Hfx No.: 528362

SUPREME COURT OF NOVA SCOTIA

Between:

RICKCOLA BRINTON

Applicant

and

THE JUDICIAL COUNCIL OF NOVA SCOTIA

THE HONOURABLE PAMELA S. WILLIAMS,
JUDGE OF THE PROVINCIAL COURT OF NOVA SCOTIA

Respondents

REPLY BRIEF OF THE APPLICANT

1. The Applicant, Rickola Brinton ("**Brinton**"), makes the following submissions in reply to the briefs tendered by the respondents, The Judicial Council of Nova Scotia (the "**Judicial Council**") and The Honourable Pamela Williams ("**Williams**").

I. RESPONSE TO WILLIAMS' ARGUMENT RE: BRINTON'S SUSPENSION

2. Williams argues at paragraph 9 of her brief that Brinton was never suspended because she was approved for long-term leave.[1] Williams relies on this point in arguing that Brinton's Complaint to the Judicial Council (the "**Complaint**") was frivolous and that her rights were not engaged by the Chair's decision to dismiss it (the "**Decision**").[2]

3. With respect, Williams' argument misses the point. The issue is not whether Brinton was or was not actually suspended; the issue is that Williams applied undue pressure on Brinton to disclose private medical information, unilaterally created a vaccination policy, and then threatened

[1] Brief of the Respondent, The Honourable Pamela Williams at para. 9 ["Williams' Brief].
[2] Williams' Brief at paras. 61, 75.

to suspend Brinton and refer her to the Judicial Council for disciplinary action if she did not comply. Brinton relies on paragraph 82 of her main brief in this regard. These events *clearly* happened, and they *clearly* compromised Brinton's judicial independence and impartiality. It is therefore a red herring to focus exclusively on the question of whether Brinton was or was not suspended. Rather, this Court should focus on the totality of the sequence of events. Williams never should have exerted the kind and degree of pressure on Brinton that she did, and she should never have sent the February 22 Letter with its ultimatum.

4. In any event, Brinton also replies that Williams' conduct towards Brinton clearly did amount to a suspension. In her letter dated February 22, 2022, Williams told Brinton that if Brinton were medically cleared to return to work but did not disclose her vaccination status, Williams would "have no recourse other than to suspend" her.[3] Williams has never retracted or otherwise terminated that condition precedent required by Williams for Brinton to resume her work.

5. As matters have been left standing between Williams and Brinton, Brinton is unable to return to work, even if her medical issues resolve. The effect on Brinton's ability to exercise her judicial duties amounts to either an actual suspension or a constructive suspension. With respect to the impact on Brinton's rights and interests, Williams has effectively suspended her indefinitely.

II. BRINTON HAS STANDING IN THIS PROCEEDING

6. Williams argues that Brinton has no standing to challenge the merits of the Decision because her legal rights have not been infringed and she has not suffered any "special damage over and above that suffered by the general public."[4]

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[3] Record of Decision Making Authority, Tab 3B at p. 120.
[4] Williams' Brief at paras. 38-54.

7. Brinton replies that she has a direct, special interest in the Complaint and this application for judicial review for two main reasons: **first**, the Decision has impacted her ability to return to work and hence has directly impacted her financial security and her ability to continue to function as a judge; and **second**, the Decision has had the effect of compromising her individual judicial independence. Brinton is directly affected by both of these things.

8. Further, Brinton replies that Williams' position in the parallel action[5] that Brinton has commenced against Williams and other defendants amounts to a concession that Brinton does have a sufficient interest in the outcome of this proceeding for her to have standing to challenge the substantive merits of the Decision.

9. In the alternative, Brinton continues to have standing to make arguments with respect to the Chair's jurisdiction, the procedural fairness of the Decision, and the Chair's failure to engage in a *Doré* analysis.

