SUPREME COURT OF NOVA SCOTIA

Citation: *Fraser v. Nova Scotia Barristers' Society et al.*, 2024 NSSC 173

Date: 20240614
Docket: Pic No. 525215
Registry: Pictou

Between:

Donn Fraser

Applicant

v.

Nova Scotia Barristers' Society, including its Complaints Investigation Committee and Elaine Cumming and Julie MacPhee

Respondents

Decision

Judge: The Honourable Justice Frank P. Hoskins

Heard: November 23, 2023; February 8, 2024; and April 4, 2024 in Pictou, Nova Scotia

Counsel: Donn Fraser, self-represented
Ewa Krajewska, for the Respondent, NSBS
Marjorie Hickey, for the Respondent, Julie MacPhee

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By the Court:

Introduction

[1] The Applicant, Donn Fraser, has brought an application for judicial review challenging two decisions made by the Complaints Investigative Committee (the "CIC") of the Nova Scotia Barristers' Society respecting complaints he filed against his former law partner, Julie MacPhee.

[2] The Respondents, the Nova Scotia Barristers' Society Complaints Investigation Committee and Elaine Cumming, Director of Professional Responsibility, filed their Notices of Participation.

[3] A brief procedural history of this matter will contextualize the nature and number of motions made during the proceedings too date.

History of Proceedings

[4] On July 6, 2023, Mr. Fraser filed a Notice of Judicial Review naming the Nova Scotia Barristers' Society, including its CIC and Elaine Cumming, the Director of Professional Responsibility, Respondents' (collectively, the "Society").

[5] On July 19, 2023, a Notice of Participation was filed by the Society.

[6] On August 3, 2023, the parties appeared in court for a Motion for Date and Directions. Though not a party to the proceedings at that time, Julie MacPhee was represented by counsel, Ms. Majorie Hickey, KC. It was noted that Ms. MacPhee would be seeking party status in the proceedings.

[7] Counsel sought directions on, *inter alia*, production of the record of the proceedings related to the complaints (the "Record") to Mr. Fraser and Ms. MacPhee. The Society's request for directions about the Record arose from the requirement under s. 40 (1) of the *Legal Profession Act* (the "*Act*") to keep all investigations confidential, the requirements under Rule 7.09 of the *Nova Scotia Civil Procedure Rules* (the "*Rules*") to file a record of proceedings and the open court principle. Rule 7.09 provides that the respondent to an application for judicial review must file with the Court and deliver to the applicant either (1) a complete copy of the record or (2) an undertaking that the decision-making authority will

appear before the judge at the time of the motion for directions and seek directions concerning the record.

[8] The *Act*, on the other hand, requires the respondent to keep all investigations confidential. Section 40(1) provides that "[a]ll complaints received or under investigation and all proceedings of the Complaints Investigation Committee shall be kept confidential by the Society". This provision applies to the Record.

[9] As a result of the interaction between s. 40(1) of the *Act*, and Rule 7.09 of the *Rules*, Mr. Fraser, and Ms. MacPhee, provided an undertaking that they would maintain the confidentiality of the Record until a motion for a sealing or confidentiality order could be heard by the Court. The purpose of the undertaking for Mr. Fraser and Ms. MacPhee was to receive and review the Record on a confidential basis in order for them to determine what position they would take on the Society's prospective motion for a sealing or confidentiality order.

[10] The Society provided a copy of the Record to the Applicant, Mr. Fraser, and to Ms. MacPhee on August 8, 2023.

[11] On August 17, 2023, Ms. MacPhee, through her counsel, informed the Society and Mr. Fraser that she had no issue with public disclosure of the material in the Record.

[12] On August 29, 2023, Mr. Fraser served motion materials on the Society to lift the undertaking of confidentiality in order to, among other things, be able to discuss the Record with any person directly mentioned in it in order to determine whether the Record should remain confidential.

[13] On September 7, 2023, the parties appeared before Justice Darlene Jamieson to hear the motion respecting the lifting of the undertaking arising from the August 3, 2023, appearance.

[14] On September 20, 2023, a Notice of Motion was filed to have Julie MacPhee added as a Respondent.

[15] On September 22, 2023, a Notice of Motion was filed by the Society seeking directions respecting the Confidentiality Order.

[16] On September 27, 2023, Justice Jamieson issued an order vacating the undertaking, an interim Confidentiality Order respecting the Record, and a permanent sealing order respecting the written submissions and Affidavit of Mr. Fraser dated August 29, 2023.

[17] On October 5, 2023, the parties appeared before Justice James Chipman to hear the motion from Julie MacPhee added as a party. On October 10, 2023, Justice Chipman issued an order granting Julie MacPhee's motion to be added as a party, and awarding costs against Mr. Fraser. Justice Chipman declined to make an order respecting the Society motion seeking directions respecting a Confidentially Order and directed the Society to return to court with a statement of the Society's position after canvassing the parties on their positions.

[18] On November 3, 2023, the Applicant, Mr. Fraser, filed a Notice of Motion for an Order in respect of the following:

1. Amendments to his Notice for Judicial Review;

2. Striking aspects of the Society's and Respondent Julie MacPhee's respective Notices of Participation;

3. Compelling the Society to make further and complete record of disclosure of the Record;

4. Requesting the Court to review, assess and set aside any inappropriate claims of privilege asserted over redacted content in the Record filed with the Court; and

5. Costs.

[19] On November 3, 2023, the Society filed Notice of Motions seeking:

1. A limited Confidentiality Order respecting the Record; and

2. The striking of the judicial review application with respect to the Society.

[20] On November 23, 2023, the Court heard submissions from the parties regarding all of the above-noted motions. Additionally, the Respondent Julie MacPhee (hereinafter "Julie MacPhee"), made submissions seeking costs. Also, a date was set for February 8, 2024, to hear motions respecting new evidence. The decisions in respect to all the motions, and the request for costs were reserved.

[21] On December 14, 2023, the parties appeared in Chambers to set dates for additional evidence to be filed and setting February 8, 2024, for hearing the motion for introduction of new evidence.

[22] On January 8, 2024, Mr. Fraser filed a Notice of Motion seeking permission to file evidence in addition to or supplemental to the Record, pursuant to Rule 7.28 of the *Rules.*

[23] On January 29, 2024, the Society and Julie MacPhee filed a Motion to Strike portions of Mr. Fraser's January 16, 2024, Affidavit. The Motion to Strike was scheduled for February 8, 2024.

[24] On February 5, 2024, the Applicant, Mr. Fraser wrote to the Court seeking an adjournment of the motions scheduled to be heard on February 8, 2024. On February 6, 2024, counsel for Julie MacPhee responded to Mr. Fraser's request for an adjournment. On February 7, 2024, Mr. Fraser sent a response.

[25] On February 8, 2024, the parties appeared virtually. The Court granted Mr. Fraser's request for an adjournment until April 4, 2024, and reserved on costs.

[26] On April 4, 2024, the motion for permission to introduce evidence and to strike portions of Mr. Fraser's Affidavit were reserved. Also, filing dates were set for the application for judicial review scheduled for June 10 and 11, 2024. I informed the parties that I would do my best to try and release all my reserve decisions sometime before the end of April to provide them with time to prepare their respective submissions for the application for judicial review schedule for June 10 and 11, 2024. Unfortunately, for scheduling reasons the reserved decisions could not be completed in time for the parties to file their respective submissions.

[27] On June 10, 2024, the application for judicial review was rescheduled, to September 4, 2024. Filing dates were also rescheduled.

[28] What follows are my reasons for decision regarding the motions heard.

Dispositions of the Motions

1. Motion to Amend the Applicant's Notice of Judicial Review

[29] The Applicant, Mr. Fraser, made a motion to amend his Notice of Judicial Review to add additional grounds and content.

[30] Civil Procedure Rule 83.03 provides authority to amend a notice after the proceeding is started:

> **83.03 Amendment of notice in other kind of proceeding**
> A party to a proceeding other than an action may amend the notice by which the proceeding is started, or a notice of contest, participation, or contention, with the agreement of the parties affected by the amendment or with permission of a judge.

[31] There is no dispute as to the test this court should apply when considering a motion to amend. As stated by Bourgeois J (as she then was) in *Nova Scotia* (*Community Services*) *v. Hopkins*[1]:

> 13 [t]he test for whether an amendment to the pleadings should be granted is settled in Nova Scotia and turns on whether there has been bad faith or serious prejudice that cannot be compensated by costs:
>
> > A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the Judge that the Applicant was acting in bad faith or that by allowing the amendment, the other party would suffer serious prejudice that could not be compensated by costs.

[32] In assessing bad faith in bringing a motion to amend, the Court should assess whether the moving party is "motivated by an improper purpose such as delay or obstruction of the proceeding or to subvert the ends of justice."[2]

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[1] 2011 NSSC 382.
[2] *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2001 NSSC 178, at para. 29.

[33] In *Unisys Canada Inc. v. Pineau- Pandya*,[3]Justice McDougall explained "bad faith":

> 19 Bad faith was discussed by Bateman JA. In *Global Petroleum Corp.*, where she held that the determination of bad faith is a discretionary decision based on the circumstances of the case (at para. 25).
>
> 20 Bad faith is established if an amendment is motivated by an improper purpose. Improper purposes can include delaying or obstructing the proceeding, or to subvert justice (*Nova Scotia (Community Services) v. Hopkins*, 2011 NSSC 382, at para. 13; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power* Co. Ltd., 2001 NSSC 178.
>
> 21 In *M5 Marketing Communications Inc. v. Ross (cob Ross Built Home)*, 2011 NSSC 32, I held that "the burden of establishing bad faith is on the party raising it. It is a serious allegation and there would have to be strong and compelling evidence in support of it" (at para. 31). I held that mere suspicion was not enough to establish bad faith (at para. 35). This premise has been cited with approval in *Thorburne v. Sun Life Assurance Company of Canada*,2020 NSSC 240.

[34] Justice Bourgeois' approach to this issue accords with the law as stated in *Garth v. Halifax (Regional Municipality)*,[4] where Justice Cromwell (as he then was) stated:

> 30 The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs.

[35] As noted in *Hopkins*, it is well settled law that the merit of the proposed amendment is not a consideration in deciding to grant the motion to amend.[5]

[36] It should also be noted that amendments to the notice for judicial review are also permitted under Rule 7.10(e)

> **7.10 Directions for judicial review**
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> A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following: …

[3] 2023 NSSC 328.
[4] 2006 NSCA 89.
[5] *Hopkins*, at para. 14.

> (e) allows an amendment to the notice for judicial review or a notice of participation;

[37] In the case at bar, the Applicant seeks an amendment to include additional grounds of review alleging that the Society erred in the following respects:

> di. In allowing or ensuring that information to be placed before the Complainant's Investigation Committee was limited and selective and/or with certain relevant evidence held by the Nova Scotia Barristers' Society being withheld from the Complaint's Investigation Committee, including but not limited to withholding evidence that contradicted submissions of Julie MacPhee or confirmed that Julie MacPhee was lying, with the Applicant being unaware of such an approach at relevant times;
>
> g1. Without limiting the generality of the forgoing, in conducting the decision-making process in a manner that:
>
> (i) was improperly tainted by input and/or decision making by Elane Cumming, who was not a proper person to be making any decision;
>
> (ii) entailed the Complaints Investigation Committee acting in violation of the principle that the "one who hears must decide" and/or otherwise improperly abdicating or delegating on a de facto basis responsibility and/or actual decision making or assessment to Elaine Cumming, and/or failing to ensure a proper separation between the role of Elaine Cummings and the function of the Complaints Investigation Committee, rather than the Complaints Investigation Committee undertaking independent assessments and forming independent opinions and decisions;
>
> (iii) allowed the opinions of Elaine Cummings to effectively make the decision (s) for the CIC and for that to happen without the Applicant having opportunity to address Elaine Cumming's flawed input and any flawed opinions, suggestions, selective evidence disclosures, or legal analysis put forward by Elaine Cumming; and/or
>
> (iv) otherwise improperly involved participation by Elaine Cumming in the decision-making process.

[38] The Applicant also seeks to include an "alternative relief" option, providing as follows:

> 3A. alternatively, returning the matter of sanction and/or imposition of any practice review to the Complaints Investigation Committee for an alternative determination based on Julie MacPhee having also committed unethical misconduct by way of her withholding, evidence from police authorities and her having improperly read from a settlement privileged communication in open Court and/or any other findings of this Court.

[39] The Respondent Julie MacPhee takes no position regarding the above amendments. The Society consent to the Applicant's amendments to the Notice for Judicial Review *except* the proposed "alternative relief" as set out above in 3A.

[40] The Applicant argues that there is no prejudice in allowing these issues to now be brought forward. He submits that the timing of the amendments being sought is a product of scheduling and disclosure of the Record.

[41] Despite the Applicant's submission that the alternative relief he seeks is available, he seems to have withdrawn the request for the amendment as he suggested the Court remains free to grant whatever relief it determines appropriate and within its jurisdiction.[6] In his motion seeking alternative relief, the Applicant argued that Rule 7.11 is very broad in terms of the Order the Court can issue to give effect to a decision on judicial review, including "an order providing anything formerly provided by prerogative writ", such as an order in the nature of *mandamus*.[7] The Applicant stresses that arguments as to what is appropriate in the context of this case would be addressed another day and believes that "there would be a legitimate justiciable issue argument to try to block amendments."[8] The Applicant further submits that the intent of the amendment was to have the issues return to the CIC for further consideration of sanction.

[42] Notwithstanding that the Applicant has withdrawn his motion, I want to be clear that the request for an alternative relief is not available in a judicial review application, as the Applicant has not provided any authority to support the proposition that Rule 7.11 is broad enough to permit such a remedy.

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[6] Applicant's Rebuttal Submissions, November 16, 2023, at paras. 3-6.
[7] Applicant's Rebuttal Submissions, November 16, 2023, at para. 4.
[8] Applicant's Rebuttal Submissions, November 16, 2023, at para.4.

[43] As the Society points out, the amendment to include the alternative relief at 3A, as set out above, is not available on a judicial review application. As a complainant, Mr. Fraser's standing is *limited* to raising issues of procedural fairness.[9]

[44] As noted in *Tupper*,[10] and *Perry*,[11] the Applicant is entitled to judicial review of the CIC decision, but not to a surrogate hearing on the merits of his complaints. Therefore, I am not satisfied that the remedy the Applicant is seeking is available upon a judicial review application.

[45] Although they do not oppose the balance of the requested amendments, the Society is *not* agreeing with the additional allegations. Rather, the Society says that the proper forum for addressing these allegations is the hearing on the merits of the judicial review. I agree that the balance of the requested amendments should be granted, given that there is no opposition to them, and they do not occasion prejudice which cannot be compensated in costs.

[46] Accordingly, the Applicant's motion to amend the Notice of Judicial Review in the manner set out in Schedule "A", is granted *except* for the amendment for "alternative relief" at described in 3A, which is not available upon a judicial review application, and thus is dismissed.

2. The Motion to Strike Portions of the Respondents' Notice of Participation

[47] The Applicant, Mr. Fraser, seeks to strike paragraphs 3, 4, 12, and 34 from the Society's Notice of Participation on the basis that they are not relevant.

