**NOVA SCOTIA JUDICIAL COUNCIL**

B E T W E E N:

THE HONOURABLE RICKCOLA BRINTON,
A JUDGE OF THE PROVINCIAL COURT OF NOVA SCOTIA

Complainant

and

THE HONOURABLE PAMELA S. WILLIAMS,
CHIEF JUDGE OF THE PROVINCIAL
AND FAMILY COURTS OF NOVA SCOTIA

Respondent

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# COMPLAINT

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**June 7, 2023**

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**PART I - OVERVIEW**

1. Pursuant to the provisions of the *Provincial Court Act*, RSNS 1989, c. 238 (the "**Act**"), The Honourable Rickcola Brinton, Judge of the Provincial Court of Nova Scotia (the "**Complainant**") presents this complaint against the respondent, The Honourable Pamela S. Williams, Chief Judge of the Provincial Court of Nova Scotia (the "**Respondent**").

2. Section 17A(2) of the Act provides that where a complaint is made against the Chief Justice 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. In this case, since the Respondent is currently Chief Judge of both the Provincial and Family Courts of Nova Scotia, the Complainant therefore presents this complaint to the Chief Justice of Nova Scotia for consideration.

3. This complaint raises issues of grave importance to the proper functioning of the judiciary, both in Nova Scotia and across Canada. It engages the principles of individual judicial independence, judicial impartiality and, by extension, the rule of law itself. It concerns the working relationship between a chief judge and a puisne judge, and the proper scope of the chief judge's authority within that relationship.

4. In this case, that working relationship has been irreparably damaged. Various actions taken by the Respondent against the Complainant between October 2021 and March 2022 constitute serious violations of the Complainant's individual judicial independence and appearance of judicial impartiality.

5. First, in mid-October 2021, the Respondent applied undue pressure on the Complainant to disclose her COVID-19 vaccination status, despite the Complainant's clear indication that she was unwilling to do so in order to (a) observe medical privacy legislation in Nova Scotia; and (b) preserve both her and the Court's collective appearance of judicial impartiality.

6. Second, on or about February 22, 2022, in response to the Complainant's unwillingness to disclose her COVID-19 vaccination status, the Respondent unilaterally decided to (a) assume that the Complainant was not vaccinated against COVID-19; (b) suspend the Complainant; and (c) refer her to the Judicial Council, ostensibly to discipline her. At no time was the Complainant given a meaningful opportunity to prepare for or respond to the Respondent's decisions.

7. Third, on or about March 28, 2022, while the Complainant was away from work on short-term disability leave due to various personal issues and illness, the Respondent improperly attempted to obtain the Complainant's private medical records in connection with the Complainant's disability insurance claim, going so far as to write directly to the Complainant's physician to request the records directly from him, without the Complainant's knowledge or consent. By then, the Complainant had already been on disability leave since October 25, 2021 with the Respondent's approval, having presented a formal "*Proof of Illness*" form to the Respondent, signed and dated by the Complainant's physician on November 15, 2021. Although the Complainant had by then been receiving disability benefits for several months, the Respondent's letter to the Complainant's physician advised that without the requested medical records, the Respondent was "*not able to authorize the 100 days of short-term illness taken*".

8. The Respondent's actions, whether taken individually or together, seriously violated her ethical obligation to act with integrity towards the Complainant, as well as several aspects of the principles both of judicial independence and impartiality.

9. First, by applying pressure to the Complainant concerning the disclosure of her vaccination status, the Respondent interfered with the Complainant's medical privacy rights, her judicial independence and her ability to preserve her own appearance of impartiality and, by extension, the appearance of impartiality of the Court itself.

10. Second, by unilaterally suspending the Complainant, the Respondent improperly took steps deliberately intended to prevent the Complainant from performing her judicial duties, further compromising the Complainant's judicial independence.

11. Third, by representing to the Complainant that she would be referred to the Judicial Council simply for declining to divulge her COVID-19 vaccination status, the Respondent misused the authority granted to her under section 17D(2) of the Act.

12. Fourth, by interfering with the Complainant's short-term disability process, the Respondent also put the Complainant's financial security in jeopardy, compromising her independence further still.

13. Regrettably, at every step of the way, the Respondent acted in excess of her authority as Chief Judge, leaving the Complainant no choice but to present this complaint, in order to protect both her own independence and impartiality as a Judge of the Provincial Court, and the independence of the Court itself.

14. Accordingly, pursuant to sections 17B(1)(c)(iii) and 17C of the Act, the Complainant asks the Chief Justice to refer this complaint to a review committee for further investigation.

**PART II - FACTS**

15. On October 6, 2021, the Government of Nova Scotia announced that it would require all employees of the Province to be vaccinated against the virus that causes COVID-19. The requirement went into force on November 30, 2021. Any employees who were unvaccinated on that date would be placed on unpaid leave.[1]

16. Provincial Court judges were unaffected by the Government's policy. However, all court staff, including judicial assistants, were subject to the new requirement.

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[1] See **Exhibit "A"**, News Release - "*Vaccination Required for Provincial Government Employees*" dated October 6, 2021.

