SUPREME COURT OF NOVA SCOTIA

Citation: *Brinton v. The Judicial Council of Nova Scotia et al.*, 2024 NSSC 397

Date: 20241223
Docket: *Hfx* No. 528362
Registry: Halifax

Between:

Rickcola Brinton

Applicant

v.

The Judicial Council of Nova Scotia and the Honourable Pamela S. Williams, Judge of the Provincial Court of Nova Scotia

Respondents

Decision on Judicial Review

Judge:	The Honourable Justice Christa M. Brothers
Heard:	June 6, 2024, in Halifax, Nova Scotia
Decision:	December 23, 2024
Counsel:	James A. Manson and Marty Moore, for the Applicant Linda R. Rothstein and Catherine Fan, for the Honourable Pamela S. Williams Andrea Gonsalves and Spencer Bass, for the Judicial Council of Nova Scotia Kevin Kindred K.C. and Caitlin Menczel-O'Neill, for the Nova Scotia Department of Justice

By the Court:

Overview

[1] The applicant, Judge Rickcola Brinton, is a judge of the Provincial Court. Judge Brinton seeks judicial review of a decision of the Honourable Chief Justice Michael Wood, in his capacity as Chair of the Judicial Council of Nova Scotia (the "Chair") dismissing her complaint against Judge Pamela Williams.

[2] During the events underlying the complaint, Judge Williams was the Chief Judge of the Provincial and Family Courts. Judge Williams was Chief Judge from February 27, 2013, until August 27, 2023. For the purposes of this decision, I will refer to her as Chief Judge Williams, or the Chief Judge.

[3] According to Judge Brinton, she filed the complaint with the Judicial Council in response to Chief Judge Williams's decision to "threaten Brinton with suspension and referral to the same Judicial Council for choosing not to disclose her Covid-19 vaccination status, among other things."

[4] In a five-page decision (the "Decision"), dated October 10, 2023, the Chair dismissed Judge Brinton's complaint rather than refer it to a review committee.

[5] The applicant seeks judicial review of the Chair's Decision on the basis that she was denied procedural fairness, and that the Decision is unreasonable. She asks the court to quash the Decision and refer her complaint to a review committee for further investigation. The applicant maintains that the Chief Judge's handling of the vaccination policy and her medical leave interfered with her judicial independence.

[6] Chief Judge Williams asks the court to dismiss Judge Brinton's application for judicial review. She submits that the applicant was treated fairly and that she lacks standing to challenge the merits of the Chair's Decision. In the alternative, the Chief Judge submits that the Decision not to refer the complaint to a review committee was reasonable.

[7] The Judicial Council of Nova Scotia takes no position on the disposition of the application but made submissions on two of the issues raised by the applicant – the Chair's jurisdiction under the *Provincial Court Act*, R.S.N.S. 1989, c. 238 ("the

Act"), to dismiss a complaint at a preliminary stage, and the content of the duty of procedural fairness owed to a complainant at the screening stages of the complaint process.

Background

[8] Judge Brinton was appointed a Judge of the Provincial Court on March 31, 2017. The background to her complaint arises from circumstances that began on September 29, 2021, in the midst of the Covid-19 pandemic.

[9] On September 29, 2021, Chief Judge Williams emailed the judges of the Provincial Court advising that the Nova Scotia Bar had inquired about the Judges Covid-19 vaccination status. The Chief Judge asked whether the judges would agree to share their vaccination status both with each other and with the Bar. While the vast majority of the judges advised that they supported the disclosure of vaccination status, two judges expressed reservations. One of those judges was Judge Brinton, who responded by way of email dated October 1, 2021:

> I realize I may be in the minority, but I echo some of what Peter said, as I have concerns with medical privacy. I also know that the vaccination mandates and passports may be disproportionately impacting racialized communities. And as an essential service, will we be creating a two-tiered society for those who already feel as though we are not free to serve them.

[10] On October 6, 2021, the Nova Scotia government announced that it would require all provincial employees to be vaccinated against Covid-19. The vaccination mandate would take effect on November 30, 2021. Any employee who remained unvaccinated would be placed on unpaid leave. While court staff, including judicial assistants and others working in the court system, were subject to this requirement, judges were not.

[11] Chief Judge Williams met with Judge Brinton on October 7, 2021, to discuss the vaccination issue. Judge Brinton offered to regularly self-test for Covid, but this option was rejected because it was not available to court staff. The Chief Judge suggested that Judge Brinton might be able to work from home doing arraignment court, but only if the other judges would agree to take on the trials assigned to her.

[12] On November 1, 2021, Chief Judge Williams emailed the judges advising:

> I can advise that only fully vaccinated judges will be assigned to sit in our courtrooms for the foreseeable future. I am not inclined to issue a public statement

> to this effect but each of you are at liberty to advise staff, lawyers, and members of the public that Provincial Court Judges sitting in courtrooms are fully vaccinated.

[13] On the same date, the Chief Judge wrote to Judge Brinton. She stated, in part:

> I am touching base with you again; although when we last spoke, we agreed you would contact me by the end of October and provide me with your decision on providing your vaccination status. The Bench is anxious to resolve this issue, as am I.
>
> Background and Issue
>
> You will recall in October we had two respectful, albeit difficult, face-to-face conversations about our Bench wanting colleagues to confirm double vaccination status, both to each other and to the public at large. All colleagues have confirmed they are double vaccinated and are urging me to publicly release a communique to the effect that all Provincial Court Judges who sit in our Courtrooms are fully vaccinated.
>
> You have advised both our colleagues and me that you are not prepared to divulge your vaccination status. I have told you that I respect your decision even though I may not agree with it. I thank you for helping me understand your position and for allowing me to share mine, as Chief Judge of the Provincial Court.
>
> …
>
> Our options are limited – I can assign you to preside over virtual hearings (Intake and custody matters) from your home for the foreseeable future. This will require colleagues to preside in your Court and hear trials. Should you agree, it will take a significant amount of time and effort to reassign Judges and have Court staff scan Informations and other documents to you daily. This will require you to be available for the entire day to deal with these dockets, five days per week.
>
> My only other option as Chief Judge is suspension pursuant to section 15(2) of the *Provincial Court Act*. I would be obliged to request the Judicial Council to investigate the circumstances giving rise to the suspension and to take the appropriate action pursuant to section 15(3). I sincerely hope we do not have to consider this option.
>
> …

[14] On November 25, 2021, Chief Judge Williams issued the following public statement:

> … all Provincial Court judges presiding in courtrooms, both now and in the future, are fully vaccinated. While some members of our Bench may not be sitting due to medical leave at present, any judge returning to sit in the Provincial Court will be fully vaccinated.

[15] In the end, Chief Judge Williams was never required to suspend Judge Brinton for failing to disclose her vaccination status. At the end of October 2021, the applicant's husband tested positive for Covid-19. The applicant and the rest of their family soon tested positive as well. Starting on October 25, 2021, the applicant maintained a 10-day quarantine as required.

[16] Upon recovering from Covid-19, Judge Brinton sought medical advice and treatment from her doctor, reporting that she was suffering from "overwhelming exhaustion and anxiety." The applicant attributed her anxiety primarily to work emails. The doctor advised the applicant to go off work for four weeks during which time he instructed her to avoid e-mails. This commenced her period of short-term disability which eventually transitioned to long-term disability. The applicant remains on long-term disability leave as of the hearing date for this judicial review.

Chief Judge Williams inquires into the medical basis for Judge Brinton's leave

[17] In addition to being responsible for "the assignment of judicial duties" pursuant to s. 15(1) of the *Provincial Court Act*, the Chief Judge of the Provincial Court is responsible for "approv[ing] of … sick and special leaves" requested by Provincial Court judges pursuant to NS Reg 250/83 and Part 2 of the Judge's Income Protection Plan adopted by the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal. The Judges' Income Protection Plan provides that the "Chief Judge may authorize short-term disability leave at full pay" for judges of the Provincial Court, and is the only person tasked with that responsibility.

[18] On February 22, 2022, the Chief Judge wrote to Judge Brinton in relation to her short term illness leave and return-to-work request. She wrote, in part:

> You advised me of your short-term illness leave effective October 25, 2021. Short-term illness can be authorized for up to one hundred (100) workdays for a single incident, that is until March 21, 2022.
>
> …
>
> On February 17, 2022, I received an email from Wendy Hudgins, Public Service Commission (PSC) Human Resources, asking whether we can accommodate your return to work, the week of March 7, 2022, on the following conditions: working virtually from home, two days per week for the first two weeks and then reassess.
>
> I spoke with Ms. Hudgins on February 18, 2022, to determine what role, if any, the PSC or Lifeworks, the government's third-party collector of medical information, plays in determining your fitness to return to work. I was advised they play no role. Unbeknownst to me, neither the PSC nor Lifeworks request medical information

> related to Judicial short-term illnesses. Her understanding is the Judge provides updates to Lifeworks.
>
> As Chief Judge, I am tasked with deciding whether to authorize your short-term illness claim and to assess your return-to-work request. I have not been provided with any medical reports to assist in that determination. You did provide a Proof of Illness form dated December 16, 2021, but it does not contain any information on the nature of your illness. In your December 17, 2021, e-mail to me you indicated as follows:
>
> > *My doctor has suggested I remain off for a while longer, maybe another 4-6 weeks at this point. This may change, but right now that's his suggestion. One of the things he's asked me to do is to stay off of my work email. I realize this causes issues with communication. I will make sure to check in early January just to keep you up to date.*
>
> I have heard nothing from you since December 17, 2021. Therefore, currently I am unable to assess your claim nor your request.
>
> …

[19] Chief Judge Williams proceeded to set out the provisions of the Supplementary Report on Income Protection by the Nova Scotia Tribunal on Provincial Court Judges' Salaries and Benefits pertaining to general and short-term income protection, which include:

> **Proof of Disability**
>
> 8(1) Evidence of a disability shall be provided to the satisfaction of the Chief Judge.
>
> …

[20] After setting out these provisions, the Chief Judge wrote:

> As a result, I am asking you to provide me with "evidence of a disability" as stated in clause 8(1) to help me assess both your claim and your request.

[21] On March 21, 2022, Chief Judge Williams wrote to Wendy Hudgins as follows:

> I received a fax today from Judge Brinton with a doctor's note attached which says:
>
> > Rickcola M Brinton has been, or will be, off work for medical reasons between the following dates:
> >
> > Start Date: 17-Dec-2021
> >
> > End Date: 16-May-2022

> This is not what I requested. I am hoping to speak with you about what I am entitled to receive so that I can satisfy myself that I should approve the STI claim. Or should I simply provide you with written correspondence that I am unable to approve her STI?

[22] Ms. Hudgins replied on March 23, 2022:

> What the employer would anticipate to receive would be a treatment plan, anticipated date of resolution and/or restrictions and limitations that the employer could review to determine if the employee could operationally do their job with or without modifications to duties/hours.
>
> Prior to declining the request for STI benefits I would attempt to communicate with the treatment provider to determine that information.

[23] On March 28, 2022, Chief Judge Williams wrote to Judge Brinton's physician, with a copy to Judge Brinton, requesting a medical report to substantiate the medical basis for Judge Brinton's short-term leave. The applicant did not consent to her doctor releasing the information, and none was provided.

[24] Judge Brinton was approved to receive long-term disability benefits shortly thereafter and has remained on a medical leave since then. The Chief Judge does not oversee the long-term disability plan. However, once the long-term disability administrator approved Judge Brinton's leave, Chief Judge Williams was satisfied that the applicant had submitted sufficient medical information to justify a long-term absence and took no further action.

The Complaint

[25] On June 7, 2023, the applicant, through her counsel, submitted a complaint against Chief Judge Williams (the "Complaint") to Chief Justice Wood asking that the Complaint be forwarded to a review committee of the Judicial Council for further investigation. The Complaint was submitted to the Chair because s. 17A(2) of the *Provincial Court Act* provides that where a complaint is made against the Chief Judge of the Provincial Court of Nova Scotia, it should be presented to the Chief Judge of the Family Court of Nova Scotia or, in the absence of the Chief Judge of the Family Court, to the Chief Justice of Nova Scotia (i.e. the Chair). As noted earlier, Chief Judge Williams was Chief Judge of both the Provincial Court and the Family Court of Nova Scotia.

[26] In the Complaint, the applicant argued that:

(a) Chief Judge Williams applied undue pressure on Judge Brinton to disclose her vaccination status;

(b) Judge Brinton was not afforded an opportunity to respond to Chief Judge William's decision to suspend Judge Brinton and refer her to the Judicial Council; and,

(c) Judge William's improperly contacted Judge Brinton's physician to obtain details of Judge Brinton's medical condition.

[27] The applicant argued that the Chief Judge's actions were a breach of her ethical obligation to act with integrity towards the applicant, her obligation to respect the applicant's medical privacy, and several aspects of the principles of judicial independence and impartiality. There is no allegation in the Complaint nor any evidence in the record that Chief Judge Williams acted in bad faith or with an ulterior motive.

[28] The following chronology regarding the Complaint is relevant.

- June 7, 2023: Judge Brinton's counsel submitted her Complaint against Chief Judge Williams, alongside a supporting Exhibit Book, to Chief Justice Wood. The Complaint was 35 pages long, with more than 100 pages of exhibits.
- June 8, 2023: The Chair forwarded the Complaint and supporting documentation to Chief Judge Williams and explained: "Prior to making any decision with respect to this request, I wish to give you the opportunity to make any submissions or comments which you consider appropriate."
- June 8, 2023: The Chair responded to Judge Brinton's counsel acknowledging receipt of the Complaint, and stating that he had forwarded the Complaint to Chief Judge Williams for comment. Judge Brinton did not object to the Complaint having been shared with Chief Judge Williams.
- June 12, 2023: Chief Judge Williams wrote to the Chair advising that she had retained counsel and requesting one month to respond to the Complaint. The Chair agreed to this request. That same day, the Chair informed Judge Brinton's counsel that he had granted Chief Judge Williams' request. Again, Judge Brinton's counsel neither responded nor objected.