[48] The Applicant also seeks to strike the CIC decisions as a schedule to the Notice of Participation on the basis that its inclusion is an abuse of process.[12]

[49] The Society opposes striking out paras. 3, 4, 12, and 34 of their Notice of Participation, which state:

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[9] *Tupper v. Nova Scotia Barristers' Society*, 2013 NSSC 290, at para. 31 (affirmed, 2014 NSCA 90); *Perry v. Nova Scotia Barristers' Society*, [2016] N.S.J. No. 178, at paras. 32-35).
[10] *Tupper v. Nova Scotia Barristers' Society*, 2013 NSSC 290.
[11] *Perry v. Nova Scotia Barristers' Society*, [2016] N.S.J. No. 178.
[12] Applicant's Written Submission, November 3, 2023, at paras. 19 and 23.

> 1. The complaints arise from the dissolution of the law firm MacIntosh, MacDonnell & MacDonald (MacIntosh) in September 2021 and the subsequent legal and regulatory proceedings that follow the dissolution. Mr. Fraser and Ms. MacPhee were partners at MacIntosh.
>
> 2. The former partners of MacIntosh filed a complaint with the NSBS relating to Mr. Fraser's conduct. That complaint included allegations that Mr. Fraser had continued to communicate with Ms. MacPhee contrary to an agreement between them. The Complainants had included a videorecording of him standing in the doorway to her office at MacIntosh. Mr. Fraser learned of the video when responding to the complaint.
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> …
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> 12. Between May 9, 2022, and April 11, 2023, Mr. Fraser wrote sixteen e-mails to Ms. Cumming at the NSBS repeatedly asking for updated timelines by which the CIC would meet to discuss the complaints. In this correspondence, Mr. Fraser insisted that the CIC request from Ms. MacPhee copies of all recordings that she made of him. He told the CIC that he would use any information received from the CIC in other court proceedings. Mr. Fraser persisted that the CIC should investigate whether Ms. MacPhee had actually provided any other evidence or video recordings to the police and Crown Prosecutors.
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> …
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> 34. Mr. Fraser is the Plaintiff in six civil actions against former members of the MacIntosh law firm.

[50] The Society also opposes striking the CIC decisions as a schedule to the Notice of Participation.

[51] The Applicant, Mr. Fraser, also seeks to strike paragraphs 3, 4 and part of paragraph 5 from Julie MacPhee's Notice of Participation.

[52] The Respondent, Julie MacPhee, opposes the striking of paragraphs 3, 4, and part of paragraph 5 of her Notice of Participation, which state:

> 1. Four former partners of Mac, Mac & Mac, including MacPhee, filed a complaint against the Applicant in May, 2021, relating to his conduct (the "Mac, Mac & Mac complaint"). The complainants requested the Society to investigate their concerns of harassment, discrimination, and lack of civility on the part of the Applicant.
>
> 2. The Mac, Mac & Mac complaint was still under investigation, the Applicant filed two complaints against MacPhee with the Society.

3. In 2022, while the Mac, Mac & Mac complaint was still under investigation, the Applicant filed two complaints against MacPhee with the Society (the Applicant seeks to strike the underlined)

[53] The Applicant's basis for striking the above noted paragraphs is that they are not relevant nor appropriate to include in the Notice of Participation. He submits that Notices "are not an opportunity to feed into the public forum irrelevant allegations and perspectives, inference or inuendo having no bearing on grounds or issues on the judicial review."[13] The Applicant further submits that the information should not be only relevant, but Rule 7.08 expresses that it is to be focused on a concise statement of the Society's position on the review or setting out alternate grounds. He adds that the prescribed form also reflects this.[14]

[54] The Applicant claims that the Notices filed by the Society and the Julie McPhee include "comments, assertions, propositions, or references" that are irrelevant to any ground of judicial review.[15]

[55] The Applicant asserts that the Society included the entirety of the decision letter to their Notice of Participation, where it is not necessary, calling this an "inappropriate and abusive tactic- an abuse of process- to try to make public false and offensive information the CIC irresponsibly included in that decision letter."[16]

[56] The Applicant further argues that the Society improperly included evidentiary references, rather than material facts.[17]

[57] In essence, the Applicant contends that the impugned paragraphs in the two Notices of Participation, should be struck because they are "irrelevant and improper content and/or content which was included as an abuse of process for ulterior purposes, as demarcated with strikethroughs in the attachments to the Notice of Motion."[18]

Rule 7.08: Participation by Respondent

[13] Applicant's Written Submission, November 3, 2023, at par. 15.
[14] Applicant's Written Submissions, November 3, 2023, at par. 15.
[15] Applicants Written Submissions, November 3, 2023, at par. 16.
[16] Applicant's Written Submission, November 3, 2023, at para. 19.
[17] Applicant's Written Submissions, November 3, 2023, at par. 21.
[18] Applicant's Written Submissions, November 3, 2023, at par. 23.

[58] Civil Procedure Rule 7.08(3) describes what must be included in a Notice of Participation. The Society argue this rule does not preclude them from providing relevant facts to provide context for the application for judicial review. The Society further submits that the material facts contained in the above paragraphs15, 16, 17, and 23 are proffered *only* for the purposes of providing context, and for no other improper purpose.

[59] Rule 13.03 of the *Rules* provides the Court with authority to strike pleadings:

> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[60] As stated by the Society, to strike a pleading under Rule 13.03, the court assumes the facts as pleaded are true and must examine whether the pleadings are sustainable on that basis.[19] The Society relies on Rule 13.03 because in the Applicant's written submissions at paragraphs 15-17, he challenges the relevance of paragraphs 3, 4, 12 and 34 to the issues in the proceedings.

[61] In *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts Act),*[20] the Court of Appeal confirmed that a preliminary motion, such as a motion pursuant to Rule 13.03, is available to dismiss a judicial review application at the Court's discretion. Bryson J.A., in delivering the judgment of the Court noted:

> 75. There is no inconsistency in this case between the Court's inherit jurisdiction to control its own process and *Rule* 7 respecting judicial review. *Rule* 7 is not a complete code of procedure in such matters and does not preclude a preliminary motion to avoid unnecessary expense, delay or poor use of judicial resources.

[62] Lastly, Rule 88 also recognizes the Court's inherent and residual discretion to prevent an abuse of the Court's process, as noted in *Toronto (City) v. C.U.P.E., Local*

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[19] *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General),* 2009 NSCA 44, at paras. 17-18).
[20] 2016 NSCA 80 at para. 75.

79,[21] where the Supreme Court of Canada provided a wide-ranging, purposive definition of abuse of process. Specifically, Rule 88.03(2) allows a party or the prothonotary to make a motion to strike a pleading on the basis that it amounts to an abuse of process.

[63] The Society submits that the impugned paragraphs 3 and 4 of its Notice of Participation serve to provide the context of the parties' relationship and describe how the Applicant came to know of the video recording that initiated the complaints and led to the decision under review. Thus, the Society argue that the facts pleaded are relevant and do *not* meet the test to strike the pleadings pursuant to Rule 13.03.

[64] With respect to paragraph 12 of its Notice of Participation, the Society submit that this paragraph is clearly relevant to the issue of procedural fairness as it relates to the Applicant's complaint against the Society.

[65] The Society further submits that the Applicant's involvement in the other proceedings against the Julie MacPhee, and former partners at Mac, Mac & Mac Law Offices is referenced in the Record. The Society contend that one of the reasons the Applicant seeks review of the Decision is that the Society did not obtain further recordings from Ms. MacPhee.

[66] Similarly, Julie MacPhee agues that paragraphs 3, 4, and part of paragraph 5 simply set out the context for one of the matters that was under review by the CIC and thus should not be struck. She says that that matter involved the Applicant's complaint that she video-recorded him without his consent. Reference to this videorecording was made specifically in the complaint filed by Ms. MacPhee and some of her partners against the Applicant (the "Mac, Mac & Mac complaint"). That reference led to the filing of the Applicant's first complaint, which is now under review in this proceeding.

[67] Ms. Julie MacPhee submits that the content of paragraph 3, as noted above, is factual and is included in the materials considered by the CIC which led to the decision under judicial review. Further, she points out that this content is specifically referenced in the Record on file in this proceeding. The description of the Mac, Mac & Mac complaint set out in paragraph 3 is provided in the Investigation Report, included as part of the Record. Moreover, Ms. MacPhee points out that the decisions under review directly references the Mac, Mac & Mac complaint. Thus, Julie

[21] 2002 SCC 63.

MacPhee submits that the reference to the Mac & Mac complaint is relevant context to understand the actions that formed the subject matter of the first complaint brought against her by the Applicant, which is the subject of this judicial review.

[68] Ms. MacPhee submits that paragraphs 4 and 5 are factual matters which are undisputed and are relevant context for understanding the decision under review. Furthermore, she argues that these paragraphs do not offend any rules with respect to pleadings.

[69] Having considered all the impugned paragraphs, and the submissions of the parties, I find that impugned paragraphs of the Society's Notice of Participation, and of Ms. MacPhee's Notice of Participation, do not, in any way, contain improper content. Rather the two Notices contain relevant facts and narration that provides context to the issues in the proceeding. In my view, these inclusions were not filed for any improper or oblique purposes relating to bad faith, and do not give rise to an abuse of process. Indeed, in my view, a reasonable person, would conclude that all of the impugned paragraphs of the two above-noted Notices are clear, concise, and factual, being proffered to provide context to the issues of these proceedings, with no oblique or improper purpose. Moreover, the Notices of Participation are pleadings which provide factual context, and it is appropriate to include the two decisions under review.

Disposition of the Motion

[70] For these reasons, the Applicant's motion to strike paragraphs 3, 4, 12, and 34 from the Society's Notice of Participation as described in Schedule "B" of the Applicant's Notice of Motion is dismissed. The Applicant's motion to strike paragraphs 3, 4 and a part of paragraph 5 from Julie MacPhee's Notice of Participation as described in the Applicant's Notice of Motion is also dismissed.

3. The Motion to Strike Inclusion of a Copy of CIC Decision to Notices

[71] The Applicant also seeks to strike the inclusion of a copy of the entirety of the CIC's decisions under review, which are attached as a schedule to the Society's and Julie MacPhee's Notices of Participation.

[72] The Applicant submits that these Notices of Participation do not call for a copy of the decisions on review. He argues that the inclusion of the entirety of the decisions under review is "an inappropriate and abusive tactic – an abuse of process – to try to make public false and offensive information that CIC irresponsibly included in the decision letter." Thus, the Applicant contends that the Schedules to the Notices of Participation should be struck as "improper content in a Notice of Participation and an abuse of process by both Respondents in furtherance of ulterior purposes."[22]

[73] Ms. MacPhee opposes the striking of the CIC decision. She argues that a Judicial Review proceeding involves a review of a decision made by a statutory decision-maker, and that the Applicant has not provided a copy of the decisions under review in his Notice of Judicial Review, contrary to Rule 7.05(4)(c). She further submits that three of the grounds of review, set out in paras. 3 (e), (f) and (g) of the Notice of Judicial Review, allege inadequate reasons in the decisions. Thus, without a copy of the full CIC decision as part of the material available in this proceeding, neither Julie MacPhee nor the Court are able to address these grounds of review.[23]

[74] The Society also opposes the striking of the CIC decisions. The Society submits that a complete copy of the record has been provided to the Applicant and filed with the Court in accordance with Rule 7.09 (a), and it is not improper to append the entire decision letter to the Notice of Participation. They rely on Rule 7.05(4)(c) and submit that the Applicant was required to attach a copy of the decision to his Notice of Judicial Review but chose not to do so. Instead, attached a redacted copy.[24] As the Society points out, "it is not for the Applicant to decide what parts of the decisions are relevant and not relevant."[25] I agree that the Applicant should have provided a copy of the decision and that he had no authority to redact it. If he had concerns about its content, then he should have made the appropriate motion in Court to deal with it, such as requesting a sealing order.

[75] I also agree with the Society's submission that "given that Mr. Fraser has invoked the Court's jurisdiction to review the CIC decision, it is appropriate and consistent with the Rules for the entire decision to be appended to the pleadings."[26]

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[22] Applicant's Written Submission, November 3, 2023, at para. 19.
[23] Respondent's (Ms. MacPhee's) Written Submission, November 13, 2023, at para. 3.
[24] Respondent's (Society's) Responding Brief, November 13, 2023, para. 29.
[25] Respondent's (Society's) Responding Brief, November 13, 2023, at par. 29.
[26] Respondent's (Society's) Responding Brief, November 13, 2023, at para. 30.

Indeed, Rule 7.05 (4)(c) contemplates that the decision under review will be part of the Record, as will be discussed later in these reasons.

[76] Rule 7.09 (a) requires the decision-making authority to file with the Court a complete copy of the record. It states:

> **7.09 Production of record by decision-making authority**
>
> (1) The decision-making authority must file with the court, and deliver to the applicant, one of the following no more than five days after the day the decision-making authority is notified of the proceeding for judicial review:
>
> (a) **a complete copy of the record**, with copies of separate documents separated by pages with numbered or lettered tabs.
>
> [Emphasis added]

[77] In this case, the Society has complied with Rule 7.09 by filing with the Court, and delivering to the Applicant, a complete copy of the Record. The Society provided a copy of the Record to the Applicant and to Julie MacPhee on August 8, 2023.[27]

[78] Rule 7.05(4)(c) states:

> (c) **if available**, an attached **copy of the decision** or documents showing what decision was made and, otherwise, an attached summary of the decision
>
> [Emphasis added]

[79] There is no ambiguity in this provision. It clearly and concisely says that if available a copy of the decision must be provided. The Applicant has not provided any authority for unilaterally redacting the decision under judicial review. Nor has he provided any authority precluding the attachment of the decision under review to a Notice of Participation.

[80] As noted above, the Applicant argues that the conduct of the Society in "appending the entirety of a decision letter to the Notices of Participation, which do not call for any copy of any decision, is an abusive tactic, - an abuse of process - to try to make public false and offensive information the CIC irresponsibly included in that decision letter. Accordingly, the Applicant urges the Court to strike those

[27] Email from E. Krajewska, August 8, 2023, Exhibit "C" to the Hawkins Affidavit.

Schedules to the Notices of Participation as being improper content in a Notice of Participation and an abuse of process by the Society in furtherance of ulterior purposes."[28]

[81] The Society says that putting the entire decision before the Court does not meet the high threshold to constitute an abuse of process as defined by the Nova Scotia Court of Appeal in *National Bank Financial Ltd. v. Barthe Estate*,[29]where Justice Saunders observed:

> 214 My review of these and other leading authorities shows that abuse of process comes in many forms. Inordinate delay; vexatious litigation; multiple proceedings commenced in different jurisdictions claiming virtually the same relief on facts involving identical parties; bogus re-litigation; following previous judicial determinations of the same matters or issues; are all examples of situations where the courts have found an abuse of process. Other examples would include cases where the complaint was not so much directed towards the nature of the proceedings, but rather the conduct of the parties during the litigation. This case falls within the latter category.

[82] The Society submits that the Applicant's claims that the decisions include "false and offensive information the CIC irresponsibly included in the decision letter" is not a reason for redacting the decision.[30] The Society further asserts that "the content of the Notice of Participation cannot conform solely to the narrative the Applicant wants to convey to the Court."[31]

[83] As Saunders J.A. noted in *National Bank Financial Ltd. v. Barthe Estate,* Rule 88 of the *Rules* is dedicated to preventing an abuse of the court's processes. Rule 88.02(1) sets out potential remedies for an abuse of process although, as noted in Rule 88.01(2), these remedies are not exhaustive (at para.165). Rule 88.02 therefore grants broad discretionary powers to the Court to determine an appropriate remedy once it is satisfied that the Court's process has been abused.

