



CJC File 18-0084, PURSUANT TO THE *CANADIAN JUDICIAL COUNCIL
INQUIRIES AND INVESTIGATIONS BY-LAWS, 2015*

**Reasons for the referral of a complaint to a
Judicial Conduct Review Panel in the matter of
the Honourable Patrick Smith
of the Ontario Superior Court of Justice**

Per the Honourable Robert Pidgeon,
Vice-Chairperson of the Judicial Conduct Committee

I write in respect of the Honourable Patrick Smith of the Superior Court of Justice (Ontario) concerning his appointment as Interim Dean of Law at Lakehead University.

Last spring, Justice Smith was contacted by the Interim President and Vice-Chancellor of Lakehead University and was offered the position of Interim Dean of Law, which he accepted after obtaining approval, from Chief Justice Heather Smith, for a six-month leave of absence from judicial duties.

I note that the faculty's key objective is to train First Nations students and students from various minority groups.

The former dean, a First Nations lawyer (Angelique EagleWoman), resigned very publicly by claiming she had been the victim of systemic racism by the university's senior administration and had faced strong resistance to her leadership by that same administration.

Following Justice Smith's appointment as Interim Dean, First Nations leaders were upset and criticized the lack of prior consultation and failure to follow the recommendations of the national advisory committee on aboriginal issues. They called on the university to rescind the appointment.

On 9 May 2018, given the public comments made in response to the statements made by First Nations chiefs, the Executive Director of the Canadian Judicial Council wrote to Justice Patrick Smith and his Chief Justice to obtain more information.

On 10 May 2018, following a meeting between a First Nations advisory committee and the university's president, committee members seemed to be reassured, or at least more reserved than their scathing comments had been up to that point, since no public statements were made subsequently.

On 11 May 2018, Chief Justice Heather Smith responded to the Executive Director that Justice Patrick Smith was absent and advised the Executive Director that she had granted Justice Smith a leave of absence from June to November 2018 to allow him to carry out duties as Interim Dean of Law at Lakehead University. At the same time, the Executive Director was informed that the federal Minister of Justice had "unofficially" approved that leave to allow Justice Smith to serve as Interim Dean of Law (see attached letter). It should be noted that the Minister added in her letter that (1) the decision to grant leave was for Chief Justice Smith to make and

(2) the university should move quickly to appoint a new dean.

After considering the information before him, the Executive Director determined that the matter warranted review by Council. The matter was referred to the undersigned, in keeping with section 4.3 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the “Review Procedures”), at the direction of the Chairperson of the Judicial Conduct Committee of Council.

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I begin my review by noting that this matter raises a question of interpretation with regard to sections 54, 55 and 56 of the *Judges Act*. Indeed, Justice Smith and his Chief Justice obtained a legal opinion in this respect (attached), prepared by Mr Murray Segal, former Deputy Attorney General of Ontario. Mr Segal provides a broad interpretation of sections 55 and 56 of the *Judges Act*:

The history of ss. 55 and its predecessors does not suggest that it was targeted at preventing judges from engaging in unpaid academic pursuits. The history of s. 55 suggests it was aimed at preventing judges from: (1) engaging in paid employment while acting as judges, and thereby neglecting their judicial duties; (2) being involved in commercial enterprises; and (3) being involved in matter of public controversy.

[emphasis added]

Then, in conducting a historical analysis of the amendments made to these sections of the *Judges Act* and the comments from ministers of justice and some parliamentarians, Mr Segal writes:

In short, the history of these provisions suggests that they were not intended at preventing judges from engaging in all extrajudicial

activity, but primarily: (1) commercial activities; (2) paid employment; and (3) matters that might be the subject of public controversy.

[emphasis added]

At pages 19 and 20 of his legal opinion, he concludes:

Summary and Additional Conditions

In sum, our view is that ss. 54 and 55 of the *Judges Act* did not prevent Chief Justice H. Smith from granting special leave to Justice P. Smith to act as Acting Dean in a limited capacity, nor do they prevent Justice P. Smith from taking such leave.

Granting special leave was within Chief Justice H. Smith's power and did not contravene s. 55 of the *Judges Act*. When leave is granted under s. 54, it must be for a purpose that is consistent with the office of a judge and judicial ethics, and it must be particularly sensitive to the judge's eventual return to the bench. These considerations were apparent in Chief Justice H. Smith's decision to grant leave on carefully designed conditions. Given the plain meaning and history of ss. 54 and 55, the history of judges pursuing roles in academia, and the principles of judicial ethics, granting special leave for Justice P. Smith to take on a closely circumscribed role as Acting Dean did not contravene s. 55.