- July 12, 2023: Chief Judge Williams submitted her response to the Chair. She argued that the Complaint should be dismissed summarily under ss. 17B(1)(a)(ii) or 17B(1)(a)(iii) of the Act because there was no evidence to support the central allegations and they were frivolous due to their lack of merit.
- August 15, 2023: the Chair wrote to Judge Brinton's counsel explaining that he had reviewed the Complaint and Chief Judge Williams' response, and requested additional submissions on whether disagreements on the scope of a chief judge's authority to administer the court fall within the jurisdiction of the Council. He asked for these submissions to be filed within a month. That same day, the Chair also forwarded this letter to Chief Judge Williams, providing her with the same opportunity to make additional submissions, within the same timeline.
- September 11, 2023: Counsel for Judge Brinton provided additional submissions on the jurisdiction issue. The letter did not raise any concerns with the procedures the Chair had employed to date, nor did it request any additional procedural rights for Judge Brinton.
- September 15, 2023: Chief Judge Williams provided her additional submissions on the jurisdictional issue. While she agreed that certain aspects of the Complaint were outside the jurisdiction of the Council, she reiterated her request that the Complaint should be dismissed as frivolous and lacking evidence.
- October 10, 2023: The Chair sent his Decision dismissing the Complaint to Judge Brinton's counsel. The Chair also forwarded a copy of the decision to Chief Judge Williams.

[29] The core of the Chair's reasoning is summarized in his conclusion that:

> the actions of Chief Judge Williams could not support a finding of judicial misconduct as defined [by the Nova Scotia Judicial Council's Review Committee] in *Lenehan*. Her decisions concerning how to assign judicial work and what medical information was required to support Judge Brinton's medical leave fall within her authority as Chief Judge. The reasons for these decisions and the methods of implementation would not warrant any of the sanctions found in s. 17K of the *Act*.

Issues on judicial review

[30]

[31] This application for judicial review involves the following issues:

1. Does Judge Brinton have standing?
2. Was the Decision procedurally unfair because Judge Brinton was not provided with a copy of Chief Williams' response to the Complaint and given an opportunity to respond?
3. Was the Chair's Decision to dismiss the Complaint *ultra vires* the Act?
4. Was the Chair's Decision unreasonable?
5. Was the Chair required to conduct a *Doré* analysis?

Context of the Complaint

[32] Before considering the grounds of review, it is important to consider the context in which the conduct underlying the applicant's Complaint took place. This information was all contained in the record before the Chair.

[33] The Covid-19 pandemic represented an unprecedented challenge for Nova Scotia's court system. The pandemic and resultant public health measures required courts to adapt and respond quickly to the evolving situation and guidance from public health officials.

[34] All levels of court were under pressure to modify existing procedures and adopt new measures to ensure the ongoing processing of cases and the protection of those who came before the courts. Regular meetings with health officers were held to ensure that the courts understood the impact of the pandemic locally and were responding proactively.

[35] Beginning in August 2021, courts across Canada began announcing the vaccination status of their judges and – for some courts – the introduction of policies requiring that all judges on the court be vaccinated. On August 25, the Manitoba Court of Queen's Bench was the first to apply a mandatory Covid-19 vaccination policy for judges, judicial assistants and others who were entering the judges' chambers.

[36] On September 2, 2021, the Federal Court disclosed that "the 53 members of the Federal Court are pleased to inform the public that we are all fully vaccinated against Covid-19."

[37] The Canadian Judicial Council advised media outlets of its position in early September 2021 when it stated:

> Each respective court, under the leadership of their chief justice, must independently determine the best approach to follow given their circumstances, to ensure the health, safety and well-being of all persons who attend the court building, as well as access to justice and the proper functioning of their court.

[38] As of September 7, 2021, the Supreme Court of Canada advised that all nine of its judges were fully vaccinated against Covid-19.

[39] While there was no mandatory policy of vaccination instituted by the New Brunswick Appeal Court or the New Brunswick Queen's Bench, both courts had announced that all of its judges were fully vaccinated against Covid-19 as of a report dated September 20, 2021.

[40] As of September 13, 2021, the Ontario Superior Court of Justice advised that the public could expect that any judges hearing cases in person "will be fully vaccinated."

[41] While this was occurring, other courts including the Federal Court of Appeal and the Manitoba Court of Appeal declined to say if a vaccination policy was in place as their respective Chiefs believed that information concerning the court's internal policies should not be shared.

[42] As of September 21, 2021, the Alberta Court of Appeal, the Alberta Court of Queen's Bench and the Provincial Court of Alberta adopted a mandatory vaccination policy.

[43] As of September 28, 2021, the Territorial Court of the Northwest Territories confirmed that all of its resident judges were fully vaccinated against Covid-19.

[44] On October 8, 2021, all three levels of British Columbia courts made a joint announcement that all judges and other judicial officers had received "the full series of accepted Covid-19 vaccines."

[45] On November 26, 2021, the Chief Justice of the Nova Scotia Supreme Court announced that "members of the public can be assured that Supreme Court judges presiding in courtrooms will be fully vaccinated." On the same day, the Nova Scotia Court of Appeal announced that "the judges of the Court of Appeal have voluntarily decided to disclose that they are fully vaccinated."

[46] It was in this context that the Provincial Court of Nova Scotia joined many other courts across the country in requiring judges presiding over in-person appearances to be double vaccinated to protect members of the public, counsel, and the court itself. In her response to the Complaint, Chief Judge Williams explained that the Bench felt that it was an important policy for the Court to adopt as a matter of conscience and health and safety:

> As a Bench, colleagues felt strongly that it was right to require that we be fully vaccinated to preside over in-person proceedings. In the end, we felt we each had an obligation to protect each other, court staff, counsel, and the public. Most of the people who attend court do not have a choice about whether to attend court. Many, including criminal accused persons and witnesses testifying under a summons, will suffer severe legal consequences if they do not. We felt that we had an obligation to minimize their risk as a basic matter of health and safety – particularly people who were immunocompromised or people who could not get vaccinated themselves. Our court's failure to lead was distracting from the tireless work of our judges to deliver justice in challenging times, undermining confidence in the administration of justice, and perpetuating a false impression that the judges viewed themselves to be above the laws and public health guidelines that applied to other Nova Scotians.

[47] The applicant elected to keep her vaccination status private, and she alone opposed any form of announcement.

The role of judicial councils

[48] In addition to situating the conduct complained of in its proper context, it is necessary for the purposes of the issues raised in this judicial review to understand the unique role of judicial councils.

[49] Judicial councils are "unique not only amongst administrative tribunals but even amongst professional disciplinary bodies" (*Moreau-Bérubé v. N.B. (Judicial Council)*, 2002 SCC 11, at para. 44). They are "highly specialized tribunal[s]" responsible for "preserving the integrity of the whole of the judiciary" (*Moreau-Bérubé*, at para. 46).

[50] In *Moreau-Bérubé*, the court stated at para. 46:

> Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as "responsible for preserving the integrity of the whole of the

> judiciary" (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien*, *supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente, supra*.

[51] The integrity of the judiciary has two dimensions: accountability and independence. Judges occupy a unique role in Canadian society and are expected to promote and observe the highest ethical standards. As the Supreme Court of Canada observed in *Therrien (Re)*, 2001 SCC 35:

> 108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies … Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
>
> 109 If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them …
>
> 110 Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:
>
> > Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule

> of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

111 The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

> [translation] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.

("Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further at p. 167:

> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.
>
> [Citations omitted]

[52] Judicial accountability is essential to public confidence in and respect for the judiciary. The public should have confidence that complaints of judicial misconduct will be evaluated objectively and disposed of fairly. Judicial councils promote public confidence in the judiciary through a disciplinary process that allows them "to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity" (*Moreau-Bérubé*, at para. 46).

[53] At the same time, to maintain the integrity of the judiciary, judicial councils must also protect judicial independence, "which includes security of tenure and the

freedom to speak and deliver judgment free from external pressures and influences of any kind" (*Moreau-Bérubé*, at para. 46).

[54] Judicial independence has been described as "the single most important element of the rule of law in a democratic society" (*Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, at para. 29). It is a constitutional right of litigants that exists for the benefit of the judged, not the judges (*Cosgrove*, at para. 31). The essential purpose of judicial independence:

> …is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour [*Gratton v. Canada (Judicial Council)*, [1994] 2 F.C. 769 (T.D.), at 782].

[55] Judicial councils are concerned with judges' conduct and ethics – not the merits of judicial decision-making. Errors in exercising their judicial functions, that is rendering decisions, are properly dealt with through the appeals process. Part of the expertise of judicial councils, which are composed primarily of judges, including chief justices and chief judges, "lies in [their] appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Act" (*Moreau-Bérubé*, at para. 60).

[56] In addition to the judges' individual independence, the constitutional principle of judicial independence has a vital second dimension: the administrative independence of the courts. This aspect of judicial independence – which is also safeguarded by judicial councils – encompasses administrative decisions that bear directly on the exercise of the judicial function, such as the assignment of judges, the sittings of the court, and the court lists (*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at para. 117).

[57] In order to maintain its institutional independence, the court controls these processes, usually through the chief judge or chief justice. Like judicial decisions, such administrative decisions cannot, without more, amount to judicial misconduct subject to sanction without offending the constitutional principle of independence.

[58] The Judicial Council is concerned with judicial misconduct that is "so seriously contrary to the impartiality, integrity and independence of the judiciary that

it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally" (*In the Matter of Complaints against Judge Gregory Lenehan* (March 29, 2018) (Nova Scotia Judicial Council Review Committee), at para 45). This is appropriately and necessarily a high bar. As the review committee explained in the *Lenehan* decision at para. 186:

> The threshold for a finding of judicial misconduct is necessarily high to protect the independence of the judiciary that is the cornerstone of the rule of law.

[59] While there are circumstances in which a judge's conduct in the course of judicial decision-making can result in discipline, this is not that kind of case. In *Best v. Attorney General of Canada*, 2017 FC 1145, the court described these "limited and exceptional" types of cases:

> [39] I agree with the Applicant that a judge's conduct in the course of judicial decision-making can, in some limited and exceptional types of cases, constitute sanctionable conduct. For example, in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249, [*Moreau-Bérubé*], the Judicial Council of New Brunswick had recommended that a Provincial Court judge be removed from office because her derogatory comments about residents of the Acadian Peninsula, made while presiding over a sentencing hearing, created a reasonable apprehension of bias and a loss of public trust. The Supreme Court of Canada restored the Council's removal recommendation which had been set aside in the courts below, observing that:
>
> > 58 Even within the appeal process, which is designed to correct errors in the original decision and set the course for the proper development of legal principles, the judge whose decision is under review is not called to account for it. He or she is not asked to explain, endorse or repudiate the decision or the statement which is called into question by the appeal, and the result of the appeal process suffices to deliver justice to those aggrieved by the error made by the judge of first instance. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.
> >
> > 59 The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole….

[60] Judicial councils do not exist "to enforce the rights of complainants or to provide them with redress" (*Taylor v. Canada (Attorney General)*, 2003 FCA 55, at para. 82). The "ultimate goal of a judicial conduct process is to guard the integrity of the judicial system or, to put it another way, to ensure public confidence in the judiciary" (*Lenehan*, at para. 10).

Legislative provisions

[61] Section 16(1) of the *Provincial Court Act* establishes the Judicial Council. It is chaired by the Chief Justice of Nova Scotia and is made up of the Chief Judge of the Provincial Court, the Chief Judge of the Family Court, two additional judges of the Provincial Court or Family Court, the president of the Nova Scotia Barristers' Society, an additional senior lawyer, and two laypersons.

[62] Under s. 17(1) of the *Act*, the Council is empowered to receive, investigate, resolve, dismiss, and adjudicate complaints against judges of the Provincial Court and Family Court:

> 17(1) The Judicial Council may
>
> (a) receive a complaint;
>
> (b) investigate a complaint;
>
> (c) resolve a complaint
>
> (d) dismiss a complaint;
>
> (e) adjudicate a complaint;
>
> (f) retain counsel;
>
> (g) hold hearings;
>
> (h) delegate its functions to a committee or a member of the Judicial Council;
>
> (i) determine its own procedures and any procedures governing a review committee.
>
> …

[63] Section 17A deals with the process for making a complaint:

> 17A (1) A complaint against a judge of the Provincial Court or the Family Court shall be made in writing by any person to
>
> (a) the Chief Judge of the Provincial Court in the case of a complaint against a Judge of the Provincial Court; or

> (b) the Chief Judge of the Family Court in the case of a complaint against a Judge of the Family Court.
>
> (2) A complaint against the Chief Judge or Associate Chief Judge of the Provincial Court shall be made in writing to the Chief Judge of the Family Court or, in the absence of the Chief Judge of the Family Court, to the Chief Justice of Nova Scotia, in which case the Chief Justice has the powers and duties of the Chief Judge pursuant to Section 17B.
>
> (3) A complaint against the Chief Judge or Associate Chief Judge of the Family Court shall be made in writing to the Chief Judge of the Provincial Court or, in the absence of the Chief Judge of the Provincial Court, to the Chief Justice of Nova Scotia, in which case the Chief Justice has the powers and duties of the Chief Judge pursuant to Section 17B.
>
> (4) When a complaint is made against a judge of either the Provincial Court or the Family Court and the matter that gives rise to the complaint is ongoing before the judge who is the subject of the complaint, the person to whom the complaint is made pursuant to subsections (1) to (3) may defer dealing with the complaint until the conclusion of the proceedings before the judge. 2000, c. 28, s. 90.

[64] Section 17B outlines the powers of the Chief Judge upon receipt of a complaint:

> 17B (1) The Chief Judge to whom a complaint is made pursuant to Section 17A may
>
> (a) dismiss the complaint and provide written reasons to the complainant if
>
> (i) the complaint is not within the jurisdiction of the Judicial Council,
>
> (ii) the Chief Judge considers the complaint to be frivolous or vexatious, or
>
> (iii) there is no evidence to support the complaint;
>
> (b) attempt to resolve the complaint;
>
> (c) refer the complaint to the Chair of the Judicial Council together with a recommendation that the complaint
>
> (i) be dismissed,
>
> (ii) be resolved with the agreement of the judge, or
>
> (iii) be referred to a review committee for further investigation.
>
> (2) Any discussions between the Chief Judge and the judge complained of respecting the complaint are confidential and shall not be disclosed by the Chief Judge to the Judicial Council.

