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Ottawa, Ontario K1A 0W8

Our File: 07-0177

29 February 2008

Mr Peter Karl Roscoe
111 Kamloops Ave
Ottawa ON
K1V 7C8

Dear Mr Roscoe:

I am writing further to your letters of 2 June 2007 and 23 October 2007, in which you make complaints regarding the Honourable Madam Justice Rosalie Abella and the Honourable Madam Justice Louise Charron of the Supreme Court of Canada.

Nature and scope of the complaint

Your complaint is set out in two letters which also attach two reports, the first entitled *Gender Bias in Family Law at the Court of Appeal 2007*, the second, *Systemic Discrimination Studies I*. There is both some overlap between the studies and an incidental amount of difference between them. As well, there is occasional divergence between the data and analysis contained in the letters and that in the accompanying studies. To the extent there are differences, the focus of the following comments are directed to the contents of your complaint letters.

You allege in your letters that Justice Abella and Justice Charron wrongly discriminate against men in family law cases. You cite the studies and their conclusions as evidence to support this allegation. You say that, in important respects, Justices Abella and Charron are not capable of performing impartial adjudication as required of a judge.

Justice Abella

In support of your complaint you provide a list of 41 cases with your 23 October letter which you indicate represents Justice Abella's "total family cases at the Court of Appeal for Ontario." I note that the revised analysis which you provided lists 53 such cases for Justice Abella; however, the following comments will focus on the list that was forwarded with the letter.

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Your analysis of the 41 cases indicates that for Justice Abella in 28 matters involving a male appellant the results were "Win All, 2, Lose All, 23," and "Win Some/Lose Some, 3." For Female Appellants you indicate that in 13 cases the results were "Win All, 10, Lose All, 2" and "Win Some/Lose Some, 1." You suggest percentages of success derived from your analysis and argue that it is demonstrated that a female appellant has a much larger chance of winning than a male and attribute the difference to bias on the part of Justice Abella.

Justice Charron

Your analysis and conclusions respecting Justice Charron are similar to those respecting Justice Abella and complain of unacceptable discrimination against men in family court actions. In the case of Justice Charron your letters and analysis indicate that 48 listed cases were available for analysis at the Court of Appeal level, and seven in the Supreme Court of Canada. Your analysis, however, focuses on the Ontario Court of Appeal decisions. Your letter confirms that a feature of your concern in respect of both judges is "...their high win loss ratio."

The studies you provided show that you have utilized the spread between what you characterize as average "male wins" and "female wins" to draw a conclusion of gender discrimination. You write that "Discrimination against men is calculated by subtracting the percentage of male wins from female wins." You have assigned five categories from "slightly discriminatory" to "fully discriminatory." You conclude that Justices Abella and Charron fall into what you deem the "heavily discriminatory" category and that Ontario Court of Appeal judges, on average, fall within a "highly discriminatory" category.

Mandate of the Canadian Judicial Council

As you know, the mandate of the Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The Council is not a court. It has no authority to review a judicial decision for the purpose of determining its correctness. Nor can the Council overturn or revise decisions reached by judges. Such powers rest only with appellate courts, including, in certain circumstances, the Supreme Court of Canada.

In accordance with the Council's mandate, and pursuant to the *Complaints Procedures* of the Council, I referred your complaint to the Honourable Richard Scott, Chief Justice of Manitoba and Chairperson of the Judicial Conduct Committee of the Council. Upon completing his review, Chief Justice Scott has asked that I address your complaint as follows.

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Chief Justice Scott advises that the Council's duty and mandate, in respect to the allegations you have presented, is to assess whether the allegations in your letters, and the information contained in the studies which you forwarded, provide a basis to conclude that Justices Abella and Charron have demonstrated bias such that it would constitute judicial misconduct. For misconduct to take place, bias would have to affect the judge's ability to perform the duties of their office, as will be further explained below.

Bias and judicial conduct: applicable standard

Ethical Principles for Judges, published by the Canadian Judicial Council, sets out a valuable frame of reference regarding the principles to be considered by judges relating to bias or prejudgement. While this publication is not a code of conduct, it does provide guidance on ethical issues, which must be considered in assessing judicial conduct. The *Principles* provide that:

> 1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

This statement reflects a key legal principle, specifically that a decision on whether or not to recuse from a case, for reasons of partiality or otherwise, is a decision that rests with the judge.

The *Principles* also provide that:

> A.3 Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpre, J. put it in *Committee for Justice and Liberty v. National Energy Board*, the test is whether "an informed person, viewing the matter realistically and practically — and having thought the matter through —" would apprehend a lack of impartiality in the decision maker.
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> Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.
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> A.4 True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind." The judge's fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias.

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These key principles recognize that a judge can have opinions and beliefs about the matters coming before the Court, without this being in and of itself a basis for concluding that the judge is biased. The judge's obligation is to keep an open mind and to remain impartial.

The case law is also of direct relevance in identifying the applicable standard. Any review of recent leading cases regarding judicial bias would certainly include *Wewaykum Indian Band* v. *Canada*, [2003] 2 S.C.R. 259, and *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91.