[84] In this case, the Applicant failed to provide a complete copy of the decision under review. I agree with Ms. MacPhee's assertion that "it is nonsensical to suggest that a judicial review proceeding should be conducted in the absence of a copy of the full decision under review, and that the review should be limited to only those

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[28] Applicant's Written Submission, November 3, 2023, at para. 19.
[29] 2015 NSCA 47.
[30] Applicant's Written Submission, November 3, 2023, at para. 19.
[31] Respondent's (Society's) Responding Brief, November 13, 2023, at para. 32.

portions of the decision the Applicant selectively produces. The Applicant chose to bring this judicial review application. For the Applicant to assert the very decision he seeks to review should not be produced for review"[32] is simply unsustainable.

[85] As stated, Rule 7.09 (a) requires the decision-making authority to file a complete copy of the record with the Court, which in this case include the two CIC decisions under review. This then becomes a public record, for the purposes of public scrutiny and meaningful review.

[86] Though the Society attached a complete copy of the CIC decisions to its Notice of Participation, which may have not been necessary given that Rule 7.09(a) requires the filing of a complete copy of the Decisions and all material provided to and considered by the CIC as part of the decision making process, there is no evidence to suggest that the Society or Ms. MacPhee attached a copy of the complete decisions of the CIC to their Notice of Participation for an "improper" purpose. Had the Applicant complied with Rule 7.09(a), the Society and Ms. MacPhee may not have felt it necessary to attach a complete copy of the decision to their Notice of Participation. It is reasonable to infer from their respective submissions that they felt it was necessary because they understand and appreciate that the availability of meaningful review and public scrutiny of administrative decision-making ensures accountability and increases public confidence in governance. I find it was reasonable to do so in the circumstances because the Notice of Judicial Review did not contain a complete copy of the CIC decisions.

[87] Given that the decisions under review are the subject of the judicial review application, and having considered their content, I am not persuaded that they should be Struck from the Notices of Participation, as the complete decision under review is a public document available for meaningful review and public scrutiny.

[88] To be clear, this is not a situation where the Society and Julie MacPhee have clearly breached a rule of procedure for an improper purpose. They simply attached the complete decisions under review, and which are in the public domain, for the purposes of meaningful review and public scrutiny. Thus, there is no abuse of process.

Disposition of the Motion

[32] Respondent's (Ms. MacPhee's) Written Submission, November 13, 2023, at para. 3.

[89] For all the foregoing reasons, the Applicant's motion to strike the inclusion of a copy of the decisions under review, which are attached to the Notices of Participation, is dismissed.

4. The Motion to Compel the Nova Scotia Barristers' Society and Elaine Cumming to make Further and Complete Record of Disclosure of the Record.

[90] The Applicant claims that the Society has failed to provide the full Record, which he asserts includes "any material, records or communications before the CIC or exchanged with the CIC concerning the subject complaints."[33]

[91] As stated above, Rule 7.09(a) requires the decision-making authority to file with the court a complete copy of the record.

[92] The Society filed a copy of the Record and provided it to the Applicant and Ms. MacPhee on August 8, 2023.[34]

[93] The Society submits that as a "complainant", the Applicant's standing on this judicial review proceeding is limited to the issue of procedural fairness.[35] They submit that the procedural fairness owed to the Applicant "as a complainant is on the low end, and he is only entitled to the disposition of the finding."[36] The Society further submits that the Applicant "cannot use this proceeding to entitle himself to more disclosure than is owed to him under the CIC's own process for dealing with complaints.[37]

[94] The Society argues that as an Applicant to a judicial proceeding Mr. Fraser is entitled to the documents that were before the CIC when it made its decision. Thus, he is not entitled to any drafts of the investigation report or of the CIC reasons for decision. Moreover, the Society submits that "the only other e-mails between the CIC and Ms. Cumming are from Ms. Cumming's assistant to coordinate times for the meetings of the CIC."[38]

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[33] Applicant's Written Submissions, November 3, 2023, at para. 30.
[34] Respondent's (Ms. MacPhee's) Written Submission, November 13, 2023, at para. 4.
[35] *Tupper*, at para. 31; *Perry*, at paras. 32-35.
[36] *Canada (Attorney General) v. Slansky*, 2013 FCA 199, at para. 165.
[37] Respondents' (Society's) Responding Brief, November 13, 2023, at para. 33.
[38] Respondent's (Society's) Responding Brief, November 13, 2023, at para. 34.

[95] The Society cites Rule 317 of the *Federal Court Rules*, SOR/98-106, for guidance on the principles that apply when a party requests further materials from a tribunal subject to a judicial review application. Rule 317 states:

> 317(1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

[96] The Society says that "in requesting further materials, the documents sought must be relevant and necessary. The rule is not intended to provide documentary discovery or allow the applicant to engage in a fishing expedition."[39]

[97] The decision in *Maxx Bath Inc. v. Almag Aluminum Inc*. including the authorities cited therein, are of assistance in considering the relevant principles that apply when a party requests further materials from a tribunal subject to a judicial review application, such as the CIC. The authorities underscore the importance of administrative decisions being open to meaningful review and public scrutiny. The availability of meaningful review and public scrutiny of administrative decision-making ensures accountability, promotes better decisions, and increases public confidence in governance.[40]

[98] The Society further submits that drafts of reasons for a decision should not be produced as they may contain errors, statements the decision-maker did not agree with, and provisional conclusions that were not carried forward in the final decision. The information and documents, broadly include emails regarding scheduling between Ms. Cumming and members of the CIC, including drafts of her reports.[41]

[99] The Society asserts that "there are no further materials that were before the CIC which the Applicant is entitled to that have not been provided to him.[42]

[100] Additionally, the Society submits that it is inappropriate and an abuse of process for the Applicant to continue requesting additional documents and communications based on speculation that the Society is withholding material.

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[39] *Maax Bath Inc. v. Almag Aluminum Inc*., 2009 FCA 204, at para. 10-11, 15.
[40] *Slansky v. Canada (Attorney General)*, 2013 FCA 199, at paras. 313-315.
[41] Applicant's Written Submissions, November 3, 2023, at para. 26.
[42] Respondent's (Society's) Responding Brief, November 13, 2023, at para. 40.

[101] Having considered the submissions of the parties and the evidence adduced in this motion, and mindful of Applicant's standing as a complainant in these proceedings, I am satisfied that the Society has produced all the material or information that formed part of the CIC Record, which is filed with the Court. I agree with the Society that the Applicant is not entitled to additional materials or information that he seeks. He has already received what he is entitled to obtain, which is the documents that were before the CIC when it made its decision, as contained in the Record. Thus, he is not entitled to drafts of the investigation report or of the reasons for decision of the CIC, or emails regarding scheduling between Ms. Cumming and members of the CIC.

[102] The Applicant has failed to persuade me that the information and documents that he seeks to be produced are relevant and necessary.

[103] In my view, the Applicant has made no reference to anything in the CIC decision from which it could reasonably inferred that the decision was based on material not already available to the parties, or that inappropriate tampering with the decision occurred. Indeed, it would be fundamentally wrong to assume that such information has been adopted by the CIC in its decision, or that inappropriate tampering, or interference with the decision-making process occurred.[43]

[104] In considering this issue, I am mindful of the instructive comments of Justice Stratas, who stated in *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*:[44]

> 15. Disclosure motions, whether within a judicial review or a statutory appeal, must be governed and abide by the foregoing principles. Non-disclosure that threatens the meaningfulness of judicial review, causes the immunization of administrative decision-making, or hinders or frustrates the prosecution and adjudication of a legitimate ground of review cannot be permitted. But attempts to conduct discovery of material to see whether a ground of judicial review might exist--the proverbial fishing expedition--also cannot be permitted.

[105] It is also clear from the authorities that what is relevant to an application for judicial review will often be found in the Notice of Application. In *Canadian National Railway Co.*, Justice Stratas makes the following salient point:

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[43] *Maax Bath Inc.*,at para. 12.
[44] [2023] F.C.J. No. 2290.

> 14 The Court must read the pleading "with a view to understanding the real essence of the application [or appeal]" and gaining "'a realistic appreciation' of the [proceeding's] 'essential character'". The Court must not fall for skilful pleaders who are "[a]rmed with sophisticated wordsmithing tools and cunning minds". Instead, it must read the pleading "holistically and practically without fastening onto matters of form.

[106] It is worthy of note that I am cognizant of the grounds, including the additional grounds (the amendment of grounds) raised by the Applicant in this judicial review application. However, bald assumptions grounded on speculation are not enough, even in the context of all the grounds raised in this judicial review application, to warrant granting the requested Order.

Disposition of the Motion

[107] For these reasons, I agree with the Society that that the Applicant is not entitled to the additional materials or information that he seeks to obtain. He has already received what he is entitled to obtain, which is the documents that were before the CIC when it made its decision. Therefore, the motion is dismissed.

5. Motion to Set Aside Any Inappropriate Claims of Privilege

[108] The Society has complied with Rule 7.09(a). It is indisputable that the Society has filed a copy of the Record and produced it to the Applicant and the Respondent Julie MacPhee. In doing so, the Society has noted that four pages contain “Privileged Opinion” which should *not* be disclosed.

[109] The onus is on the party asserting privilege to establish that the communications in question are privileged. Such claims are to be assessed on the facts specific to that claim. Once privilege has been established, the onus is on the party seeking to overcome the privilege to establish that the communications should be disclosed.[45]

[110] In considering the issue of privilege, I have followed the process set out in Rule 85.06 which deals with privileged documents. In accordance with Rule 85.06 (1), I have kept the document, marked “Privileged Opinion” in my possession, as I must determine a claim that the document is privileged. It remains confidential until the determination is made. In order to determine whether the document is privileged,

[45] *Ng’ang’a v. Mburu*, 2018 NSSC 26, at para. 19.

I have taken personal control of the document, containing four pages marked "Privileged Opinion" as directed by Rule 85.06 (2)(a). Pursuant to Rule 85.06(c), I unsealed the document and read it, for the purpose of making the determination of whether it is privileged.

[111] It should be noted that Rule 85.06(3) provides:

> A document taken control of and kept confidential by a judge is not part of the public court record and need not be made the subject of a confidentiality order.

[112] The Respondent Julie MacPhee submits that she has no basis for knowing the content of these 4 pages, and therefore says she is not in a position to address this motion.[46]

[113] The Society filed with the Court the Record, including the investigative report prepared by Elaine Cumming. Parts of the investigation report included Ms. Cumming's legal research and opinion provided to the CIC. The Society assert that Ms. Cumming's opinion is protected by solicitor- client privilege. The Applicant is therefore *not* entitled to its disclosure.

[114] The Applicant seeks to have the Court review the four pages for the purposes of assessing whether it is protected by solicitor-client privileged.

[115] As the Society points out, "Ms. Cumming is a licensed lawyer, working as the Director of Professional Responsibility within the employ of the Nova Scotia Barristers' Society. Ms. Cumming exercises the delegated authority of the Executive Director, to conduct the investigation related to the Applicant's complaints against Ms. MacPhee. In this capacity, Ms. Cumming was tasked with collecting the relevant facts, conducting research, and providing her legal opinion/advice which could guide the CIC handling of the complaints, and rendering their decision."[47]

[116] The Society cites the seminal case of *Pritchard v. Ontario (Human Rights Commission)*,[48] for the proposition that Ms. Cumming's legal opinion provided to the CIC is protected by solicitor- client privilege and therefore the Record should be read as excluding privileged communications from in-house counsel. Major J, in

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[46] Respondent's (Ms. MacPhee's) Written Submission, November 13, 2023, at para. 5.
[47] Affidavit of Elaine Cumming, November 13, 2023.
[48] [2004] 1 S.C.R. 809, at paras. 14-21.

delivering the judgment of the Supreme Court of Canada, explained the importance and scope of solicitor-client privilege. He wrote:

> 14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see Smith v. Jones, [1999] 1 S.C.R. 455, at para. 46.
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> 15 Dickson J. outlined the required criteria to establish solicitor-client privilege in Solosky v. The Queen, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation [page817] for legal advice, whether litigious or not: see Solosky, at p. 834.
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> 16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see Solosky, supra, at p. 835.
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> 17 As stated in R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:
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> > Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

> 18 In Lavallee, Rackel & Heintz v. Canada (Attorney General), [2002] 3 S.C.R., 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in McClure:
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> > ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
> >
> > [Emphasis added]
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> 19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see R. v. Campbell, [1991] 1 S.C.R. 565, at para. 49. In Campbell, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
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> 20 Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: Campbell, supra, at para. 50.
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> 21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the **context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.**
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> [Emphasis added]

[117] As noted above, owing to the nature of their work, in-house counsel often have both legal and non-legal responsibilities. Each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship,

the subject matter of the advice, and the circumstances in which it is sought and rendered.

[118] In this case, it is my view that Ms. Cumming's role within the Nova Scotia Barristers' Society encompasses both legal and non-legal roles. In the context of the investigation of the complaints in question, her role was clearly that of in-house or staff counsel, providing legal advice or opinion to the CIC. Similar to the case in *Pritchard,* Ms. Cumming's legal opinion was provided to the CIC to be considered or not considered at their discretion.

[119] The Society assert that Ms. Cumming's investigation of this matter and results are reflected in the privileged portion of the Investigative Report, which is subject to solicitor-client privilege. Having read the four pages contained in the sealed envelop, I conclude that all of the material contained in those pages is privileged information.

[120] Having considered all of the evidence, and the submissions of the parties, I am satisfied that Ms. Cumming was acting as staff counsel to the CIC regarding the complaints addressed in the decisions. Therefore, solicitor-client privilege as accorded to other legal counsel applies, as it does to a broad range of communications between lawyer and client, as emphasized above.

[121] As submitted by the Society, in *Pritchard*, the Supreme Court of Canada also noted that procedural fairness does not require the disclosure of privileged legal opinion and does not affect solicitor-client privilege. Major J stated:

> 31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

[122] In *Pritchard*, the Court held that legislation that purports to limit or deny solicitor-client privilege will be *interpreted restrictively*, and that solicitor-client privilege cannot be abrogated by inference.[49]

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[49] *Pritchard*, at para. 31.

[123] The applicable legislation at issue in *Pritchard* was s. 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. j.1., which provides:

> 10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[124] In interpreting this provision with the principles above, the Supreme Court held that the provision "does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the 'record' includes legal opinions." Therefore, the record of proceedings should not be read as including privileged communications from in house-counsel.[50]

[125] The Supreme Court of Canada's interpretation of s. 10 is applicable to this case as the requirements for filing a record of proceedings in an application for judicial review echo the same language in Rule 7.09 (a), which states:

> (a) a complete copy of the record, with copies of separate documents separated by pages with numbered or lettered tabs.

[126] In my view, applying the principles from *Pritchard,* Rule 7.09 (a) should not be interpreted to abrogate the solicitor-client privilege attached to the legal opinion/advice provided by Ms. Cumming to the CIC.

[127] As previously mentioned, I have reviewed an unredacted copy of the Record to review the claim for privilege in accordance with Rule 85.06 and, having determined that the document containing four pages is protected by solicitor-client privilege, I have sealed the document for the purposes of making a sealed record for the Court of Appeal.

Disposition of the Motion

[128] For these reasons, based on the totality of the evidence, and the submissions of the parties, I am satisfied that the Society has established that the document containing four pages is protected by solicitor-client privilege, and I am not satisfied

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[50] *Pritchard*, at para. 35.

that the Applicant has established that the communications should be disclosed. Accordingly, the motion to seal the document containing four pages is granted.