Our conclusion is based on the understanding that Justice P. Smith will have a narrowly circumscribed role as Acting Dean. We would have serious concerns if Justice P. Smith were taking on the role of Acting Dean without any or sufficient limitations.

We would suggest considering the following additional conditions or clarifications for greater precision :

- (a) That Justice P. Smith not have any involvement in fundraising on behalf of the Faculty of Law or Lakehead University, including but not limited to seeking government funding and soliciting donations;
- (b) That he be particularly sensitive in making any public statements;
- (c) That a change to his title be considered to reflect his narrow academic role;
- (d) That he not use any judicial chambers resources or staff in this role as

Acting Dean;

(e) That he continue to be vigilant about avoiding conflict or potential conflicts;

(f) That he approach the Office of the Chief Justice of the Superior Court immediately should the circumstances change, or any issues arise which may raise new ethical implications, possibly lead to public controversy, or generally on which he requires direction;

(g) That the attempt to facilitate and expedite the Faculty of Law's process of appointing a permanent Dean; and

(h) That he obtain an agreement in writing with the University confirming the limitations on his role as Acting Dean.

In our view, these additional conditions will limit the potential for public controversy and may help to clarify public perception on the nature of his role as Acting Dean. They will also help to avoid any impression that he is lending his judicial status to the University for financial or other purposes. Further conditions may also provide additional buffers in relation to His Honour's return from leave.

[emphasis added]

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In my view, a somewhat different interpretation must be given to the provisions in question. In my respectful opinion, the question for Council in this matter is whether Justice Patrick Smith's conduct in accepting an appointment as Interim Dean of the Law Faculty potentially contravenes the *Judges Act* or his ethical obligations as a member of the judiciary. The question is not whether Chief Justice Heather Smith lawfully or reasonably exercised her discretion under paragraph 54(1)(a) of the *Judges Act*. The question is whether the leave of absence was properly taken by Justice Patrick Smith. In my view, Chief Justice Heather Smith's consent and support for Justice P. Smith's leave of absence, and the Minister of Justice's apparent lack of concern, are simply factors to be weighed in assessing the nature and gravity of Justice Patrick Smith's conduct, and whether this conduct is appropriate.

Section 55 of the *Judges Act* requires judges to devote themselves exclusively to their judicial duties, and to abstain from businesses and occupations falling outside the judicial sphere. This is confirmed by the legislative history of sections 55, 56, and 56.1 of the *Judges Act*. Being granted a leave of absence under section 54 of the *Judges Act* does not permit a judge to take on a business or occupation outside of the judicial sphere (except for acting as a commissioner, arbitrator, adjudicator, referee conciliator or mediator on any commission or on any inquiry, provided certain statutory conditions under section 56 of the *Judges Act* are met). The meaning of “occupation” should be broadly interpreted to capture all non-judicial activities that interfere with the judicial role, whether due to their onerous or time-consuming nature or given their incompatibility with judicial office.

In addition, it is worth noting that in a decision rendered on 22 June 2015 (attached), regarding a complaint made against an Ontario Court of Appeal judge who had accepted a position as chancellor at Brescia University College, the Chairperson of the Judicial Conduct Committee, the Honourable Michael MacDonald, concluded:

Chief Justice MacDonald came to the opinion that Justice Gillese’s appointment to the Chancellor’s post did not place her in a position that is incompatible with her judicial functions. Chief Justice MacDonald took into consideration the strict limitations that were agreed upon by officials from Brescia and by Justice Gillese, as well as her pro-active course of action which included discussions with her Chief Justice to avoid any potential conflict and limit any associated risks. In these specific circumstances, Chief Justice MacDonald agrees with Chief Justice Strathy that Justice Gillese’s acceptance of this ceremonial post is not contrary to judicial ethics and may, in fact, be of benefit to the judiciary.

[emphasis added]

Note that in that case, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from Chief Justice MacDonald regarding the interpretation of sections 55 and 56 of the *Judges Act*, suggested the following:

The words “occupation and business” cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words “occupation and business” certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity.

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To better understand the issues this case raises, it should be added that Council’s *Ethical Principles for Judges* and integrated commentary caution judges against the risks associated with accepting such positions, particularly in a context such as the one faced by Justice Patrick Smith.

Article 1(c) of the *Principles* relating to impartiality states as follows:

Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.

The commentary at C.9 further states:

... Such participation [as chancellor of a university¹] may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

[emphasis added]

¹Note added by the undersigned.