17. In mid-October, the Respondent e-mailed the puisne judges on the Provincial Court, advising that the Nova Scotia bar had inquired about their vaccination status.[2] The Respondent asked the other members of the Court whether they would agree to share their vaccination statuses with each other and whether the Court should share that information with the bar in the form of a private statement.

18. Multiple judges responded stating that they were vaccinated and expressing support for disclosure of vaccination status.[3] One judge indicated he was vaccinated and joked that "*the government should know this from the micro chip implanted in me in the shots*".[4]

19. Two judges expressed hesitation short of disagreement. For example, one judge noted that there may be privacy concerns for judges who cannot be vaccinated for a "*legitimate medical reason*" while adding that he had less sympathy for judges who were unvaccinated for other reasons.[5]

20. Though fearing a possible backlash, the Complainant responded to the group, stating:

> 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.[6]

21. In response to the Complainant's comment, another judge replied, "*Either we all voluntarily declare we are vaccinated, or the Chief should use her powers and order that all the [Provincial Court] judges be vaccinated"*.[7]

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[2] See **Exhibit "B"**, Various e-mails from and to Chief Judge Williams, dated September 29-November 5, 2021.
[3] *Ibid*.
[4] *Ibid*, "E-mail from Scovil J. dated September 29, 2021". **See page B-5 of Exhibit "B"**.
[5] *Ibid*, "E-mail from Ross J. dated September 29, 2021" (**see page B-11 of Exhibit "B"**) and "E-mail from Whalen J. dated September 29, 2021." (**see page B-18 of Exhibit "B"**).
[6] *Ibid*, "E-mail response of Brinton J. dated October 1, 2021." (**See page B-27 of Exhibit "B"**).
[7] *Ibid*, E-mail from Begin J. dated October 11, 2021. (**See page B-32 of Exhibit "B"**).

22. On October 7, 2021, the Respondent requested to meet with the Complainant.[8] When they spoke, the Respondent attempted to persuade the Complainant to change her mind. The Complainant explained that her position was a matter of conscience and a result of prayerful contemplation. The Complainant told the Respondent that she felt compelled to speak up because she believed that the COVID-19 vaccine question was a political issue causing division and that the Court should remain neutral.

23. Trying to find a workable solution to the matter, the Complainant then offered to self-test for COVID-19 as often as needed. The Respondent rejected the Complainant's offer to because that option was not available to court staff.

24. The Respondent then advised the Complainant that the only option (to which the Respondent in any event doubted that the other judges would agree) was to limit her work to presiding over arraignment court from home if the other judges agreed to take on the trials assigned to her. The Complainant was willing to co-operate but shared the Respondent's doubt that the other judges would agree to such an arrangement.

25. The Respondent then advised the Complainant that if the above possible solution was not accepted by the other judges, then the Complainant would have to find another solution.

26. It is important to note that at this time, there was no requirement for Provincial Court judges to be fully vaccinated against COVID-19 for them to perform their duties. It is therefore unclear why the Respondent believed that the Complainant's only option was to work from home and preside over arraignment court.

27. In any event, the Complainant shared her concern with the Respondent that it was difficult to speak openly about the issue. The Respondent agreed, and assured the Complainant that she

[8] *See* **Exhibit "C"** – E-mails between Brinton J. and Williams CJ. dated October 7, 2021.

would not seek to suspend her or refer her to the Judicial Council. At no time did the Respondent advise the Complainant that she might do so in the future, or that the Complainant had done (or had not done) anything that would warrant any form of discipline at all. At no time did the Respondent advise the Complainant that she was considering implementing a vaccination policy.

28. Nonetheless, on November 1, 2021, the Respondent sent a follow-up e-mail to the puisne 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.[9]

29. The Respondent did not explain how she believed she had the authority to make such a decision.

30. On November 25, 2021, contrary to her earlier advice to the Complainant and the other puisne judges, and without the Complainant's prior knowledge, the Respondent issued a public statement announcing that:[10]

> …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.

31. Meanwhile, at the end of October 2021, the Complainant's husband tested positive for COVID-19. The Complainant and the rest of their family soon tested positive as well. Starting on October 25, 2021, the Complainant maintained a 10-day quarantine as required.

32. Upon recovering and completing her quarantine, the Complainant found herself suffering from overwhelming exhaustion and anxiety. The Complainant visited her doctor, Dr. Babatolu,

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[9] See **Exhibit "B"**, e-mail from the Respondent to the puisne judges, dated November 1, 2021. (**See page B-40 of Exhibit "B")**.

[10] **Exhibit "D"** - Statement from the Chief Judge regarding the Vaccination Status of Provincial Court Judges dated November 25, 2021.

and informed him that the greatest source of her anxiety was work e-mails. She explained that the anxiety was so severe that her body would shut down. Dr. Babatolu advised the Complainant to go off work for four weeks during which time he instructed her to avoid reading e-mails.

