

2 August 2005

Mr Richard Marceau
Member of Parliament for Charlesbourg / Haute St-Charles
Room 232, West Block
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr Marceau:

This is a follow-up to my letter of 2 May 2005 concerning your complaint, dated 29 April 2005, against the Honourable Michel Robert, Chief Justice of Quebec.

In accordance with the *Complaints Procedures* of the Canadian Judicial Council, I referred your complaint to the Honourable John Richard, Chief Justice of the Federal Court of Appeal and Vice-Chairperson of the Council's Judicial Conduct Committee. Chief Justice Richard has asked me to write to you to inform you of his decision.

Your complaint states that Chief Justice Robert allegedly [translation] "tainted judicial independence in Canada and, above all, discredited the entire judiciary." In your view, Chief Justice Robert allegedly failed in his duty to exercise judicial restraint and undermined public confidence in the judiciary. In support of these allegations, you provided remarks made by Chief Justice Robert on Radio-Canada radio.

In reviewing your complaint, Chief Justice Richard examined the entire context in which Chief Justice Robert expressed himself publicly. He also asked Chief Justice Robert to provide his comments regarding the complaint.

Chief Justice Richard noted that Chief Justice Robert was asked to comment on the judicial appointments process on several occasions. This was in response to requests for interviews from journalists, mostly as a result of public statements made by Mr Benoît Corbeil, who alleged that there were irregularities in the appointments process.

In response to such a request, Chief Justice Robert gave an interview to Ms. Isabelle Richer, from Radio-Canada television, on Friday, 22 April. During this interview, Chief Justice Robert made the following comments on the judicial appointments process:

[translation]

People think that it's a secret, clandestine and mysterious process and that judges are appointed because of their partisan activities, which is not the case.

During the same interview, Chief Justice Robert provided his views on the transparency of the appointments process as follows:

[translation]

The process ensures that appointments are based on merit, but unfortunately, because of its obscure nature, it doesn't seem to convince the population, hence perhaps the points of view that are heard these days about judicial appointments.

In response to another request, Chief Justice Robert gave an interview to Mr Marc Verrault, from Radio-Canada radio, on Monday, 25 April. Following a request made to the Société Radio-Canada, it appears that this interview was never broadcast in full. Nevertheless, a news clip was created from remarks that Chief Justice Robert made during that interview. Chief Justice Robert's remarks were then juxtaposed with those made by professor Henri Brun. This news clip was used in a report by Mr Verrault which was broadcast on 26 April during the *Radiojournal* newscast, and included the following remarks by Chief Justice Robert:

[translation]

One must generally subscribe to the Canadian federal system, because that's the system in which we operate. Personally, I have nothing against those who want to replace the Canadian system with another; they are entirely free to do so. However, I don't believe that they should hold judicial office.

[hereinafter referred to as the "first quote"]

During the April 25 interview, Chief Justice Robert also stated the following:

[translation]

To be appointed, to hold office, I mean, as a federally appointed judge, I think it's a kind of prerequisite that one cannot be a sovereigntist. At least, I believe that's the general opinion among most judges in Canada.

[hereinafter referred to as the "second quote"]

However, this second quote was not broadcast on 26 April. It appears that it was broadcast on radio only later, as part of another news clip.

The broadcasting of the first quote led to additional requests for interviews from journalists. Chief Justice Robert gave a few additional interviews on April 26, including one to Mr Jean Dussault, of Radio-Canada radio. During this interview, Chief Justice Robert provided the following comments on his first quote:

[translation]

What I was saying in that text, but my reply may have been incomplete, and I don't blame the journalist, what I was saying is that one cannot promote sovereignty and, at the same time, hold judicial office. That's impossible. Because when one holds judicial office, one makes the commitment under oath to respect the Canadian Constitution as it is, not as one wishes it would be. That is simply what I was saying.

[hereinafter referred to as the "third quote"]

In the comments he provided to the Council in response to the complaint, Chief Justice Robert said that the second quote was taken out of context and does not reflect his views. He added that the second quote should be interpreted to mean that someone cannot hold judicial office and, at the same time, actively militate in favour of a political option.

However, Chief Justice Robert acknowledges that the remarks he made were incomplete and imprecise, as he tried to explain during the interview with Mr Jean Dussault (third quote). Chief Justice Robert, in his comments to the Council regarding the complaint, said that he deeply regretted the controversy created by his remarks during the interview with Mr. Verrault (second quote).

In his comments regarding the complaint, Chief Justice Robert also indicated the following:

[translation]

I do not believe that people who hold or have held views that are in favour of Quebec sovereignty should not be able to hold office as federally or provincially appointed judges. My remarks, which were imprecise and incomplete, may have been interpreted as such and, again, I wish to clarify my thoughts.

No one is excluded from eligibility to hold office as a federally or provincially appointed judge on the basis of political beliefs or allegiances.

At the selection committee level, this criteria is not relevant. Political activities are not a prerequisite nor a disqualification for a judicial appointment.

