

The undersigned respectfully submit the following complaint regarding comments made by the Right Honourable Richard Wagner, Chief Justice of the Supreme Court of Canada, published in *Le Devoir* on April 9, 2022.<sup>1</sup> The article focused on the Truckers Convoy (TC) and its participants.

### ***Background***

The TC took place in Ottawa between January 28 and February 20, 2022. An undetermined number of transport trucks and other vehicles were driven to Ottawa to protest COVID vaccine mandates. They were parked on the streets in front of Parliament Hill and in downtown Ottawa. Crowds of Canadians peacefully assembled, waving Canadian flags, dancing in the snow, and listening to speeches. Prior to February 20, 2022, two commercial trade routes between Canada and the United States of America located in Windsor, Ontario and Coutts, Alberta, had been blocked by trucks. These trade route actions were apparently not connected formally to the TC but were promoting the same cause of protesting various COVID-19 mandates imposed in Canada.

As of February 15, 2022, only the TC was ongoing. The truck blockades in Windsor and Coutts had been resolved through the efforts of local police using regular police powers. The Ambassador Bridge protest blockade in Windsor was cleared by February 14, 2022, and the Coutts border protest blockade was cleared as of February 15, 2022.

On February 14, 2022, Prime Minister Trudeau declared a Public Order Emergency under Part II of the *Emergencies Act*, R.S.C. 1975, c. 22 (*EA*). On February 15, 2022, two regulations were promulgated under the Declaration, the "[Emergency Measures Regulations](#)", SOR/2022-21, and the "[Emergency Economic Measures Order](#)" SOR/2022-22. In days following, amongst other actions, police forcefully cleared the streets of protesters near Parliament Hill and in downtown Ottawa, and the bank accounts of several hundred Canadians were frozen. On February 23, 2022, the Declaration of Public Order Emergency was revoked under the *EA*.

In February 2022, four (4) different Canadian groups either on their own behalf or on behalf of individual persons, filed Notices of Application for Judicial Review of the invocation of the *EA* in the Federal Court of Canada. All Applications are ongoing.

### ***Impugned Comments***

The following are translations of quotes and paraphrases of statements allegedly made by the Chief Justice to the author of the April 9, 2022, *Le Devoir* article regarding the TC and its participants. These quotes and paraphrases are the subject of this complaint:

*"What we have seen recently on Wellington Street here is the beginning of anarchy*

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<sup>1</sup> Marco Bélair-Cirino, "Le juge en chef du Canada n'a pas oublié l'odeur d'anarchie," *Le Devoir*, 9 April 2022. <https://www.ledevoir.com/politique/canada/697566/convoi-de-la-liberte-le-juge-en-chef-du-canada-n-a-pas-oublie-l-odeur-d-anarchie>

*where some people have decided to take other citizens hostage, to take the law into their own hands, not to respect the mechanism. [...] That, I find that worrying.”*

...

*Forced blows against the state, justice and democratic institutions like the one delivered by protesters to the doors of the Prime Minister's office and the Privy Council, Parliament, the Supreme Court of Canada and the Press Gallery parliamentary between January 28 and February 21 must be denounced with force, and this, by all the figures of power in the country, believes Mr. Wagner.*

*He therefore disapproves of the political actors who stuck to the Freedom Convoy, which was made up of people of “good faith”, but also of “remotely guided” people seeking to bypass the political “system”. “It doesn't inspire good feelings in me. I find that disturbing,”*

...

### **Clearing up the “confusion”**

*The occupation of downtown Ottawa was fueled not only on diesel fuel, but also on a “misunderstanding” and, “it must be said”, “a certain ignorance” of the basics of the rule of law Canadian, laments Mr. Wagner.*

*“In the world around us, we see situations that undermine democracy and judicial independence. The worst mistake we can make is to say: “We are exempt from that. It didn't happen with us.” It is a mistake. You have to be on the lookout. We must denounce any circumstance that could undermine our principles such as judicial independence, the rule of law, institutions. I like to say that Canada is not a military power, is not an economic power. But, I think it is a power at the level of judicial and legal values. And that is our strength in Canada because we have succeeded, over the years, in maintaining respect for institutions, in maintaining the rule of law. But it does not live on its own,” insists the chief judge.<sup>2</sup>*

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<sup>2</sup> French version: « Ce qu'on a vu récemment sur la rue Wellington, ici, c'est un petit début d'anarchie où certaines personnes ont décidé de prendre d'autres citoyens en otages, de prendre la loi entre leurs mains, de ne pas respecter le mécanisme. [...] Ça, je trouve ça inquiétant », affirme-t-il dans un échange avec Le Devoir à l'approche du 40<sup>e</sup> anniversaire de la Charte canadienne des droits et libertés.