33. Thus, on or about November 15, 2021, the Complainant submitted a "*Proof of Illness*" form, signed and dated by Dr. Babatolu, to the Respondent, thereby satisfying the requirements set out at section 9(1) of Part 2 of the *Supplementary Report on Income Protection* prepared by the Nova Scotia Tribunal on Provincial Court Judges' Salaries and Benefits, which requires a judge to provide "*evidence of a disability*" to the "*satisfaction of the Chief Judge*".[11] Notably, the "*Proof of Illness*" form did not request or require the Complainant to provide medical records of any kind to satisfy the "evidentiary" requirements of section 9(1).[12]

34. During her short-term disability leave, the Complainant appropriately did share (and continued to share) the details of her medical diagnosis and treatment plan with Sarah Giavroutas, Disability Case Manager with Lifeworks, the group insurance benefits administrator at that time for government employees and Provincial Court judges.

35. On December 15, 2021, while the Complainant was still on short-term disability leave, the Respondent sent an e-mail to the Complainant advising that the other judges were unwilling to take on her scheduled trials. The Respondent added: *"…they are of the view that a judge must perform all aspects of the work, including trials. I agree with them.*"[13] As she was avoiding work e-mails pursuant to her doctor's orders, the Complainant did not see the e-mail at this time.

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[11] See **Exhibit "E"** – *Supplementary Report on Income Protection,* prepared by the Nova Scotia Tribunal on Provincial Judges' Salaries and Benefits. (**See page 17 of Exhibit "E"**).

[12] See **Exhibit "F"** - Proof of Illness form, dated November 15, 2021.

[13] The Complainant was unable to locate this e-mail in her records. However, the Respondent referred to the e-mail in her later letter to the Complainant dated February 22, 2022. See **Exhibit "G"**, Letter from Chief Judge Williams dated February 22, 2022, at p. 3.

36. On December 17, 2021, the Complainant informed the Respondent that she had been told to take another 4-6 weeks off of work by her doctor. The Complainant submitted a second Proof of Illness to this effect.[14]

37. On February 22, 2022, the Respondent wrote a letter to the Complainant stating that she would not approve the Complainant's request for short-term disability benefits unless she provided "*evidence of a disability*." Note that the Respondent also stated that the "Proof of Illness" form previously provided was insufficient in her eyes because it lacked "*information on the nature of [the] illness.*"[15]

38. This was the first time that Respondent did anything to indicate that the Complainant's "*Proof of Illness*" form was not enough to satisfy the "evidentiary" requirement of section 8(1).

39. In any event, the Respondent went on to again raise the issue of the Complainant's vaccination status in the February 22 Letter. She wrote:

> In the event you are medically cleared to return to work, there is still the issue of your vaccination status. As of November 5, 2021, you were still unwilling to divulge your private vaccination status. In my December 15, 2021, e-mail to you, I reiterated the need for you to be fully vaccinated upon your return, in keeping with the Provincial Court policy; see enclosed. If you continue to choose not to disclose your vaccination status, you will be considered non-vaccinated and unable to preside over in-person trial and sentencings in the Court Room, which is a large part of the daily functions of a Provincial Court Judge. Regrettably, I will have no recourse other than to suspend you and refer the matter to the Judicial Council.[16]

40. This was the first time that the Complainant heard that she was to be suspended, that she would be deemed to be unvaccinated, or that she would be permanently unable to preside in court, all because of declining to divulge her vaccination status, which the Respondent acknowledged in

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[14] See **Exhibit "H"**, Proof of Illness form, dated December 17, 2021.
[15] See **Exhibit "G".**
[16] *Ibid* at p. 3.

the February 22 Letter as "*private*". It was also the first time that the Complainant heard that she would be referred to the Judicial Council.

41. The Complainant replied in writing indicating that she would apply for long-term disability.

42. On March 21, 2022, Dr. Babatolu provided a note confirming that the Complainant would be off work due to medical reasons from December 17, 2021 until at least May 16, 2022.[17]

43. In April 2022, the Complainant was approved for long-term disability by Manulife.

44. Before then, however, on March 28, 2022, without any warning or further attempt to contact the Complainant, and without the Complainant's consent, the Respondent wrote to Dr. Babatolu to request that he supply her with details of the Complainant's medical issues. The Respondent advised:

> I am writing to request a medical report for the timeframe October 25, 2021, to March 21, 2022, outlining the treatment plan, anticipated date of resolution, and/or restrictions and limitations to determine if Judge Brinton could have operationally performed her job with or without modifications to duties/hours.
>
> As Chief Judge, I am tasked with authorizing short-term illness claims for Judges of the Provincial Court. Without this information, regrettably I am not able to authorize the 100 days of short-term illness taken.[18]

45. The Complainant received a copy of the letter but did not realize it had been addressed to her doctor until she received a call from Dr. Babatolu informing her of the letter he had received. The Complainant became concerned that the Respondent's statement that she was "*not able to authorize the 100 days of short-term illness taken*" (which had already been incurred by this point) meant that the Respondent would seek or was seeking to recover the benefits that had already been

[17] **Exhibit "I"** - Note from Dr. Babatolu, dated March 21, 2022.
[18] **Exhibit "J"** - Letter from Chief Judge Williams to Dr. Babatolu, dated March 27, 2022.

paid to the Complainant. During the call, the Complainant declined to consent to the release of her records.