[65] Section 17C sets out the Chair's powers upon receipt of a recommendation from the Chief Judge:

> 17C Upon receipt of a recommendation made pursuant to clause (c) of subsection (1) of Section 17B, the Chair of the Judicial Council may either accept the recommendation of the Chief Judge, and advise the complainant and the Judge in writing, or empanel a review committee. 2000, c. 28, s. 90

[66] The review committee's powers are addressed at s. 17G:

> 17G The review committee shall investigate the complaint and may
>
> (a) dismiss the complaint;
>
> (b) resolve the complaint with the agreement of the judge; or
>
> (c) refer the complaint to a hearing before the Judicial Council. 2000, c. 28, s. 90.

[67] The complaint process, which contemplates multiple levels of review, allows the Judicial Council to screen out unmeritorious complaints that do not warrant further investigation or discipline.

[68] While the *Act* establishes the Judicial Council and outlines the basic complaints process, the statute is silent on many important matters faced by the Judicial Council. There are no regulations governing the Judicial Council's procedures. Instead, the legislature has provided the Judicial Council with significant latitude to interpret the relevant provisions of the *Act* and fill in any gaps. Section 17(1)(i) expressly authorizes the Judicial Council and provides the power to "determine its own procedures and any procedures governing a review committee."

[69] Once a complaint is referred to the Judicial Council, the Judicial Council is required to hold a hearing. Upon concluding the hearing, the Judicial Council has the power under s. 17K to:

- dismiss the complaint;
- impose discipline, short of removal from office; or,
- recommend that the judge be removed from office.

Does Judge Brinton have standing?

[70] In addition to challenging the Chair's Decision on procedural fairness grounds, the applicant seeks to challenge the merits of the Decision.

[71] The respondents acknowledge that the Chair owed a duty of procedural fairness to the applicant but they argue that she has no standing to challenge the Decision on substantive grounds.

[72] The common law test for standing was set out in *Robichaud v. College of Registered Nurses of Nova Scotia*, 2011 NSSC 379:

> [10] In establishing standing, the burden is on the Applicants in the case at hand to show that they have "some special interest, private interest or sufficient interest" in the decision or proceeding. [*Pieters v Ontario College of Teachers*, [2008] O.J. No. 527 (S.C.J.), at para 4, quoting *Cowan v. Canadian Broadcasting Corp*. [1966] 2 O.R. 309; *Emerman, supra*, at para 19.]
>
> [11] The Applicants can discharge that burden by demonstrating that the College has infringed a legal right of theirs, or that they have a legal right which will "cause or threaten to cause [them] some special damage over and above that suffered by the general public". They must be more than "interested observers". [*Behr v College of Pharmacists of British Columbia*, 2005 BCSC 879, paras 15, 18 and 28.] They can discharge the burden by showing the decision affected their "personal or economic rights or obligations". [*Friends of the Old Man River Society v. Ass'n of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, at paras 32 & 41; *Metropolitan Centre Inc. v Abugov Kaspar Architecture, Engineering, Interior Design*, 2007 ABQB 419, at paras 25 and 28.]
>
> [12] It is not sufficient to <u>be interested in</u> the decision. The party applying for judicial review must <u>have a special, private or sufficient interest in</u> the decision or proceeding. That will be satisfied when that party's rights or obligations have been, are or will be affected more than the general public.
>
> [Emphasis in original]

[73] Since the test requires me to consider whether the Chair's Decision affected the applicant's rights or obligations, which is also relevant to the duty of procedural fairness analysis, and will determine whether she is entitled to challenge the Decision on substantive grounds, the issue of standing is a logical place to start.

[74] Courts across the country have held that "[u]nless a statute expressly provides otherwise, a complainant in a professional discipline case has no standing to challenge the substantive reasonableness of a decision not to refer a complaint to a discipline hearing" (*Fuchigami v. Ontario College of Teachers*, 2024 ONSC 106, at para. 14. See also *Tupper v. Nova Scotia Barristers' Society*, 2013 NSSC 290, aff'd 2014 NSCA 90; *Robichaud v. College of Registered Nurses of Nova Scotia, supra; Friends of the Old Man River Society v. Association of Professional Engineers,*

Geologists and Geophysicists of Alberta, 2001 ABCA 107, leave to appeal refused [2001] S.C.C.A. No. 366; *M.H. v. College of Physicians and Surgeons of Alberta*, 2006 ABQB 395; *Metropolitan Centre Inc. v. Abugov Kaspar Architecture, Engineering, Interior Design*, 2007 ABQB 419; *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159; *Davidoff v. Law Society of Alberta*, 2014 ABQB 370; *Warman v. Law Society of Alberta*, 2015 ABCA 368; *Tran v. College of Physicians and Surgeons of Alberta*, 2017 ABQB 337, aff'd 2018 ABCA 95; *Berg v. British Columbia (Police Complaint Commissioner)*, [2006] B.C.J. No. 1027 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 300; *Pound v. Lunney*, 2007 BCSC 85; *Allen v. College of Dental Surgeons of British Columbia*, 2007 BCCA 75; *Emerman v. Assn. of Professional Engineers and Geoscientists of British Columbia*, 2008 BCSC 1186; *Cameron v. The Association of Professional Engineers and Geoscientists of Saskatchewan*, 2022 SKCA 118; *Toutsaint v. Investigation Committee of The Saskatchewan Registered Nurses' Association*, 2023 SKCA 11, leave to appeal refused [2023] S.C.C.A. No. 100; *Fineday v. Saskatchewan (Public Complaints Commission)*, 2024 SKKB 6.)

[75] In *Friends of the Old Man River Society*, *supra*, the Alberta Court of Appeal commented on the role of a complainant in a professional discipline process:

> [41] The Act makes it clear that the disciplinary process is a matter between the Association and the individual member whose conduct has been questioned. The Act is directed solely to the Association and its members; the rights, duties and responsibilities contained in the Act relate only to them. Under the investigative process contained in Pt. 5, a complainant is not made a party either to the investigation or the disciplinary process itself. The only parties are the Association and the member whose conduct is under investigation. Council's decision to terminate the investigation of the Engineers could have no detrimental impact on either FOR or Opron. It did not affect their personal or economic rights or obligations. They have no more interest in the conduct of the Engineers than any other member of the public. There is no *lis inter partes* between FOR and Opron, on the one hand, and the Association or the Engineers, on the other. Judicial review is not available in these circumstances.
>
> [Emphasis added]

[76] In *Tran*, *supra*, Ross J. noted that a person who complains to a professional regulatory body has the same interest as any member of the public:

> 23 A person who complains to a professional regulatory body has the same interest as any member of the public: an interest in ensuring that members of the profession

> meet the standards set by the governing body. It is the role and the obligation of the professional regulator, not the complainant, to ensure that standard is met.

[77] In *Fineday, supra*, the court explained that the law treats complainants as external to the complaint, even though the conduct they complained about has usually happened *to them*:

> [38] When a complaint is made that could have disciplinary consequences, the implications for a member may be severe. The member's career could be impacted or even ended. … Full judicial review of a decision is generally available to a member who is the subject of a complaint.
>
> [39] In contrast, a complainant is treated by the law as external to the complaint. From the complainant's own point of view, that may seem wrong or even offensive. The issue about which they complain is something that happened to them. Nonetheless, the pattern in Saskatchewan legislation is that only limited standing is granted to a complainant in the investigative and disciplinary stages. More particularly, where a complaint is dismissed during or after an investigation/screening phase, the complainant lacks standing to seek review.
>
> [Emphasis in original]

[78] In *Douglas v. Canada (Attorney General),* 2013 FC 451, the Federal Court dismissed the complainant's request to be added as a necessary party on a judicial review brought by Justice Lori Douglas on the basis that he had no substantive rights in the underlying discipline process:

> [35] As found by the Inquiry Committee, the investigation process contemplated under subsection 63(3) of the *Judges Act* is concerned with the broader public interest in protecting public confidence in the administration of justice. It transcends the interests of the individual complainant. Once engaged, it is only the public interest, as represented by the independent counsel, and the rights of the judge whose conduct is investigated and to whom party status is expressly conferred by section 64 of the *Judges Act*, that are at issue. The complainant has no individual legal right to have his or her complaint determined, or in the outcome of the inquiry process.
>
> [36] Mr. Chapman, as complainant, has no right or interest in whether or not the Inquiry Committee should be recused, or whether the proceedings should be prohibited. The fact that he enjoyed procedural rights in that proceeding does not transform these procedural rights into substantive rights.
>
> [Emphasis added]

[79] As the Supreme Court explained *in Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, "[t]he complaint is merely what sets the process in motion" (para 73).

The legislature has not seen fit to give complainants the right to appeal a decision to dismiss a complaint, nor do complainants have the right to control the investigation or prosecution of any complaint if the Judicial Council decides to inquire into the allegations.

[80] Consistent with the jurisprudence of courts across the country, the Nova Scotia Judicial Council Review Committee has held that "[a] person who makes a complaint against a judge does not control the process" because "[t]hey are not a formal party to the process … and that is in accordance with the principles relating to judicial independence" (In the Matter of Complaints Against Judge Alanna Murphy (March 30, 2022) (Nova Scotia Judicial Council Review Committee) at para. 19).

[81] Justice Brinton argues that her case is distinguishable from all these authorities because, unlike the other complainants, she has a direct, special interest in the Decision dismissing her Complaint. She cites three ways in which the Decision affects her personal rights and obligations more than those of the general public.

[82] First, the applicant says her economic rights have been affected by the Chair's Decision because Chief Judge Williams effectively suspended her, leaving her unable to return to work and resume her judicial duties. The applicant says that as a judge, she does not have recourse to the usual protections afforded to most employees. Instead, she brought the complaint against Chief Judge Williams to seek accountability for her wrongful suspension, among other things. According to the applicant, the Chair, by dismissing the complaint without further investigation, has tacitly approved and exacerbated the harm to her economic interests. As a result of the Decision, the applicant cannot return to work even if her health allows, clearly affecting her economic rights.

[83] Second, the applicant says the Decision impacted her personal rights and obligations because Chief Judge Williams's conduct infringed upon the applicant's judicial independence. The applicant notes that judicial independence has both individual and institutional dimensions, and that the individual dimension includes independence from a chief judge. The applicant says her personal, conscientious decision to keep her vaccination status private was the basis for Chief Judge Williams's decision to prevent her from hearing cases. In dismissing the complaint, the Chair tacitly approved of Chief Judge Williams's conduct and implicitly ratified the limitation on the applicant's judicial independence.

[84] The applicant submits that although judicial independence exists for the benefit of the public, she is the custodian of that independence and has a special interest over and above the general public in seeking corrective action for its limitation. The applicant summarizes her position on this issue at paragraph 15 of her reply brief:

> Put another way, as a Judge of the Provincial Court, Brinton is the holder of certain rights not available in the same sense to the general public, including the right to personal judicial independence and impartiality, and the right to be treated as such by other members of her Court, including the Chief Justice. Williams' actions have called the scope and content of those rights into question …

[85] Finally, the applicant says she has a special interest in the proceeding by virtue of the position adopted by Chief Judge Williams in the parallel civil action the applicant filed against her for alleged torts arising from the same conduct at issue in the complaint. In moving to strike the action, Chief Judge Williams argued in her motion brief that the "proper process to submit a complaint about an administrative decision of a chief judge is through the provincial judicial council", and that "repetitive litigation must be avoided when, as here, judicial review is available." The applicant says standing in this proceeding must exist, otherwise she would have no means of challenging the merits of the Decision.

[86] The applicant cites *Kipiniak v. The Ontario Judicial Council*, 2012 ONSC 5866 (Div. Ct.), in support of her position on standing. In *Kipiniak*, the applicant, Mr. Kipiniak, made a complaint to the Ontario Judicial Council about the conduct of Justice Pamela Thomson of the Toronto Small Claims Court. The OJC dismissed the complaint and Mr. Kipiniak sought judicial review of Council's decision. On the issue of whether Mr. Kipiniak had standing, the court stated:

> [19] The respondent submits that even if judicial review is available, Mr. Kipiniak has no standing because his rights are not affected. It argues that a complainant has no greater interest than other members of the public in the manner in which a complaint against a judge is disposed of. It relies on the decision of this court in *Pieters v. Ontario College of Teachers*, a brief oral decision in which the complainant sought judicial review of a decision of the Investigations Committee of the College of Teachers to not refer a complaint to the Discipline Committee. In that case, Mr. Pieters brought the complaint in his capacity as Vice Principal observing the principal's actions. The court concluded that he had not established that he has "some special interest, private interest or sufficient interest" to be granted standing. His position was no different than any member of the public or other member of the College of Teachers.

> [20] We would first point out that Mr. Kipiniak is in a different position than Mr. Pieters. Rather than being a passive observer, he was directly and specifically impacted by the conduct at issue in the complaint. He was the object of the conduct. It is at least arguable that this gives him sufficient interest to be granted standing. However, we do not rest our decision on this basis.
>
> [Emphasis added]

[87] The court went on to find standing based on correspondence from the Registrar to the applicant which represented to him that judicial review was available if he was dissatisfied with the OJC's decision. The court held:

> [26] In this case and in these somewhat unique circumstances, we are satisfied that Mr. Kipiniak has sufficient interest to be granted standing to bring this application for judicial review. Nonetheless, for reasons given, we are unable to grant Mr. Kipiniak any of the remedies he seeks and the application for judicial review must be dismissed. …
>
> [Emphasis added]

[88] The Divisional Court's observation that it was "at least arguable" that Mr. Kipiniak had a sufficient interest in the decision to give him standing was clearly *obiter*. It is also inconsistent with the full line of professional regulation decisions cited at paragraph 73 of this decision. More importantly, the statement conflicts with the Divisional Court's more recent decision in *Fuchigami, supra*.

[89] In *Fuchigami*, the applicant was a teacher who filed a complaint against three of his colleagues. The complaint related to a play presented to grade eight students on themes of bullying and school violence which the applicant had found "triggering." The Investigation Committee of the College of Teachers decided not to refer the complaints to the Discipline Committee. The applicant sought judicial review of the decision to dismiss the complaints.