6. Motion for Confidentiality Order

[129] As will be discussed later in these reasons, the Society is seeking a *limited* Confidentiality Order over the content of the Record regarding reference to the Applicant's spouse and children.

[130] The Society submit that the Applicant's request for a full confidentiality order should be issued over the Record, should be dismissed for the following reasons. First, the Applicant has *not* brought a motion for a full confidentiality order, including not filing an affidavit. Thus, he has not led evidence that would satisfy the test in *Sherman Estate v. Donovan*,[51] identifying a significant risk to an important public interest that would override the open court principle. Second, relying on s. 40(1) of the *Act* is insufficient, as it must be read in the context of the entire *Act* and the constitutional imperative of the open court principle.[52]

[131] In response to the Society's motion for a *limited* confidentiality order, the Applicant submits that it is not appropriate that the majority of the Record be made public. He says that the "Record of Proceedings includes extremely inappropriate, false, scandalous and vexatious ravings."[53] The Applicant argues, that, "the position of the NSBS on the Confidentiality Order, even in the such context of mishandling and the Record of Proceedings being more offensive as a result, would completely abandon any effort to defend the NSBS' overarching statutory obligation of confidentiality over the Record would otherwise have."[54]

[132] The Applicant further submits that the "interests inherent in supporting a statutory scheme envisioning confidentiality and inherent in avoiding a "chilling effect" on the filing of complaints with the NSBS with the public understanding it is intended to be a confidential scheme, warrant protection by sealing of the Record.[55]

[133] The Applicant argues that "privacy interests are not the be-all and end-all of what must be considered. Other important interests qualify, and it is submitted that

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[51] 2021 SCC 25.
[52]Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 3.
[53]Applicant's Written Submission, November 13, 2023, at para. 5.
[54]Applicant's Written Submission, November 13, 2023, at para. 6.
[55]Applicant's Written Submission, November 13, 2023, at para. 7.

there are indeed extremely important interests warranting protection in the form of maintaining statutory confidentiality scheme and in avoiding the 'chilling effect' referenced above. This is in accordance with the overriding test of the Supreme Court of Canada per *Sierra Club*, *supra*."[56]

[134] The Applicant asserts, again, as he did in his written submissions at paras. 92 to 99, dated September 29, 2023, the necessity of a full confidentiality order because of "the important interests which exist in the form of furthering the statutory scheme of confidentiality, as well as submissions therein at paragraphs 116 to 120 regarding the concern with protecting interest of avoiding a 'chilling effect.'''[57]

[135] The Applicant says there is nothing in the *Legal Profession Act* which expressly overrides the statutory obligations upon the Nova Scotia Barristers' Society under s. 40 to take steps necessary to keep records relating to the complaint process confidential, even in the context of a complaint having extended into the realm of judicial review. The Applicant argues that "under the express wording, there is nothing that changes the NSBS's statutory obligation to attempt to maintain confidentiality simply because a judicial review application has been filed.[58]

[136] The Applicant says that with respect to the second and third prongs of the *Sherman Estate* test "there is not a less intrusive way to protect the inserts engaged in this case. What has been affected in terms of simply sealing Recording of Proceedings and material referencing it, is reasonable."[59] He adds, with respect to any balancing and proportionality, there is no contest that the information should be sealed. No public interest is furthered by allowing offensive lies to be made public, through the medium of this process rather than by otherwise disseminating false accusations.[60]

[137] The Applicant further submits that "from every angle, provisions providing for confidential sealing of the Record of Proceedings filed with this Court would be appropriate. So too would provision for any other Court filed materials in this Application making reference to content contained of the Records of Proceedings

[56]Applicant's Written Submission, November 13, 2023, at para. 11.
[57]Applicant's Written Submissions, November 13, 2023, at para. 12.
[58]Applicant's Written Submission, November 13, 2023, at para. 13.
[59] Applicant's Written Submissions, September 29, 2023, at paras. 121.
[60]Applicant's Written Submissions, September 29, 2023, at paras. 122.

being sealed and references redacted for a separate and publicly filed copy of such material."[61]

[138] The Society contends that because the Applicant has *not* brought his own motion for a confidentially order, he has the burden to satisfy the Court that the open court principle should be limited.

[139] The Society submits that at the appearance before Justice Chipman on October 3, 2023, the parties agreed to a timetable by which the Society would inform the other parties whether it would be bringing a motion for a confidentiality order one week before any motion was to be served. The Society understood that the purpose of the timetable was to allow either the Applicant, Mr. Fraser, or the Respondent Ms. MacPhee to bring their own motion for a confidentiality order if the Society chose not to do so.[62]

[140] The Society submits that the Applicant "must provide an evidentiary foundation for a confidentiality order. Instead, the Applicant alludes to the public interests that may be applicable, without providing any evidentiary basis for justifying a complete sealing order or publication ban."[63]

[141] The Society cites *Rhyno* v. *Nova Scotia Barristers' Society,*[64]for the proposition that a motion for a confidentiality order requires an evidentiary basis. In that case, Chief Justice Wood, in delivering the judgment for the Court, stated:

> 11 A motion for a confidentiality order requires an evidentiary basis. The judge must have a clear understanding of the facts in order to exercise his or her discretion judicially. In the *Coltsfoot Publishing Ltd.* Decision, Justice Fichaud discussed this requirement:
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> > [31] The "sufficient evidentiary basis" should include more than just conclusory assertions. In *Toronto Star Newspapers Ltd. V. Ontario,* [2005] 2 S.C.R. 188, Justice Fish for the Court said:
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> > > 9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a

[61] Applicant's Written Submissions, September 29, 2023, at para. 123.
[62] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 5.
[63] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 6.
[64] 2019 NSCA 67.

> generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.
>
> [32] Similarly, in *Globe and Mail*, Justice LeBel for the Court (paras 92-94, 99) rejected the "bald assertions, without more", with "no tangible proof" of the supposed serious risk that was advanced for the requested publication ban.
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> …
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> [38] ... My reading of the authorities, such as *Globe and Mail*, is that the facts to support **a confidentiality order must be established by evidence (that is assessed on the balance of probabilities), not by bald assertions or unsworn generalizations, and those facts in turn must establish a real and substantial risk to an important public interest.**
>
> **[**Emphasis added]

[142] Based on these principles, the first step is to consider whether there is sufficient evidentiary basis to establish that some restriction on publication is necessary to prevent a serious risk to an important public interest.

[143] The Society submits that in responding to its motion for a limited confidentiality order, the Applicant has failed to show any evidence to support his claim that the Society should seek a confidentiality order aside from a general reference to the Society's confidentiality obligations under s. 40(1) of the *Act,* and general assertions of the chilling effect on complainants bringing complaints forward.[65]

[144] The Society assert that the Applicant is wrong to submit that s. 40(1) of the *Act* mandates an inflexible confidentiality obligation that applies in all circumstances, for the following three reasons:

- First, all statutes must be interpreted in a manner to conform to the Constitution. Section 40(1) yields to the constitutional imperative of the open court principle. However, this does not mean that s. 40 (1) does not inform the existence of a pressing public interest at the first stage of the Sherman Estate analysis.
- Second, the Act, enumerates instances where this confidentiality may be waived under s. 40(2).

[65]Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para.9.

- Lastly, when read as a whole, the Act demonstrates that there are processes for complaints, such as the Applicant's, to obtain confidentiality orders when a matter is referred to a hearing committee. The presence of these processes informs the interpretation and application of s. 40(1) of the Act in the context of a judicial review proceeding. Sections 40(2)(a) and (aa) set out some of the exceptions to the confidentiality obligation under s. 40(1) and addresses how the confidentiality of a complaint is to be dealt with when the matter is referred to at a disciplinary hearing. Section 40(2)(a) provides that a complaint may be disclosed to the public when the notice of hearing is published in accordance with the regulations. Under s. 40(2)(aa) a complaint may be disclosed to the public if such conditions or information is disclosed during the course of a hearing.

[145] The Society further points out that s. 44 of the *Act* sets out the process by which a complaint may be disclosed to the public if it is brought before the hearing panel. The hearing panel may order a publication ban pursuant to s. 44(3). However, as the Society says, the statute itself assumes that once the matter is referred to a hearing, the proceeding will be open and thus the complainant may seek a confidentiality order.[66]

[146] As the Society states, the reasonable expectation of a complainant in bringing a complaint against a member of the profession is that the complaint will be kept confidential during the investigation process. At the hearing stage, however, the default is that the process is public.[67]

[147] In recognizing the chilling effect that disclosure could have on initiating complaints, the Society does not suggest that every time there is a judicial review proceeding of a CIC decision the open court principle should always trump the statutory obligation of confidentiality. Rather they say that whether and in what circumstances the record of proceedings should remain confidential should be determined on a case-by-case basis on the facts and evidence before the court with consideration to Rule 7.09, and the open court principle.[68] I agree.

[148] In this case, the Society submits that the Applicant has failed to show how the chilling effect applies to the circumstances of this case. For example, by way of

[66] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para.13.
[67] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 14.
[68] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 15.

contrast, in *Killan v. College of Physicians and Surgeons of Ontario*,[69] in that case, the Divisional Court granted a partial sealing order over parts of the record that identified members of the public and physicians who filed complaints against a doctor who was providing patients with medical exemptions from COVID-19 vaccine requirements. The College of Physicians and Surgeons sought to prevent the publication of the names and other identifying information of people who made complaints to the College about the Applicant's conduct. In recognizing that there is a public interest in encouraging patients, members of the public and other doctors to identify and report potential misconduct, the Court noted that although this interest is significant, it is not sufficient.[70] It must also be shown that court openness poses a serious risk to that interest.[71] In that case, the court found that the record demonstrated that it did, in that, the record included communications from individuals who were unhappy with the College's decision to suspend the Applicant's license. This raised genuine concerns for the Court that these individuals may harass the complainants if information identifying them was made public.[72] In the result, the Court concluded that there was significant risk of harm to an important public interest.[73]

[149] In this case, the Society says that the complainant (Mr. Fraser) brought the judicial review application and has also initiated an action against Ms. Cumming.[74] The identity of the complainant or the fear of reprisal for bringing the complaint is not at issue.

[150] The Applicant says his own interests warrant protection, in addition to the privacy interest of his wife and children, which will be discussed later in these reasons. With respect to the Applicant's own interest, the Society point out what the Supreme Court in *Sherman Estate* has made clear that "neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness."[75]

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[69] 2022 ONSC 5931.
[70] *Killan,* at para. 95.
[71] *Killan,* at para. 95.
[72] *Killan,* at para. 95.
[73]Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para.18.
[74] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 19.
[75] *Sherman Estate,* at para. 63.

[151] The Society argues that while the Applicant may be unhappy with the allegations, he has failed to show a "real and substantial risk" grounded in evidence that poses a serious threat to his interest,[76] and that a court file cannot be sealed in its entirety every time a party makes allegations or includes mischaracterizations and attacks on the character of the other party.[77]

[152] The Society further submits that the Applicant fails to apply the second part of the test, in *Sierra Club,* which weighs the salutary effects against the negative effects.[78]

[153] Lastly, the Society argue that because the Applicant has made serious allegations against the regulator that he did not receive procedural fairness and that the regulator is biased against him, it is in the interest of justice for these allegations to be made in an open court proceeding. Moreover, they submit that if the Applicant is of the opinion that the regulator is incompetent in the handling of the complaints, the open court principle is all the more important is disclosing the full record to ensure transparency and accounting of the alleged procedural unfairness and conduct of the Society.[79]

[154] Having considered the submissions of the parties, and the evidence, I am not persuaded that the entirety of the Record must be sealed, as there is an insufficient evidentiary basis to establish a real and substantial risk to an important public interest. In reaching this conclusion, I am mindful of Justice Fichaud's comments in *Coltsfoot Publishing Ltd.* that a "sufficiently evidentiary basis should include more than just a conclusionary assertion."[80] In other words, the facts that go to support a confidentiality order must be established by evidence and not by bald assertions or generalizations. Moreover, I also mindful of Justice Kasirer's comments, in *Sherman Estate,*[81] which are apposite:

> 2 [T] here is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general

[76] *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, at para. 54.
[77]Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 22
[78] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 23.
[79] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at para. 24.
[80] *Coltsfoot Publishing Ltd.*, at para. 31.
[81] *Sherman Estate,* at para. 2.

> matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[155] I agree with the Society's submission that while the Applicant may be unhappy with the allegations, he has failed to show a real and substantial risk grounded in evidence that poses a serious threat to his interest. A court file should not be sealed in its entirety every time a party makes allegations or includes mischaracterizations and attacks on the character of the other party.

[156] I also agree with the Society that given that the Applicant makes serious allegations against the Society that he did not receive procedural fairness and that the Society is biased against him, it is in the interests of justice for these allegations to be made in an open court proceeding.

7. The Motion for a Limited Confidentiality Order

[157] As stated, the Society is seeking a *limited* Confidentiality Order over the content of the Record, covering references in the record to the Applicant's spouse and children. The test for such a discretionary order has been articulated by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance),*[82] and refined in *Sherman Estate.*[83]

[158] In *Sherman Estate,* Kasirer J., in delivering the judgment of the Court, succinctly expressed the heightened importance of the open court principle to the proper functioning of Canadian democracy in these words:[84]

> 1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press – the eyes and ears of the public – is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> 2 **Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But**

[82] 2002 SCC 41, at paras. 53-57.
[83] *Sherman Estate*, at para. 38.
[84] *Sherman Estate*, at para. 1-2.

> **this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.**
>
> (Emphasis added)

[159] The Society submits that sealing the aforementioned parts of the record is consistent with the open court principle and the test for a confidentiality order set out by the Supreme Court of Canada in *Sherman Estate:*[85]

> 38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments…

[160] The Society submits that Civil Procedure Rule 7 and ss. 40(1) and 40(2) of the *Act* must be interpreted in such a fashion that preserves the open court principle and, therefore, that the public have access to the Record after the CIC renders its decision, *unless* a justifiable competing interest compels the restriction of the open court principle.[86]

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[85] *Sherman Estate*, at para. 38.
[86] Respondent's (Society's) Brief Re Confidentiality Order, November 3, 2023, at para. 23.

[161] In this case, the Society says that it would be just and appropriate for the Court to issue a *limited* confidentiality order over the Record where there are references to the Applicant's spouse and children. The competing public interest that would justify the sealing order is the protection of persons who are vulnerable – children – who are not parties to the proceedings.[87]

The Test: Discretionary Limit of Openness

[162] As stated above, only where the following three prerequisites have been met can a discretionary limit on openness be ordered.

Court openness poses a serious risk to an important public interest

[163] The Society says that the important public interest in this case is the interest in protecting vulnerable parties, particularly those who are not parties to the complaints or the decision under review. In *A.B. v. Bragg Communications Inc.*,[88] the Supreme Court of Canada recognized the vulnerability of children and held that protection of young people's privacy rights was an important consideration. Justice Abella, writing for the Court, recognized the inherent vulnerability of children wherein she wrote:

> 17 Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, C.-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she [page577] personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See *R. v. D.B.*, [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 170-74.

[164] As the Society stresses, the court further noted that studies have shown that allowing names of children and other identifying information to appear in media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities.[89]

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[87]Respondent's (Society's) Brief Re Confidentiality Order, November 3, 2023, at para. 24.
[88] 2012 SCC 46, at paras. 17-27.
[89] Respondent's (Society's) Brief Re Confidentiality Order, November 3, 2023, at para. 27.