In those decisions of the Supreme Court of Canada, the Court recognized that judges must approach all cases with an open mind. The Court also held that there is a presumption of impartiality and that it is the responsibility of the party alleging bias to demonstrate that bias – actual or apprehended – exists.

The Supreme Court has made it clear that the grounds on which bias is alleged must be serious and inquiries into possible bias highly fact specific. Moreover, the Court has indicated that there is a strong presumption in favour of judicial impartiality.

That being said, a situation where actual or apprehended bias has been established is not in of itself indicative of judicial misconduct. The remedy for actual or apprehended bias lies in the recusal of the judge, or in the reversal, by a Court of Appeal, of the decision reached as a result of real or apprehended bias. Without anything more, bias – real or apprehended – does not translate into a finding of misconduct by the judge.

While Chief Justice Scott does not comment on the merits of the decisions reached by the Court in the cases cited in your studies, he advises that establishing real or apprehended bias in any of these cases would require clear, cogent, and fact-specific evidence to rebut the strong presumption in favour of judicial impartiality. Even if bias were established, additional clear evidence would be required to warrant a finding of judicial misconduct. This might be in the nature of bad faith, wilfully ignoring key evidence, wilfully concealing facts that would allow a challenge of the judge's impartiality, or other behaviour on the part of the judge that would seriously undermine public confidence in the judge's ability to impartially adjudicate cases.

Allegations of bias and discrimination

In light of the standard set out above, your allegations against Justices Abella and Charron are now addressed.

Justice Abella

In respect of Justice Abella, the 41 published Reasons for Decision identified in your correspondence have been reviewed with regard to your allegations of discrimination.

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In none of these matters was there a request or any suggestion whatsoever that Justice Abella should recuse or disqualify herself on the ground of bias or prejudgement. None of the reasons for decision issued in those matters disclose statements or observations that suggest any of the parties involved raised any concerns about a perception of bias or absence of impartiality.

Chief Justice Scott notes that, in most of the matters identified, Justice Abella did not write individual reasons for decision, but rather took part in writing the Court's collegial reasons or concurred in a decision written by a colleague. In 37 of the 41 decisions referred to, the Court unanimously decided the matter under appeal, issuing a single decision agreed to by all three judges. In one matter Justice Abella was one of a majority of two. Thus, in almost all of the matters considered, Justice Abella's decision and reasons were precisely the same as those of the other experienced, seasoned jurists sitting with her on the Court. Justice Abella dissented in only three of the 41 matters. In those three cases she dissented, as it happened, once in the husband's favour, once in favour of the wife. In a third matter, she indicated that based upon her consideration of the interests of the child concerned, she was not in agreement with the majority.

Accordingly, an analysis of the actual decisions of the court in the matters which were decided shows that Justice Abella very rarely differed from the analysis of the relevant factual and legal issues and disposition of the matter by her judicial colleagues, and that when she did do so there was no basis on which a reasonable and informed person could conclude that the differences in position were the result of gender bias. Incidentally, it could be noted that, during the period in question, the Court was composed of a clear majority of male judges.

Although the letters and studies indicate they provide a complete or representative portrait of the total of family law cases considered by Justice Abella, further legal research indicates that they do not. Many cases dealing with property, procedural or jurisdictional issues, cases which were identified as "criminal" and certain other decisions of arguable relevance in the broad category of "family law" are eliminated or ignored. The studies provided examine only a specifically defined and circumscribed set of cases and not the suggested full spectrum of family law decisions where Justice Abella was one of the judicial panel. A fully informed observer would be hesitant about sweeping conclusions drawn from such a limited and narrow sample.

In short, it is clear that the "wins" and "losses" ascribed by the studies do not result from an individual initiative on the part of Justice Abella but generally reflect a collegial decision by the court on a reasoned basis. The suggestion that Justice Abella is individually responsible for the outcome of these 41 cases, or that a consideration of their content would suggest that individual bias led to their outcomes, is simply unsupportable.

Justice Charron

In respect of Justice Charron, a consideration of the allegations made and of the conclusions offered in the studies lead Chief Justice Scott to also conclude that there is no evidence of bias.

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An examination of the 48 identified Court of Appeal decisions relating to Justice Charron shows that the list identified is not a comprehensive one and excludes or ignores many decisions that would have to be relevant in any rigorous study. No specific consideration is accorded to matters decided on the basis of the interests of children, a substantial proportion of those listed.

Also of importance, an examination of the 48 decisions does not disclose any deviation from the approach of other members of the court which a reasonable and informed observer could attribute to bias. In one matter Justice Charron acted as a single judge in a chambers application. In all of the remaining 47 cases which are identified and analyzed, Justice Charron either is the author of a unanimous decision of the court or more commonly concurs without any deviation with a decision authored by a colleague or with the decision of the court. There does not appear to be a single matter in which Justice Charron was asked to recuse or disqualify herself. In no case is there any specific statement or observation whatever, from which it might be concluded that bias or an intention to discriminate may have been present.

Certain decisions briefly mentioned in your material, in respect of Justice Charron, were those of the Supreme Court of Canada; again, however, there is no specific basis suggested or offered in respect of these decisions which would give rise to a perception of bias.