[90] On the issue of standing, the court stated:

> [14] The Applicant was the Complainant. Unless a statute expressly provides otherwise, a complainant in a professional discipline case has no standing to challenge the substantive reasonableness of a decision not to refer a complaint to a discipline hearing. The Applicant does have limited standing to challenge this kind of discipline decision on grounds of procedural fairness …
>
> [15] As found by the Nova Scotia Court of Appeal, this principle has been widely recognized in Canadian jurisdictions:

> The issue of whether a complainant in a professional disciplinary matter has standing to apply for judicial review has been considered in a number of cases: *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, leave to appeal refused [2001] SCCA No 366*; Berg v. British Columbia (Police Complaint Commissioner)*, [2006] B.C.J. No. 1027 (BCCA), leave to appeal refused [2006] SCCA No 300); *M.H. v. College of Physicians and Surgeons of Alberta*, 2006 ABQB 395; *Pound v. Lunney*, 2007 BCSC 85; *Allen v. College of Dental Surgeons of British Columbia*, 2007 BCCA 75; *Metropolitan Centre Inc. v. Abugov Kaspar Architecture, Engineering, Interior Design*, 2007 ABQB 419; *Emerman v. Assn. of Professional Engineers and Geoscientists of British Columbia*, 2008 BCSC 1186; *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159; *Robichaud v. College of Registered Nurses of Nova Scotia*, 2011 NSSC 379. These authorities appear to be in agreement that a non-party does not have standing to seek judicial review of the merits of a disciplinary body's decision. Where judicial review has been found to be available, it has been limited to issues relating to procedural fairness. (*Tupper v. Nova Scotia Barristers' Society*, 2013 NSSC 290, para. 31)

[16] This principle has long been the law of Ontario, has been followed consistently in this court and has been applied, in particular, in cases emanating from the Respondent: *Cowan v. Canadian Broadcasting Corporation*, [1966] 2 OR 309 at 311 (CA); *Pieters v. Ontario College of Teachers*, 2008 CanLII 5113, para. 4 (Ont. Div. Ct.); *Kipiniak v. Ontario Judicial Council*, 2012 ONSC 5866 (Div. Ct.); *Bouragba v. Ontario College of Teachers*, 2018 ONCA 6940, para. 3 (Div. Ct.).

[17] The Applicant argues that he has a "special and sufficient interest" that gives him standing in this case. He says this is so because he decided to leave his teaching position and he decided that he will not return to teaching unless and until his complaints are heard by a Discipline Panel. With respect, the Applicant cannot create a "special and sufficient interest" by deciding to leave his profession - effectively by delivering an ultimatum that, until his view of this matter prevails, he will not teach again, and because he has made that decision for himself, he has a personal interest and party standing to pursue discipline of the respondent Members. The Applicant has not cited any authority for the proposition that a complainant may create a "special and sufficient interest" giving them party standing by making a unilateral decision about what they will or will not do as a consequence.

[18] Professional discipline proceedings are not for the purpose of providing therapy to a complainant. If the Applicant wishes to return to teaching, and if he requires accommodation in the workplace because of his health issues, that is a matter for him to pursue with his employer, and not a justification for professional discipline proceedings.

[Emphasis added]

[91] The *Provincial Court Act* does not provide a complainant with the standing to challenge the reasonableness of a decision not to refer a complaint to a review committee. Nor am I satisfied that the applicant meets the test for standing at common law.

[92] In my view, Judge Brinton's status as a judge of the Provincial Court and "custodian" for the public's right to judicial independence does not give her a legal interest in the outcome of the disciplinary process. Like many other complainants, the applicant was directly affected by the conduct complained of – it happened *to her* – but this is not enough to give her a legal interest necessary for standing.

[93] The Chair's decision to dismiss the complaint could have no detrimental impact on the applicant and could not affect her personal or economic rights or obligations. The applicant's complaint set the disciplinary process in motion, but she is not a party to it (*Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 73). The only parties to the process are Chief Judge Williams and the Judicial Council.

[94] The Decision could not affect Judge Brinton's economic rights because she was never actually suspended. The applicant continued to preside over cases in-person until she went on medical leave in October 2021. She has remained on medical leave since that time. The Chair's Decision dismissing her complaint neither raises, nor perpetuates, any barrier to the applicant resuming her judicial duties should her medical issues resolve.

[95] Lastly, Judge Brinton maintains that because Chief Judge Williams argued, on a motion to strike her civil action claim, that the "proper process to submit a complaint about an administrative decision of a chief judge is through the provincial judicial council", and that "repetitive litigation must be avoided when, as here, judicial review is available", she has a special interest in the Decision dismissing her complaint. She has provided no authority for this position. In my view, the applicant cannot rely on arguments made by Chief Judge Williams on a motion in a separate proceeding, long after the Decision was made, as the basis for standing.

[96] I find that the applicant has no standing to challenge the merits of the Chair's Decision dismissing her complaint. However, in the event I am wrong, I will consider her arguments on the merits later in this decision.

Was there a breach of the duty of procedural fairness?

[97] Decision makers owe a duty of procedural fairness whenever their decisions affect "the rights, privileges or interests of an individual" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 79). The content of the duty is variable and depends on the specific context of each case. Procedural fairness is reviewed on a correctness standard (*Smith v. Canada (Attorney General)*, 2020 FC 629, at para. 67).

[98] The applicant argues that she was not afforded the appropriate level of procedural fairness during the complaint process. She submits that the Chair lacked jurisdiction to solicit a response to the Complaint from Chief Judge Williams at the preliminary screening stage, but, having done so, he was required to provide her and her counsel with a copy of Chief Judge Williams's response and an opportunity to respond. I note that the applicant and her counsel were fully aware that the Chair had asked for and was provided with a response from Chief Judge Williams months before he issued his Decision and did not request an opportunity to review the response or to reply to it. Nor has the applicant identified how an opportunity to respond could have affected the outcome.

[99] The respondents argue that the *Provincial Court Act* specifically provides that the Chief Judge or Chief Justice may seek out a response from the judge complained of at the screening stage and requires that the response be kept confidential. They further submit that the applicant was entitled only to nominal procedural fairness, which she was given.

[100] In *Therrien (Re)*, *supra*, the court commented upon the two components of the duty to act fairly at paragraph 82:

> Essentially, the duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo judex in sua causa* rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve: *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, cited with approval in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 22, and *Ruffo*, *supra*, at para. 88. Thus, in *Baker*, *supra*, at paras. 23-28, L'Heureux-Dubé J. specifically pointed out that several factors have been recognized in the jurisprudence as relevant to determining what is required by the duty of procedural fairness in a given set of circumstances. While she did not provide a comprehensive list of such

> factors, she referred to: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures. It is from this perspective that I will now consider the allegations of breach of the rules of procedural fairness made by the appellant in the instant case.

[101] In *Taylor, supra,* the Federal Court of Appeal confirmed that a duty of procedural fairness applies to a decision to screen out a judicial conduct complaint. In that case, the Attorney General took the position that the Chairperson of the Judicial Conduct Committee owed no duty to a complainant to observe procedural fairness in the course of determining whether to close a file. As a result, a complainant could not apply for judicial review on the ground of bias, no matter how egregious. The court summarized the Attorney General's position as follows:

> 75 Counsel for the Attorney General advanced two principal reasons why the Chairperson of the Judicial Conduct Committee owes no duty of fairness to a complainant when exercising the power to close a file. First, and most important, a complainant has no interest that is affected by the exercise of this power. A complainant to the Canadian Judicial Council is not seeking to vindicate any right or personal interest. Mr. Taylor's concern was that the Council thoroughly investigate Justice Whealy's conduct in order to reassure the public, and members of religious and racial minorities in particular, either that the Judge had not compromised his ability to judge impartially, or to recommend his removal in order to protect litigants and witnesses from having to appear before a judge whose conduct is incompatible with the high standard of impartiality that the public rightly demands of judges.
>
> 76 Moreover, the argument goes, when considering a complaint against a judge, the Council is not deciding a dispute between a complainant and a judge, or determining whether to grant or deny relief to the complainant. Rather, its function is to decide whether a judge's misconduct is so serious as to merit removal from office. At the preliminary stage of the Council's process, with which this case is concerned, the duty of the Chairperson of the Judicial Conduct Committee is to determine whether a judge's conduct is serious enough to warrant either an expression of disapproval, or further investigation with a view to a recommendation by the Council of removal. The filing of a complaint simply draws to the attention of the Council a possible instance of judicial misconduct, which the Council is obliged to dispose of in one of the statutorily prescribed ways.

[102] The court held, however, that while the closing of a file may not adversely affect a personal interest of the complainant, a duty of procedural fairness still applies to the Chairperson's decision:

> 77 On the basis of existing case law, this argument is not without merit. Canadian administrative law has not so far committed itself to the proposition that the public interest in accurate administrative decision-making is in itself sufficient to engage the duty of fairness. Thus, even though the duty of fairness performs, among other things, the instrumental function of enhancing the substantive quality of administrative action, the duty does not apply where an individual is not adversely affected by the impugned decision. Despite the elasticity of the concepts of "affect" and "interest" in the *Cardinal* test, they have not been abandoned as necessary triggers for the duty of fairness.
>
> 78 Nonetheless, in my opinion, this is an exceptional case. While the closing of a file may not adversely affect a personal interest of the complainant, more is at stake than accurate decision-making. To deny a complainant the right to procedural fairness is apt to frustrate the ability of the Council to perform its statutory function of improving the quality of judicial services by thoroughly and impartially investigating complaints in order that it may take appropriate action, and thereby enhance public confidence in the judiciary.
>
> 79 The fact that a judge is entitled to an impartial consideration by the Council of a complaint further strengthens the case for imposing the duty of fairness in favour of a complainant. In my opinion, it would be inimical to the sensitive role of the Council in enhancing the administration of justice in Canada to impose the duty of fairness to protect the independence of the judiciary, as well as the private interest of judges in their reputations and livelihood, but not to impose it to protect the equally important public interest in ensuring that judicial misconduct is accurately identified and appropriately dealt with. In a sense, a complainant may be seen as the self-appointed representative of the public interest in protecting "the right of persons who come before the courts to a fair public trial by an impartial tribunal", to borrow words from *Moreau-Bérubé* at para. 45. The fact that the By-Laws confer participatory rights on the judge who is the subject of the complaint, but only provide that the complainant be advised when a file is closed, does not, in my view, preclude the imposition of the duty of fairness in favour of a complainant.
>
> …
>
> 84 Finally, I would note that, in addition to the importance of the duty of fairness to the Council's ability to perform its function, its applicability is indicated by the nature of the decision made by the Chairperson of the Judicial Conduct Committee that a judge's conduct does or does not warrant removal from office. A determination of this question involves the application of a statutory standard that is not at the general or policy end of the spectrum, and requires an appreciation of the facts about an individual's conduct and the exercise of judgment about whether the conduct was improper and, if it was, its seriousness when viewed against the

> public interests in ensuring that judges do not misconduct themselves and in maintaining judicial independence. This is the kind of question that is more likely to be answered appropriately by an impartial person.
>
> 85 For these reasons, I conclude that the duty of fairness, including the duty of impartiality, applies to the Chairperson's decision to close a file pursuant to subsection 50(1) of the Council's By-Laws. …

[103] Accordingly, the duty of procedural fairness owed to Judge Brinton by the Chair included at least the right to have the complaint screened by an impartial decision-maker. Determining whether it went any further and included the right to a copy of Chief Judge Williams' response, and an opportunity to reply, requires an examination of the *Baker* factors (*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817). In *Baker*, *supra*, the court provided a non-exhaustive list of five factors that are to be considered when deciding the level of procedural fairness that must be accorded to a party. These factors are:

1. The nature of the decision
2. The nature of the statutory scheme
3. The significance of the interests
4. The legitimate expectations of the person challenging the decision
5. The previous procedural choices of the administrative decision maker

[104] As I will explain, the applicant's submissions on the *Baker* factors demonstrate a fundamental misunderstanding of the role of the Judicial Council, the nature of judicial misconduct, and the impact of the Chair's Decision on her.

[105] In arguing that she was entitled to a higher than normal degree of procedural fairness, the applicant focused mainly on the first, third, and fifth factors. In *Baker*, *supra*, the court explained the first factor at paragraph 23:

> One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
>
> [Emphasis added]

[106] In oral submissions, the applicant's counsel argued that the nature of the decision being made supported a higher degree of procedural fairness because the Complaint involves an "adversity of positions", with two judges "debating or asserting different concepts of the principle of judicial independence." He submitted that the first step in deciding whether there has been judicial misconduct is to determine, "What is the content of judicial independence? What does it mean?" Counsel distinguished the situation from "the usual" case of a complaint against a judge involving an allegation of bias, or a case of sexual harassment, because everyone knows what bias or sexual harassment entails. In other words, there is no need for an argument between the complainant and the judge about what those concepts mean in order to decide whether misconduct has occurred. Counsel continued, in oral submissions:

> What we're talking about here is unique. It's, in my view, never been really, never really been considered before. What does it mean, what are the chief judge's powers vis-à-vis another judge in terms of disclosing private medical information? Can that amount to judicial misconduct? Well, the answer to that obviously involves a first level legal analysis. And you've got two judges who are co-equal members of the Bench, each with a custodial duty, shall we say, each with a vested interest in upholding the rule of law, each with a vested interest in understanding what their rights and duties are, both personally and as members of the public that they serve.

[107] Counsel reiterated that, in his view, the Judicial Council's role in resolving the Complaint is to determine the content of judicial independence, which would dictate whether Chief Judge Williams had committed judicial misconduct:

> I've just mentioned we've got this debate between two judges talking about the content of this principle. In my view, this is the, what is it, the determination that must be made to reach the conclusion. In my view, you don't get to judicial misconduct unless we say, first of all, what the principle means. <u>If Judge Williams is correct, as a matter of law, and she's got the right to do what she did, then there cannot be judicial misconduct. I accept that. But the converse is also true.</u> So um, we are closer, in my view, to an adversarial process because this is what judges do. They make determinations of law.
>
> [Emphasis added]

[108] Respectfully, the converse is not also true. The issue of whether Chief Judge Williams committed judicial misconduct does not turn on whether she exceeded her powers and violated the applicant's judicial independence by introducing a mandatory vaccination policy for all judges of the Provincial Court, and encouraging Judge Brinton to comply with that policy by disclosing her vaccination status. Nor

is it the Judicial Council's role to determine the constitutionality of mandatory vaccination policies.

