system to impartially and fairly determine the issues raised in the four (4) Notices of Application filed, plus any other Notices of Applications to be filed, will be undermined. The question is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude, *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 at 394; *Hennessey v. Canada*, 2016 FCA 180, 484 N.R. 77 at paras.15-18. It has been established by the case law that a mere disagreement with a judge does not give rise to a valid claim of bias, which needs cogent evidence in support of such claim: *Bergey*

v. Canada (Attorney General), 2017 FCA 30 at para. 65; *Samson v. Canada (Attorney General)*, 2021 FCA 212 at para. 4. A subjective appreciation of impartiality on a hypothetical matter that is rooted in unsupported claims related to comments attributed in a news article does not meet the threshold of the reasonable apprehension of bias test. In any event, as mentioned previously, it is a Chief Justice's responsibility to speak out, even on a controversial matter, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. A Chief Justice is unlike a puisne judge due to his/her day-to-day responsibilities for the administration of the court. It is important to note that public confidence is at higher risk when public and dogmatic motivated attacks against the judiciary are launched without merit or for improper purposes.

The Council's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* provide an early screening process of complaints that falls under my responsibility.

Considering that your complaint is unsupported, is largely based on a hypothetical scenario, is manifestly without substance, and does not concern judicial conduct, it does not warrant further consideration by the Council.

I trust this information is useful.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jacqueline Corado', with a stylized flourish at the end.

Jacqueline Corado
Acting Executive Director