

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

Craig Scott

Professor of Law

cscott@osgoode.yorku.ca

Graduate Program

Director, Research

LLM and PhD

Via RESGPA@

Osgoode.yorku.ca

Academic Director,

International &

Transnational Law

Intensive Program

OSGOODE HALL

LAW SCHOOL

4700 Keele St.

Toronto ON

Canada M3J 1P3

Tel 416 736 5030

Fax 416 736 5736

www.osgoode.yorku.ca

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The Right Honourable Richard Wagner, P.C.,

Chief Justice of Canada

in his capacity as Chairperson
of the Canadian Judicial Council,
Canadian Judicial Council
Ottawa (Ontario) K1A 0W8

Via Email

September 20, 2020

Dear Chief Justice Wagner,

RE: Request to proactively seek the name of the subject of a complaint in accordance with the Canadian Judicial Council's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*

I write to you in your capacity as Chairperson of the Canadian Judicial Council (CJC) to ask that you inquire into and reverse, or reconsider, any decision that may have been made not to consider a complaint filed on September 17, 2020, by Leslie Green with respect to an as-yet-unnamed judge of the Tax Court of Canada. I adopt Professor Green's complaint as my own for purposes of this letter, so kindly consider his letter incorporated by reference and me thus also as a "complainant" for purposes of the CJC procedures.

A report in today's *Globe and Mail* by Sean Fine states: "The judicial council told The Globe it cannot undertake an investigation into a complaint unless it has the name of the judge in question." Section 4(c) of the *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* provides: "If the Executive Director determines that a matter warrants consideration, the Executive Director must refer it to the Chairperson..." It is unclear from the report in today's *Globe* whether Professor Green's letter was filtered out by the Executive Director without passing it on to you. Therefore, I address the present letter to you directly and frame the issue as one of a possible reversal by you of the Executive Director's decision not to proceed *or* as one of you reconsidering your own decision.

The preliminary screening criteria for the Executive Director in section 5 do not include any reference to a judge's name needing to be known if enough information has been provided for the CJC to make inquiries in order to proactively seek out and determine the name, if the rest of the complaint reveals conduct that presumptively is problematic under the *Judges Act* and the *Principles of Judicial Ethical Conduct*. Section 5 reads as follows:

Early Screening Criteria

For the purposes of these Procedures, the following matters do not warrant consideration:

- (a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;
- (b) complaints that do not involve conduct; and
- (c) any other complaints that are not in the public interest and the due administration of justice to consider.

If the Executive Director assumed authority to reject the complaint at this stage without referring to you, then I am asking for a reversal of that decision based on the information I ask to be considered later in this letter. If, on the other hand, the matter was indeed referred to you as Chairperson, I most respectfully request that you reconsider and change your own decision. Here I note that section 6 sets out your own screening role:

Screening by Chairperson

The Chairperson must review a matter referred by the Executive Director and may

- (a) seek additional information from the complainant;
- (b) seek the judge's comments and those of their chief justice; or
- (c) dismiss the matter if the Chairperson considers that it does not warrant further consideration.

Nothing in section 6(a) requires that the name of the judge be known for "additional information from the complainant" to be sought. The earlier substantive-jurisdiction clause (section 3) is not phrased in a way that precludes a proactive role of the Council to determine a judge's name once a complaint has brought problematic conduct to the Council's attention. Here, we have a complaint about a known but as-yet-unnamed judge of a court with a very limited number of judges. Section 3.1 reads: "Any person, including a member of the Council, may make a complaint about *a judge*." It does not say a "named" judge.

Obviously, I understand that a full investigation of “a judge” requires the name at some point; indeed, I publicly messaged earlier this week that, once the name is clear, the CJC would need to investigate (assuming a complaint is in hand), by which I mean through the interactive roles of the Chairperson, an investigator and a Panel. Indeed, one cannot get to the second screening criterion in section 6(b) without that name. However, I would respectfully suggest that a purposive interpretation of the role of the CJC (a) in ensuring unethical judicial conduct does not go unaddressed and (b) in maintaining the integrity of the judiciary should both mean the Executive Director cannot screen out a complaint solely due to a lack of a name and that you as Chairperson have full authority to “seek additional information from the complainant” preliminary to either going on to section 6(b) – assuming that the complainant has been able to provide information that allows you to determine the name or make further inquiries to determine the name – or to section 6(c) to dismiss for lack of a name at that point.