A. Brinton has a Direct, Special Interest in the Proceeding

10. As the Respondent fairly acknowledges, the general rule that complainants do not have standing to challenge the substantive merits of a decision of a disciplinary body is not a "bright line".[6] Complainants in disciplinary proceedings have standing to seek substantive review of decisions where they have "*some special interest, private interest or sufficient interest*" which is engaged by the decision challenged.[7] The complainant must show that their "*personal or economic rights or obligations*" have been affected by the decision "*more than the general public*."[8]

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[5] *Brinton v. The Honourable Pamela S. Williams, Judge of the Provincial Court of Nova Scotia et al.* (Hfx. No.: 527144) [the "**Action**"], see **Schedule "A"** to this Reply brief.
[6] Williams' Brief at para. 40.
[7] *Tupper* v. *Nova Scotia Barristers' Society*, 2013 NSSC 290 at para. 30, Respondent's Book of Authorities ["**RBOA**"] Vol 2, Tab 18, aff'd 2014 NSCA 90, RBOA Vol 2, Tab 19**,** citing *Robichaud v. College of Registered Nurses of Nova Scotia*, 2011 NSSC 379 at para. 10, RBOA Vol 2, Tab 20 ["*Robichaud*"]**.**
[8] *Robichaud*, *supra* note 6, at paras. 11-12, RBOA Vol 2, Tab 20.

11. Brinton says that she does in fact have such an interest in this case. **First**, Brinton's economic rights have been affected by the Chair's Decision. As described above, Williams has effectively suspended Brinton, which leaves her unable to return to work and resume her judicial duties. As a judge, Brinton does not have recourse to the usual protections afforded to most employees. Instead, she brought the Complaint against Williams to seek accountability for Williams' wrongful suspension, among other things. However, in dismissing the Complaint without further review, the Chair has tacitly approved and exacerbated the harm to Brinton's economic interests. In short, as a result of the Decision, Brinton cannot return to work even if she is able to. Thus, the Decision has clearly affected Brinton's rights and obligations personally. Brinton has been affected beyond her interest as a member of the public and ought to have standing to challenge the substantive merits of the Decision for this reason.

12. **Second**, Brinton's personal rights and obligations, and indeed her very judicial independence *qua* Judge of the Provincial Court, have also been impacted by the Decision. Judicial independence has both individual and institutional dimensions.[9] The individual dimension includes independence from a chief judge.[10]

13. Brinton's judicial independence was infringed upon by Williams as described in the Notice for Judicial Review in this proceeding. Brinton's personal, conscientious decision to keep her vaccination status private – an issue which has come before courts across Canada – was the basis for Williams' decision to prevent Brinton from hearing cases. In dismissing the Complaint, the Decision also tacitly approved of Williams' conduct on this issue, and implicitly ratified this limitation on Brinton's judicial independence.

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[9] *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 CanLII 317 (SCC), [1997] 3 SCR 3 at para. 118, Applicant's Book of Authorities [**ABOA**], Tab 14.
[10] *Lippé v. Charest*, [1991] 2 SCR 114 at 138, ABOA, Tab 17.

14. While judicial independence exists for the benefit of the public, as the bearer of that independence, Brinton has a special interest over and above the general public in seeking corrective action for its limitation.

15. 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: (a) does a chief justice in fact have the power to force puisne justices to accept medical treatment, and disclose that they have done so, in order to remain eligible to discharge their judicial functions? (b) if so, how, if at all, is a pusine judge's judicial independence protected in such a case? (c) what is the proper definition of the relationship between a chief judge and a puisne judge insofar as the principle of judicial independence is concerned? These are all questions that have a direct bearing on Brinton's personal rights and responsibilities as a judge. Indeed, since normal members of the public do not have access to the same rights, in the same sense, as a judge does, that is all the more reason why Brinton can be properly seen as having a direct, personal and special interest in the outcome of this matter.

16. In sum, in bringing the Complaint, Brinton has not come to this proceeding like any member of the public. She is a Judge of the Provincial Court and she has been directly impacted by the conduct complained of. She is not "a passive observer" but rather "was directly and specifically impacted by the conduct at issue in the complaint. [She] was the object of the conduct", and as such has standing to seek substantive review of the dismissal of the Complaint.[11]

[11] *Kipiniak v. Ontario Judicial Council*, 2012 ONSC 5866 at para. 20 cit'd by *Fairchild v. Bligh*, 2015 NUCJ 17 at para. 20, RBOA, Tab 32.

B. Brinton's Parallel Civil Action Constitutes an Additional Special Interest

17. As noted above, Brinton has brought the Action against Williams for alleged torts arising from the conduct at issue in the Complaint. Williams argues in this proceeding that Brinton cannot create "*a legal interest in the proceedings through [her] own unilateral action*" by "*commencing a parallel civil claim.*"[12]

18. Brinton replies that she has a direct, personal and special interest in this matter as described in the above paragraphs. She does not need to "create a legal interest in the proceedings though her own unilateral action" by "commencing a parallel proceeding".

19. Furthermore, it does not lie in Williams' mouth to make this argument because she, through counsel, has made an inconsistent argument in the Action.