[165] For these reasons, the Society argues that there is a public interest in protecting the privacy interest of Applicant's children.

2. *The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk*

[166] The Society submits that the risk to the public interest in protecting vulnerable parties arises from references in the record to alleged ongoing issues in the Applicant's home. They say that the risk to these vulnerable persons can be sufficiently addressed by redacting the portion of the Record of Proceedings that refers to family issues, without sealing the entire record. Anonymization would be insufficient in this case as it involves references to the Applicant's family members, who are readily identifiable.[90]

3. *As a matter of proportionality, the benefits of the order outweigh its negative effects*

[167] The Society submits that the Court must balance the salutary and deleterious effects of granting the confidentiality order. They argue that it is appropriate for the majority of the Record to be public. The Applicant alleges that the Society did not discharge its duty of procedural fairness. Thus, it is in the public interest to understand the process that the Nova Scotia Barristers' Society followed in investigating the complaints. The Record is the evidence of that process. The publication of the information related to any alleged issues are unnecessary in determining the relevant issue of this judicial review when balanced against the risk and harm to the vulnerable parties that are not parties to the complaints or the decision under review.[91]

[168] The Respondent Ms. MacPhee endorses and consents to the Society's motion for a Confidentiality Order over those portions of the Record that reference the Applicant's spouse and children. She concurs that the references highlighted in Exhibit "D" to the Affidavit of Dawn Lang sworn on November 3, 2023, should not be in the public realm, and that a limited Confidentiality Order in this regard reflects a proper application of the principles enumerated in the *Sherman Estate* test.[92]

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[90] Respondents (Society's) Brief Re Confidentiality Order, November 23, 2023, at para. 29-30.
[91]Respondent's (Society's) Brief Re Confidentiality Order, November 3, 2023, at paras. 32-33.
[92] Respondent's (Ms. MacPhee's) Written Submission, November 13, 2023, at para. 6.

Disposition of the Motion

[169] Having considered all of the foregoing, I am satisfied that it would be appropriate in this case to grant a *limited* confidentiality order redacting only the part of the Record that refers to the Applicant's wife and children. Accordingly, the Society's motion is granted.

8. Motion to Strike the Parties Named in the Judicial Review Application with respect to the Respondents' Complaints Investigation Committee and Elaine Cumming

[170] The Society submits that the CIC and Elaine Cumming are not appropriate Respondents in this judicial review application and therefore they should be struck from the Notice of Judicial Review, by removing the CIC and Elaine Cumming from the Style of Cause.

[171] Ms. MacPhee agrees that neither Elaine Cumming nor the CIC are appropriate parties to this judicial review proceeding. The Society submit that the CIC is a committee of the Society (*Legal Profession Act*, SNS 2004, c. 56, s. 34). The investigatory arm of the Society is not a separate legal entity. Accordingly, it should not be named as a party distinct from the Society.

[172] Ms. MacPhee further submits that judicial review applications address the actions of decision-makers. Ms. Cumming is not a decision-maker. The decisions under review are signed on behalf of the statutory decision maker, the CIC. As a result, the only appropriate respondent is the Society itself.

[173] Similarly, the Society submits that the Society, sitting as CIC, was the decision-maker. The CIC has power and authority to request further research and clarification, if warranted, on the face of the investigation report. It is therefore the CIC's conduct carrying out the investigation and addressing the complaint that is subject to review on the issue of procedural fairness. In responding to the Applicant's submission that since Ms. Cumming would be subject to indemnity from the Society, there is no downside to her being included as a party, the Society asserts that, while Ms. Cumming may not be exposed to any personal costs in this proceeding, the Applicant has used these proceedings to disparage and attack her character and

integrity, significantly harming her professional reputation with irrelevant allegations and opinions.[93]

[174] The Applicant submits that the relevant party to this proceeding is the Nova Scotia Barrister' Society, which for relevant purposes was functioning through and acting as an internal committee known as CIC, albeit with its employee Elaine Cumming also impacting procedural fairness. Therefore, he contends that:

> for stylistic and naming purposes, the relevant Respondent was accurately and properly named by the Applicant as 'Nova Scotia Barristers' Society, including its Complaints Investigation Committee.' That is naming is stipulating one party and it is only reference to one Respondent. The words 'including' even denote the CIC being part within the named party NSBS and not something separate from it. There is no distinction in the sense of there being two separate Respondents within that nomenclature. The approach is in keeping with how entities and other governmental bodies are named as parties to legal proceedings, including with to the department involved or in this case the committee involved, or in this case the committee involved, or some other operational group or wing of actual legal entity being referenced for the sake of clarity. In some respects, the naming is not so different than well-established approaches of evening naming businesses with added reference to a relevant operating division, such as 'ABS Inc. doing business as ABC Manufacturing' or "XYZ Sales'. The simple fact is that the Nova Scotia Barristers' Society is the legal entity and the relevant Respondent, as the proceedings have been filed, with proper reference to its Complaints Investigation Committee. There is nothing to do in terms of striking anything in connection with the judicial review application allegedly against the CIC nor removal of the CIC as a respondent, because there is no such application against it as named Respondent nor any such would-be Respondent (separate from the NSBS). Again, the CIC is not even an existing independent legal entity that is a party. [94]

[175] The Applicant submits that the "entire aspect of the Respondent's motion seeking some manner of remedy of striking in connection with the CIC is meritless and should be dismissed."[95]

[176] Having considered the evidence, and the submissions of the parties, I have no difficulty in reaching the conclusion that CIC is a committee of the Society. It is

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[93] Respondent's (Society's) Rebuttal Brief, November 17, 2023, at paras. 28 to 29.
[94] Applicant's Response Written Submissions, November 13, 2023, at para. 26.
[95] Applicant's Response Written Submissions, November 13, 2023, at para. 27.

appointed by the Council of the Society under the *Legal Profession Act*, SNS 2004, c. 56. Section 34 of the *Act* provides:

> **Complaints Investigation Committee**
>
> 34 (1) The Council shall appoint a Complaints Investigation Committee made up of lawyers and persons who are not members of the Society and may make regulations
>
> > (a) establishing processes for receiving and responding to complaints or other information concerning the conduct, practice, professional competence or capacity of members of the Society;
> >
> > (b) establishing processes for investigating the conduct, practice, professional competence or capacity of a member of the Society;
> >
> > (c) prescribing the makeup of the Complaints Investigation Committee and determining the criteria for being the Chair or a Vice-chair;
> >
> > (d) determining the quorum for the Complaints Investigation Committee;
> >
> > (e) determining the manner in which members of the Complaints Investigation Committee must receive notice of meetings and the consequences of failing to receive notices;
> >
> > (f) determining the means by which the Complaints Investigation Committee makes decisions;
> >
> > (g) prescribing the circumstances in which a member of the Complaints Investigation Committee whose term has expired may remain a part of the Committee until matters in which that member of the Committee has been involved have concluded.
>
> (2) Regulations made pursuant to clause (1)(c) must provide that a majority of the members of the Complaints Investigation Committee are members of the Society. *2004, c. 28, s. 34; 2010, c. 56, s. 9.*

[177] As the Society succinctly and accurately states:[96]

[96] Respondent's (Society's) Brief RE Motion to Strike, November 3, 2023, at para. 5.

> The CIC is simply a committee within the Society appointed by the Council to investigate the conduct, practice and professional competence or capacity of a member of the Society. The CIC has all the powers conferred to it by the *Legal Profession Act* and the regulations pursuant to the *Act* (the Regulations) in the discharge of its functions as well the powers, privileges, and immunities of a commissioner under the *Public Inquires Act*, SNS 2015, c. 50. Regulation 9.5.5. grants CIC and the Executive Director the discretion to conduct an investigation in such a manner as it determines appropriate.

Test for a Motion to Strike

[178] As the Society submits[97] Civil Procedure Rule 13.03 provides the Court jurisdiction to grant summary judgment on pleadings, if it: (a) discloses no cause of action or basis for a defence or contest; (b) is based on a cause of action outside the courts jurisdiction; or (c) makes a claim that is clearly unsustainable when the pleading is read on its own.[98] In *Carvery*, Fichaud J.A., writing for the Court, wrote:[99]

> 25 This Court has said that a motion for summary judgment on the pleadings succeeds only if the responding party's claim or defence is "certain to fail" because it is "absolutely unsustainable", *i.e.* it is "plain and obvious" that it "discloses no cause of action or defence". *Cragg v. Eisener*, 2012 NSCA 101, para. 9, and authorities there cited; *Cape Breton v. Nova Scotia*, para. 21.

[179] In *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd*., the court held that a motion pursuant to Rule 13.03 is analogous to striking a pleading.[100] On a motion to strike on the basis of Rule 13.03, the Court assumes that the facts as pleaded have been proved and examines only the pleadings to assess whether it is plain and obvious that the claim as pleaded cannot succeed because it discloses no reasonable cause of action or is clearly unsustainable when it is read on its own.[101]

[180] In *Canada Elevator Industry Education Program v. Nova Scotia (Electors and Lifts),*[102]Justice Bryson, for the Court, confirmed that a preliminary motion, such as

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[97] Respondent's (Society's) Brief RE Motion to Strike, November 3, 2023, at para. 14.
[98] *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21.
[99] *Carvery*, at para. 25.
[100] 2023 NSSC 25, at para. 10.
[101] *Homeburg Canada Inc. v. Halifax Regional Municipality*, 2003 NSCA 61, at para. 7.
[102] 2016 NSCA 80, at para. 75.

a motion pursuant to Rule13.03, is available to dismiss a judicial review application. He stated:

> 75 There is no inconsistency in this case between the Court's inherent jurisdiction to control its own process and *Rule* 7 respecting judicial review. *Rule* 7 is not a complete code of procedure in such matters and does not preclude a preliminary motion to avoid unnecessary expense, delay or poor use of judicial resources.

[181] In my view, the pleading is clearly unsustainable as against the CIC and Elaine Cumming, as they are not proper respondents to this judicial review, for the following reasons.

[182] I agree with the Society that CIC is not a proper respondent under Rule 35.04 of the *Rules.* Rule 35.04 (1) requires the party initiating a proceeding for judicial review to name as respondents the decision-making authority, each person who is a party to the process under review or the process that led to the decision under review, and any other person required by legislation.

[183] Rule 35.04(2) requires that an arm of a decision-making authority that is not legally separate from the authority and that prosecuted a complaint be included as a respondent. Further, courts have acknowledged that non-legal entities that hold a separate function, such as prosecution, can be named as a respondent.[103]

[184] In my view, it is indisputable that in these proceedings the decision-making authority is the Society, as the Society is the regulator. The CIC is not an "arm" of the Society that must be named as a respondent. The CIC is a part of the internal process that the Society has set up for investigating and adjudicating complaints. It does not hold a separate function from the Society.

[185] As the Society submits, under s. 12 (1) of the *Act,* Bar Council, the governing body of the Society, may establish committees and authorize a committee to do any act or exercise any power or jurisdiction the Council is authorized to do or exercise under the *Act.* Pursuant to s. 34(1), the Council appoints CIC members, and may make regulations for processing complaints and carrying out investigations related to the conduct, practice, professional competence, or capacity of a member of the Society. The Council delegates part of its decision-making authority to the CIC

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[103] *Canadian Broadcasting Corporation v. Nova Scotia (Attorney General),* 2010 NSSC 295, at paras. 14-15.

within its disciplinary process. But the ultimate responsibility for the decision lies with the Society.[104]

[186] The Society points out that cases involving judicial review of CIC decisions have only named the Society, such as in *D.L.W. v. Nova Scotia Barristers' Society*.[105] The Society submit that it is sufficient to name only the Society, who is the appropriate decision-making authority. Accordingly, the Society submits that Committees to whom decision-making authority is delegated should not be named as respondents on a judicial review application. I agree.

[187] With respect to Ms. Cumming, the Society submits that she is not an appropriate respondent to this judicial review for three reasons: (1) she is not a decision-making authority; (2) she is not a party to the process that led to the decision under review; (3) the investigating stage is not subject to judicial review.[106]

[188] Ms. Cumming did not issue the decision that is the subject of this judicial review. She did not render any decision, nor did she participate in the final decision-making. For these reasons, I agree with the Society, that while Ms. Cumming's report may have been part of the process that led to the decision under review, she was not a party to the process. Ms. Cumming's role was limited to gathering information from the complainant and the party subject to the complainants, and providing a report summarizing the investigation, including the options available to the CIC for consideration.[107]

[189] Lastly, I agree with the Society that judicial review of the appeal does not extend to seeking judicial review of the underlying investigation. In *Al-Ghamdi,* Justice Goss explained why judicial review does not extend to the review of the underlying investigation:[108]

> 51 The investigatory stage of disciplinary hearings are not subject to judicial review because at this stage the decision to proceed with a complaint is akin to prosecutorial discretion: *Friends of the Old Man River* at paras 36-37 and 41-42.

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[104] Respondent's (Society's) Rebuttal Brief RE Motion to Strike, November 3 , 2023, at para. 24.
[105] 2010 NSCA 40.
[106] *Ali-Ghandi v. College and Association of Registered Nurses of Alberta*, 2017 ABQB 685, at para. 51 and 55.
[107] Respondent's (Society's) Rebuttal Brief RE Motion to Strike, November 3 , 2023, at para. 28.
[108] *Ali-Ghandi,* at para. 51.

[190] Based on all the evidence and the submissions of the parties, I find that Ms. Cumming's role was limited to the investigating stage, and therefore, she is not a proper respondent to this judicial review proceeding.

[191] In the alternative, the Society submits that if Ms. Cumming is a proper respondent to the judicial review, the allegations against her based on the Application alone are clearly unsustainable.

[192] The Society submits that the Applicant's allegations against Ms. Cumming on the issue of procedural fairness are clearly unsustainable, because as the investigator she controls her process and is not required to respond to every request by the complainant and had the discretion to exercise judgment and reasonable care in carrying out the investigation. I agree. Moreover, as noted above, the steps taken by Ms. Cumming during the investigatory stage and the procedural fairness owed during this stage cannot be subject to judicial review.

[193] Again, for the foregoing reasons, any allegation that Ms. Cumming failed to render a proper decision meeting administrative law expectations and requirements or failed to render a decision and provide reasons addressing the complaints, are unstainable because she was not the decision-making authority.

[194] As the Society points out, the CIC, upon review of the investigation report, including the summary of investigation which included correspondence between Ms. Cumming and the Applicant, Mr. Fraser, had authority to request further investigation into the complaints pursuant to Regulation 9.5.8(b). The CIC, after review of the materials before them, including the issues raised by Mr. Fraser in the judicial review application, determined that there was no need for further investigation.[109]

[195] I agree with the Society that it is not Ms. Cumming's role to render a decision based on the investigation or to provide the Applicant with the reasons for the decision.

[196] I also agree that the allegations of malice, bad faith, and intent to harm the Applicant are not within the jurisdiction of this court on judicial review with respect to Ms. Cumming as she is not the decision-making authority. Such allegations can

[109] Respondent's (Society's) Rebuttal Brief RE Motion to Strike, November 3 , 2023, at para. 34.

only be brought against the proper Respondent, the Society, especially considering the Applicant's limited standing in the matter.

[197] As previously mentioned, a complainant's standing to seek judicial review and the duty owed to a complainant, is limited to procedural fairness.[110] A non-party, such as the Applicant, does not have standing to seek judicial review of the merits of a disciplinary body's decision.[111]

Disposition of the Motion

[198] For all the foregoing reasons, I find that CIC and Elaine Cumming are not Respondents to this judicial review proceeding and accordingly the motions to strike the pleadings as against them as parties are granted.

