LETTER FROM COMPLAINANT (IN ENGLISH ONLY)

From: Anonymous Anonymous Sent: 25/02/2017 12:53:49 AM

This email contains my complaint regarding the conduct of Chief Justice Joyal of the Court of Queen's Bench of Manitoba and Chief Justice Chartier of the Court of Appeal of Manitoba.

I have made this complainant anonymously because I am a practicing lawyer and I am concerned about the professional impact of attaching my name to a complaint about three eminent members of the Manitoba judiciary.

I write in response to an article by Sean Fine appearing on the Globe and Mail website on February 23, 2017. The most relevant excerpts of that story follow:

Manitoba's three chief justices and its Attorney-General are proposing to eliminate all preliminary inquiries during an unprecedented four-year experiment on fighting delay in the criminal-justice system.

In a rare collaboration, the four have written to federal Justice Minister Jody Wilson-Raybould asking for a change to the Criminal Code that would permit the experimental approach. Defence lawyers were not involved in developing the proposal, and are deeply opposed. …

Chief Justice Joyal likened any proposal to limit or end preliminary inquiries to "the third rail of the criminal justice system," and said that was why his group did not consult defence lawyers: "You'll never get to begin, you'll never get a consensus, so at some point there has to be a proposal you can mould and refine and make acceptable more or less to everybody."

The proposal includes a limited alternative to preliminary inquiries: In crimes punishable by 10 years or more in prison, defence counsel could instead apply to a Court of Queen's Bench judge for permission to hold an out-of-court hearing called a "discovery." First, they would have to persuade the judge it is warranted. Defence lawyers could examine just the complainants, and "up to" one other prosecution witness. And only for one hour for each witness.

The process would give the defence a better picture of the Crown's case, but not determine whether the case could be thrown out at that point.

"It would be very circumscribed," Chief Justice Joyal said.

The group of judges (including Court of Appeal Chief Justice Richard Chartier and Provincial Court Chief Judge Margaret Wiebe) and Attorney-General Heather Stefanson sent Ms. Wilson-Raybould a letter and accompanying proposal on Dec. 21 and asked to meet with her. She has not responded yet. …

Ms. Stefanson said the Crown has been required since 1991 to disclose its case to the defence. “The role of preliminary inquiries, the necessity for them, has diminished,” she said in an interview.

She called the co-operative effort between the three senior judges and herself a first for Manitoba, and “it could be unprecedented across the country. I think this is a great way to show we’re on the same page in Manitoba. We’re ready and willing to be part of the solution on court delays.” She said that just last week, she had a “very productive conversation” on the issue with Ms. Wilson-Raybould, but declined to reveal more. …

I understand that a newspaper article will often leave out important details. It is possible that this story has mischaracterized the judges’ involvement in this process. Yet with these caveats in mind, based on what I know from the article, I respectfully submit that:

1. It was inappropriate for these judges to collaborate with the Attorney General of Manitoba in the development of what appears to be a detailed proposal for a significant amendment to the Criminal Code that would have far-reaching effects on the justice system and on the procedural rights of the accused, particularly since their proposal involves controversial issues, not merely matters related to court administration, which require Parliament to balance several different competing interests.

2. It was inappropriate for these judges to work privately with the Attorney General of Manitoba to formulate such a proposal, particularly without the input of the defence bar or public, and without notice to the defence bar or public.

3. It was inappropriate for the involved judges to advance this proposal by way of a private letter to the Minister of Justice of Canada, and to seek audience with the federal Minister of Justice to discuss their proposal, as this causes these judges to at least appear to have to become involved in backroom political lobbying.

My complaint is not motivated by the substance of this proposal per se, particularly since the full proposal has not been made public (to the best of my knowledge). I realize that preliminary inquiries and court delays have long been a subject of debate and reasonable disagreement in Manitoba and across Canada.

I also recognize the special role of chief justices in commenting publicly on matters that touch upon the administration of justice. I do not for a moment suggest that judges must remain sphinxes about matters touching on court administration or court delays.

Yet I believe there are still important ethical limits to chief judges’ ability to advocate for changes to the Criminal Code, particularly when they do so in secret or in conjunction with another level of government such as the provincial Crown. I quote from what I believe are some

of the relevant portions of the Canadian Judicial Council Statement of Principles (emphasis added):

Judicial independence … characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence and impartiality. …

Judges should refrain from conduct such as … participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. …

Nothing in these Principles prevents or indeed discourages judicial participation in law reform or other scholarly or educational activities of a nonpartisan nature directed to the improvement of the law and the administration of justice. Judges seconded to law reform commissions may exercise greater latitude with respect to matters under consideration by the Commission. The Commentary to the ABA Model Code (1990) indicates that "...[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system and administration of justice... Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession."

However, when engaging in such activities, the judge must not be seen as "lobbying" government or as indicating how he or she would rule if particular situations were to come before the judge in court. This, of course, does not prevent judges from making representations to government concerning judicial independence or, through the appropriate mechanisms, with respect to salaries and benefits. Discussion of the law for educational purposes or pointing out weaknesses in the law in appropriate settings is in no way discouraged. For example, in certain special circumstances, judicial commentary on draft legislation may be helpful and appropriate, so long as the judge avoids giving informal interpretations or opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or legislative drafting and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalized effort by the judiciary, not that of an individual judge. …

The duties of chief justices and, in some cases, those of other judges having administrative responsibilities will lead to contact and interaction with government officials, particularly the attorneys general, the deputy attorneys general and court services officials. This is necessary and appropriate, provided the occasions of such interactions are not partisan in nature and the subjects discussed relate to the administration of justice and the courts and not to individual cases. Judges, including chief justices, should take care that they are not perceived as being advisors to those holding political office or to members of the executive.