20. Williams has brought a motion to strike the Action, which is currently pending in this Court. In that motion, counsel for Williams has 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.*"[13] Williams goes on to argue in her motion to strike the Statement of Claim in the Action that "*[r]epetitive litigation must be avoided when, as here, judicial review is available.*"[14]

21. It is inappropriate for Williams to argue (1) in the Action, that judicial review is the appropriate process for Brinton to follow and then (2) here, on judicial review, that Brinton has no standing to seek substantive judicial review. With respect, the Respondents cannot have it both ways. Since Williams argues, in the context of the Action, that (1) the Action is *not* the appropriate vehicle for Brinton to seek redress on the merits in this matter; but (2) that this judicial review proceeding *is* the appropriate forum, then Williams must therefore concede that Brinton has direct

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[12] Williams' Brief at para. 44.
[13] Williams' Motion Brief for her Motion to Strike the Action, paragraph 62. **Note: for the sake of efficiency, Brinton has attached the relevant portions of Williams' Motion Brief as Schedule "A" to this reply brief.**
[14] *Ibid.*, paragraph 64.

standing to challenge the Chair's Decision on the merits. Otherwise, Brinton would be left with no possible substantive remedy at all.

C. In the Alternative, Brinton has Standing to Challenge the Jurisdiction and Procedural Fairness of the Decision

22. Brinton raises four arguments on this application. Brinton argues that:

a. the Chair's Decision is *ultra vires* because it was not made pursuant to one of the grounds listed in s. 17B(1)(a);

b. the Chair breached his duty of procedural fairness to Brinton by failing to provide Williams' submissions and provide an opportunity for reply;

c. the Chair failed to engage in the required *Doré* analysis; and

d. the Chair's decision was unreasonable.

23. Even if Brinton is denied standing to seek substantive review of the Decision, Brinton still has standing with respect to issues (a)-(c) above.

24. **First**, Brinton has standing to challenge the jurisdiction of the Decision. Even without a special interest, complainants have a right to a fair procedure and have remedies if the process is conducted in an unfair manner.[15] The process to which Brinton, as a complainant, was entitled was one where the Chair would dismiss her Complaint only for the grounds identified in s. 17B(1)(a). If the Chair purported to dismiss her complaint without resort to those limited grounds, then he has failed to follow the process to which Brinton is entitled.

25. **Second**, as Williams fairly accepts, Brinton has standing to argue that the Chair breached his duty of procedural fairness by failing to provide Brinton with Williams' submissions and provide her an opportunity to reply.[16]

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[15] *Perry v. Nova Scotia Barristers' Society*, 2016 NSSC 121 at paras. 34-35, RBOA Vol 2, Tab 29.
[16] Williams' Brief at para. 27.

26. **Third**, Brinton has standing to challenge the Chair's failure to engage in the *Doré* analysis. This issue of whether a *Doré* analysis was conducted *at all* is distinct from the issue of whether it was conducted *reasonably*. While the latter constitutes substantive review and is reviewable on a standard of reviewable, the former is reviewable on a standard of correctness.[17]

27. As argued by Professor Paul Daly:

> The *Doré* duty is a procedural duty. A procedural duty imposes obligations on administrative decision-makers to do certain things prior to making a decision. The source for a procedural duty can be statute, the common law or the Constitution and the obligations imposed are obligations to do certain things during the decision-making process. The *Doré* duty is constitutional in origin and obliges administrative decision-makers to take account of *Charter* values before making a final decision.[18]

28. At the procedural stage, prior to engaging in substantive review of the decision maker's proportionality analysis, courts must be "satisfied that a *Charter* analysis was actually undertaken."[19] Brinton's right to have her Complaint considered fairly includes the right that the Chair engage in the required *Doré* analysis. His failure to do so is a failure to satisfy a procedural duty which is reviewable on a standard of correctness. Brinton has standing to seek review of that failure before this Court.