9. The Applicant's Motion to Introduce Fresh Evidence: Rule 7.28

[199] The Applicant seeks leave pursuant to Rule 7.28 (1) to introduce evidence beyond the Record produced by the Society. The Applicant's proposed supplemental evidence is by way of an Affidavit sworn January 16, 2024, with 13 attached exhibits (the "January 16 Affidavit").

[200] Rule 7.28 of the *Rules* requires a party who proposes to introduce evidence beyond the record on a judicial review to file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.

Positions of the Parties

Applicant's Position

[201] The Applicant, Mr. Fraser, raises several grounds of alleged breaches of procedural fairness in his notice for judicial review. In essence, he submits that the entirety of his January 16 Affidavit is admissible under Rule 7.28 because it provides the court with background information and procedural context in relation to his grounds for alleging that the decision under review was the product of bad

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[110] *Robichaud v. College of Registered Nurses of Nova Scotia*, 2011 NSSC 379; *Friends of the Old Man River Society, Mitten, and Toutsaint v. Investigation Committee of The Saskatchewan Registered Nurses Association*, 2023 SKCA 11, at paras. 22-24.
[111] *Tupper*, at para. 31; *Perry*, at paras. 32-35.

faith, bias, and/or improper exercise of statutory authority, including on the part of Elaine Cumming. He also says that the supplementary evidence is necessary to show how the Society erred in failing to afford him procedural fairness in the course of dealing with his complaints, including failing to refuse to obtain evidence and to exercise statutory powers while being informed of the existence of such evidence, among other allegations.

The Respondents' Positions

[202] The Society objects to the admission of most of the proposed (fresh) evidence contained in the January 16 Affidavit, for two reasons. First, it is not admissible because it does not meet the test for proper evidence in a motion. Second, while some paragraphs of the January 16 Affidavit, and two attached exhibits provide information relevant to the Applicant's allegations of procedural defects in the decision of the CIC, most of the additional evidence does not fall within the three recognized categories of additional evidence admissible on judicial review. For these reasons, the Society filed a Notice of Motion seeking to strike most of the proposed fresh evidence.

[203] Ms. MacPhee also objects to the admission of most of the fresh evidence contained in the Applicant's January 16 Affidavit, particularly the evidence that pertains to her. The essence of her argument is that most of the paragraphs where she is referenced should be struck because the content fails to meet the test for the introduction of new evidence on judicial review applications or the general test for admissibility of affidavit evidence.

Context of the Motions to Supplement Record and to Strike

[204] The context of all of these motions is important, as the Applicant is asking the Court, among other things, to set aside the decision of the CIC. Thus, in determining the issue of what fresh evidence, if any, should be introduced in this judicial review proceeding, it is important to be mindful of the context in which these motions arise, which includes the limited role of the Court on this judicial review, and the limited issues that were before the CIC that are subject to review.

[205] Before embarking upon the issues that arise from these motions, it is important to reaffirm the nature and scope of this judicial review to provide the necessary context for a meaningful analysis of the issues.

The Nature and Scope of this Judicial Review Proceeding

[206] First, by its very nature, a judicial review is a proceeding whereby the Court reviews the decision of an administrative decision maker. It is not a trial, nor is it a re-trial of the question before the administrative decision maker.[112]

[207] The scope of the review in this proceeding is narrow because the Applicant, Mr. Fraser, is a complainant, not a party to the Society's investigative and hearing process. As Ms. MacPhee aptly says, it is a "respondent to a complaint, rather than the complainant, that faces all the jeopardy in investigative and hearing processes. Such proceedings can have serious ramifications for a respondent."[113] Unlike a respondent, the complainant faces no such jeopardy. Therefore, the procedural obligations owed by a decision maker to a complainant are much more limited than those owed to a respondent. Thus, a non-party to a decision does not have standing to seek judicial review of the merits of the decision. A non-party complainant, such as Mr. Fraser, cannot challenge the reasonableness of the decision under review. As a result, the judicial review of the CIC's decision is limited to the questions of whether the decision was conducted in an unbiased manner consistent with the procedural fairness requirements owed to a complainant in a proceeding under the *Act* and its *Regulations.*

[208] Ms. MacPhee submits that the CIC as an administrative decision-maker dealt with two narrow questions: was a video recording surreptitiously made, and did Ms. MacPhee read from a without prejudice communication and distort the nature of the communication? Based on the answers to these two factual questions, the CIC then had to decide on the merits of the complaints, in terms of whether the conduct amounted to ethical breaches. Ms. MacPhee further submits that with respect to the first question, she readily admitted that she made the recording and provided it to the CIC. Thus, the CIC had Ms. MacPhee's admission and the recording before it as part of the Investigative Report. She also points out that the CIC had as evidence the transcript of the proceeding in question to establish what was read by Ms. MacPhee. Therefore, the CIC did not need additional evidence to make the factual findings it did. The CIC was not required to assess credibility to make its determination, as the facts were not in issue.[114] In light of the foregoing, the Ms. MacPhee submits that:[115]

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[112]*Sorflaten v. Nova Scotia (Environment),* 2018 NSSC 7, at para. 10.
[113] Respondent's (Ms. MacPhee's) Brief, January 30, 2024, at para. 12.
[114] Respondent's (Ms. MacPhee's) Brief, January 30, 2024, at paras. 17-21.
[115]Respondent's (Ms. MacPhee's) Brief, January 30, 2024, at para. 22.

> [B]oth the limited role of the Court in reviewing decisions of administrative decision makers and the narrow scope of the issues before the CIC, provide the contextual background for determining the admissibility of evidence for this judicial review proceeding. That contextual background must be applied against the legal framework for introducing new evidence on judicial review.

[209] The Society emphatically state that it is the CIC decisions in respect to the two complaints that he made against Julie MacPhee (C254 and C297), and only these decisions, which are the subject of this application for judicial review.[116]

[210] The Applicant applies for judicial review of the CIC's decisions on the following grounds:

i. the decision was the product of bad faith, bias, and/or improper exercise of statutory authority, including on the part of Elaine Cumming who at all material times held (among other things) malicious and partisan distain and animosity toward the Applicant as well as the track record of inappropriately and with bad faith, malice or otherwise improper intent abusing her position and statutory authority to attempt to harm the Applicant and/or accede to wishes of Julie MacPhee and other adverse to the Applicant;

ii. the Respondents erred in failing to afford the Applicant proper procedural fairness and in breaching obligations or procedural fairness in the course of the Respondents dealing with the Complaint;

iii. without limiting the generality of the foregoing, the Respondents erred

    a. in failing to and outright refusing to obtain and to exercise statutory powers to obtain other relevant evidence of Julie MacPhee unethically making surreptitious recordings, while being informed of the existence of such evidence and being expressly asked by the Applicant to obtain such evidence which (among other things) prevented the Applicant from making further submissions and/or allowing proper consideration of all submissions relevant to the matters before the Respondents;

[116]Respondent's (Society) Brief RE Proposed Additional Evidence, January 29, 2024, at para. 9 -10.

b. in failing to even consider the express part of the Complaint concerning Julie MacPhee having withheld evidence from legal authorities and the request that Julie MacPhee be made subject to a practice review;

c. in failing to allow the Applicant proper opportunity to make submissions and provide information, including by withholding from the Applicant and denying the Applicant to review and comment on Julie MacPhee's allegations and her submissions in full;

d. without limiting the generality of the foregoing in conducting the investigation, assessment and decision-making process, contrary to normal practices of the Nova Scotia Barristers' Society, including what was held out to the Applicant as normal practice and/or the reasonable expectations of the Applicant, to the detriment of the Applicant and the advantage to Julie MacPhee;

e. in failing to render a proper decision, including a decision with proper reasons meeting administrative law expectations and requirements;

f. without limiting the generality of the foregoing, failing to render a decision and provide reasons addressing it any way the express aspect of the Complaint that Julie MacPhee withheld evidence from legal authorities and the request that she be subjected to a practice review;

g. without limiting the generality of the foregoing, failing to provide a decision with reasons based on facts, evidence or law that gave rise to reasonable path of reasoning in respect to of findings of Julie MacPhee not having breached settlement privilege and/or otherwise failing to provide adequate reasons on that issue meeting appropriate ministry of law standards and expectations;

di. In allowing or ensuring that information to be placed before the Complainant's Investigation Committee was limited and selective and/or with certain relevant evidence held by the Nova Scotia Barristers' Society being withheld from the Complaint Investigation Committee, including but not limited to withholding evidence that contradicted submissions of Julie MacPhee or confirmed that Julie MacPhee was lying, with the Applicant being unaware of such an approach at relevant times;

g1. Without limiting the generality of the forgoing, in conducting the decision-making process in a manner that:

(v) was improperly tainted by input and/or decision making by Elane Cumming, who was not a proper person to be making any decision;

(vi) entailed the Complaints Investigation Committee acting in violation of the principle that the "one who hears must decide" and/or otherwise improperly abdicating or delegating on a de facto basis responsibility and/or actual decision making or assessment to Elaine Cumming, and/or failing to ensure a proper separation between the role of Elaine Cummings and the function of the Complaints Investigation Committee, rather than the Complaints Investigation Committee undertaking independent assessments and forming independent opinions and decisions;

(vii) allowed the opinions of Elaine Cummings to effectively make the decision (s) for the CIC and for that to happen without the Applicant having opportunity to address Elaine Cumming's flawed input and any flawed opinions, suggestions, selective evidence disclosures, or legal analysis put forward by Elaine Cumming; and/or

(viii) otherwise improperly involved participation by Elaine Cumming in the decision-making process.

3. Such further and other errors or grounds of review as may appear

Law and Analysis

[211] As a starting point, it is worthy of note that Rule 7 of the *Rules* deals with the record on a judicial review.

Rule 7.10: Judicial Discretion to Decide What Should Be in the Record

[212] Rule 7 of the *Rules* provides the court with the discretion to decide what should be in the record. Rule 7.10 states:

> A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:
>
> > (a) settles what will make up the record and whether something is part of the record;
> >
> > …
> >
> > (c) directs the format in which the record will be produced, and whether a party must receive a paper copy of a record that is in electronic format;
> >
> > …
> >
> > (g) rules on the admissibility of evidence sought to be introduced at the review hearing;
> >
> > …
> >
> > (h) provides for the introduction of **admissible evidence by affidavit** or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript;
> >
> > [Emphasis added]

[213] Rule 7.10 is referred to as the discretion to settle the record. There is no definition of "record" in the *Civil Procedure Rules.* Rule 7.09 simply says it must be complete.[117]

Fresh Evidence on a Judicial Review: Rule 7.28

[214] Given that the Applicant's January 16 Affidavit was not before the CIC, in order for it to be introduced on judicial review leave of this court is necessary.

[215] Rule 7.28(1) requires a party who proposes to introduce evidence beyond the record on a judicial review to file an affidavit describing the proposed evidence and providing the evidence in support of its introduction. The reason for this rule is that evidence that was not before the initial decision-maker is generally not admissible on judicial review.[118]

[216] As the Society notes, in most cases the differing roles played by judicial review courts and administrative decision-makers limit courts to the record before

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[117] *Sandeson v. Nova Scotia (Attorney General),* 2022 NSSC 170, at para. 11.
[118] *Sandeson*, at para. 15.

the administrative decision-maker. Thus, evidence that was not before the decision-maker when they made the decision cannot assist the court in determining whether the decision respects the relevant standard of review.[119]As stated by Justice Jamieson in *Sandeson*:[120]

> 15 Generally speaking, evidence that was not before the initial decision-maker is not permitted to be filed on a judicial review. The record that goes before the reviewing court should be the material that was before the decision-maker at the time the decision was being made. In their text *Judicial Review of Administrative Action in Canada*, (Carswell: loose-leaf) Vol.1 6.52, Brown and Evans comment that "affidavit evidence will only be permitted to supplement the administrative record in limited circumstances." They further state:
>
> > where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record...On the other hand, where the alleged error is not jurisdictional, nor one of adjudicative or procedural fairness, the applicant will...usually be confined to the record of the tribunal's proceedings, without augmentation.

[217] However, Justice Jamieson went on to note that there are limited number of exceptions to the general exclusion of new (fresh) evidence:[121]

> 16 There are limited exceptions to the general rule prohibiting fresh evidence on a judicial review. The exceptions, although not a closed list, are general background information of assistance to the court in understanding the issues relevant to the judicial review; affidavit evidence of procedural defects that cannot be found in the evidentiary Record and affidavit evidence highlighting a complete absence of evidence before the administrative decision-maker when it made a particular finding. (Justice Stratus in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.)) However, the exceptions are narrow and best understood as circumstances where the rationale behind the general rule is not offended. As Justice Stratas said in *Association of Universities*, *supra*, at paragraph 20:
>
> > There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-

[119]Respondent's (Society's) Brief RE Proposed Additional Evidence, date January 29, 2024, at para. 16.
[120] *Sandeson*, at para. 16.
[121] *Sandeson*, at para. 16.

> maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker.

[218] In *Bernard* v. *Canada Revenue Agency*,[122] Justice Stratas provided further insight into these recognized exceptions:

> 20 The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without argumentation, the documents that are key to the reviewing court's understanding of the record.
>
> 21 In *Delios*, above, I put it this way (at paragraph 45):
>
> > The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy -- that is the role of the memorandum of fact and law -- it is admissible as an exception to the general rule.
> >
> > [Emphasis added]
>
> 22 But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20; *Delios*, above at paragraph 46.
>
> [Emphasis added]
>
> 23 The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of

[122] 2015 FCA 263, at paras. 20-28.

powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

24 The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record--which is the first exception--but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.

25 The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662* (1998), 161 Nfld. & P.E.I.R. 1999 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

26 I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000),

> 195 D.l.r. (4th) 399;264 N.R. 174; *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).
>
> 27 The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).
>
> 28 The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4TH) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was unreasonable because it wrongly construed certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4TH) 577.

[219] In relation to the procedural fairness exception, Justice Jamieson in *Sandeson* referred to *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, where the Court of Appeal held that on the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal.[123]

[220] Before turning to an application of these general exceptions to this judicial review proceeding, I note that, in addition to the Respondents' (the Society and Julie MacPhee) objections to the admissibility of specific paragraphs and attached exhibits of the Applicant's January 26 Affidavit under Rule 7.28, they also object to the admissibility of specific paragraphs of the Applicant's January 16 Affidavit and

[123] 2018 NSCA 83, at para. 73.

the attached exhibits as being irrelevant, argumentative, conclusionary, or unsubstantiated, and thus contrary to Rule 39. 04, which provides:

> 39.04 (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[221] Also, according to Rule 39.05, a party who files a scandalous, irrelevant, or otherwise oppressive affidavit is subject to the provisions of Rule 88 – Abuse of Process.

Appropriate Contents of Affidavits: *Waverley* Guidelines

[222] The seminal case in Nova Scotia on the contents of affidavits is *Waverley (Village) v. Nova Scotia (Municipal Affairs),*[124] wherein Justice Davison set out in summary form the guidelines for admissible affidavit evidence. He wrote:

> 14 Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissible as evidence to determine the

[124]1993 NSSC 71, at paras. 14 and 20.