46. Thereafter, the Respondent's office called Dr. Babatolu, following up on the request in the Respondent's earlier letter. Dr. Babatolu's office called the Complainant a second time to ask if she had given consent for the release of her medical information. The Complainant repeated that she had not.

47. Ultimately, Dr. Babatolu did not provide the Respondent with the requested records. By this time, the Complainant had already provided the necessary information to her long-term disability benefits provider, Manulife.

48. In April 2022, the Complainant was approved for long-term disability by Manulife. .

49. The Complainant has received no updates or further communication from the Respondent since April 2022. Given that the Complainant was unable to comply with the condition imposed by the Respondent in the February 22 Letter, the clear terms of the letter indicate that the Complainant was suspended and that the matter would be referred to the Judicial Council.

**PART III – LAW & ISSUES**

50. The Complainant relies on the below legal principles and preliminary submissions in support of her complaint. The Complainant reserves the right to rely on additional principles and make additional submissions through her counsel, as needed, as this matter moves forward.

**Judicial Independence**

51. This complaint engages the principle of judicial independence, which requires that the relationship between the courts and others "*must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice*."[19]

[19] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 37 [*Mackin*].

52. The principle of judicial independence finds expression both in the Preamble to the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*.[20] They provide:

> **Preamble:**
>
> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:[21]
>
> **Section 11(d):**
>
> 11 Any person charged with an offence has the right […]
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;[22]

53. Whereas s. 11(d) of the *Charter* applies to those who are charged with an offence, the constitutional guarantee of judicial independence is not limited *only* to the scope of s. 11(d) - the broader principle that is "*embodied in the Preamble*" applies also "*to provincial courts and the judges of those courts when they hear non-criminal matters*."[23]

54. Moreover, the principle extends even deeper than the above provisions. The Supreme Court of Canada has written that judicial independence is "*at root an unwritten constitutional principle…exterior to the particular sections of the Constitution Acts*", which can be "*traced to the Act of Settlement of 1701.*"[24]

55. In *Beauregard v. Canada*, at paragraphs 25-29, Chief Justice Dickson discussed the foundations of judicial independence which, in Canada, derive from: (a) Canada's federal structure with a constitutional division of powers between federal and provincial governments; (b) the

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[20] *Ibid*.
[21] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK).
[22] *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule B, *Canadian Charter of Rights and Freedoms*, s. 11(d) [the *Charter*].
[23] *Therrien (Re)*, 2001 SCC 35 at para. 68 [*Therrien*].
[24] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at para. 83 [*Remuneration Reference*].

enactment of the *Charter of Rights and Freedoms*; and (c) the preamble to the *Constitution Act, 1867*,[25] which states that Canada is to have a Constitution "*similar in Principle to that of the United Kingdom*". As Dickson C.J. observed at paragraph 29:

> Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble. Furthermore, s. 129 of the *Constitution Act, 1867* continued the courts previously in existence in the federating provinces into the new Dominion. The fundamental traditions of those courts, including judicial independence, were also continued.[26]

56. In addition, the Complainant relies on the following cases, all of which have discussed the principle of judicial independence at length: *R. v. Valente (No. 2)*;[27] *Beauregard v. Canada*;[28] *Lippé v. Charest*;[29] and *Therrien c. Québec (Ministre de la justice)*.[30]

57. The Complainant also relies on *Mackin v. New Brunswick (Minister of Justice)*,[31] where Gonthier J. (for the majority) restated the principles governing judicial independence in Canada (with which the dissenting justices also agreed)[32] at paragraphs 34-40:

> 34 Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. Within the Canadian Constitution, this fundamental value has its source in s. 11(*d*) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be "similar in Principle to that of the United Kingdom". It was in *Provincial Court Judges Reference, supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.
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> 35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions. Such a view of the concept of independence may be found in art. 2.02 of the Universal Declaration on the Independence of Justice (reproduced in S. Shetreet and

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[25] *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (UK).
[26] *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at paragraphs 25-29 (SCC) [*Beauregard*].
[27] *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (SCC) [*Valente*].
[28] *Beauregard v. Canada*, [1986] 2 S.C.R. 56 (SCC) [*Beauregard*].
[29] *Lippé v. Charest*, [1991] 2 S.C.R. 114 [*Lippé*].
[30] *Therrien v. Québec (Ministre de la justice)*, 2001 SCC 35 (SCC) [*Therrien*].
[31] *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13 (SCC).
[32] *Ibid.*, paragraph 91.

J. Deschênes, ed., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450), which states:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [Emphasis added.]

The adoption of a broad definition of judicial independence by this Court was confirmed, moreover, in *Provincial Court Judges Reference, supra*, at para. 130, where Lamer C.J., for the majority, stated the following:

> Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: *Lippé, supra*, at pp. 152 *et seq., per* Gonthier J. [Emphasis added.]