III. THE CHAIR WAS REQUIRED TO CONSIDER THE IMPACT ON BRINTON'S FREEDOM OF EXPRESSION

29. Williams argues that Brinton did not raise the issue of her freedom of expression before the Chair at first instance and cannot do so now on review.[20]

30. Brinton replies that the Chair's duty to consider the impact on her right to freedom of expression arises independently, even if Brinton did not raise the issue. The onus on a decision

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[17] *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 at para. 35, ABOA, Tab 10.
[18] Daly, *The Doré Duty*, 2023 CanLIIDocs 1256, ABOA, Tab 21.
[19] *Lethbridge and District Pro-Life Association v. Lethbridge (City)*, 2020 ABQB 654 at paras. 105, 108. ABOA, Tab 23; see also *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43, ABOA, Tab 24.
[20] Williams' Brief at para. 75.

maker to consider *Charter* rights and values arises in three circumstances: 1) it is evident that it must be considered because of the nature of the governing statutory scheme; 2) because the parties raised the value before the administrative decision maker; or 3) because of the link between the value and the matter under consideration.[21]

31. An individual raising the issue of an infringement of a *Charter* right or value is only one situation where a decision-maker must consider potential l impacts to *Charter* protections. In the case at bar, the third situation, described above, applies. Given the facts at issue in the Complaint, the Chair should clearly have considered whether Brinton's *Charter* right to freedom of expression was engaged and whether the Decision appropriately balanced it with statutory objectives, and Brinton is able to advance that argument now, on judicial review.

IV. THE CHAIR OUGHT TO HAVE PROVIDED BRINTON WITH WILLIAMS' SUBMISSIONS

32. The Judicial Council argues that the duty of procedural fairness owed to Brinton "did not include a right to reply to Chief Judge Williams' submissions."[22] However, the Judicial Council acknowledges that there are some cases where a complainant should receive a judge's response to a complaint depending on the context.[23]

33. Brinton replies that this is one of the strongest cases for when a complainant ought to receive a judge's response to a complaint. Brinton does not come to the complaint process as a usual member of the public. Rather, she comes as a judge of the Provincial Court who worked with Williams. She is not a mere *witness* to the alleged wrong, but the *victim* of it. As a judge, Brinton does not have access to the forms of redress for wrongs committed by her manager that are available to most employees. A complaint to the Judicial Council was an appropriate action and

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[21] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 66, ABOA Tab 9.
[22] Legal Brief of the Respondent, the Judicial Council of Nova Scotia ["Judicial Council's Brief"] at para. 79.
[23] Judicial Council's Brief at para. 82.

the complaint process ought to reflect that by extending adequate procedural rights to Brinton. The Chair's failure to provide Williams' submission infringed his duty of procedural fairness. That failure is reviewable for correctness.

May 24, 2024

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SCHEDULE A

2023 Hfx No. 527144

Supreme Court of Nova Scotia

Between:

RICKCOLA BRINTON

Plaintiff

and

THE HONOURABLE PAMELA S. WILLIAMS,
JUDGE OF THE PROVINCIAL COURT OF NOVA SCOTIA

THE OFFICE OF THE CHIEF JUDGE OF
THE PROVINCIAL COURT OF NOVA SCOTIA

THE PROVINCIAL COURT OF NOVA SCOTIA

THE ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING
HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF NOVA SCOTIA

Defendants

JUDICIAL DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STRIKE PLEADINGS
(Returnable at 2 p.m. on June 19, 2024)

To: **The Plaintiff**
c/o James Manson
Charter Advocates Canada
[redacted]

Tel: [redacted]

Counsel for the Plaintiff

And To: **The Defendant, The Attorney General of Nova Scotia representing His Majesty the King in Right of the Province of Nova Scotia**

[redacted]

Department of Justice (N.S.)

[redacted]

Tel: [redacted]

Counsel for the Defendant, The Attorney General of Nova Scotia representing His Majesty the King in Right of the Province of Nova Scotia

October 25, 2021.[52] Judge Brinton further acknowledges in her pleading that Chief Judge Williams made the decision on November 1, 2021 to only assign fully vaccinated judges for court hearings.[53] Since Judge Brinton has been on medical leave since before the November 1, 2021 decision, the decision did not apply to her. Chief Judge Williams was never required to decide what work to assign to Judge Brinton while the November 1, 2021 decision was in effect. Since the policy never applied to Judge Brinton, there is no cause of action that the policy violated her rights.

57. Similarly of no consequence, when Judge Brinton elected not to provide, or consent to her physician's disclosure of, her medical information in response to Chief Judge Williams' requests, that was the end of the matter. The Statement of Claim concedes that Judge Brinton's physician made no disclosure of medical information in response to the requests, by which time, the insurance carrier approved her long-term disability, thereby mooting the issue.[54] There is no cause of action for breach of medical privacy because there was no disclosure of medical information.