I wish to point out that the conclusion reached by Murray Segal, a jurist for whom I have a great deal of respect, is puzzling to me for reasons I will explain below.

After broadly interpreting sections 54 and 55 and stating that Chief Justice Heather Smith was within her rights to grant Justice Patrick Smith leave of absence to serve as dean, he writes:

Our conclusion is based on the understanding that Justice P. Smith will have a narrowly circumscribed role as Acting Dean. ...

He adds:

We would have serious concerns if Justice P. Smith were taking on the role of Acting Dean without any or sufficient limitations.

He then adds eight conditions, as listed previously (see pages 4 and 5), that Chief Justice Heather Smith imposed for Justice Patrick Smith in her letter of April 30, 2018:

As we discussed, in accordance with s. 55 of the Judges Act, your role at the Faculty will require clear parameters. You cannot accept any remuneration from the University and your role must be limited to academic leadership. You must delegate administrative authority, including recruitment, financial decisions and academic appeals to others within the Faculty.

Essentially, Mr Segal imposes conditions on Justice Smith that for all intents and purposes would limit his role to a ceremonial one. The total of eleven conditions imposed by the Chief Justice and Mr Segal lead me to that conclusion.

I wrote to Justice Patrick Smith on 12 July 2018 to ask whether he was complying with the conditions proposed by Mr Segal and his Chief Justice. When he answered in the affirmative, I asked how he was following them and, specifically, what his current duties were.

He provided me with a response on 17 July 2018 that can be summarized as follows:

- The conditions proposed by Mr Segal were all implemented, as shown in an agreement with the university dated 31 May 2018 (attached).
- The recruitment process for a new dean is in place.
- Justice Smith cannot speculate as to when a new dean will be appointed.
- Justice Smith made a public statement at a student convocation on 1 June 2018, and will make others, in accordance with the suggestions put forward by Mr Segal.

* * *

That said, I am left with four questions.

- 1) Can sections 55, 56 et 56.1 of the *Judges Act*, considered in the context of their legislative history, allow a judge to temporarily act as dean of a faculty of law?
- 2) Regardless of the interpretative approach applied to sections 54, 55 and 56 of the *Judges Act*, did Justice Smith carefully weigh the risks associated with accepting the position of Interim Dean?
- 3) Can the appointment of Justice Smith as acting dean be perceived as taking advantage of the prestige of judicial office, given all the circumstances of this matter, with the goal of continuing the operations of a faculty of law with special vocation?
- 4) Considering the leave of absence granted by his Chief Justice to allow Justice Smith to serve as Interim Dean, and the implicit approval from the Minister

of Justice regarding this activity, can I conclude that the matter is serious enough to warrant the removal of a judge who appears to have acted in good faith?

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After considering the interpretation of the relevant legislative provisions, only one question remains: did Justice Smith err by incorrectly assessing the situation, that is, by erroneously weighing the inherent risks of the situation?

My answer to this question is that he did. Given the context surrounding the departure of the previous dean, who resigned on the ground that she had allegedly been the victim of systemic racism by the administration at the university, whose purpose is to train indigenous students and students from minority groups, and given the administration's alleged resistance to the dean's leadership. These are serious, litigious issues that have been, and can further be, subject of public debate. Justice Smith's role may be circumscribed, but it goes beyond a purely ceremonial role and is one of leadership within the university, one that takes him away from his judicial duties.

We are far removed from the context in *Gillese*, where the issue in question was focused on the interpretation of section 55 of the *Judges Act*. In that case, the role of the judge was limited to ceremonial functions and the judge continued to perform her normal judicial duties. Additionally, the judge's appointment as Chancellor was not the subject of any challenge by a particular group and was not the subject or any public controversy.

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In summary, I am of the view that Justice Patrick Smith engaged in misconduct by accepting a position as Interim Dean without considering the possible public

controversy associated with the reaction from the chiefs of First Nations and without considering the political environment or the potential effect on the prestige of judicial office.

I had to answer this question bearing in mind that (1) an interim or permanent dean is the public face of a faculty and (2) Justice Smith accepted the appointment while the media attention was underway. In addition, and with respect, it is my opinion that the situation is exacerbated by his erroneous assessment of the risks that will continue to exist at an institution where litigation would surely come before the Court of which he is a member.

I therefore conclude that the matter might be serious enough to warrant the removal of Justice Patrick Smith from office. I accordingly refer the matter to a Review Panel, in keeping with subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*, to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*.

Original signed by

The Honourable Robert Pidgeon
Vice-Chairperson, Judicial Conduct Committee
Canadian Judicial Council

Encls.