While I do not have all the facts, I suggest that a reasonable and informed member of the public, appraised of the facts now known publicly because of Mr. Fine's article, would share my concerns about the three highest members of the Manitoba judiciary working in conjunction with the provincial Crown, putting forward a controversial proposal to amend the Criminal Code. I note again how this proposal would have far-reaching consequences for the administration of criminal justice in Canada, and could eliminate an important and long-standing procedural protection for individuals accused of serious crimes. To this extent, it seems obvious that the proposal would favour the interests of the provincial Crown over the interests of the accused.

I understand that a balance needs to be struck in the Canadian court system between procedural protections and expeditious and cost-effective justice. Where that line is drawn, however, is a matter for our elected representatives in Parliament, subject to judicial review for compliance with the Charter. In my view, the joint letter as described in the Globe and Mail article gives rise to a reasonable perception that the Chief Justices were acting as advisors to those holding political office, contrary to the CJC's Statement of Principles.

The perception of partiality is heightened by what appears to have been the judges' deliberate failure to seek any input from defence counsel or members of the public when formulating this joint proposal with the Crown. The perception is further heightened by the relatively detailed nature of the proposal, which goes beyond simply expressing general concerns about delays caused by preliminary inquiries. It is still further heightened by Chief Justice Joyal's frankly rather disdainful comments to the Globe and Mail about the absence of any benefit that might accrue from input by defence counsel, on the basis that involving defence counsel would inevitably result in a failure to achieve consensus. The controversial nature of the proposal, and the fact defence counsel might object to that proposal, is, if anything, a reason for more consultation with members of the bar and public, not less. Likewise, the fact there might be an absence of consensus at the end of such consultations is a strong sign that any proposed changes to the Criminal Code are better left for political actors, not for the judiciary.

There is a reason why this "co-operative effort" between the Chief Justices and the Minister of Justice, which demonstrates how they are "on the same page," is "unprecedented across the country." It is because this sort of behind-the-scenes policymaking involving a Minister of Justice and senior members of the judiciary gives rise to clear concerns about the judges' impartiality.

As often the case in ethical matters, it is useful to consider how one might respond if circumstances were "reversed," so to speak. Assume that the heads of all three branches of the Manitoba judiciary had met privately with defence lawyers, without notifying the Crown, and without seeking any input from the Crown. Assume that these three very senior members of the judiciary advanced a proposal to eliminate certain mandatory minimum sentences, which (they suggested) would reduce the number of matters that go to trial, and thereby reduce backlogs in the courts. Assume the proposal went so far as to identify specific mandatory minimum sentences that should be eliminated. Assume this proposal was advanced by means of a private letter to the federal Minister of Justice, where an audience was sought with the

Minister of Justice to discuss the joint proposal. The provincial Crown and members of the public would have understandable and significant concerns about the impartiality of these judges. Indeed, I respectfully suggest such behaviour would be considered scandalous.

These judges have also waded into an issue that might well appear before their courts. Any amendment to the Criminal Code is always subject to a Charter challenge. The specifics of this proposal (including, for example, time limits on the examination of a witness during the proposed discovery process) could well give rise to Charter litigation, regardless of the current state of the law with respect to the absence of a constitutional right to preliminary inquiries. Yet without Mr. Fine's reporting on this issue, members of the public would likely never have known that these senior members of the judiciary were involved in advancing this proposal. The behind-the-scenes nature of this letter raises the spectre that the same members of the judiciary who advanced this proposal to the federal Minister of Justice could one day be responsible for selecting the judges who would rule upon the constitutionality of their own proposal.

Again, one is left to wonder whether the involvement of these judges would have ever come to light but for Mr. Fine's reporting. I am reluctant to impute nefarious motives to the justices involved, yet the decision not to release their proposal publicly might leave a reasonable observer to conclude that some involved would have preferred that their association with this proposal remain unknown to the public.

In my respectful view, such lobbying of the federal Minister of Justice, done in concert with the provincial Crown, crosses an ethical line. It reflects an error of judgment on the part of the involved judges, and gives rise to a reasonable apprehension that these judges are partial toward the interests and policy preferences of the provincial Crown. I respectfully suggest that such behaviour should at least be the subject of further investigation by the CJC.

I presume that Chief Justice Joyal will be provided with a copy of this complaint by the Judicial Council. When he receives it, I would ask him to also treat this as a complaint with respect to the conduct of Chief Judge Wiebe, pursuant to s. 28(2) of the Provincial Court Act. I note that s. 28(3) of that Act requires that a complaint be signed by the complainant. In the event my complaint about the conduct of Chief Judge Wiebe is deemed irregular because it is anonymous and unsigned, I respectfully suggest that my letter discloses sufficient grounds for referral to a Judicial Inquiry Board in accordance with ss. 30 and 31 of the Act.

I close by acknowledging the awkward nature of this complaint, since it involves the highest echelons of the Manitoba judiciary. I note these are the same judges who themselves are responsible for investigating complaints against judges and who are responsible for defending the independence of the judiciary. I respectfully request that the Judicial Council take this matter seriously despite the seniority of the judges involved.

Although I would appreciate being advised of the outcome of my complaint via email, I do not propose to make any further submissions to the Council.

Anonymous