58. Accordingly, this is a further reason for striking the claims under Rule 13.03(1)(a) without leave to amend. No amendment will cure that the pleaded facts disclose no breach.

Issue C: It is an abuse of process to bring claims barred by judicial immunity and already decided by the Judicial Council

59. Rule 88 provides for the disposal of frivolous, vexatious, and abusive pleadings. The Judicial Defendants seek an order under Rule 88.02(1)(a) to dismiss the proceeding against them.

60. As previously noted, claims to which judicial immunity applies cannot be the subject of a suit. In *McPherson*, the Nova Scotia Court of Appeal affirmed a motions judge's application of judicial immunity to dismiss the claims against a sitting judge as an abuse of process.[55]

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[52] Statement of Claim at paras. 24-25.
[53] Statement of Claim at para. 21.
[54] Statement of Claim at paras. 35 and 39-40.
[55] *McPherson* at paras. 8 and 41.

61. The following observations in *Taha v. Clements*, 2021 PECA 5, are apt where, as here, there is no debate that Chief Judge Williams was at all times acting within her judicial capacity:[56]

> The claim contains entirely unfounded and unwarranted inappropriate and scandalous allegations and aspersions regarding the person of the defendant judge. There is nothing on the face of the proceeding […] to support [the plaintiff]'s various bare allegations of bad faith made outside the defendant judge's jurisdiction. Hence the matter is vexatious. In these circumstances, it was appropriate for the motions judge to find, as he did, that the proceeding was frivolous, vexatious, and an abuse of process.

62. The proper process to submit a complaint about an administrative decision of a chief judge is through the provincial judicial council. In June 2023, Judge Brinton submitted a complaint against Chief Judge Williams to the Nova Scotia Judicial Council, asserting the same alleged deficiencies that are raised before this Court. In a decision issued in October 2023, the Chief Justice of Nova Scotia, as Chair of the Judicial Council, found no basis to Judge Brinton's complaint of judicial misconduct and upheld Chief Judge Williams. Judge Brinton is seeking judicial review of this decision, the hearing for which is on June 6, 2024.

63. It is an abuse of process for Judge Brinton "to relitigate the same issues which were decided by the Judicial Council."[57] In *Norheim*, 2021 ABQB 465, the Court of Queen's Bench of Alberta held that a judge's lawsuits challenging the Chief Judge's "administrative decision" to not reappoint him were an abuse of process.[58] The judge had made a complaint to the Alberta Judicial Council, which was dismissed.[59] The Court determined that the judge was entitled to seek judicial review of the council's dismissal but did not do so.[60] The Court noted that "[o]ne category of abuse of process […] pertains to the attempted relitigation of settled issues, regardless of the litigant's

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[56] *Taha v. Clements*, 2021 PECA 5 at para. 12 [emphasis added].
[57] *Norheim v. Chief Judge of the Provincial Court of Alberta*, 2021 ABQB 465 ("***Norheim***") at paras. 43 and 50.
[58] *Norheim* at paras. 10 and 84.
[59] *Norheim* at para. 13.
[60] *Norheim* at paras. 40-41 and 84.

motive."[61] Since "relitigation of the Judicial Council's decision" is not a "circumstance[] where relitigation is necessary in order to enhance the credibility and integrity of the judicial system," the Court dismissed the lawsuits.[62]

64. Repetitive litigation must be avoided when, as here, judicial review is available. Same as the judge in *Norheim*, having failed to obtain the relief she wanted from the Judicial Council, Judge Brinton looks to this Court as another avenue of redress, but relitigation will not enhance the integrity of the adjudicative process and should not be permitted.

65. Accordingly, the claims against the Judicial Defendants should be struck as an abuse of process.

CONCLUSION

66. The Judicial Defendants move for summary dismissal of the pleadings on grounds of the absolute bar of judicial immunity and the absence of any cause of action. Additionally, they request the dismissal of the proceeding as an abuse of process.

67. Based on the foregoing, the Judicial Defendants respectfully submit that all of the claims against them should be struck without leave to amend.

References

68. The Judicial Defendants rely on the following legislation, Rules, and points of law:

- *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;
- *Provincial Court Act*, R.S.N.S. 1989, c. 238;
- Rules 13.01, 13.03, 38.03, 83.11, 88.01, and 88.02 of the *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov. 19, 2008;
- Authorities cited in this factum; and
- Such other and further authorities as this Honourable Court deems just.

[61] *Norheim* at para. 47.
[62] *Norheim* at paras. 49-52.