Chief Justice Richard noted, in particular, that Chief Justice Robert acknowledged that the remarks he made on 26 April were imprecise and incomplete and did not reflect his views regarding the judicial appointments process. Chief Justice Richard also noted that Chief Justice Robert made specific efforts to clarify his views on the issue of political beliefs, during subsequent interviews and in the comments he provided to Council regarding the complaint. Chief Justice Richard accepted Chief Justice Robert's clear explanations on that subject, including the following comment that Chief Justice Robert provided regarding the complaint:

[translation]

Among members of the Quebec judiciary, many people may have held or may still hold sovereigntist views. I am convinced that these people administer justice with independence and impartiality and that they honour the commitments made in their oath of office and allegiance.

With respect to the duty to exercise judicial restraint that is normally incumbent upon judges, Chief Justice Robert explained that as Chief Justice of Quebec, it was his duty to intervene publicly in order to speak about the judicial appointments process. In his view, this was important because of statements made by Mr Corbeil. According to Chief Justice Robert, Mr Corbeil's remarks had the effect of discrediting the entire judiciary of Quebec.

On that point, Chief Justice Richard noted that it was in his capacity as Chief Justice of Quebec that Chief Justice Robert intervened publicly to comment on the judicial appointments process. He noted that, generally, a judge should refrain from commenting or expressing opinions on controversial political issues. However, a judge may take part in public discussions on matters regarding the administration of justice. *Ethical Principles for Judges*, published by the Canadian Judicial Council, provide as follows at chapter D3:

3. Judges should refrain from:
 - (a) membership in political parties and political fund raising;
 - (b) attendance at political gatherings and political fund raising events;
 - (c) contributing to political parties or campaigns;
 - (d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice;
 - (e) signing petitions to influence a political decision.

The judicial appointments process is a matter that directly affects the independence of the judiciary and the operation of the courts and, in Chief Justice Richard's view, it is possible for judges to express themselves publicly on such matters without failing in their duty to exercise judicial restraint.

In Chief Justice Richard's view, it is furthermore established that chief judges have an obligation to comment on matters directly affecting the operation of their courts, as well as a duty to help provide the public with information on the administration of justice.

Indeed, spontaneous interviews create specific challenges for judges who speak publicly on matters affecting the administration of justice. According to Chief Justice Richard, it is clearly preferable for judges to exercise restraint when speaking publicly. However, Chief Justice Richard considers that Chief Justice Robert's intervention, given the entire context, did not constitute a failure of his duty to exercise judicial restraint.

In his analysis of the complaint, Chief Justice Richard also reviewed the Council's conclusions in the *Flynn* inquiry, outlined in a report to the Minister of Justice dated March, 2003, since this case also related to remarks made by a judge about a controversial matter.

In this case, the Attorney General of Quebec asked the Council to hold an inquiry, as a result of a conversation that Mr Justice Flynn had with a journalist from the newspaper *Le Devoir* on 22 February 2002, which was reported in the next day's edition. Mr Justice Flynn had commented on a matter of some public controversy in which he was personally involved, since his spouse owned some of the property at issue. Furthermore, it appeared that the matter could become the subject of litigation, which would have been heard by the Superior Court, on which Mr Justice Flynn sat.

The members of the Inquiry Committee summarized their conclusions as follows:

The members of the Committee disapprove the communication and statements made by Mr Justice Bernard Flynn reported in the article in the newspaper *Le Devoir* on February 23, 2002 and conclude that in keeping with his duty to act in a reserved manner he should have refrained from making public comments about the transaction involving his wife. They consider these statements to be inappropriate and unacceptable. However, in the Committee's opinion, the conduct of Mr. Justice Bernard Flynn does not mean he has become incapacitated or disabled from the due execution of the office of judge within the meaning of subsection 65(2) of the Judges Act, and for this reason it does not recommend that Mr. Justice Bernard Flynn be removed from office.

The *Flynn* case highlights the following points with respect to the behaviour for which the judge was criticized: the matter at issue was a public controversy that in no way affected the operation of the courts or the independence of the judiciary; the issue was contentious and may have had to be settled by the courts; the judge was personally involved in the controversy.

However, none of these elements are found in this complaint. For these reasons, Chief Justice Richard considers that the Council's conclusions in the *Flynn* inquiry do not have application in the context of this complaint.

To sum up, for the reasons given above, Chief Justice Richard is of the view that your complaint does not warrant further consideration.

Since your complaint involves a member of the Council, it was referred to outside counsel in accordance with paragraph 6.1 of the *Complaints Procedures*, which provides as follows:

When the Chairperson proposes to close a file that involves a member of the Council, he or she shall refer the complaint and the proposed reply to Counsel who shall provide his or her views on the proposed disposition of the complaint.

In this case, Mr Pierre-Marc Johnson, of the law firm of Heenan Blaikie, reviewed the complaint and provided his views on the decision proposed by Chief Justice Richard. Mr Johnson indicated he was in agreement with both the decision of Chief Justice Richard and the reasons for his decision, which are summarized in this letter.

In view of the foregoing, Chief Justice Richard instructed me to close the file and to write to you to inform you of his decision.

I trust that this information is helpful.

Yours sincerely,

[Original signed by:]

Norman Sabourin
Executive Director and General Counsel