[109] The issue of whether Chief Judge Williams committed judicial misconduct turns instead on whether the impugned conduct was so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in her ability to perform the duties of office, or in the administration of justice generally, and warrants a disposition of the complaints other than dismissal in order to restore that confidence. The impugned conduct in this case consisted primarily of joining other courts across the country in introducing a mandatory vaccination policy in the midst of a global pandemic and in the absence of binding legal authority holding that such an action would be unconstitutional or otherwise in excess of her powers as Chief Judge.

[110] If the applicant wanted a determination as to whether the mandatory vaccination policy violated her s. 2(b) *Charter* rights or the principle of judicial independence, she ought to have brought an application for judicial review of the decision to introduce the policy. She chose not to do so. Even if she had brought such an application, however, and succeeded in obtaining a ruling that Chief Judge Williams, while acting in good faith, had exceeded her powers and infringed on the applicant's judicial independence or her s. 2(b) *Charter* rights, it would still not mean that Chief Judge Williams committed misconduct.

[111] The applicant's submissions on the third factor – the importance of the decision to the individuals affected – were misguided. In *Baker*, the court described the third factor as follows:

> 25 The third factor in defining the nature and extent of the duty of fairness is the importance of the decision to the individuals affected. The more important the decision is to the lives of the individuals affected and the greater its impact on them, the more stringent the procedural protections required will be. This was stated, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia* , [1980] 1 SCR 1105, at p. 1113:
>
> > High quality justice is required when a person's right to practice their profession or keep their job is at stake. [. . .] A disciplinary suspension can have serious and permanent consequences on a career.
>
> …
>
> The importance of a decision to the persons affected therefore has a significant impact on the nature of the obligation of procedural fairness.

[112] On this factor, Briton's counsel submitted that the Chair's Decision to dismiss the Complaint is of great importance to "everyone." He said the Decision was obviously very important to the applicant, because she alleges that the Chief Judge's conduct compromised her judicial independence and impartiality in several ways, interfering with her ability to fulfill her role as a judge. She further alleges that the Chief Judge violated her freedom of expression by attempting to force her to disclose information that she did not wish to disclose, which also violated her right to medical privacy. Counsel described these allegations as "very serious infringements of an individual's civil liberties." He said the Chair's Decision was therefore "of clear importance to Brinton, in terms of both vindication and ensuring that such conduct between a chief judge and a puisne judge does not take place again."

[113] Counsel said the Decision was also important to Chief Judge Williams, because it is important for chief judges "to know how far they can go", and to other chief judges and chief justices across the country.

[114] I certainly agree that the Decision is important to Chief Judge Williams. As the subject of the Complaint, it is only her rights and interests that are at issue, and she is entitled to a high degree of procedural fairness as a result. For the applicant, on the other hand, the Decision is far less important. As discussed earlier in relation to standing, the applicant's personal or economic rights or obligations are not affected by the Decision to dismiss her Complaint. She had no legal interest in the outcome, and the Decision – to dismiss the Complaint - had very little impact on her. Dismissal of her Complaint does not prevent her from returning to the Provincial Court, if her health allows. Moreover, as I have already explained, a complaint to the Judicial Council was not the proper route to challenging the constitutionality of the vaccination mandate – a decision which the applicant argued would be critical to any finding of judicial misconduct.

[115] Moving on to the fifth factor, the court in *Baker* explained it in the following terms:

> 27 Fifth, the analysis of the procedures required by the duty of fairness should also take into account and respect the procedural choices that the body itself makes, particularly where the law leaves the decision-maker free to choose its own procedures, or where the body has expertise in choosing the appropriate procedures in the circumstances: *Brown and Evans*, supra, at pp. 7-66 to 7-70. Although clearly not determinative, great weight must be given to the body's own choice of procedures and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, per Gonthier J.

[116] In relation to the procedures chosen by the Chair, applicant's counsel argued that the Chair had no authority under the *Act* to invite written submissions from Chief Judge Williams, but, having done so, owed the applicant an increased degree of procedural fairness. According to counsel, by soliciting a response from Chief Judge Williams, the Chair improperly engaged in an investigation rather than simply conducting a preliminary screening. As a result, the applicant argues, he ought to have provided the applicant with a copy of Chief Judge Williams's response and given her an opportunity to reply.

[117] Section 17(1)(i) of the *Provincial Court Act* gives the Judicial Council the power to "determine its own procedures and any procedures governing a review committee." Section 17B(2) of the *Act* expressly contemplates that during the preliminary screening of a complaint, the Chief Judge (or the Chief Justice pursuant to s. 17A(2)) will discuss the complaint with the judge complained of:

> (2) Any discussions between the Chief Judge and the judge complained of respecting the complaint are confidential and shall not be disclosed by the Chief Judge to the Judicial Council.

[118] The applicant argues, without authority, that "discussions" is not broad enough to encompass written submissions. The Oxford Languages online dictionary defines the term "discussion" as follows:

- a conversation or debate about a certain topic.
- a detailed treatment of a particular topic in speech or writing.

[119] The applicant has not offered a compelling reason to interpret "discussions" as narrowly as she suggests. In my view, an expansive interpretation is more consistent with the extensive procedural fairness rights owed to a judge when a judicial council considers a complaint against them. A decision to refer a complaint to a review committee communicates to the public that further investigation is required before the Judicial Council can conclude that the complaint lacks merit (i.e., that the judge has not committed judicial misconduct). In *Smith v. Canada (Attorney General)*, 2020 FC 629, the Federal Court found that the CJC breached the duty of fairness by failing to provide the judge with the full details of the allegations and failing to give him an opportunity to respond during the initial screening phase before referring the complaint to a review committee (paras. 162-63).

[120] I find that not only was the Chair permitted by the *Act* to provide Chief Judge Williams with an opportunity to respond to the Complaint, he was potentially

required to do so in accordance with the duty of procedural fairness owed to her in this case. I am not satisfied that by giving Chief Judge Williams the opportunity to respond to the Complaint, the Chair transformed a preliminary screening into an investigation and elevated the duty of fairness owed to Judge Brinton as a result.

[121] In my view, the jurisprudence indicates that the content of the duty of fairness owed to a complainant in a judicial discipline proceeding is on the low end of the spectrum, and does not include a procedural right to disclosure of a judge's response to the complaint. In fact, an automatic right to a copy of the judge's response would be inconsistent with the mandate of judicial councils to safeguard judicial independence and maintain public confidence in the judiciary. In *Lenehan* the review committee met with Judge Lenehan and his legal counsel for several hours for the purpose of a recorded interview. None of the 121 written complaints provided by a 121 different entities and individuals were given a copy or allowed to comment on that recorded interview. And properly so.

[122] In *National Council of Canadian Muslims v. Canada*, [2022] F.C.J. No. 1111 (Fed. Ct.), the applicants sought judicial review of a decision by the CJC that their complaints against a judge did not warrant the establishment of an Inquiry Committee. The applicants argued that they were denied procedural fairness because they were not provided with copies of materials considered by the CJC, including the judge's responses to the complaints. The court's analysis, including its consideration of the *Baker* factors, is instructive:

> 193 The Applicants' submission that the complainants are entitled to "know the case to meet" overlooks that it is the complainants' own allegations that establish the "case to meet" by the judge who is implicated. The Applicants' submission is really a request for greater participatory rights, including disclosure of all information considered in the course of the CJC's review and an opportunity to rebut that information. Although, as the CJC notes, this goes far beyond the current *Review Procedures*, *By-laws* and the jurisprudence, the issue for the Court is, as stated in *CPR* at para 54,
>
> > whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed.
> >
> > [Emphasis added.]
>
> 194 I find that, first, the duty of procedural fairness owed to the complainants is at the lower end of the spectrum, but that is not to say that there is no duty owed.

Second, the CJC met the duty owed in the circumstances; the complainants had the opportunity to submit their complaints, which were detailed, the CJC conducted an impartial review in accordance with its *By-laws* and *Review Procedures*, and the complainants were informed of the outcome. In addition, the CJC's website informed the public that the complaint had been referred to a Review Panel, reported the outcome of the CJC's investigation and provided a link to the Report of the Review Panel.

195 There is no precise measurement for the duty of procedural fairness as the duty and its elements will vary with the circumstances. In the present case, both the *Baker* factors and the jurisprudence support finding that the duty of procedural fairness owed to the complainants in the CJC's investigative process is at the lower end of the spectrum or range and is not comparable to the duty owed to the judge who is the subject of the complaint and the investigation.

A. ***The Baker Factors***

196 In *Baker*, the Supreme Court of Canada emphasized that the scope of the duty of procedural fairness is variable and must be determined in the specific context of each case. The factors that inform the scope of the duty include the nature of the decision, the nature of the statutory scheme, the importance of the decision to the person affected, the legitimate expectations of that person and the choice of procedure made by the decision-maker.

197 Although the *Baker* factors are more often relied on to determine the scope of the duty of procedural fairness owed to a person who does have a "case to meet," the factors can be adapted to inform the scope of the duty of procedural fairness owed to complainants in the CJC review process. The Supreme Court emphasized that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair and impartial and open process "appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

198 The first factor is the nature of the decision and the process followed in making it. *Baker* guides that the more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required (*Baker* at para 23).

199 The review of complaints about judicial conduct is an investigative, not an adversarial, process. The Review Panel does not make findings of fact or hear evidence. The decision not to constitute an Inquiry Committee and to issue a formal expression of concern is an administrative decision. The process does not resemble the judicial process even though the decision is made by judges.

200 With respect to the nature of the statutory scheme, greater procedural protections will be required when no appeal procedure is provided within the applicable statute, or when the decision is determinative of the issue and further requests cannot be submitted (*Baker* at para 24). In the present case, there is no

internal appeal process; however, complainants could request reconsideration and could bring additional complaints, if warranted. In addition, the decision may be the subject of an application for judicial review to this Court by the judge, or as in the present case, by the complainants.

201 The importance of a decision to the individuals affected is a significant factor affecting the content of the duty. The more important the decision and the greater the impact on the persons affected, the greater the procedural protections required (*Baker* at para 25). The decision to either constitute an Inquiry Committee or take other measures, such as issue an expression of concern, is of high importance to the judge as it has an impact on their judicial and legal career and their reputation more generally. The establishment of an Inquiry Committee could ultimately lead to a recommendation for their removal from office. While not to diminish the importance of the decision to the complainant, given that the complaints process is investigative, the personal interests of the complainant are not adversely affected in the same way.

202 However, the decision is clearly important to the complainants. The complainants took the initiative to bring the complaints and clearly articulated why they were concerned about the conduct at issue. In addition, as the Court of Appeal noted in *Taylor v Canada (Attorney General)*, 2003 FCA 55 [*Taylor*], there is an important public interest--represented by the complainants--in protecting the right to a fair hearing before an impartial tribunal (para 79). The CJC's role in addressing judicial conduct, including through the complaints process, enhances public confidence in the administration of justice.

203 The legitimate expectations of the person challenging the decision also informs the procedures required by the duty of fairness in particular circumstances. If the person has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires that procedure (*Baker* at para 26).

204 The Applicants' submission that the complainants had a legitimate expectation that they would be updated and could make further submissions is not well founded. The Applicants' reliance on paragraph 6(a) of the *Review Procedures* may be based on their misreading of that provision, which states that the Chair or Vice-Chair may seek additional information from the complainant. There is nothing in the *Review Procedures* or *By-laws* to provide a legitimate expectation of disclosure of information or greater participation, nor did the email from the CJC acknowledging the receipt of the complaint suggest any greater procedural rights than those accorded. That email provided a link to the CJC's website for information about the complaints process, just as described above.

205 The fifth *Baker* factor guides that the choice of procedure made by the decision-maker should be taken into account and respected, particularly when the statute leaves it to the decision-maker to choose its own procedure, or when it has an expertise in determining what procedures are appropriate in the circumstances (*Baker* at para 27). Paragraph 61(3)(c) of the *Judges Act* authorizes the CJC to make by-laws regarding the carrying out of inquiries and investigations into judicial

> conduct, which reflects Parliament's intent that the CJC be able to determine its own procedures. As elaborated on above, the CJC's complaint review process is set out in the *By-laws* and the *Review Procedures*, which provide some procedural rights for complainants; some are permissive, others are mandatory. In accordance with its own procedures, the CJC is not required to solicit further submissions from the complainant after the complaint is made; the CJC is not required to inform the complainant that the matter has been referred to a Review Panel; the CJC is not required to disclose the submissions of the judge at issue to the complainant or to invite any type of response or rebuttal from the complainant. The CJC is not required to advise the complainant of the status of the review or that a decision is imminent, but must inform the complainant if a complaint is dismissed or has concluded, or if a Review Panel recommends that an Inquiry Committee be established.
>
> 206 In addition, the CJC has significant expertise in the review and investigation of complaints of judicial conduct.
>
> 207 In the present context, consideration of the relevant *Baker* factors supports the conclusion that the duty of procedural fairness owed to the complainants in the CJC's review process--which in this case pertains to the initial screening and intermediate screening process for complaints--is at the lower end. In other circumstances, for example, where an Inquiry Committee is constituted, other factors may lead to a different result. To summarize: the initial screening by the Executive Director, the Vice-Chair, followed by the Review Panel and the ultimate disposition of the Vice-Chair (following the determination that an Inquiry Committee is not warranted) is an investigative process, not judicial decision making; although there is no internal appeal process within the CJC, judicial review is available; the complainants had no legitimate expectation of a different process; the CJC has the authority, in accordance with the *Judges Act*, to make by-laws governing inquiries and investigations into judicial conduct, and has done so; and the CJC's choice of procedure is clearly set out in their *By-laws* and *Review Procedures*.
>
> 208 The importance of the decision to the complainants, on its own, does not support finding a higher level of procedural fairness than that provided.
>
> [Emphasis added]

[123] In finding that the applicants were not entitled to disclosure of the judge's response to their complaints, the court rejected the applicants' argument that the Federal Court of Appeal's decision in *Taylor*, *supra* established that complainants are entitled to disclosure of any materials considered by the CJC. The applicant makes a similar argument in this case. The court in *National Council of Canadian Muslims* stated:

> 216 In *Taylor*, the complainant also argued that it was unfair that a letter written by the judge to the CJC, which was considered by the Chair, was not disclosed to him prior to the rendering of the decision. The Court of Appeal noted that it could think of no good reason to not disclose the letter. However, the alleged breach of procedural fairness in *Taylor* was the lack of impartiality or bias; the issue was not whether the non-disclosure of the letter was a breach of procedural fairness and the Court made no such finding (see para 105).
>
> 217 Contrary to the Applicants' submissions, I do not regard *Taylor* as establishing a principle that complainants are entitled to disclosure of the information considered by the CJC or that they are owed a higher level of procedural rights than set out in the *By-laws* and *Review Procedures* or as supported by the application of the *Baker* factors. *Taylor* supports the view that complainants should not be denied procedural fairness, which is not disputed. The issue is the scope or level of the duty. As noted, complainants have some procedural rights, but not to the same extent as the judge who is the subject of the complaint.
>
> [Emphasis added]

I agree with this reasoning.