> issues before the court. In my respectful view the type of affidavits which are being attacked in this proceeding are all too common in proceedings before our court and it would appear the concerns I express are shared by judges in other provinces...
>
> …
>
> 20 It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities, and I would enumerate these principles as follows:
>
> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
>
> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application [a motion under the present Rules]. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
> 3. Affidavits used in applications [motions] may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[223] These remarks are reflected in various aspects of Rule 39.

[224] As stated, the Respondents' strongly object to the admissibility of specific paragraphs and attached exhibits of the January 16 Affidavit because they not in compliance with the Rule 7.28, Rule 39, or the guidelines set out in *Waverly* for admissible affidavit evidence. Accordingly, the Respondents urge the Court to strike out all the offending parts of the January 16 Affidavit, including the impugned attached exhibits.

Application of the General Principles and Relevant Rules

[225] As previously mentioned, the Applicant seeks to place his affidavit and attached exhibits within the procedural fairness exception. He submits that this evidence "is needed to show not only the breach of procedural fairness, but the impact or what would have unfolded if not for the breach."[125]

[226] The Society concedes that evidence identifying procedural defects that are not apparent in the record of the decision-maker is admissible on judicial review, as described above. In acknowledging this, the Society stresses that as a complainant, the Applicant may only raise issues of procedural fairness. He does not have standing to seek judicial review of the merits. That said, the Society disagrees that the January 16 Affidavit and attached exhibits do, in fact, raise issue of procedural fairness with respect to the decisions of the CIC. In particular, the Society urge this Court to decline the admission of paras. 6-72, 76(b)-76(k), and 80-104 of the Affidavit, as well as the attached Exhibits A-I, and K-M. The Society says that this evidence does not assist this court in reviewing the CIC decisions. Rather, the proposed evidence is argumentative, repetitive, and unsubstantiated. Moreover, the Society says most of the paragraphs in the January 16 Affidavit cannot be admitted as evidence because they are not relevant to this judicial review proceeding, contrary to Rule 39.04(2)(1) of the *Rules.*[126]

[227] Ms. MacPhee says that much of the Affidavit is inadmissible for various reasons, which vary from paragraph to paragraph. The principal reasons to strike, she says, arise from the content of the impugned paragraphs, which include:

(i) failing to meet one of the permitted exceptions for the introduction of affidavits on judicial review;

(ii) being immaterial or irrelevant as it focuses nearly exclusively on matters that are not related to the matters at issue in the judicial review application;

(iii) containing expression of opinions;

(iv) containing argument, advocacy, "spin", or submissions;

(v) containing unsupported conclusions;

(vi) containing pleadings not evidence;

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[125] Letter from Donn Fraser to the Court dated December 13, 2023.
[126] Respondent's (Society's) Brief RE Proposed Additional Evidence, January 29, 2024, para.27.

(viii) not referencing the source of the informant; and

(ix) containing scandalous, abusive or inflammatory characterizations of Ms. McPhee. [127]

[228] Ms. MacPhee argues that the following paragraphs are not admissible: paragraphs 5-21; 14; 38 and 39; 44; 46; 73; 75; 76 (g), (h), (i), and (k); and 89 -104. Ms. MacPhee submits that paragraph 76 (a), including the attached exhibit J is admissible except for the part that states, "the content of which is true and which effectively identified that MacPhee had lied in certain of her assertions of her assertions in response to the complaints against MacPhee" is inadmissible.

[229] Before embarking upon my analysis of the issues, I will briefly comment on the general legal principles governing the general admissibility of evidence that is at issue in these motions.

Relevance and Materiality

[230] The basic rule of evidence is that "information can be admitted as evidence only where it is relevant to a material issue in the case."[128] The concept of relevance has been explained as follows:[129]

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, 'Does the evidence assist in proving the fact that the party calling that evidence is trying to prove?'

[231] Evidence that is relevant to an issue at trial is admissible, as long as it is not subject to an exclusionary rule and the trial judge does not exercise their discretion to exclude it.[130]

[232] In *Schneider*, the Supreme of Court of Canada described the analytical framework to determine relevance. Justice Rowe, for the majority, wrote:[131]

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[127] Respondent's (Ms. MacPhee's) Brief, January 30. 2024, at para. 48.
[128] D.M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 32.
[129] *The Law of Evidence*, at p.35.
[130] *R. v. Schneider*, 2022 SCC 34, at para. 36.
[131] *Schneider*, at paras. 38-39.

38 The first step in determining admissibility is considering whether the evidence is relevant. At this stage, this is often referred to as "logical relevance". However, I will use the word "relevance" (rather than "logical relevance") in this decision.

39 To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). Beyond this, there is no "legal test" for relevance (Paciocco, Paciocco and Stuesser, at p. 35). Judges, acting in their gatekeeping role, are to evaluate relevance "as a matter of logic and human experience" (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 44). When doing so, they should take care not to usurp the role of the finder of fact, although this evaluation will necessitate some weighing of the evidence, which is typically reserved for the jury (Vauclair and Desjardins, at p. 687, citing *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at paras. 95 and 98). The evidence does not need to "firmly establish ... the truth or falsity of a fact in issue" (*Arp*, at para. 38), although the evidence may be too speculative or equivocal to be relevant (*White*, at para. 44). The threshold for relevance is low and judges can admit evidence that has modest probative value (*Arp*, at para. 38; *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 18). A judge's consideration of relevance "does not involve considerations of sufficiency of probative value" and "admissibility ... must not be confused with weight" (*R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 715 , per La Forest J., dissenting, but not on this point, quoting *Morris v. The Queen*, [1983] 2 S.C.R. 190, at p. 192). Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance. Whether evidence is relevant is a question of law, reviewable on the standard of correctness (*R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-21).

[233] Charron J., for the court, discussed relevance in *R. v. Blackman*:[132]

30 Relevance can only be fully assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. The reality that establishing threshold relevance cannot be an exacting standard is explained by Professors D. M. Paciocco and L. Stuesser in *The Law of Evidence* (4th ed. 2005), at p. 29, and, as the authors point out, is well captured in the following statement of Cory J. in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38:

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The

[132] 2008 SCC 37, at para. 30.

> evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue.

[234] Evidence is *material* if it is relevant to a live issue in the case. If it is not relevant to a live issue, it must be excluded because it has no probative value.[133]

[235] In additional to excluding relevant and material evidence for policy reasons, trial judges retain the general discretion to exclude relevant evidence when its potential prejudice exceeds its probative value.

[236] It is a basic principle of the law of evidence that the *probative value* of a piece of evidence depends on the context in which it is proffered.[134] Thus, as stated in *Calnen*, it is important for counsel and trial judges to specifically define the issues, purpose, and use for which such evidence is being proffered, and to articulate the reasonable and rational inferences which might be drawn from it.[135]

[237] In summary, admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though probative, the evidence must be excluded on a clear ground of policy or of law.

Identification of Hearsay Evidence

[238] In *Schneider*, Rowe J. defined hearsay as having three components:

> (1) a statement or action made outside of court by a declarant;
>
> (2) which a party seeks to adduce in court for the truth of its contents;
>
> (3) without the ability of the other party to contemporaneously cross-examine the declarant.[136]

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[133] *R. v. Calnen*, 2019 SCC 6, at para. 109.
[134] *R. v. Araya*, 2015 SCC 11, para. 31.
[135] *Calnen*, at para. 113.
[136] *Schneider*, at para. 47.

[239] Hearsay is *presumptively* inadmissible unless an exception to the hearsay rule applies. The reason for that is that it serves as a safeguard against inaccurate fact finding. As stated by Justice Rowe in *Schneider*:[137]

> 48 Historically, the common law excluded hearsay evidence (*Smith*, at pp. 924-25; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 153; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 13). Courts premised this exclusion on two primary concerns. First, hearsay evidence may be unreliable and does not afford parties the ability to test reliability by cross-examination (*Khelawon*, at para. 2; *Mapara*, at para. 14). Second, direct evidence is preferable and, thus, hearsay evidence may not be the best available (*Mapara*, at para. 14).

[240] While the definition of hearsay is easy to cite, it can be very difficult to identify or recognize. For that reason, care must be taken to identify the purpose for which the statement is being proffered.

[241] For the purposes of this motion, it is not necessary to delve into the breadth of the hearsay rule, other than what has been briefly discussed above.

Opinion and Fact

[242] It is important to distinguish between opinion and fact. As Dickson J stated in *R. v. Graat*:[138]

> 45 Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

[243] As stated in *The Law of Evidence:*[139]

> In the law of evidence, an opinion means an ‘an inference from observed fact.’ An inference from observed fact is different than the observed fact itself. A witness who says a wound was life-threatening, for example, is drawing an inference from an observed fact and is therefore offering an opinion. If the same witness merely describes the wound by saying ‘the victim had a wound in his neck’ or ‘carotid artery was severed’, that witness is simply reporting an observed fact. The distinction between inferences and facts is important to the law of evidence, to the extent that it can be drawn. … A basic tenet of our law is

[137] *Schneider*, at para. 48.
[138] [1982] 2 S.C.R 819, at para. 45.
[139] D.M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at pp. 233-34:

> [therefore] that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience.' In other words, there is a general discretionary rule that operates to make opinion evidence presumptively inadmissible.

[244] As a general rule, a witness may not give opinion evidence but may testify only to facts within their knowledge, observation, and experience.[140]

[245] Lay witnesses (non-experts) may be permitted to offer opinions or conclusions where there is no other way for them to communicate ordinary knowledge they possess. In *Graat*, Dickson J stated:[141]

> 50. I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.
>
> > When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
> >
> > "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."
> >
> > There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general.

[246] Generally, the opinion rule limits a witness to statements of what they observed, without inference. As the Supreme Court of Canada has recently noted in *R. v. Kruk*:[142]

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[140] Lederman, Sidney N., Michelle K. Fuerst and Hamish C. Stewart. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. Toronto: LexisNexis, 2022, at §12.2, p. 815.
[141] *Graat*, at para. 50.
[142] 2024 SCC 7, at paras. 149-150.

> 149 An "opinion" can be understood as a particular *inference* proffered by a witness (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. [2015] 2 S.C.R. 182, at para. 14). The line between fact and opinion is not always clearly drawn (*Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 835). As a general rule, however, witnesses may not give opinions, but should testify only to "facts" in their knowledge, observation, and experience; it is for the trier of fact to draw inferences from proven facts (Lederman, Fuerst and Stewart, at 12.2). However, a qualified expert witness may provide the trier of fact with a "ready-made inference" that the trier of fact would otherwise not be able to draw because of the technical nature of the subject matter (*ibid.*; *R. v. Mohan*, [1994] 2 S.C.R. 9). A lay witness may also be able to give an opinion on certain matters (see *Graat*); however, as the evidence approaches the central issues that the court must decide, resistance to admissibility increases (Lederman, Fuerst and Stewart, at 12.15).
>
> 150 "Speculation" is a concept that has been given several meanings in different contexts. Notably, inferences must be ones which can be reasonably and logically drawn from a primary fact established by the evidence (or on judicial notice); however, "[a]n inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation" (*R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 530). It follows that reasoning that is not based on the facts established by evidence is generally speculative. However, "[t]he boundary that separates permissible inference from impermissible speculation in connection with circumstantial evidence is often a very difficult one to determine" (Watt, at s.12.01; see also Hill, Tanovich and Strezos, at s. 31:17; *Canadian Pacific Railway Co. v. Murray*, [1932] S.C.R. 112, at p. 117).

[247] In light of the forgoing, I will assess the admissibility of each impugned paragraph, or part thereof, and the attached exhibits contained in the Applicant's January 16 Affidavit, with these principles in mind.

Admissibility of the Impugned Evidence Contained in the Applicant's Affidavit

[248] The Society says that paras. 6-61 and 63-68 of the Affidavit, as well as Exhibits A, B, C, D, E, F, H, and I, are inadmissible because they are not relevant to this judicial review. I agree. As the Society submits, while the Applicant raises concerns with respect to procedural fairness, these paragraphs and exhibits describes how he feels he has been mistreated in the Society's investigation in other proceedings: the complaint made against him, not his alleged mistreatment as a complainant they concern in these complaints against Ms. MacPhee.[143]

[143] Respondent's (Society's) Brief Re: Proposed Additional Evidence, January 29, 2024, at para. 30.

[249] As the Society points out, this judicial review relates only to the Applicant's complaints against Ms. MacPhee. The conduct of the Society in their carriage of the complaint against the Applicant, Mr. Fraser, is not before the Court. The Society further point out that the Applicant has decided to challenge the CIC's carriage of the complaint into his conduct by appealing that decision directly to the Court of Appeal in accordance with s. 37 (7) of the *Act.*[144]

[250] The Society submits that this Court cannot be placed in the position of making findings about whether the Applicant, Mr. Fraser, was afforded procedural fairness in other proceedings before the Society. Those proceedings are ongoing. I agree. Evidence about other proceedings is of no assistance to the task of determining whether the CIC's disposition of the complaints against Ms. MacPhee were procedurally flawed, with which this Court is seized.[145] Notwithstanding this, the Society says that all of the paragraphs and exhibits noted above go to the complaint against the Applicant, in particular:

i. Paragraphs 6-17 and Exhibit A describe the dissolution of Mac Mac & Mac and the lodging of a complaint against Mr. Fraser.

ii. Paragraphs 18-21, 30-45, 46-54, and Exhibits C, D, E, and F relate to the Society's investigation into Mr. Fraser's conduct, the Society's efforts to schedule a hearing according to s. 37 of the Legal Profession Act, and Ms. Cumming's alleged misuse of s. 37. Paragraphs 55-57 and 63-68 describe the imposition of conditions on Mr. Fraser's certificate to practice law. This information is clearly relevant to the CIC's investigation into Mr. Fraser, not Ms. MacPhee. It should not be admitted on this judicial proceeding.

iii. Paragraphs 22-28 and Exhibit B deal with Mr. Fraser's efforts to inquire into Ms. Cumming's professional background. This is not relevant.

iv. Paragraphs 58-61, as well as Exhibits G, H, and I, discuss correspondence Mr. Fraser sent to local members of Society "and certain other lawyers" after the Society invited its stakeholders to participate in a survey to assist in the development of future NSBS directions and activities. This information plainly has nothing to do with the alleged procedural defects in the CIC's decision relating to his complaints against Ms. MacPhee. They cannot be admitted for the truth of their content.

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[144]Respondent's (Society's) Brief Re: Proposed Additional Evidence, January 29, 2024, at para. 31.
[145] Respondent's (Society's) Brief Re: Proposed Additional Evidence, January 29, 2024, at para. 33.

[251] For these reasons, the Society submits that paragraphs 6-61 and 63-68 of the Affidavit, as well as Exhibits A, B, C, D, E, F, H, and I, are irrelevant. The Society further submits that the impugned evidence cannot be admitted for the truth of its contents, and it would be hearsay.

[252] The Society's submissions provide compelling reasons to strike the above noted paragraphs and attached Exhibits. I agree that these paragraphs and attached Exhibits are not relevant and therefore not admissible under the recognized exceptions pursuant to Rule 7.28 and are inadmissible under s. 39.04 (2)(a) and the guidelines articulated in *Waverley*. Therefore, pursuant to Rule 39.04 (2) I *must* strike paragraphs 6-61 and 63-68, and Exhibits A, B, C, D, E, F, and H, of the January 16 Affidavit.

