



November 23, 2016

**VIA FACSIMILE: (416) 327-2339**

**The Ontario Judicial Council**  
P. O. Box 914,  
Adelaide Street Postal Station,  
31 Adelaide Street East,  
Toronto, Ontario  
M5C 2K3

Dear Madam / Sir:

**Re: Amended Complaint Against Justice Bernd Zabel**

Please accept the amended complaint letter which incorporates the additional endorsement by the Roundtable of Diversity Associations.

Respectfully Submitted,

Zaid Sayeed  
Chair of the Board  
Canadian Muslim Lawyers Association

Imtenan Abd-El-Razik  
Steering Committee Member  
Canadian Association of Muslim  
Women in Law



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Dear Madam / Sir:

**Re: Complaint Against Justice Bernd Zabel**

Please accept this letter as a written complaint in respect of the conduct of Justice Bernd Zabel, on November 9, 2016, at the Hamilton (John Sopinka) Courthouse. On that date, Justice Zabel entered his Courtroom wearing a red baseball cap bearing the slogan "Make America Great Again", which is commonly worn by supporters of Donald Trump.

On behalf of the Canadian Muslim Lawyers Association (CMLA), the Canadian Association of Muslim Women in Law (CAMWL) and the accompanying endorsers of this letter, who are copied hereto, we hereby request an expedited public review of this matter by a panel of the Ontario Judicial Council and, as appropriate, discipline against Justice Zabel.

**The Canadian Muslim Lawyers Association**

1. Founded in 1998, the CMLA is a Toronto-based non-profit association of Muslim lawyers from all Canadian provinces and territories. It has over 200 members and, among its other purposes, serves as an advocate on select issues of importance to Canadian Muslim lawyers and the broader Canadian Muslim Community. A selection of its activities includes the presentation of oral and written submissions to Parliamentary and Senate Committees, active representation of the Muslim community via involvement in diversity initiatives, providing comment to the government and political parties on legislation, and seeking leave to and intervening in various court cases, including before the Supreme Court of Canada.

### **The Canadian Association of Muslim Women in Law**

2. The CAMWL was founded in the summer of 2013 by a small group of women who were connected through their identification as Muslim women, their practice and/or study of the law, and their commitment to social justice. CAMWL has since grown to over 90 members and has worked to advance the legal rights and interests of Muslim women and other marginalized groups in Canada, while promoting camaraderie within its membership.
3. Through public education, direct advocacy, and law reform, CAMWL strives to create spaces for its members to voice their opinions on legal issues affecting Muslim women in Canada, and indeed, on any legal issue where diversity, equity, and justice are concerned. To this end, CAMWL is conscious of the importance of indigenous movements for justice and equality across Canada and strive to ensure that its work complements these struggles.

### **Reported Facts**

4. On November 9, 2016, Justice Zabel was reported to have entered his courtroom wearing his black robes, white collars and red sash, along with a red baseball cap displaying the slogan “Make America Great Again”. The “Make America Great Again” baseball cap is commonly worn by supporters of Mr. Trump and those who endorse his political views. Upon being seated, Justice Zabel reportedly removed his baseball cap from his head and placed it on the bench, in full view of those present.

### **The Specific Import of the Cap and Slogan**

5. “Make America Great Again” was the well-known campaign slogan of then-U.S. Republican Presidential candidate (now President-Elect) Donald Trump, who was elected to the U.S. presidency following a highly divisive and polarizing campaign. In the course of his campaign, Mr. Trump made disparaging statements against many vulnerable groups, including women, racial minorities, religious minorities, and persons with disabilities. As but a few examples, he proudly made the following pronouncements:
  - “When Mexico sends its people, they’re not sending the best. .... They’re bringing drugs. They’re bringing crime. They’re rapists...”
  - “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States...”;
  - “Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything...”

### **Principles of Judicial Office - Section 1.1**

6. Ontarians have a right to judges who act in a manner which befits their position and merits the trust and confidence of the public. This right is enshrined in the *Principles of Judicial Office*, which establishes standards for judicial conduct. Section 1.1 of the *Principles* states that judges must be impartial and objective in the discharge of their judicial duties. In commentary, this has been interpreted to mean that judges must

not be influenced by partisan interests and that their objectivity shall not, by words or conduct, manifest favour, bias or prejudice towards any party or interest. In light of common public perception of the afore-mentioned cap and slogan, the wearing of same exhibits “favour, bias or prejudice” and raises a spectre of partiality which can be expected to engender distrust of the judicial system.