[124] The court went on to discuss the Federal Court of Appeal's more recent decision in *Canada (Attorney General) v. Slansky*, 2013 FCA 199:

> 218 In *Slansky*, the Federal Court of Appeal considered whether the CJC should have disclosed a report of an investigator retained by the CJC to the complainant. In addressing the reasons for non-disclosure, Justice Mainville, in concurring reasons, explained the distinction between the procedural rights of the judge and those of the complainant, at paras 164--65:
>
> > Confidentiality is somewhat limited vis-à-vis a judge who is the subject of the inquiry and who is directly affected by its outcome. The judge is entitled to notice of the subject-matter of the investigation, and he must be provided sufficient information about the material evidence gathered: *Judges Act*, s. 64 and *Complaints Procedures* of the Council at section 7.2. In investigating a complaint against a judge, the Council is in effect determining whether the judge's conduct could amount to an abuse that merits a further inquiry to determine whether the judge should be removed from office. Since the rights of the judge may be directly and substantially affected by the ultimate outcome, the Council owes the judge a high duty of procedural fairness throughout the process so as to afford the judge an effective opportunity to respond.
> >
> > However, since the complainant's only legal right is to make a complaint, the content of any duty of fairness that the Council may owe to the complainant in dismissing the complaint is at the low end of the spectrum: *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3

> F.C. 91 at paras. 50 to 52; *Hon. Lori Douglas v. Canada (Attorney General)*, 2013 FC 451 at paras. 20 to 22; see by analogy *Jacko v. Ontario (Chief Coroner)* 2008, 247 O.A.C. 318, 306 D.L.R. (4th) 126 at para. 18. The limited duty of disclosure owed under the Council's *Complaints Procedures* is simply to inform the complainant of the disposition of the complaint. This was amply discharged in this case. The Council owes no further duty of disclosure to Mr. Slansky.
>
> [Emphasis added.]

> 219 The jurisprudence establishes that the CJC's complaints review process is investigative (*Slansky*). There is no dispute or *lis* between the complainant and the judge against whom the complaint is made. The complaint sets the investigative process in motion. The role of the CJC is to seek the truth, through its own research and with information provided by the complainant and the judge whose conduct is under review …

[125] In *Slansky*, the appellant, a lawyer, complained to the CJC about the alleged serious misconduct of an Ontario Superior Court of Justice judge during a long and difficult first degree murder trial, in which the appellant represented the accused. The CJC Chairperson dismissed the complaint and closed the file without referring it to an Inquiry Committee of the CJC. In making this decision, the Chairperson relied on a report from Professor Martin Friedland (Friedland Report). The appellant brought an application for judicial review of the Chairperson's decision. Although the Friedland Report had been taken into account by the Chairperson, the CJC refused to disclose it as part of the tribunal record, claiming that it constituted legal advice and was protected by solicitor-client privilege, and was also subject to public interest privilege. A Federal Court prothonotary granted the appellant's motion to compel disclosure of the report and rejected the CJC's privilege arguments. The Federal Court reversed the prothonotary's decision, finding that the Friedland Report was subject to both legal advice and public interest privilege.

[126] In dismissing the appeal, Mainville, J.A. noted that the CJC (like other judicial councils) is charged with maintaining public confidence in the federal judiciary, and that it is the CJC’s prerogative and responsibility to decide whether public confidence is better served by disclosing or withholding information gathered in an investigation into a judge’s conduct:

> [122] One of the responsibilities of the Canadian Judicial Council is to maintain public confidence in the federal judiciary. For this purpose, and pursuant to the statutory mandate vested in it by Parliament under the *Judges Act*, the Canadian Judicial Council is empowered to carry out investigations and inquiries into the conduct of a superior court judge.

> [123] In the course of such inquiries and investigations, questions may arise as to the disclosure of certain information, such as the disclosure of statements given to the Canadian Judicial Council under an undertaking of confidentiality. In such circumstances, the Council must determine whether maintaining public confidence in the judiciary is better served by disclosing or withholding the information.
>
> [124] It is the prerogative and responsibility of the Canadian Judicial Council to decide in which circumstances and to what extent it is in the public interest not to disclose information obtained in the course of an investigation into the conduct of a judge. This public interest privilege flows in part from the constitutional principle of judicial independence. A large degree of deference is owed to the Council on this matter. However, in the context of a judicial proceeding where the issue may arise, it is the role of the court to balance the harm to judicial independence and the Council's processes that may result from a disclosure against the prejudice to the administration of justice that may result from non-disclosure.
>
> [Emphasis added]

[127] Mainville, J.A. noted that all judicial councils investigating the conduct of a judge must consider the allegations in light of the constitutional principle of judicial independence:

> [141] Many provinces have enacted similar legislation entrusting judges with the responsibility to oversee the conduct of provincial court judges, for example in Ontario the *Courts of Justice Act*, R.S.O. 1990, c. C.43, at sections 49 to 51.12. Indeed, judicial independence requires that such investigations and inquiries into the conduct of judges be dealt with primarily by other judges: *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paragraphs 39 and 57; *Moreau-Bérubé*, at paragraph 47.
>
> [142] A judicial council investigating allegations of judicial misconduct has a unique mandate to consider the allegations in light of the constitutional principle of judicial independence. This unique mandate was explained in *Therrien (Re)*, above, at paragraphs 147-148, and restated as follows in *Moreau-Bérubé*, at paragraph 51:
>
> > Gonthier J. noted in *Therrien, supra*, at para. 147 ..., that "before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office". In making such a determination, issues surrounding bias, apprehension of bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence. This, according to Gonthier J., creates "a very special role, perhaps a unique one, in terms of

> both the disciplinary process and the principles of judicial independence that our Constitution protects" (para. 148). [Emphasis added.]
>
> [143] When undertaking an examination of the conduct of a judge, the Canadian Judicial Council must ensure that the examination respects the underlying purpose of the constitutional principle of judicial independence. Throughout its investigation, it must act in a manner that does not materially impair the independence and impartiality of the judiciary more than is necessarily inherent in the discharge of its statutory responsibility of preserving the integrity of the judiciary: As noted by La Forest J. in *MacKeigan*, at page 813:
>
> > To conclude, bodies which are set up or which in the course of their duties are required to undertake an examination of the conduct of a superior court judge in the exercise of judicial functions must be so constructed as to respect the letter and the underlying purpose of the judicature provisions of the Constitution. Nor can investigatory bodies act in a manner that might materially impair the protection accorded by s. 99 or the independence and impartiality of the judiciary.
>
> [144] It may be necessary, in appropriate circumstances, to refuse to disclose information gathered in the course of an examination into a judge's conduct, particularly when such disclosure risks impairing the independence and impartiality of the judiciary. The *Judges Act* recognizes this.

[128] Mainville, J.A. proceeded to explain how disclosure of a judge's response to a complaint could threaten judicial independence:

> [160] First, the thrust of Mr. Slansky's complaint against the trial judge was that the judge's management of the trial was improper, and that the decisions he rendered before and during the trial were unfair to the defendant. As I have already noted, judicial independence requires that a judge be immune from having to account for and justify his or her decisions beyond the reasons given in open court. From a practical point of view, this immunity should not be raised in order to impede an investigation by the Canadian Judicial Council. However, this does not mean that the immunity becomes meaningless when the Council carries out an investigation or an inquiry. Rather, the Canadian Judicial Council must carefully assess whether disclosing information provided by the judge in order to explain these rulings would infringe upon judicial independence.
>
> [161] Though the trial judge may well have provided justifications to the Council concerning his conduct of the trial or his decisions, this does not mean that these justifications must be disclosed to Mr. Slansky or to the Federal Court. To put it simply, the trial judge does not report to Mr. Slansky or to the Federal Court. Under the principle of judicial independence, he need not (and should not) justify his conduct of the trial, or any of his judicial decisions, to either the appellant or the Federal Court. The trial judge may well wish to explain to the Council his management of the trial and the reasons for his trial decisions, but that does not

> entail that he must do so publicly. As noted by the Executive Director of the Canadian Judicial Council at para. 24 of his affidavit dated February 9, 2007 (AB at p. 66): "The maintenance of this confidentiality also enables Counsel to obtain information from a judge (who is the subject of a complaint) that might be important in explaining the judge's conduct but that might not be volunteered if it were to be made public. Indeed, judicial independence may be threatened if Council cannot give assurances of confidentiality about information provided by a judge regarding a judge's state of mind during the deliberative or decision-making process." I agree.
>
> [Emphasis added]

[129] Although a judicial council might opt to share a judge's response to a complaint with the complainant where that disclosure would increase (or at least not diminish) public confidence in the judiciary while also safeguarding judicial independence, disclosure is not required as a matter of procedural fairness.

[130] In *Baker, supra,* Justice L'Heureux Dubé noted that "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (para. 22).

[131] In this case, the decision being made was whether to forward Judge Brinton's Complaint to a review committee or to dismiss it. The Judicial Council complaints review process is investigative, not adversarial. There was no dispute between Judge Brinton and Chief Judge Williams. In filing her Complaint, which was 35 pages long and supplemented by over 100 pages of exhibits, the applicant had ample opportunity to put forward her views and evidence and to have them considered by the Chair. Her participatory rights ended there. Consistent with the extensive procedural fairness rights owed to Chief Judge Williams, the Chair gave her the opportunity to respond to the allegations against her before deciding whether to forward the Complaint to a review committee. The applicant had no right to receive a copy of the Chief Judge's response, nor to be given an opportunity to reply to it. Any duty of procedural fairness owed to the applicant was met when she filed her Complaint and had it considered by an impartial decision-maker. I find there was no breach of procedural fairness in this case.

Was the Chair's dismissal of the Complaint *ultra vires* the *Act*?

[132] As I noted earlier, I conclude that Judge Brinton has no standing to challenge the Decision on substantive grounds. However, in case I am wrong, I will go on to consider her arguments on the merits of the Chair's Decision.

[133] The applicant argues that the Chair acted outside the narrow bounds of the statutory authority conferred on him under s. 17B of the *Act* in several ways. First, the Chair dismissed the Complaint without proper grounds. The Chair, acting in the place of the Chief Judge, could only dismiss the Complaint for being outside the Judicial Council's jurisdiction, frivolous or vexatious, or unsupported by evidence. The applicant says the Chair made no such findings. Instead, the Decision only concluded that the Complaint is dismissed "by virtue of the authority in s. 17B(1)(a) of the *Act*." The Decision did not specify whether the dismissal was under subsections 17B(1)(a)(i), (ii), or (iii) – none of which, the applicant says, support a dismissal of her Complaint in any event.

[134] Second, the applicant submits that in dismissing the Complaint on the basis that he did, the Chair encroached on the authority granted to a review committee. The *Act* grants a review committee a broader discretion to dismiss complaints. The applicant submits that the Chair relied on the decision of the review committee empaneled to investigate a complaint against Judge Gregory Lenehan which found that the issue for the review committee is whether the alleged conduct "could" support a finding of judicial misconduct. The applicant submits that the Chair erred in adopting and applying the same test. She argues that the Chair mischaracterized his role, citing the following paragraphs at page 5 of the Decision:

> The question which I must decide is whether Chief Judge Williams engaged in judicial misconduct, as that term was defined in the Lenehan report… I must also be satisfied that the conduct in question could justify one of the dispositions other than dismissal set out in s. 17K of the Act.
>
> […]
>
> Having considered all of the material provided to me as well as the applicable principles, I conclude that the actions of Chief Judge Williams could not support a finding of judicial misconduct as defined in *Lenehan.*

[135] Finally, the applicant argues that the Chair's decision to invite submissions from Chief Judge Williams was *ultra vires* the *Act*. I previously rejected this argument when it was raised in the context of the duty of procedural fairness and I need not say anything further.

[136] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada noted that the reasonableness standard applies to a decision-maker's interpretation of the scope of its own authority:

> [109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[137] The Nova Scotia Court of Appeal recently summarized the reasonableness standard in *EMC Emergency Medical Care Inc. v. Canadian Union of Postal Workers*, 2024 NSCA 55:

> [32] In *Vavilov*, the majority's decision set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov's* approach. In *Paladin*, paras. 40-48, this Court summarized the principles from *Vavilov* and *Mason*.
>
> [33] Reasonableness is a "reasons first" approach. The reviewing court does not start with its view, i.e. it does not fashion its "own yardstick … to measure what the administrator did", and then proceed with "disguised correctness review". Rather, the reviewing court "must begin its inquiry into the reasonableness of the decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". (*Vavilov*, paras. 83-84; *Mason*, paras. 8, 58, 60 and 62-63)
>
> [34] Both the administrative decision's outcome and reasoning matter. The outcome always must be justifiable and, where reasons were required, the reasons must "justify" the outcome. The reviewing court "must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable". (*Vavilov*, paras. 86-87; *Mason*, paras. 58-59)
>
> [35] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification.