36 On the other hand, in order for a judge to remain as far as possible sheltered from pressure and interference from all sources, he or she "should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions" (S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschênes, *op. cit.*, 590, at p. 599).

37 The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent *status* of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

38 The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent *status* (*Valente (No. 2)*, *supra*, at p. 689, *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.)). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably *seen* to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for

such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

39 As was explained in *Valente (No. 2)*, *supra*, at p. 687, and in the *Provincial Court Judges Reference, supra*, at paras. 118 *et seq.*, the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente (No. 2)*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general *perception* of the court's independence. Moreover, these three characteristics must also be *seen* to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.[33]

58. The majority continued at paragraphs 42-43 and 50-51 to confirm the aspects of security of tenure and financial security as part of judicial independence:

(a) Security of Tenure

42 In *Valente (No. 2)*, *supra*, at p. 695-696, it was found that in its individual dimension, the security of tenure provided for provincial court judges in Canada generally required that they may not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry. Similarly, in New Brunswick, s. 4.2 of the *Provincial Court Act* provides that a judge shall retire

[33] *Ibid.*, paragraphs 34-40.

> at the age of 75 and ss. 6.1 to 6.13 provide that a judicial inquiry shall be held in order to adjudicate on the merits of a recommendation that a judge be removed from office.
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> 43 It was stated further that, in order for the individual dimension of security of tenure to be constitutionally protected, it was sufficient that a judge could be removed from office only for a reason relating to his or her capacity to perform his or her judicial duties (*Valente (No. 2)*, *supra*, at p. 697). Any arbitrary removal is accordingly prohibited.
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> […]
>
> (b) Financial Security
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> 50 In *Valente (No. 2)*, *supra*, only the individual dimension of financial security was considered in connection with the determination of salaries by the executive branch. It was determined at that time that the constitutional requirements in this regard were limited to ensuring that the judges' salaries were provided for by law and that the executive could not arbitrarily encroach upon this right in a manner that affected the independence of the courts. In *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), it was confirmed that this obligation also applied to the legislative branch.
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> 51 In the *Provincial Court Judges Reference, supra*, at para 121, it was clearly indicated that the financial security of provincial court judges also had an institutional dimension, shaping the relationships between the judiciary, on the one hand, and the executive and legislative branches, on the other.

**Judicial Impartiality**

59. This complaint also engages the principle of judicial impartiality. In *Re Charkaoui*,[34] the Supreme Court of Canada commented on judicial impartiality at paragraph 32, as follows:

> Although the scope of the required hearing can vary according to context (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)), a hearing must include "[a]n independent judicial phase and an impartial judge" (*Ferras*, at para. 25). This requirement is also consistent with the unwritten constitutional principle of judicial independence: *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.). It has also been called "the cornerstone of the common law duty of procedural fairness" (*Application Under s. 83.28 of the Criminal Code, Re*, [2004] 2 S.C.R. 248, 2004 SCC 42 (S.C.C.) (*Re Bagri*), at para. 81), and is necessary in order to ensure judicial impartiality: *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.), at p. 139. It is not enough that the judge in fact be independent and impartial; fundamental justice requires that the judge also appear to be independent and impartial. This flows from the fact that judicial independence has two facets: actual independence and perceived

[34] *Re Charkaoui*, 2007 SCC 9 (SCC).

> independence: *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), at p. 689. [Emphasis added.]

**Analogous Caselaw**

60. In addition to the above statements of principle, the Complainant relies on the following two analogous cases: (1) *Rees et al. v. Crane*;[35] and (2) *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*.[36]

***Rees et al. v. Crane***

61. *Rees et al. v. Crane* stands for the proposition that where the suspension of a judge by a chief justice is not done in accordance with an established procedure, it is unlawful; the chief justice has no such powers outside the established procedure.

62. The issues in this case arose when the Chief Justice of the Supreme Court of Trinidad and Tobago did not assign a certain puisne judge, Justice Richard Crane, to hear any matters in the upcoming October 1990 – January 1991 law term. A letter sent by the Chief Justice to Justice Crane, which he belatedly discovered on October 8, 1990, shortly before commencement of term, advised him:

> I have to inform you that the Judicial and Legal Service Commission, having considered complaints about your performance in court and doubts about your current state of health, has decided that you should cease to preside in court until further notice.[37]

63. The decision to suspend Justice Crane, however, had not been made, as required, in accordance with Section 137(4) of the Constitution of Trinidad and Tobago. Rather, it had apparently been made either by Trinidad and Tobago's Judicial and Legal Service Commission, or by the Commission acting on the advice of the Chief Justice. None of these actors had the power

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[35] *Rees et al. v. Crane*, [1994] 2 A.C. 173 (Trinidad & Tobago P.C.) [*Rees*]. (**NOTE: this decision is included in the Complainant's Book of Exhibits as Exhibit "K").**

[36] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABQB 309 (QB).

[37] *Rees*, page 5.

under Section 137(4) of the Constitution to suspend Justice Crane – that power resided with the President of Trinidad & Tobago.