I would further point out section 9 which, again read purposively, can be interpreted to allow you as Chairperson to engage an investigator. Section 9 does not require that this investigator only be hired once a judge’s name is known and appears open to the interpretation that an investigation can be used within section 6(a) in order to try to determine a name. Section 9 reads:

Information Gathering

9.1 The Chairperson may instruct the Executive Director to retain an investigator to gather further information about a matter and prepare a report. In that case, the Executive Director must inform the judge and their chief justice.

9.2 The investigator is to gather relevant information. They may conduct confidential interviews if necessary and may provide assurances of confidentiality to those who provide information.

9.3 Before finalizing the report, the investigator must provide the judge with an opportunity to comment on the information obtained by the investigator. The judge’s comments

must be included in the investigator's report.

9.4 Where information is obtained in confidence, the investigator must include in the report written reasons for having provided the assurance of confidentiality.

Section 9.1 refers to gathering information about "a matter", which is more than broad enough to include a complaint that there are good grounds to believe that a judge on a named court (here the Tax Court) has engaged in inappropriate conduct. This permits, under section 9.2, the investigator to determine the name of the judge and then, under both sections 9.2 and 9.3, conduct further investigations and interviews once that name is determined.

Having constituted myself as a complainant in the first paragraph, I now provide information that would allow you to determine who the Tax Court judge is. I have reliable and solid reason for believing, including belief based on the news reports cited in Professor Green's letter, that the following persons have first-hand knowledge of the name of the Tax Court judge and the timing and recipients of one or more communications to the University of Toronto Faculty of Law in relation to the appointment of the Director of the International Human Rights Program. If contacted, I assume that every one of them would feel ethically and possibly legally obliged to answer the questions of an investigator truthfully, even as they may, for different reason, have decided not to speak to reveal such information to journalists. They are:

1. Edward Iacobucci, Dean of Law, Faculty of Law, University of Toronto
2. Audrey Macklin, Professor of Law, Faculty of Law, University of Toronto
3. Alexis Archbold, Assistant Dean, Faculty of Law, University of Toronto
4. Jennifer Lancaster, Assistant Dean (Advancement), Faculty of Law, University of Toronto

I am quite certain that at least one of these persons would see it as her or his duty to provide the name if the CJC asked.

Each one of these persons should be approached. I would also suggest that the Chief Justice of the Tax Court should be consulted in case he has first-hand knowledge from the judge that he or she did indeed seek to influence an appointment in the way and context alleged. The Chief Justice may well know which judges have associations with the Faculty of Law of the University of Toronto, and – out of concern for the reputation and integrity of the Tax Court – taken the initiative to approach those judges and ask

them to confirm or deny whether they were involved. He may have learned, first hand, the name of the relevant judge for this complaint.

I would also indicate that I do not have my own first-person knowledge of the name of the judge, although I do know the name that is circulating of a judge who is believed to be the judge. The legal status of a letter to the CJC and its contents is unclear to me. However, as a matter of absolute or qualified privilege, I would be in a position to pass on that name to an investigator, if asked, on the understanding that the investigator or CJC would not reveal that name publicly until the appropriate moment within its own procedures. The intent would be for the investigator to then determine, via one or more of the above persons, if this is indeed the judge. I include the possibility that the CJC will determine the judge did not contact the law school and thereby decide not to reveal the name publicly. I would not reveal the name until it is properly public.

If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Craig Scott', with a long, sweeping horizontal stroke extending to the right.

Craig Scott, Professor of Law, Osgoode Hall Law School;
Graduate Program Director, Research LLM and PhD

Cc: Norman Sabourin, Executive Director and Senior General Counsel