Context includes the evidence, submissions, record, the policies and guidelines that informed the decision maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov,* paras. 88-94, 97, 110; *Mason,* paras. 61, 67, 70)

…

[38] In *Vavilov,* paras. 108-109, the majority adopted Justice Rand's statement in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p. 140, that "there is no such thing as absolute and untrammelled 'discretion' ", as any discretion must accord with the legislative purposes for which it was given. The reasonableness standard applies to allay that concern. There is no doubt the interest arbitration board's award is subject to review for reasonableness.

[39] In the application of the standard, the breadth of the discretion afforded by the statute affects whether the decision is reasonable: *Vavilov,* paras. 88-90, 108, 110. The contextual factors bulleted above show the interest arbitration board is accorded significant flexibility to do its job.

[40] Nonetheless, the decision must satisfy *Vavilov*'s minimum standards, *i.e.* the "hallmarks of reasonableness". These are "justification, transparency and intelligibility". (*Vavilov,* paras. 99 and 103; *Mason,* para. 60)

[41] Intelligibility and transparency mean a decision will be unreasonable where "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (*Vavilov,* paras. 99 and 103; *Mason,* para. 60). A question-begging gap or incoherence on a critical point may impair intelligibility. Mere repetition of statutory language followed by a peremptory conclusion challenges transparency, "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment" (*Vavilov,* para. 102; *Mason,* para. 65).

[42] In this case, intelligibility and transparency require that the reviewing court be able to understand the arbitration board's reasoning from the board's reasons, supported by the permissible contextual aids I have noted above. (*Vavilov,* paras. 88-94, 97 and 110; *Mason,* paras. 61, 67 and 70)

[43] Reviewing courts "cannot expect administrative decision makers to 'respond to every argument or line of possible analysis' [citation omitted], or to 'make an explicit finding on each constituent element, however subordinate, leading to its final conclusion' "[citation omitted]. That is because "[t]o impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice". Rather, the questions for the reviewing court are: was the decision maker "actually alert and sensitive to the matter before it", were

the parties' concerns "heard", and does an omission reflect "inadvertent gaps and other flaws in its reasoning"? [*Vavilov*, para. 128; *Mason*, para. 74].

[44] The third hallmark is justification. In *Vavilov*, the majority explained:

> • An outcome derived from reasoning with a significant error is unreasonable. The reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived' [citation omitted]". (*Vavilov*, para. 102).
>
> • On the other hand, a "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. The flaw must be "sufficiently central or significant to render the decision unreasonable". (*Vavilov*, para. 100).
>
> • To assess whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker". If yes, "[t]he reasonableness standard requires that a reviewing court defer to such a decision". If no, the decision "fails to provide a transparent and intelligible justification" and is unreasonable. (*Vavilov*, paras. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).
>
> • *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that "constrain the decision maker", under this test, and their utility in a particular case: the governing statutory scheme, other statutes or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals. The factors are "not a checklist" and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[45] Subject to the above, it is unnecessary that the reviewing court agree with the administrative decision. The reviewing court neither is applying correctness nor, in this case, is it the appointed interest arbitrator.

[46] As to the remedy, when the administrative decision has "a fundamental gap or … an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision". The reviewing court may not "disregard the flawed basis for a decision and substitute its own justification for the outcome". (*Vavilov*, para. 96). Rather, the court should remit the matter to the decision maker. However, where "the interplay of text, context and purpose leaves room for a single reasonable

> interpretation … it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker", and the reviewing court may end the matter (*Vavilov*, para. 124 and to the same effect para. 142; *Mason*, paras. 71, 120-22).
>
> [47] This "robust" standard of reasonableness is meant to "strengthen a culture of justification in administrative decision-making" (*Vavilov*, para. 12; *Mason*, para. 63).

My review of the Chair's decision must be guided by these principles.

[138] Under the *Provincial Court Act*, the Chief Judge and the Chair exercise important powers to screen out unmeritorious complaints at any early stage. The *Act* sets out a tiered process through which every complaint must travel. At each stage, the Judicial Council has the power to dismiss a complaint if it does not warrant further consideration in the next step of the process. This power is consistent with the Judicial Council's role in safeguarding judicial independence, and the high bar for sanctionable judicial misconduct.

[139] At the outset, a complaint must be directed to the Chief Judge of the judge who is the subject of the complaint (either the Provincial Court or the Family Court). The Chief Judge assesses the complaint and has three options under s. 17B(1). First, the Chief Judge can dismiss the complaint with written reasons if:

1. the complaint is not within the jurisdiction of the Council,
2. the Chief Judge considers the complaint to be frivolous or vexatious, or
3. there is no evidence to support the complaint.

[140] Second, the Chief Judge can attempt to resolve the complaint. Third, the Chief Judge can refer the complaint to the Chair, with a recommendation that the complaint be:

(i) dismissed;

(ii) resolved with the agreement of the judge; or

(iii) referred to a review committee.

[141] The role of the Chief Judge under s. 17B has been characterized as a "screening function" to determine if there are "reasonable grounds to believe that the complaints should proceed to a review committee" (*Lenehan*, at para. 23). If the Chief Judge does not dismiss or resolve the complaint, they can refer it to the Chair

with a recommendation that the complaint be dismissed, resolved, or referred to a review committee. Pursuant to s. 17C, the Chair can either accept the recommendation and dismiss or resolve the complaint or empanel a review committee.

[142] When the Chair refers a complaint to a review committee, the committee must investigate and, pursuant to s. 17G, can either:

(a) dismiss the complaint;

(b) resolve the complaint with the agreement of the judge; or

(c) refer the complaint to a hearing before the Council.

[143] The role of the review committee is to determine "whether the allegations could objectively amount to findings of judicial misconduct that warrant a formal hearing (*Lenehan*, at para. 4).

[144] In deciding whether to refer a complaint for a hearing, the review committee applies the test set forth in *Lenehan* at paragraph 45:

> Whether the impugned conduct, if proven or admitted, could support a finding of judicial misconduct. That is, from the point of view of a reasonable, dispassionate, and informed public could it be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore the confidence?
>
> [Emphasis in original]

[145] After a hearing, the Council has the power under s. 17K to:

- dismiss the complaint;
- require the judge to obtain counselling, remedial treatment, or instruction; or
- impose other non-monetary sanctions that the Council considers appropriate.

[146] The Council may also recommend that the judge be removed from office if, in the opinion of the Council, the judge is unable to duly execute the function of the judge’s office by reason of:

(a) age or infirmity,

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by the judge's conduct or otherwise, in a position incompatible with the due execution of that office.

[147] The *Act* therefore provides three opportunities to dismiss a complaint before it proceeds to a hearing:

(a) the Chief Judge's discretion under s. 17B(a)(i);

(b) the Chair's discretion (on recommendation of the Chief Judge) under s. 17C; and

(c) a review committee's discretion under s. 17G.

[148] The broad discretion of the Judicial Council to screen out and summarily dismiss unmeritorious complaints, as provided for in ss. 17B and 17C of the *Act*, is crucial to the Council's ability to fulfill its role of protecting judicial independence and the integrity of the judiciary. Judicial councils across the country maintain similar screening mechanisms. In relation to CJC complaints, the court in *Cosgrove, supra* noted:

> 74 The experience of the Council is that the vast majority of ordinary complaints are dismissed summarily. Of the few that remain, almost all are resolved quickly with remedial measures or a letter of explanation. Only a miniscule percentage of ordinary complaints disclose conduct that warrants an inquiry, and even fewer result in a recommendation of removal.

[149] While this court has no evidence about the number of complaints filed in Nova Scotia, the Judicial Council has only empanelled a review committee on three occasions since Nova Scotia adopted the current judicial conduct scheme in 2000.

[150] If the Judicial Council was required to send all complaints to an investigative stage, even where they appear on their face to be lacking merit, brought for improper purposes, abusive of the complaints process, or otherwise not in the public interest, public confidence in the integrity of the judiciary would be seriously undermined. The public would have diminished confidence in the judiciary if complaints to the Council could be weaponized against judges in efforts to judge shop, punish a judge for an unfavourable ruling, attempt to incentivize a judge to rule in a particular way, or dictate the administration of the court.

[151] Turning to the Decision in this case, it took the form of a five-page letter addressed to Judge Brinton's counsel. The Chair began by accurately describing his role under s. 17B on page 1:

> Since Judge Brinton's complaint is against the Chief Judge of the Provincial Court, s. 17A(2) of the *Act* requires me, as Chief Justice, to exercise the power and duties set out in s. 17B. These are set out in ss. (1) and consist of the following:
>
> - Dismiss the complaint and provide written reasons if: (i) the complaint is not within the jurisdiction of the Judicial Council, (ii) I consider the complaint to be frivolous or vexatious or (iii) there is no evidence to support the complaint.
> - Attempt to resolve the complaint.
> - Refer the complaint to a review committee for further investigation.

[152] The Chair then noted that he had determined that a resolution of the Complaint was not feasible:

> In your submissions on behalf of Judge Brinton, you urge me to refer the complaint to a review committee.
>
> Given the nature of the complaint, I determined that a resolution was not feasible and, as a result, I did not pursue that option.

[153] This left him with two options – refer the complaint to a review committee or dismiss it for one of the three reasons under 17B(1)(a). The Chair continued on page 2:

> My role under s. 17B of the Act is to exercise a screening function which includes determining whether the complaint should be referred to a review committee for further investigation. I should only do so if there are reasonable grounds to believe the complaint raises issues of judicial misconduct of sufficient seriousness that could lead to one of the sanctions set out in s. 17K of the Act which are:
>
> - Requiring the judge to obtain counselling, medical treatment or instruction.
> - Imposing appropriate non-monetary sanctions including reprimand.
> - Recommending the judge be removed from office as a result of inability to duly execute the function of their office.

[154] The Chair proceeded to cite *Lenehan* in relation to "the test to be applied in reviewing complaints against Provincial Court judges" and held that he should apply the same test in determining whether further investigation by a review committee was warranted:

> The review committee appointed to investigate complaints against The Honourable Judge Gregory Lenehan conducted an extensive review of judicial misconduct jurisprudence and in their report described the test to be applied in reviewing complaints against Provincial Court judges as follows (para 45):
>
> > Whether the impugned conduct, if proven or admitted, could support a finding of judicial misconduct. That is, from the point of view of a reasonable, dispassionate, and informed public could it be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore the confidence?
>
> I have concluded I should apply the same test in determining whether further investigation by a review committee is warranted with respect to the complaint of Judge Brinton. (page 2)

[155] The Chair went on to explain the distinction between legal error and judicial misconduct, which he considered important and applicable to his preliminary screening decision:

> The review committee in *Lenehan* also commented on the distinction between legal errors and judicial misconduct in paragraph 46 of their report:
>
> > In considering this, the Review Committee must be mindful of the distinction between legal errors and judicial misconduct, as earlier referenced. Appellate courts exist to deal with the former; Judicial Council regimes exist to deal with the latter. While there are some cases where judicial error and judicial misconduct can co-exist, legal errors, without more, do not amount to judicial misconduct.
>
> I believe this distinction is important and applicable, by analogy, to Judge Brinton's allegation that Chief Judge Williams made decisions or took actions which exceeded the scope of her authority as Chief Judge. Even if Chief Judge Williams acted in excess of her authority that, alone, would not amount to judicial misconduct. Something more would be required. (page 2)
>
> [Emphasis added]

[156] In my view, contrary to Judge Brinton's submissions, the Chair's reliance on the *Lenehan* test in determining whether to refer the Complaint to a review committee did not amount to usurping the role of the review committee. In exercising his role under s. 17B, the Chair was required to engage in a limited merits assessment to the extent required to determine whether the Complaint was within the Judicial Council's jurisdiction, was frivolous or vexatious, was unsupported by

the evidence, or ought to be referred to a review committee. This screening process, designed to weed out unmeritorious complaints, necessarily required the Chair to consider whether Chief Judge Williams's conduct could ever meet the test for judicial misconduct and, if so, ought to be referred to the review committee for further investigation.

[157] The Chair proceeded to review the facts which were "well documented and set out in detail in Judge Brinton's complaint" (page 5). He then wrote:

> Chief Judge Williams was responsible for assigning judicial duties, including which judges were to preside in which courtrooms. After consultation with the judges of her court, she decided she would only assign fully vaccinated judges to sit in court. This was consistent with the practice of other courts as well as the direction given to court staff by the government.
>
> The decision to only assign fully vaccinated judges for court hearings was made while Judge Brinton was on medical leave. However, it would have applied to her if she had been cleared to return to work. Chief Judge Williams had several communications with Judge Brinton about what would happen in this circumstance. One possibility, which Chief Judge Williams identified, was to have Judge Brinton work virtually from home; although there were concerns about whether there was an adequate volume of this work as well as what would happen with respect to the in- person hearings in Judge Brinton's courtroom. If there was insufficient virtual work available, Chief Judge Williams felt she might have to suspend Judge Brinton under s. 15(2) of the Act and refer the issue to the Judicial Council as required by ss. (3). Since Judge Brinton was not cleared to return to work, Chief Judge Williams was never required to decide what work to assign to Judge Brinton and whether there might be other options to consider.
>
> Chief Judge Williams was responsible for assessing the medical evidence and approving requests for short-term medical leave by Provincial Court judges. The forms submitted by Judge Brinton in the fall of 2021 contained no information concerning her illness or disability and Chief Judge Williams decided she needed additional information concerning this. She wrote to Judge Brinton on February 22nd requesting additional information and received a response on March 21st which did not include the requested information. On March 28th she wrote directly to Judge Brinton's doctor with a copy to Judge Brinton requesting the information. Judge Brinton, as she was entitled to, did not consent to additional medical information being provided by her physician. That was the end of the issue.
>
> [Emphasis added]

[158] The Chair proceeded to make the following statement that the applicant argues demonstrates the Chair's misunderstanding of his role under s. 17B:

> Judge Brinton says the sequence of events starting in the fall of 2022 were very difficult for her and created significant stress. She says she felt pressure as a result of the decisions made and actions taken by Chief Judge Williams and the other judges of the Provincial Court in response to the COVJD pandemic. The question which I must decide is whether Chief Judge Williams engaged in judicial misconduct, as that term was defined in the Lenehan report. This requires actions which, viewed objectively, could seriously undermine the impartiality, integrity, and independence of the judiciary to the extent that the public's confidence in the ability of Chief Judge Williams to perform her judicial duties has been undermined. I must also be satisfied that the conduct in question could justify one of the dispositions other than dismissal set out ins. 17K of the Act.
>
> [Emphasis added]