64. In any case, Justice Crane was not informed of the decision and only learned about his suspension upon his return from having been abroad, some two weeks before the new law term was to commence. He had no meaningful opportunity to contest the decision before it was implemented.[38]

65. The issue in this case, then, was whether Justice Crane's initial suspension by the Chief Judge had been lawful. The matter was ultimately appealed to the Privy Council, where the issue was characterized as "*whether what the Chief Justice did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension*."[39]

66. The Privy Council found that the situation "*went beyond mere administrative arrangement*", and that the initial suspension was wrongful.[40] It observed:

> ... the Chief Justice must have the power to organise the procedures and sitting of the courts in such way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be rearranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or even temporarily he does not sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.
>
> The exercise of these powers, however, must be seen against the specific provisions of the Constitution [of the Republic of Trinidad and Tobago 1976] relating to the suspension of a judge's activities or the termination of his appointment. <u>It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a</u>

[38] *Ibid*., pages 5-6.
[39] *Ibid.* at page 8.
[40] *Ibid.*, at page 8.

> judge cannot be suspended nor can his appointment be terminated by others or in other ways. The issue in the present case is thus whether what Bernard C.J. did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.
>
> Their Lordships agree with the majority in the Court of Appeal that what happened here went beyond mere administrative arrangement. Despite the fact that the respondent continued to receive his salary and theoretically (as has been argued) could have exercised some power e.g. to grant an injunction if approached directly to do so, the respondent was effectively barred from exercising his functions as a judge sitting in court. He was left out of the October to January roster and there was no indication that he would thereafter sit again. It was in effect an indefinite suspension This in their Lordships' view was outwith the powers of the Chief Justice. […] The suspension was wrongful as long as it lasted and the majority of the Court of Appeal were entitled and right to quash the Chief Justice's decision. [41] [Emphasis added throughout.]

67. The Privy Council further ruled that Justice Crane was denied natural justice because he ought to have been told the allegations against him and given an opportunity to respond.[42]

***Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)***

68. In this case, Judge John Reilly of the Provincial Court of Alberta successfully applied for judicial review of a decision made by Chief Judge Edward Wachowich to re-assign him from Canmore to Calgary, including relocation of his place of residence, also from Canmore to Calgary. The decision was clearly made due to the Chief Judge's concerns about the nature of Judge Reilly's decisions and was of a disciplinary and not of an administrative nature.[43]

69. The matter involved two separate decisions by Justice Mason of the Alberta Court of Queen's Bench, each of which was affirmed on appeal to the Alberta Court of Appeal.

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[41] *Ibid.*, pages 7-8.
[42] *Ibid.* at page 17.
[43] See *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABQB 309 at paragraph 4 (QB).

70. Mason J.'s first decision dealt with the Chief Judge's application to strike Judge Reilly's application for judicial review. The Court ultimately dismissed the application and permitted the judicial review to proceed.[44] On appeal, the Court of Appeal affirmed.[45]

71. In his initial decision, Justice Mason provided the following helpful commentary at paragraph 48:

> 48 Counsel for the Chief Judge urges me to characterize the Chief Judge's directive as administrative, supervisory and disciplinary. He then argues that the directive was within the Chief Judge's unfettered and unreviewable power. However, while certain actions by a Chief Judge will not be reviewable, I cannot agree that a Chief Judge has completely unfettered powers. At the core of adjudicative judicial independence is the freedom of individual judges to hear and decide cases without interference by the government, any organization or group, any individual or even another judge. See *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.) at pp. 69-73, which was quoted by Lamer C.J.C. in *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.) at 136-38. At 138, Lamer C.J.C. asserts that adjudicative judicial independence is free from all government interference, including the "Chief Justice":
>
> > I do not intend, however, to limit this concept of "government" to simply the executive or legislative branches. By "government", in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state. This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include any person or body within the judiciary which has been granted some authority over other judges; for example, members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice.
>
> […]

72. Mason J.'s second decision disposed of the matter on its merits. The Court granted Judge Reilly's application for judicial review and quashed the Chief Judge's decision to re-assign him to Calgary.[46] The decision was also affirmed on appeal to the Court of Appeal.[47]

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[44] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1998 ABQB 741 (QB).
[45] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABCA 18 (CA).
[46] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABQB 309 at paragraph 194 (QB).
[47] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 2000 ABCA 241 (CA).

73. In his second set of reasons, Mason J. held, at paragraph 90:

> 90 Defining the range of a chief judge's powers is beyond the scope of this judgment. While a chief judge may have the power to, for example, encourage a judge to release judgments more quickly, the disciplinary powers purportedly exercised by the Chief Judge in this case unquestionably fall outside any possible scope allowed for by the principles of judicial independence and the development of the position of chief judge as first among equals. If Judge Reilly's situation needs to be addressed, it must be done via powers exercised by the Judicial Council, not by the Chief Judge taking the powers for himself. [Emphasis added.]