Again, the suggestion that bias was present in the identified matters becomes unsupportable when considering the collegial nature of the decisions.

As outlined above, even if there had been apparent bias in any of these cases, this would not necessarily amount to judicial misconduct. There is no indication that Justice Abella or Charron may have acted at any time in bad faith, that they wilfully ignored key evidence, that they wilfully concealed facts, or otherwise engaged in behaviour that would seriously undermine public confidence in their ability to impartially hear cases.

Conclusions reached in the studies provided

Even though the allegations against Justices Abella and Charron, as indicated above, cannot be sustained, your allegations also suggest there would have been systemic or unconscious bias on the part of all judges of the Ontario Court of Appeal in family law matters.

The studies indicate the criteria on which cases were selected in regard to Justice Abella and classify 37 of the 41 matters selected as "Male or Female," and "Win All" or "Lose All" matters. The studies and your correspondence then suggest that the resulting high "win/loss ratio" establishes bias and discrimination. A similar approach was followed in respect of Justice Charron and the other judges of the Court of Appeal.

Chief Justice Scott is of the view that the conclusions you draw are based on a clearly fallacious underpinning and erroneous assumptions.

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Family law matters are inherently complex. Issues of child custody, in particular, must be decided after consideration of many factors, most significantly the best interests of the child, as well as the ability and situation of the parents. To suggest that the outcome of such complex matters can be categorized through a binary "win/lose" method is simplistic and devoid of reality.

Parties do not "win" or "lose" in cases of family disputes. The public interest and applicable law governs the outcome of the proceedings. Your analysis is based on an assumption that family matters are a private dispute between two parties. This is not the case. In many respects, the children involved – and even society generally – may have a greater stake and interest in the outcome of such disputes than the parents.

In reviewing such situations, therefore, a judge must consider many factors and come to conclusions not on the basis of individual interests of the "male" or "female," as suggested by your studies, but often on the basis of broad societal interests, including the interests of any children involved. A reasonable, fair-minded and informed person would have grave doubts about the attribution of gender bias to a judge when such decisions are governed by consideration of the best interests of the children.

Another significant concern is that while the study assumes that appellate cases alone are an appropriate source of decisions for the analysis undertaken, an informed observer would seriously question this assumption. Such an observer would know that a complete and fair-minded assessment of appellate decisions must reflect their legal and factual context, in particular the nature and outcome of the trial decisions under appeal.

In well over half of the 41 matters identified, the Court of Appeal affirmed the decision taken by the trial judge, without change. The approach of the studies is that such matters nevertheless represent a "win" for the respondent and a "loss" for the appellant, and that such "wins" and "losses," removed from their legal context, may be statistically analysed to establish bias on the part of each of the judges considering the appeal. Chief Justice Scott is of the view that such a conclusion is completely unsupportable. There are any number of reasons why a party may seek a review of a decision on appeal, including a simple inability to accept a fair and informed decision by the Court. The fact that such a party then "loses" on appeal may be more indicative of a reluctance or inability to accept the decision of the trial court than a serious legal challenge on the merits.

There are other concerns that arise as well from the careful application of the assumptions made in the studies to the actual decisions reached. By the studies' own criteria, the "win all" category for males is understated and that for females overstated. The "lose all" category for males is overstated and that for females understated. The incidence of matters in which the males and females "win some/lose some" is significantly understated. Again the interaction of the legal process with the outcome is not considered. Almost all of the "lose all" matters, whether the identified "loss" is by a

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male or female appellant, involve matters where the decision of the trial judge is upheld on appeal. In the remaining small sample of matters it is more common that appellants "win some/lose some" in regard to the issues taken on appeal than that a party of either gender succeeds completely. The "win all / lose all" analysis offered seriously misrepresents the complexity and indeed the outcomes of many of the matters considered.

Equally important, the studies do not take into account the precise mandate of the Court of Appeal in reviewing trial decisions. The court is required to apply a certain standard of review in making a determination on whether or not to reverse the findings of the lower court. In particular, the Court of Appeal cannot substitute its own judgement to findings of fact made by the trial judge, unless the appeal court finds there was a palpable and overriding error in the conclusions reached by the trial court. In other words, a court of appeal must normally defer to the findings of fact made by the trial court, even if those findings might be subject to a variety of interpretations. As for pure matters of law, a court of appeal will intervene when legal errors are made; however, in family law, most appeals do not turn strictly on a point of law.

In light of the above, Chief Justice Scott is of the view that the conclusions drawn in your study simply do not support in any way the allegations to the effect that there exists a form of systemic or unconscious bias on the part of the judges of the Ontario Court of Appeal.

Decision with regard to the complaint

Therefore, after due consideration of the allegations you made, and the information provided in your correspondence and appended studies, Chief Justice Scott finds that you have not established that any judicial misconduct has taken place, either by the individual judges named or by judges acting collectively.

Accordingly, Chief Justice Scott has directed me to close the file by providing you with this letter.

Yours sincerely,

Norman Sabourin
Executive Director and Senior General Counsel