[159] While I agree with Judge Brinton that the underlined statement is not a proper characterization of the Chair's role, or indeed the role of the review committee, it does not necessarily follow that the Decision is unreasonable. The standard of reasonableness is not a standard of perfection. As the Supreme Court of Canada explained in *Vavilov, supra*, any flaw or misstep must be sufficiently central or significant to render the decision unreasonable:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[160] Although the Chair misstated his role as being to decide whether Chief Judge Williams engaged in judicial misconduct, it is clear from the rest of the Decision that he did not actually answer that question. Instead, consistent with his earlier observation that referral to the review committee for further investigation would only be appropriate where, on preliminary assessment, the conduct in issue could support a finding of judicial misconduct, he concluded:

> Having considered all of the material provided to me as well as the applicable principles, I conclude that the actions of Chief Judge Williams could not support a finding of judicial misconduct as defined in *Lenehan*. Her decisions concerning how to assign judicial work and what medical information was required to support Judge Brinton's medical leave fall within her authority as Chief Judge. The reasons

> for these decisions and the methods of implementation would not warrant any of the sanctions found in s. 17K of the Act.
>
> By virtue of the authority in s. 17B(1)(a) of the Act the complaint of Judge Brinton is dismissed. (page 5)
>
> [Emphasis added]

[161] While the applicant submits that the Chair's failure to indicate whether he was dismissing the Complaint under s. 17B(1)(a)(i), (ii) or (iii) makes the Decision unreasonable, I disagree. In my view, it is implicit from the Decision that the Chair determined that the Complaint was "frivolous or vexatious". The Chair's conclusion that the facts underlying the Complaint, even if proved, could not support a finding of judicial misconduct is consistent with the jurisprudence concerning the test for a frivolous complaint or proceeding. A frivolous complaint or proceeding has been described as one that cannot possibly succeed because it:

- "clearly has no merit" – *Catford v. The Health Professions Appeal and Review Board*, 2017 ONSC 7411, at para. 24.
- "will necessarily fail" – *R. v. Haevischer*, 2023 SCC 11, at para. 67.
- is "obviously unsustainable" – *Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 79, at para. 25.
- has "no rational argument based upon the evidence or law in support of that claim" – *Mercier*, at para. 30.

[162] As the Supreme Court of Canada stated in *Haevisher*, the "key characteristic" of a frivolous application is the "inevitability or necessity of failure" (para. 67).

[163] For these reasons, I find that the Decision to dismiss the Complaint was not *ultra vires* on the basis that it dismissed the Complaint without making any of the necessary findings under s. 17B(1)(a)(i)-(iii), or that the Chair arrogated the authority granted to the review committee.

Was the Decision to dismiss the Complaint reasonable?

[164] The applicant argues that the Decision to dismiss her Complaint does not withstand scrutiny upon review on a standard of reasonableness. In particular, she argues that the decision is untenable in light of the legal principles of judicial independence and impartiality. The applicant says that in her Complaint, she made substantial preliminary submissions on the nature of judicial independence and how

Chief Judge Williams' conduct had interfered with her judicial independence. She also made analogy to the cases of *Rees et al. v. Crane*, [1994] 2 A.C. 173 (Trinidad & Tobago P.C.), and *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABQB 309, which were both judicial review proceedings that involved findings that a Chief Justice or Chief Judge had exceeded their authority and made decisions affecting puisne judges which went beyond administrative management.

[165] The applicant further argues that the Chair's Decision was unreasonable because he failed to refer to any of the cases she cited, and he entirely failed to consider the issues of judicial independence engaged by the Chief Judge's conduct.

[166] The applicant's submissions on the reasonableness of the Chair's Decision are grounded in the same flawed understanding of the role of the Judicial Council and the nature of judicial misconduct that characterized her submissions on standing and procedural fairness.

[167] It was not the role of the Chair, in exercising his screening function, to determine whether the facts alleged in the Complaint could support a finding that Chief Judge Williams exceeded her authority by introducing a mandatory vaccination policy that was unconstitutional (whether as a violation of Judge Brinton's judicial independence or her s. 2(b) *Charter* rights) or by contacting Judge Brinton's physician in an effort to carry out her responsibility to decide whether to authorize Judge Brinton's short-term illness claim and to assess her return-to-work request.

[168] When Chief Judge Williams sought medical documentation to support Judge Brinton's short-term disability claim, she acted within her power under the *Act* and on advice (Wendy Hudgins email dated March 23, 2022 – albeit incorrect advice that did not address the correct process to obtain the medical evidence) as Chief Judge Williams had never before had to exercise this function (NS Reg 250/83 and Part 2 of the Judges Income Protection Plan).

[169] However, what should come from this acknowledged mistake? Could this support a finding of judicial misconduct? Removal from office? I think not. Such would be a profound overreach in the circumstances.

[170] As the Chair noted, "[e]ven if Chief Judge Williams acted in excess of her authority that, alone, would not amount to judicial misconduct. Something more would be required" (page 2).

[171] *In the Matter of the Complaint Against Clyde K Wells* (March 12, 2003), the Judicial Conduct Committee of the CJC held that good faith exercises of discretion by a Chief Justice (or Chief Judge) in carrying out their role "clearly fall outside the realm of judicial misconduct":

> There can be no doubt that all of your actions in this matter were taken in good faith, in conscientiously seeking to fulfil your role as Chief Justice, in accordance with your view of the position the Canadian Judicial Council. Indeed, the Council's 1999 paper on The Judicial Role in Public Information, states that
>
> > Unfair criticism and inaccurate reporting can damage the reputation of judges and erode public respect for the courts in the administration of justice.
>
> …
>
> I have concluded that your actions in this matter involve the exercise of discretion in carrying out your role of Chief Justice, without any oblique or improper motive, and with the best of intentions. Accordingly, they clearly fall outside the realm of judicial misconduct and this complaint file is accordingly being closed.

[172] Without even a hint of the "something more" required for a finding of judicial misconduct, like an allegation or any evidence that Chief Judge Williams was acting in bad faith, it was entirely reasonable for the Chair not to engage with the applicant's authorities considering judicial independence or judicial review decisions considering the proper scope of a Chief Judge's authority.

[173] The Chair's role in screening the Complaint was to determine whether there were reasonable grounds to believe that it should proceed to a review committee which, as noted earlier, necessarily required him to consider whether Chief Judge Williams's conduct could ever meet the test that would be applied by the review committee. He concluded, quite reasonably in my view, that the facts underlying the Complaint could never support a finding of judicial misconduct and, as a result, there were no reasonable grounds to believe that the Complaint should proceed to a review committee. While it would have been preferable for the Chair to have identified the subsection of the *Act* he was relying on to dismiss the Complaint, the Complaint was destined to fail, making it frivolous.

[174] The Chair's Decision might not have been perfect, but when I read it holistically and contextually, I find that it bears the hallmarks of reasonableness – justification, transparency and intelligibility. The Chair's Decision was reasonable.

[175] If the Decision was not reasonable, it is still neither appropriate nor necessary to send the matter back to the Chair given his broader powers under s. 17C of the *Act*. Given this legislative provision, the Chair could have made a recommendation to himself under s. 17B(1)(c) that it be dismissed under s. 17C. Furthermore, given the Complaint, and the significant materials and factual background furnished in the Record, the decision would be the same (*British Columbia (Police Complaint Commissioner) v. Sandu*, 2024 BCCA 17).

Was the Chair required to do a *Doré* analysis?

[176] The applicant submits that the Decision should be set aside because the Chair was required to engage in a *Doré* analysis and failed to do so. The applicant submits that a *Doré* analysis was required because Chief Judge Williams' conduct limited Judge Brinton's right to freedom of expression under s. 2(b) of the *Charter* and violated the constitutional guarantee of judicial independence, and the Decision to dismiss the Complaint "tacitly approved" of that conduct. I disagree.

[177] The Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12, "established an approach for reviewing discretionary administrative decisions that limit *Charter* protections" (*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 13, at para. 60). It is only triggered "[o]nce the reviewing court has determined that the impugned administrative decision infringes *Charter* rights or limits the values underlying them" (*Commission scolaire*, at para. 67).

[178] The applicant's argument that *Doré* applies is premised on the assertion that Chief Judge Williams' decisions interfered with her judicial independence and freedom of expression. Although Judge Brinton has continued to insist that she was "constructively suspended", the record establishes and the Chair concluded that she was on medical leave at the time she alleged that Chief Judge Williams prevented her from performing her judicial duties. During that period, Chief Judge Williams did request medical documentation to substantiate Judge Brinton's absences. However, the Supreme Court of Canada has held that requiring a judge to substantiate their use of medical leave is not an infringement of their judicial independence (*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, at para. 207; *Valente v. The Queen*, [1985] 2 S.C.R. 573, at pp. 711-714). As for Judge Brinton's allegations that Chief Judge Williams infringed her freedom of expression, those allegations were never put to the Chair at first instance.

[179] More fundamentally, however, the applicant's arguments are premised on the incorrect assumption that the Judicial Council's role is to reverse or uphold the conduct complained of. It is not. *Doré* applies only if the decision under review has affected a *Charter* right or value. It does not apply just because – as here – the underlying conduct is alleged to have engaged the *Charter*. As the Federal Court explained in *Best v. Canada*, concerning a similar screening decision by the Executive Director of the CJC:

> [49] As for the Applicant's arguments that his legal and Charter-protected rights were violated by the Executive Director's decision to screen out his complaint, I find these to be wholly without merit and completely answered by *Taylor v Canada (Attorney General)*, [2002] 3 FC 91 at paras 40-44, 2001 FCT 1247, aff'd *Taylor v Canada (Attorney General)*, 2003 FCA 55 at para 114, [2003] 3 FC 3. The decision under review is that of the Executive Director and not Justice Shaughnessy's exercise of discretion or conduct in the context of judicial decision-making. The Applicant's arguments in this regard are premised upon an assumption which presupposes that Justice Shaughnessy's conduct amounted to judicial misconduct. The only rights affected by the complaint were those of Justice Shaughnessy, not those of the Applicant.
>
> [Emphasis added]

[180] The only discipline decisions reviewed under the *Doré* framework are ones that have allegedly had a disproportionate impact on the *Charter* rights of the member under investigation. See, e.g., *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425; *Doré v. Barreau du Québec*; *Groia v. Law Society of Upper Canada*, 2018 SCC 27; *Zuk v. Alberta Dental Association and College*, 2018 ABCA 270; *Foo v. Law Society of British Columbia*, 2017 BCCA 151146. No decision has applied the *Doré* framework because of the impact on the complainant because a discipline decision does not affect their rights.

[181] I find that the Chair was not required to conduct a *Doré* analysis.

Conclusion

[182] Errors in judicial decision-making – without more – do not amount to judicial misconduct. Instead, they are matters properly dealt with through the normal appeal process or other review proceedings. As the Supreme Court of Canada explained in *Moreau-Bérubé*, *supra*, errors only rise to the level of judicial misconduct when "it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole" in a way that "is not curable by the appeal process" or any other mechanism of review.

[183] The Complaint advanced against Chief Judge Williams could not support a finding of judicial misconduct. Consequently, it is both important and necessary that the Complaint be screened out early in the process.

[184] The applicant clearly stated that she is not challenging any of the decisions reached by Chief Judge Williams. In fact, in correspondence addressed to the Chair dated September 11, 2023, the applicant stated:

> …the Respondent should never have unilaterally created a vaccination policy whereby only fully vaccinated judges would be assigned to sit in courtrooms and hear cases. Where this allegation could conceivably form the basis of a judicial review proceeding, in this case Judge Brinton is not seeking to challenge the policy itself or have it set aside.

[185] I am constrained by the case the parties have presented. This is not a judicial review of a vaccine mandate, yet many of the applicant's arguments seem to be geared to such a case. The applicant conflates the misconduct decision with the decision by Chief Judge Williams to enact a vaccination policy. This policy or the decision to put one in place has never been the subject of a judicial review and is not before me.

[186] What was advanced was a complaint of judicial misconduct. A complaint that Chief Judge Williams, in reaching a decision to require vaccination of the Provincial Court Judges, a decision made in consultation with and having overwhelming support from Provincial Court Judges, could be the basis of a finding of judicial misconduct by the Chief Judge. This is in the context of a global pandemic, where the considerations and motives of Chief Judge Williams were:

> In the end, we felt we each had an obligation to protect each other, court staff, counsel, and the public. Most of the people who attend court do not have a choice about whether to attend court. Many, including criminal accused persons and witnesses testifying under a summons, will suffer severe legal consequences if they do not. We felt that we had an obligation to minimize their risk as a basic matter of health and safety – particularly people who were immunocompromised or people who could not get vaccinated themselves. Our court's failure to lead was distracting from the tireless work of our judges to deliver justice in challenging times, undermining confidence in the administration of justice, and perpetuating a false impression that the judges viewed themselves to be above the laws and public health guidelines that applied to other Nova Scotians.
>
> [Emphasis Added]

[187] Based on the case law, I have concluded that the applicant does not have standing to challenge the substantive decision reached by the Chair. However, the applicant has a right to procedural fairness, on the lower end of the spectrum, which was met by the Chair.

[188] Despite concluding the applicant lacked standing, I went on to conclude that the Chair's decision was not *ultra vires* and there is no case authority requiring the Chair, in these particular circumstances, to engage in a *Doré* analysis. After reviewing the Decision, the Record and all the case authorities, I conclude the Decision bears all the hallmarks of reasonableness – justification, transparency and intelligibility.

[189] Even if I had concluded otherwise, however, I would not remit the Complaint to the original decision-maker. As noted by the Supreme Court of Canada in *Vavilov*, *supra*, "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (para. 142). This is such a case. The underlying facts to the Complaint are undisputed, making further investigation unnecessary. In my view, the dismissal of Judge Brinton's Complaint at the screening stage of the judicial discipline process is inevitable. The Chair's conclusion that the allegations in the Complaint could not support a finding of judicial misconduct is the only reasonable one available.

Brothers, J.