74. The Court went on to cite the passages included above from *Rees et al. v. Crane*. Then, at paragraph 130, Mason J. went on to comment:

> 130 From my review of the decisions of the Supreme Court of Canada in cases such as *Valente (No. 2)*, *Beauregard*, *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.), *Campbell* [sub nom. *Remuneration Reference*] and *MacKeigan*, judicial independence has two dimensions: individual judicial independence and institutional judicial independence. The core principle of the individual judicial independence dimension is an individual judge's complete liberty to hear and decide cases. This is clearly stated by the majority in *Lippé* at 153, citing *Beauregard* at 69:
>
> > Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.
>
> At 153, the majority in *Lippé* continues by citing from *Valente (No. 2)*, at 685:
>
> > As such, it [independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
>
> I also note *Campbell* at 87, which emphasizes that judicial independence insulates courts from interference. This basic theme is also present in the earlier cited passage from Shetreet and Deschênes on" substantive independence" - that a judge must be subject only to the law and his or her own conscience, not to irrelevant pressures.
>
> [Emphasis added.]

75. Justice Mason held that the matter before him raised the issue of Judge Reilly's "*complete liberty to hear and decide cases without interference by his Chief Judge.*"[48] He found that Judge Reilly's liberty to do so was indeed at risk. In Mason J.'s view, "*there is a violation of Judge Reilly's immunity to having to justify the how and why of his decisions, together with an attack on his security of tenure. Accordingly, I characterize the present case as involving Judge Reilly's core characteristic of security of tenure and the individual judicial independence dimension.*"[49]

76. Mason J. continued at paragraph 142:

> 142 While security of tenure is typically used in the sense of outright dismissal or removal, it also must include the lesser, but no less real, threat of a move from the current place of appointment. Such a move, or threat, could seriously undermine a judge's economic, family and social status in the community in which he or she is currently appointed. This undermining could approach or achieve dismissal. For example in *Rees*, the Privy Council held that a judge was subject to "in effect an indefinite suspension" (at 188). There, the chief justice, after receiving complaints about the judge, did not include him on the sitting roster for the following term. An investigation commenced after that action was taken. The Privy Council agreed with the judge that this was not merely an administrative arrangement, but was an indefinite suspension, which the chief justice did not have the power to impose. [Emphasis added.]

77. And at paragraphs 180-182:

> 180 […] Here, the Chief Judge attempted to exercise [his purported power to relocate Judge Reilly]. I have found that he did so to discipline Judge Reilly for decisions and an overall approach with which the Chief Judge did not agree. The fact that this occurred gives even more weight to Lamer C.J.C's. concerns [as set out in the *Remuneration Reference* – see paragraph 266 of that decision]. The issue of the new provision which gives this power to the Judicial Council is not before me; therefore, I will not comment on whether it courts the same danger.
>
> 181 Regarding the constitutional authority of a chief judge, it seems clear to me that it is not unlimited, even in the exercise of administrative functions. I find support for this in the section of the *Campbell* decision dealing with provincial court closures in Manitoba for" Filmon Fridays" as a cost saving measure. The government had argued that the chief judge made the actual decision to close the court on those days, so that there was no interference with the court's administrative independence. The

[48] *Ibid.*, paragraph 141.
[49] *Ibid.*

majority of the Supreme Court of Canada disagreed. Moreover, the majority held that the chief judge, had she in fact made the decision, would have exceeded her constitutional authority (at 152):

> ... administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "*primus inter pares*": *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision. [emphasis added]

> 182 Therefore, while a chief judge can exercise his administrative independence (or exercise the Provincial Court's administrative independence) to a degree, a chief judge cannot interfere with a judge's individual adjudicative independence, or be perceived to interfere with that judge's individual adjudicative independence. I cannot emphasize enough that a judge's individual adjudicative independence must not be threatened or be perceived to be threatened. This is for the sake not only of the judge's independence, but for the integrity of the judicial system as a whole. [Emphasis added.]

78. Finally, Justice Mason also held that Judge Reilly had not been given the benefit of natural justice. He never received notice that he was to be re-assigned and his residence moved. There was no opportunity granted to him to prepare himself and no opportunity to respond. The Court held that the Chief Judge's decision ought to be quashed on this basis alone.[50]

**Relevant Ethical Principles**

79. The Complainant relies as well on the following statements of principle drawn from the publication *Ethical Principles for Judges*, published by the Canadian Judicial Council:[51]

> **2. JUDICIAL INDEPENDENCE**
>
> **Principles:**
>
> 1. Judges must exercise their judicial functions independently and free of extraneous influence.

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[50] *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)*, 1999 ABQB 309 at paragraphs 187, 190-192 (QB) [*Alberta Judges*].

[51] *Ethical Principles for Judges*, Canadian Judicial Council Catalogue Number JU11-4/2004E, **Exhibit "L"**, page 4.

[…]

4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

**Commentary:**

[…]

5. Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence.

6. Judges should be vigilant with respect to any attempts to undermine their institutional or operational independence. […]

**3. INTEGRITY**

**Principles:**

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

**Commentary:**

1. […] 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.

