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Judicial Council
Conseil canadien
de la magistrature

Ottawa, Ontario K1A 0W8

Personal and Confidential

CJC File: 13-0326

10 December 2013

Mr Alain Olivier
4493, rue De Laroche
Montréal, QC H2J 3J2

Dear Mr Olivier:

This letter is in response to your letter of complaint involving Justice Richard Wagner, forwarded to the Right Honourable Beverly McLachlin, as Chair of the Canadian Judicial Council, on 3 October 2013.

In accordance with the *Complaints Procedures* of the Council, I referred your letter to the Honourable Neil C. Wittmann, Chief Justice of Alberta and Vice-Chairperson of the Judicial Conduct Committee of the Council. After reviewing your complaint and the accompanying materials, Chief Justice Wittmann has directed me to provide you with this response.

The mandate of the Council in matters of judicial conduct is to decide whether or not to recommend that a judge be removed from office in certain specific circumstances. The reasons for removal are set out in the *Judges Act* and address cases where a judge has become incapacitated or disabled from performing the duties of a judge. This can be as the result of age or infirmity, misconduct, a failure to execute the duties of the position or being in a position incompatible with the duties of a judge.

It is important to note that the Council has no authority to review a judicial decision for the purpose of determining its correctness. Nor can the Council change or rescind a judgment. In particular, the conclusions and findings of a judge, including the judge's determination on the procedures to be followed, the findings of the judge on credibility or other issues of evidence, or the conclusions of judges on issues of law, fall under the judge's traditional decision-making responsibility and do not fall within the mandate of the Council to review. If there exists a disagreement with such a judicial decision or

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regarding the exercise of judicial discretion, the appropriate recourse lies with an appellate court.

Your correspondence complains that Justice Wagner on his own volition agreed to be placed in a situation of conflict of interest in the hearing of an appeal in a matter in which you were involved. Your correspondence and the accompanying materials detail the circumstances of concern to you.

Your materials indicate that you had initiated an action in the Superior Court of Québec requesting $47,400,000.00 in damages, against a number of defendants including the Attorney General of Canada, members of the Royal Canadian Mounted Police (RCMP) involved in a police operation code-named Operation Deception, and a police informer involved in that operation. Your action was heard by Justice Michel A. Caron of the Québec Superior Court in September, October and December of 2007. Justice Caron rendered a decision in the matter on 8 January 2008.

Your appeal of the decision of Justice Caron was heard by a panel of the Québec Court of Appeal comprised of Justices François Pelletier, Richard Wagner, and Claude C. Gagnon, (ad hoc), in September 2011, and February 2012. The Court of Appeal decision was issued on 21 January 2013.

Leave to appeal the decision of the Court of Appeal was sought from the Supreme Court of Canada on 22 March 2013. The application for leave was dismissed by the Supreme Court on 11 July 2013. The materials which you filed with the Council together with your complaint indicate that you have filed a further Motion for Reconsideration of Application for Leave to Appeal and Motion for Extension of time before the Supreme Court in respect of the matter.

While your complaint challenges the decision of Justice Caron and that of the Court of Appeal, suggesting that they may have closed their eyes and completely set aside the evidence adduced before them, it appears that you are still pursuing an appeal in respect of those issues. Your disagreement with the conclusions of the trial court and the Court of Appeal on issues of credibility and evidence and regarding issues of law as detailed in your complaint and the accompanying materials, is obvious. However, as previously indicated, issues such as the assessment of credibility and evidence do not fall within the mandate of the Judicial Council regarding judicial conduct and are properly subject to

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appeal in the case of disagreement with the decisions taken. Since the decisions of concern have in fact been appealed, Chief Justice Wittmann observes, they will not receive further consideration here.

Your complaint does raise two issues regarding which you allege there was a conflict of interest.

Possible Conflict of Interest or Apprehended Bias on the part of Justice Wagner

The first of these is the concern which you raise concerning possible bias or a possible conflict of interest on the part of Justice Wagner in failing to recuse on his own volition because of his prior association with the judge whose decision was under appeal in the matter, Justice Caron. You indicate that both Justice Wagner and Justice Caron were former associates with the law firm Lavery, DeBilly, prior to their successive nominations to the Superior Court. You assert that you, therefore, had reasonable cause to fear that as a judge of the Court of Appeal reviewing what a former and long time associate had decided, Justice Wagner would not be impartial or would appear not to be impartial.

You indicate that you learned about the above possible bias or conflict of interest on 4 September 2011, upon being advised of the constitution of the panel to hear your appeal. On 7 September 2011, you indicate, that through your attorneys, you brought the issue of a possible bias or conflict of interest to the attention of the Honourable Chamberland, then acting as interim Chief Justice of the Québec Court of Appeal. You indicate that at that time it was suggested that a formal motion requesting recusal be filed. This, you indicate was not done, for reasons which you recount were related to possible delay, lack of knowledge of the now alleged closeness of the relationship between Justices Wagner and Caron, or because of a perceived possible prejudice to you or your attorneys.

You indicate that subsequently, in late August of this year you discovered that Justice Chamberland was also a former partner of Justice Wagner at the Lavery, DeBilly law firm.

You suggest that the situation where the principal judges that ruled on your case were all from the same firm may generate a serious apprehension of bias.

You provide some details of the relationships which you suggest raise an apprehension of bias. Justices Caron, Wagner and Chamberland were all partners of or associated with,

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the law firm of Lavery, DeBilly, prior to their appointment to the bench. You indicate that Justices Wagner and Caron were members of the same litigation team.

You are correct that Justices Caron, Wagner, and Chamberland all were connected with the law firm of Lavery, DeBilly, prior to their appointment to the bench. The Lavery, DeBilly, firm is a large one with well in excess of 150 lawyers. Justice Caron practised at Lavery, DeBilly, prior to his appointment to the Québec Superior Court on 14 March 2005. Justice Wagner was at the firm from 1980 until he was appointed to the Québec Superior Court on 24 September 2004. He was appointed to the Québec Court of Appeal on 3 February 2011, and to the Supreme Court of Canada on 5 October 2012. Justice Chamberland was at the Lavery firm from 1972 until 16 March 1988, after which he was Deputy Minister of Justice and Deputy Attorney General of Québec until he was appointed to the Court of Appeal of Québec on 10 June 1993.

Justice Wagner had been away from the Lavery firm for just over 7 years when he heard your appeal.

Justice Chamberland had been away from the Lavery firm for 23 and a half years when your attorneys approached him regarding your concerns about the former association of Justices Caron and Wagner in the firm.

The relevant standard to apply in circumstances where concerns arise regarding possible conflict of interest or the apprehension of bias was authoritatively set out by the Supreme Court of Canada in the case of *Wewaykum Indian Band v. Canada [2003] 2 S.C.R. 259.* The Court indicated:

> [60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by DeGrandpre J. in *Committee for Justice and Liberty v. National Energy Board, supra*, at p. 394, is the reasonable apprehension of bias: ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is it more likely than not that [the decision-maker], whether consciously or unconsciously would not decide fairly."