[253] I also agree with the Society's submission that paragraph 76(k) of the January 16 Affidavit is inadmissible, as it is clearly not relevant. I agree with the Society that it is "not clear how evidence showing that Ms. Cumming withheld Ms. MacPhee's health issues from the CIC's consideration has any bearing on these alleged procedural defects."[146] Thus, I am not satisfied that it is relevant to these judicial review proceedings. Accordingly, paragraph 76(k) is not relevant and is therefore not admissible under the recognized exceptions under Rule 7.28 and are inadmissible under Rule 39.04 (2)(a) and the guidelines articulated in *Waverley*.

[254] With respect to paragraph 62 of the Applicant's January 16 Affidavit, he claims the CIC determined Ms. Cumming should not involve herself in the Applicant's complaints against Ms. MacPhee. I agree with the Society assertion that to the extent that Mr. Fraser offers this evidence as proof that the CIC in fact determined that Ms. Cumming should not involve herself in these complaints, they are unsubstantiated hearsay, as Mr. Fraser does not provide a source for his claims. Consequently, these paragraphs must be struck pursuant to Rule 39.04 (2)(b).

[255] The Society says that Rule 39.04 (2)(b) also applies to paragraphs 76(f) - 76(j) of the January 16 Affidavit, where Mr. Fraser describes evidence that he alleges Ms. Cumming withheld from the CIC's consideration. I agree with the Society that he fails to specify the nature of the "information" or "evidence" that substantiates these assertions.

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[146] Respondent's (Society's) Brief RE Proposed Additional Evidence, January 29, 2024, at para. 36.

[256] The Society submits that paragraphs 86-88 of the January 16 Affidavit describes the response he anticipates he would have given had he received Ms. MacPhee's response to his complaint C297. This evidence is clearly not admissible pursuant to Rule 39.04 (2)(a) as it is argumentative. As emphasized in *Waverley*, affidavits should confine to facts, and conclusionary statements that embody or assume points of law should not be admitted.[147] Consequently, these paras. 86-88 of the January 16 Affidavit must be struck, as they are not admissible.

[257] The Society submits that paragraphs 76(b), 76(c) -76(e), 77-85, 89-104, as well as Exhibits K, L, and M, should be struck because they do not describe procedural defects that cannot be found in the evidentiary record of the administrative decision-maker. Put differently, this is not fresh or additional evidence beyond the record as required under Rule 7.28 (1).

[258] As the Society points out, paragraph 76(b), including Exhibit K, refers to criminal charges with respect to Mr. Fraser that were stayed in March 2023. Paragraphs 76(c) -76 (e), as well as Exhibit L, refer to Mr. Fraser's acquittal on charges before Judge Begin, reasons which are reported at *R v. Fraser*.[148] Thus, the Record of the Proceedings demonstrates that the CIC had this evidence. Indeed, Ms. Cumming's Investigation Report begins its discussion of complaint C254 by noting "[t]he charges [of assault] against [Mr. Fraser] were dismissed following a two-day trial in July 2022. An appeal of that decision was dismissed by decision dated April 17, 2023. The charges relating to Julie MacPhee have been stayed on or about March 9, 2023."[149] Thus, the Society says this evidence adds nothing, and to admit it would risk usurping the role of the CIC as a trier of fact rather than further this Court's task on judicial review.

[259] The evidence in paragraphs 77-85 of the January 16 Affidavit addresses the Applicant's "reasonable expectations", and the Society's alleged failure to meet those expectations. As the Society point out, this evidence also appears in the Record. Paragraph 80 summarizes correspondence from the Applicant to Ms. Cumming, which Ms. Cumming reproduced in full in her Investigation Report, as do paragraphs 81-85 with respect to the Society's failure to disclose Ms. McPhee's response to complaint 297. Thus, I agree with the submissions of the Society that

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[147] *Canadian Imperial Bank of Commerce v. CNH Capital Ltd.*, 2013 NSCA 35, at para. 82.
[148] 2022 NSPC 4.
[149] Redacted Record, Investigation Report, p.3.

these paragraphs are of no use to the Court in evaluating the Applicant's alleged procedural defects.

[260] Paragraphs 89-104 and Exhibit M of the January 16 Affidavit relate to the Applicant's allegation that Ms. McPhee made a further secret recording. The Applicant says he did not receive this additional recording until January 2024 and argues that Ms. Cumming's failure to obtain and present this further recording to the CIC is a breach of natural justice.

[261] While this additional recording was never physically presented to the CIC, Ms. Cumming's Investigation Report clearly indicates that the CIC was notified of the existence of other recordings. In Ms. MacPhee's response to complaint C254, she indicates that she recorded her "doorway on days Mr. Fraser was agitated."[150] This response appears in the CIC's decision letter.[151] It its decision the CIC acknowledged that Ms. MacPhee has been very forthright about the fact that she made video recordings of Mr. Fraser without his consent.[152] As the Society says, "there is no doubt that the CIC understood there was more than one video."[153] In my view, there is a reasonable inference that the CIC was aware that there was more than one video, which begs the question of what the relevance of the additional recording to this judicial review proceeding is, as it is not necessary to the determination of the issues raised on judicial review.

[262] Ms. MacPhee submits that paragraphs 89 -104 of the Applicant's June 16 Affidavit should be struck because they do not meet any of the exceptions for introduction of new (fresh) evidence on judicial review. She says that though this is new evidence, it is not general background evidence, or evidence of procedural unfairness. She further submits that she herself, in her response to the complaint about the video recording, made no secret that she recorded videos on more than one occasion, so it was known to the CIC that more than one video had been taken.

[263] Ms. MacPhee says the content of this video provides no assistance to this Court in conducting its review of the CIC's decision that found the recording of another video by Ms. MacPhee to be a breach of the Code of Professional Conduct, warranting a counsel. Thus, Ms. MacPhee argues that it is irrelevant to the decision

[150] Redacted Record, Investigation Report, at p. 4.
[151] Letter of Ms. Cumming to Mr. Fraser, May 31, 2023, at p. 3.
[152] Letter of Ms. Cumming to Mr. Fraser, May 31, 2023, at p. 3.
[153] Respondent's (Society's) Brief RE Proposed Additional Evidence, date January 29, 2024, at para. 47.

rendered by the CIC, which is the only matter before this Court on judicial review and therefore should not be admitted. I agree.

[264] For all of the foregoing reasons, I agree with the Society's assertion that all the above noted paragraphs of the January 16 Affidavit are not necessary to bring procedural defects to this Court's attention, as they do not exhibit the exceptional circumstances justifying the admissibility of additional evidence on judicial review. In reaching that conclusion, I am mindful that the exceptions to the general rule include circumstances where additional evidence is necessary to assist the court by highlighting or summarizing background information; or evidence is necessary to explain the absence of evidence on a certain subject matter; or where such evidence is necessary to explain an improper purpose or fraud or issues of procedural fairness. This burden falls to the moving party to establish the new evidence is necessary. Here, the Applicant has failed in that regard.

[265] Consequently, for these reasons, paragraphs 89-104, as well as Exhibit M of the January 16 Affidavit must be struck, as they are not admissible.

[266] Ms. MacPhee says that paragraphs 5-21 provide the Applicant's "spin" on the events giving rise to the dissolution of the former law firm, and do not qualify as admissible evidence either under the permissible exceptions to be introduction of evidence on judicial review, or under the Rules and common law test for appropriate content of affidavits.[154]

[267] I agree with Ms. MacPhee that paragraphs 5-21 are not admissible under the recognized exception for general background information, as discussed above. In my view, paragraphs 5-21 offer a personal narrative of the Applicant's views of what occurred which is not non-argumentative or neutral, nor does it consist of uncontroversial orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker.[155] Moreover, this judicial review is not complex. The allegations and evidence before the CIC were straightforward as they did not involve factual complexity, which requires additional background information for the purposes of judicial review.

[154] Respondent's (Ms. MacPhee's) Brief, January 30, 2024, at para. 49.
[155] *Delios*, at para. 45.

[268] In addition, paragraphs 5-21 do not meet the requirements of Rule 39.04, which prohibits affidavits taking on the flavour of a summation and/or opinions, or which seemingly are unsupported conclusions of the Applicant's perceptions of what happened. I agree with Ms. MacPhee that the detailed information about the internal dissension at the Applicant's former law firm is neither relevant nor material to the narrow factual issues that were before the CIC.

[269] In my view, paragraphs 5-21 of the January 16 Affidavit do not meet the tests for introduction n judicial review under Rule 7. 28 and do not meet the requirements of the Rule 39.04 and the guidelines articulated in *Waverley,* because their content is argumentative, non-neutral, irrelevant, and opinionated. Therefore, pursuant to Rule 39.04 (2) I *must* strike paras. 5-21 of the January 16 Affidavit.

[270] With respect to para. 14 of the January 16 Affidavit, I am also in agreement with Ms. MacPhee, it is inadmissible for the following reasons:

a. It is clear that a pleading is not evidence. It has no place in this judicial review application, which is designed to allow this Court to review the CIC's decision on two narrow matters;

b. Despite including the entire pleading as an Exhibit sought to be introduced as evidence on the judicial review, Mr. Fraser only deposes in paragraph 14 of his Affidavit that paragraphs 10-27 of the pleading, and their referenced Schedules are true;

c. The entire content of the pleading has no relevance to the issues on judicial review. Indeed, it is date stamped March 8, 2023, and if Mr. Fraser believed it have relevance to his complaint, he could have been provided it to the CIC prior to the rendering of their decision on May 31, 2023; and

d. Of most concern is the content of the pleading that contains egregiously disparaging remarks not only about Ms. MacPhee, but about others who have no relevance to the narrow subject matter of this judicial review (Ms. MacPhee's Brief, January 30, 2024, at para. 57).

[271] Again, for the reasons stated above, paragraph 14 of the January 16 Affidavit is not admissible under the exceptions permitting supplemental evidence to be led on a judicial review application. Nor does it meet the requirements of Rule 39.04 and the guidelines articulated in *Waverley*. Therefore, pursuant to Rule 39.04 (2) I must strike paragraph 14.

[272] Ms. MacPhee says paragraph 38 of the January 16 Affidavit should be struck because it addresses the actions of the Society respecting a suspension it had earlier imposed on the Applicant, as part of the complaint process arising from the complaint filed by Ms. MacPhee and others 2021. She says it does not meet any of the exceptions for the introduction of affidavit evidence on judicial review. Nor is it general background information portrayed in a factual, neutral, and uncontroversial way, and the remaining exceptions do not apply. I agree.

[273] I also agree with Ms. MacPhee's submission that paragraph 38 is not relevant or material to the issues under review by the CIC, as the CIC had third party evidence (the video recording, and the transcript of the court proceeding in issue) to provide the factual basis for their conclusions.

[274] This paragraph is also an impermissible commentary on Ms. MacPhee's credibility.

[275] For these reasons, the paragraph also does not meet the requirements of the *Rules*, or the legal principles articulated in *Waverley.*

[276] Ms. MacPhee submits that paragraph 39 of the January 16 Affidavit should be struck because it refers to an incident involving a police officer "as part of Julie MacPhee coordinating pointless personal service of a document on me", which is unnecessary editorial description, has no relevance to the matters before the CIC, and contains unsupported conclusions. I agree that this paragraph should be struck as it is not in compliance with Rule 39.04 (2)(a), or the legal principles enunciated in *Waverley*.

[277] Ms. MacPhee seeks to strike paragraph 44 of the January 16 Affidavit because it is not relevant to the issues on this judicial review, as the Applicant refers to his own perspective on how he treats women, and references matters unrelated to the CIC decisions under review. She adds that this is not relevant general background information needed to understand the issues before the CIC. I agree, as this paragraph should be struck as it is not in compliance with Rule 39.04 (2)(a), or the legal principles enunciated in *Waverley*.

[278] With respect to paragraph 46 of the January 16 Affidavit, Ms. MacPhee correctly states that "the latter part of this paragraph references conduct involving another lawyer which had no relevance to the matters decided by the CIC, and is not

relevant to this judicial review." [156] In my view, this paragraph should be struck as it is not in compliance with Rule 39.04 (2)(a), or the legal principles enunciated in *Waverley*.

[279] Ms. MacPhee submits that paragraph 73 of the January 16 Affidavit should be struck because it refers to information that he provided to the CIC in matters relating to the complaints against him and uses inflammatory language describing unsupported conclusions respecting "lies, falsehoods and/or misleading statements". She adds that the statements in the paragraph are not neutral uncontroversial statements. They are unsupported conclusions containing arguments with impermissible commentary on the credibility of Ms. MacPhee, and therefore do not provide factual information. I agree. In my view, this paragraph contains conclusionary statements, and is argumentative. Thus, it should be struck as it is not in compliance with Rule 39.04 (2)(a), or the legal principles enunciated in *Waverley*.

[280] The Society seeks to strike paragraph 75 of the January 16 Affidavit because it is argumentative, contains statements that are unsupported conclusions and are not relevant to the issues that were before CIC. I agree. The paragraph is argumentative and contains conclusionary statements. Consequently, it should be struck as it is not in compliance with Rule 39.04 (2)(a), or the legal principles enunciated in *Waverley.*

[281] Ms. MacPhee submits that paragraphs 76(a) refers to a letter from the Applicant's spouse sent by her counsel to the Society in the context of Ms. MacPhee's response to the first complaint filed by Mr. Fraser. Ms. MacPhee says that Mr. Fraser cannot depose to the accuracy of someone else's letter, and further that the statement he makes about the letter, which is that it "effectively identified that Ms. MacPhee had lied in certain of her assertions in response to the complaints against MacPhee." I agree with Ms. MacPhee that this statement is inadmissible because it is conclusionary and argumentative. Accordingly, this impugned portion of paragraph 76(a) must be struck from the January 16 Affidavit, as it is not in compliance with Rule 39.04(2), or the legal principles articulated in *Waverley.*

[282] Ms. MacPhee submits that paragraphs (g) and (h) should be struck from the January 16 Affidavit because they are unsupported, conclusionary statements and irrelevant. I agree. The content of these two paragraphs clearly do not comply with Rule 39.04 (2)(a), and/or the legal principles enunciated in *Waverley*.

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[156]Respondent's (Society's) Brief RE Proposed Additional Evidence, January 29, 2024, at para. 68.

[283] Ms. MacPhee says paragraphs 76(i) and (j) of the January 16 Affidavit allege that she verbally attacked another female partner in that other partner's own office with the Former Law Firm, and thus, are not general background information necessary for understanding of the judicial review. I agree. These two paragraphs do not fall within any of the exceptions pursuant to Rule 7.28. They contain conclusionary statements and are argumentative. Thus, they do not comply with Rule 39.04 (1), or the enunciated principles in *Waverley*. Consequently, I must strike them.

[284] With respect to paragraph 76(k), Ms. MacPhee says this paragraph is clearly irrelevant and inflammatory. I agree. This paragraph has no probative value and thus serves no evidentiary purpose to this judicial review proceeding. Nor does this paragraph fall within any of the exceptions to the prohibition of proffering evidence beyond the scope of the record. This paragraph also fails to comply with Rule 39.04 (1), and therefore must be struck.

Dispositions on Motions

[285] For all of the foregoing reasons, the Society's motions to struck paragraphs 6-72, 76(b)-76(k), and 80-104, as well as Exhibits A-I and K-M from the Applicant's January 16 Affidavit is granted.

[286] For all of the foregoing reasons, the Respondent, Julie MacPhee's motion to strike paragraphs: 5-21, 14, 38, 39, 44, 46, 73, 75, part of 76(a) as noted above, 76 (g) – (K), 89-104 is granted.

Costs

[287] Decision on Costs to follow submissions.

Hoskins, J.