2. In addition to judges' observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one judge reflects on the judiciary as a whole.

**6. IMPARTIALITY**

**Principles:**

**A. General**

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.

3. The appearance of impartiality is to be assess from the perspective of a reasonable, fair minded and informed person.

**STATEMENT OF ISSUES**

82. In light of all of the above helpful guidance from the Supreme Court of Canada and the Canadian Judicial Council, and following *Rees* and *Alberta Judges*, above, there can be no doubt that this matter raises issues of paramount importance to the proper functioning of the judiciary, both in Nova Scotia and across Canada. Accordingly, this complaint should be referred to the Chair of the Judicial Council, along with a recommendation that it be referred to a review committee for further investigation, pursuant to section 17B(c)(iii) of the Act.

83. Furthermore, in this case, since the Chair of the Judicial Council and the Chief Justice of Nova are the same person (pursuant to section 16(1)(a) of the Act), the Complainant asks that a review committee be immediately empanelled pursuant to section 17F of the Act.

84. The principles and jurisprudence cited above are clear: *a judge must at all times be completely free from external interference*. There are no exceptions. This includes being free from undue influence from government, other judges, or even a chief judge such as the Respondent.

85. The bottom line in this matter is that the Respondent's conduct toward the Complainant, at several points along the way, violated both the principles of judicial independence and judicial impartiality, as follows:

a) the Respondent should never have pressured the Complainant to reveal her COVID-19 vaccination status in the first place. Such pressure was entirely inappropriate, and placed the Complainant in a situation where her own perception of how to remain impartial (and to be *seen* to be impartial) towards litigants in her court was compromised;

b) the Respondent should never have met with the Complainant to try to persuade the Complainant to change her mind and agree to disclose her vaccination status. When the Complainant refused at first instance, the Respondent's only viable course of action was, if she thought it necessary, to refer the matter to the Judicial Council;

c) the Respondent should never have advised the Complainant that the only way to proceed was for the Complainant to work from home while her colleagues took over her in-person trials, and if her colleagues were not willing to do so, then it was up to the Complainant to find another solution. There was no requirement for provincial court judges to be vaccinated against COVID-19, and there were no such obligations on the Complainant's part whatsoever; the Respondent's pressure on this point was unacceptable – essentially, the clear message to the Complainant was "*disclose your vaccine status… or else you won't be able to hear cases anymore*". This seriously undermines the principle of judicial independence;

d) the Respondent should not have unilaterally created a policy whereby only fully vaccinated judges would be assigned to sit in courtrooms and hear cases. The policy represents a further clear violation of the principle of judicial independence and judicial impartiality. Furthermore, such a policy goes far beyond a chief judge's limited administrative powers. It matters not that many of the other judges supported the policy – the reality is that not all judges did, and those who did not were unable to hear cases freely. This is unacceptable;

e) the Respondent should not have unilaterally suspended the Complainant, or even have threatened to do so, as indicated in the February 22 Letter. The Respondent did not have the power to do so *for any reason*, let alone simply because the Complainant was unwilling to disclose her vaccination status. The only recourse open to the Respondent was to refer the matter to the Judicial Council;

f) the Respondent should not have written to the Complainant's doctor, Dr. Babatolu, to ask him to supply the Respondent with the details of the Complainant's medical issues. This was obviously inappropriate, as evidenced by the fact that the Complainant's insurer approved both her short-term and long-term disability applications without the Respondent's involvement. This placed financial pressure on the Complainant, who began to wonder whether her disability claim would be cancelled and her livelihood thereby compromised, and thereby violated the principle of judicial independence by compromising the Complainant's financial security; and

g) in all cases, the Respondent should have given the Complainant a meaningful opportunity to be heard, particularly following the delivery of the February 22 Letter where the Respondent clarified that the Complainant would be suspended and referred to the Judicial Council. The Respondent's failure to do so runs

contrary to the principles and guidance established and set out in the jurisprudence discussed above.

**PART IV - CONCLUDING REMARKS**

86. For all of the above reasons, the Complainant asks that this complaint be referred without delay to a review committee for further investigation, pursuant to section 17B(c)(iii) of the Act. The Complainant, through her counsel, stands ready to provide such further information as may be needed by the Chief Justice of Nova Scotia or the review committee for the purpose of investigating this complaint. Should this complaint be referred to a review committee, or should it proceed to a hearing before the Judicial Council, then the Complainant reserves all procedural rights before those two bodies, including the right to fully present evidence, the right of cross-examination, and the right to make such further written and oral submissions as may be necessary in order to support her position in this matter.

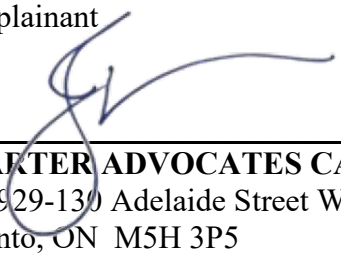
**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

June 7, 2023



**THE HONOURABLE RICKCOLA BRINTON,**
**JUDGE OF THE PROVINCIAL COURT OF NOVA SCOTIA**

Complainant



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