### **Principles of Judicial Office - Section 3.2**

7. Section 3.2 of the *Principles* states that judges must avoid any conflict of interest, or the appearance of any conflict of interest, “in the performance of their judicial duties.” The commentary elaborates on the principle, providing that Judges “must not participate in any partisan political activity...” Clearly, the wearing of paraphernalia representing a political party while on the bench constitutes participation in partisan political activities “in the performance of ... judicial duties.”
8. Justice Zabel’s decision to wear a cap emblazoned with the “Make America Great Again” slogan in his Courtroom fell below the standard of conduct that is expected of Ontario judges and runs afoul of the *Principles of Judicial Office*.

### **Judicial Misconduct**

9. As stated *In the Matter of a Complaint Respecting the Honourable Madam Justice Lesley M. Baldwin* (2002), which applied the findings of *Moreau-Bérubé v New Brunswick (Judicial Council)* [2002] SCC 11, the test for whether misconduct warrants a disposition by a convened Judicial Council is whether the impugned conduct is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the “public’s confidence” in the ability of the judge to perform the duties of office or in the administration of justice generally. If the test is met, then Council may adopt a variety of dispositions in order to “restore that confidence.” Per the Judicial Council:

“The personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it” (*In the Matter of a Complaint Respecting the Honourable Justice Norman Douglas* (2006)).

10. An independent judiciary is the right of every Canadian and must be exemplified by all judges in dispensing impartial justice under the law. Judges must be free of extraneous influences and should strive not only to conduct themselves with integrity and impartiality but also to act in a manner that sustains and enhances public confidence in the judiciary.
11. Justice Zabel’s wearing and displaying of the “Make America Great Again” cap is conduct which impugned the perceived objectivity of not just himself but of the entire judiciary. The partisan slogan and symbolism represented by his cap undermined public confidence in our judicial system, created an apprehension of bias in the administration of justice, and has no place in an Ontario courtroom.

12. Members of the Canadian Muslim community commonly manifest several of the identities derided by the President-elect, whether as Muslims, women, immigrants, black, or otherwise racialized. The effect Justice Zabel's actions will have on Muslims appearing before him, whether as lawyers or litigants, is unmistakable, and unfortunately, likely irreversible. Moreover, given the extent to which Islamophobia is gendered in nature, we are deeply concerned with how Muslim women in particular would be addressed and treated in Justice Zabel's courtroom.

### **Justice Zabel's Apology**

13. In the course of drafting this complaint, we were advised that Justice Zabel admitted the impropriety of his conduct and apologized for same. While the undersigned and the accompanying endorsers believe that this apology should be taken into account when determining the appropriate sanction, if any, we are also cognizant of the damage caused to the reputation of the judicial system and distrust engendered as a result of his conduct, particularly when considered in light of the systemic difficulties already faced by minority lawyers, witnesses, and parties in seeking or contributing to the administration of justice. The undersigned and the accompanying endorsers are concerned that the failure to impose a sanction under the *Courts of Justice Act*, in this case, will not "restore the confidence" of the public in the administration of justice and request that this be considered at the disposition stage of a hearing.

### **Request for Review**

14. We, the undersigned and accompanying endorsers, request a public review of Justice Zabel's conduct on November 9, 2016. We also call for disciplinary measures, as appropriate.

We look forward to your response at your earliest opportunity. Should you wish to discuss this matter further, please feel free to contact us at the Canadian Muslim Lawyers Association at [info@cmla-acam.ca](mailto:info@cmla-acam.ca), or Canadian Association of Muslim Women in Law at [contact@camwl.ca](mailto:contact@camwl.ca).

Respectfully Submitted,



Zaid Sayeed  
Chair of the Board  
Canadian Muslim Lawyers Association



Imtenan Abd-El-Razik  
Steering Committee Member  
Canadian Association of Muslim  
Women in Law

Endorsers copied:

Dina Awad, Executive Member, Arab Canadian Lawyers Association

Donna Walwyn, President, Canadian Association of Black Lawyers

Brendan Wong, President, Federation of Asian Canadian Lawyers (Ontario)

Atoosa Mahdavian, Chair of the Board, Iranian Canadian Legal Professionals

Lai-King Hum, Chair, Roundtable of Diversity Associations

Ranjan K. Agarwal, President, South Asian Bar Association of Toronto