Les coups de force portés contre l'État, la justice et les institutions démocratiques comme celui asséné par les protestataires aux portes du bureau du premier ministre et du Conseil privé, du Parlement, de la Cour suprême du Canada et de la Tribune de la presse parlementaire entre le 28 janvier et le 21 février doivent être dénoncés avec force, et ce, par toutes les figures du pouvoir du pays, estime M. Wagner.

[Ce texte fait partie de notre section Perspectives.](#)

Il désapprouve donc les acteurs politiques qui se sont collés sur le Convoi de la liberté (Freedom Convoy), qui était constitué de personnes de « bonne foi », mais aussi de personnes « téléguidées » cherchant à court-circuiter le « système » politique. « Ça ne m'inspire pas de bons sentiments. Je trouve cela inquiétant », laisse-t-il tomber dans la salle de lecture des juges située dans l'édifice de la Cour suprême.

**Dissiper la « confusion »**

To summarize, the Chief Justice appears to have concluded that the TC and/or some of the TC participants:

- *were the beginning of anarchy*
- *had decided to take other citizens hostage, to take the law into their own hands, not to respect the mechanism*
- *had delivered forced blows against the state, justice and democratic institutions which must be denounced with force, and this by all the figures of powers in the country*
- *were “remotely guided”*
- *were seeking to bypass the political system*

Within the context of the four (4) Notice of Applications filed with the Federal Court, all matters related to the TC, including but not limited to its objectives, methods, processes and the actions of the participants (referred to in the *Le Devoir* article) will be reviewed to determine whether the invocation of the *EA* was justified in the circumstances.

It is conceivable that one or more of those Applications may eventually be heard by the Supreme Court of Canada, before the Chief Justice.

To that end, we respectfully submit that the Chief Justice’s views expressed in the *Le Devoir* article fit within the legal definition of a reasonable apprehension of bias and an appearance of partiality. We submit that the Chief Justice’s remarks will undermine Canadians’ confidence in the independence of the Supreme Court of Canada in particular, and in the judiciary, generally. We further submit that the confidence of the litigants in the capacity of the judicial system to impartially and fairly determine the issues raised in the four (4) Notices of Application filed, plus any other Notices of Applications to be filed, will be undermined.

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L’occupation du centre-ville d’Ottawa a carburé non seulement au diesel, mais aussi à une « mauvaise compréhension » et, « il faut le dire », à « une certaine ignorance » du b.a.-ba de l’État de droit canadien, se désole M. Wagner.

« Dans le monde qui nous entoure, on voit des situations qui mettent à mal la démocratie et l’indépendance judiciaire. La pire erreur qu’on puisse faire, c’est de dire : “Nous, on est exempts de ça. Ce n’est pas arrivé chez nous.” C’est une erreur. Il faut être aux aguets. Il faut dénoncer n’importe quelle circonstance qui puisse mettre en échec nos principes tels que l’indépendance judiciaire, la règle de droit, les institutions. J’aime dire que le Canada n’est pas une puissance militaire, n’est pas une puissance économique. Mais, je pense que c’est une puissance au niveau des valeurs judiciaires et juridiques. Et ça, c’est notre force au Canada parce qu’on a réussi, à travers les années, à maintenir le respect des institutions, à maintenir la règle de droit. Mais ça ne vit pas tout seul », insiste le juge en chef.

**Re: Reported Comments of The Right Honourable Richard Wagner, P.C., Chief Justice of Canada.**

## ***Ethical Principles for Judges - 2021***

In making this submission, we rely upon the principles set out in the ***Ethical Principles for Judges***, published by the Canadian Judicial Council (CJC Rules) which govern federally appointed judges including the Chief Justice of the Supreme Court of Canada. Particularly, we respectfully submit that the Chief Justice's above-listed remarks are contrary to the principles enunciated in Part V (Impartiality).

Sections A and B of Part V of the CJC Rules states,

A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.

B. Judges avoid conduct which could reasonably cause others to question their impartiality.<sup>3</sup>

Commentary to Part V, is particularly relevant,

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.<sup>4</sup>

## ***International Standards of Judicial Conduct***

As stated in the United Nations Basic Principles on the Independence of the Judiciary (Basic Principles),

In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of

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<sup>3</sup> *Ethical Principles for Judges*, Canadian Judicial Council, published on June 9, 2021, page 39.

<sup>4</sup> *Ibid.* page 40.

their office and the impartiality and independent of the judiciary.<sup>5</sup>

The Bangalore Principles of Judicial Conduct (Bangalore Principles) confirm the mandate “to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”<sup>6</sup>

The Commentary on The Bangalore Principles of Judicial Conduct (Commentary) recommends that when a judge has publically expressed an opinion about an issue that arises in the judge’s court, and “the judge’s impartiality might reasonably be questioned, the judge must disqualify himself or herself from any proceedings if past actions cast doubt on the judge’s impartiality and judicial integrity.”<sup>7</sup>

The Commentary emphasizes that generally a judge should not speak publicly about an issue when doing so could undermine confidence in the judge’s impartiality, expose the judge to political attacks or be inconsistent with the dignity of judicial office<sup>8</sup> and identifies the dangers inherent in a judge’s involvement with public controversies and states,

A judge should not involve himself or herself inappropriately in public controversies. The reason is obvious. The very essence of being a judge is the ability to view the subjects of disputes in an objective and judicial manner. It is equally important for judges to be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded and even-handed approach which is the hallmark of a judge. If a judge enters the political arena and participates in public debates—either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the Government—he or she will not be seen to be acting judicially when presiding as a judge in court. The judge will also not be seen as impartial when deciding disputes that touch on the subjects about which the judge has expressed public opinions; nor, perhaps more importantly, will he or she be seen as impartial when public figures or Government departments that the judge has previously criticized publicly appear as parties, litigants or even witnesses in cases that he or she must adjudicate.<sup>9</sup>

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<sup>5</sup> Basic Principles, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, at para. 8.

At <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>

<sup>6</sup> The Bangalore Principles of Judicial Conduct, Adopted July 2006 by ECOSOC as a further development of and complementary to the Basic Principles, at para. 4.6.

<https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>

<sup>7</sup> Commentary on the Bangalore Principles of Judicial Conduct, UN Office on Drugs and Crime, September 2007, at para. 140

[https://www.unodc.org/res/ji/import/international\\_standards/commentary\\_on\\_the\\_bangalore\\_principles\\_of\\_judicial\\_conduct/bangalore\\_principles\\_english.pdf](https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf)

<sup>8</sup> *Ibid* at para. 134.

<sup>9</sup> *Ibid* at para. 140.

## Canadian Case Law

We further rely on *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, [2015 SCC 25](#), [\[2015\] 2 S.C.R. 282](#) (S.C.C.) (Yukon). The Supreme Court of Canada in *Yukon* stated,

**20** The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

. . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; [Committee for Justice and Liberty v. National Energy Board](#), [\[1978\] 1 S.C.R. 369](#), at p. 394, per de Grandpré J. (dissenting)]

...

**22** The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding “[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” and “connotes absence of bias, actual or perceived”: p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see *S.(R.D.)*, at para. 49, per L’Heureux-Dubé and McLachlin JJ.

**23** In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:

. . . public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis added; paras. 57-58.]

**24** Or, as Jeremy Webber observed, “*impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other*”: “*The Limits to Judges’ Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger*” (1984), 29 McGill L.J. 369, at p. 389.

(Emphasis in Original)

## **Conclusion**

We bring this matter forward to the CJC with respect and gratitude for the Chief Justice's service to Canada, and also with concern for the dignity of the judiciary and public confidence in the ability of Canadian courts to determine issues fairly, independently, and without judicial bias or partiality. We are aware that "*In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy.*"<sup>10</sup> The reported comments by the Chief Justice do not reasonably fit into this exception. In the event that the 'collapse of democracy and the rule of law' are considered as a justification for the remarks, we would like to make additional submissions on this point.

Our democracy depends on an independent, impartial and competent judiciary and judicial system, hence the necessity for judges to refrain from making public statements that may create the appearance of bias, partiality or pre-judgment of issues that are or may be before Canadian Courts. It is the appearance of the remarks that we are concerned with and which the CJC Rules, International Standards of Judicial Conduct and the Yukon decision address.

We would deeply regret that any Canadian would, upon reading the Chief Justice's published remarks, lose confidence in the independence and impartiality of our highest Court and in the Canadian judicial system, generally.

We thank the CJC for carefully considering this matter and taking all necessary steps it has available to it, to properly address this complaint.

Respectfully submitted.

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<sup>10</sup> Independence of judges and lawyers Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29 April 2019 at para. 102. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/118/68/PDF/G1911868.pdf?OpenElement>