OJC

TWENTY-THIRD ANNUAL REPORT

2017-2018

ONTARIO
JUDICIAL COUNCIL

The Honourable George R. Strathy

CHIEF JUSTICE OF ONTARIO

Co-Chair, Ontario Judicial Council

The Honourable Lise Maisonneuve

CHIEF JUSTICE

ONTARIO COURT OF JUSTICE

Co-Chair, Ontario Judicial Council

ONTARIO JUDICIAL COUNCIL

January 11, 2019

The Honourable Caroline Mulroney
Attorney General for the Province of Ontario
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

Dear Minister:

It is our pleasure to submit the Annual Report of the Ontario Judicial Council concerning its twenty-third year of operation, in accordance with subsection 51(6) of the *Courts of Justice Act.* The period of time covered by this Annual Report is from April 1, 2017 to March 31, 2018.

Respectfully submitted,

George R. Strathy
Chief Justice of Ontario
President of the Court of Appeal for Ontario

Lise Maisonneuve
Chief Justice
Ontario Court of Justice

TABLE OF CONTENTS

Introduction 1

1) Composition and Terms of Appointment 2
2) Members 3
3) Administrative Information 6
4) Functions of the Judicial Council 7
5) Education Plan 10
6) Communications 10
7) Principles of Judicial Office 11
8) Judicial Appointments Advisory Committee 11
9) The Complaints Procedure 12
10) Notification of Disposition 17
11) Legislation 17
12) Compensation for Legal Costs Incurred 18
13) Summary of Complaints 18

Appendix A – Case Summaries ..... A - 23

Appendix B – *Principles of Judicial Office* ..... B - 99

Appendix C – *Hearing about the Conduct of the Honourable Justice Bernd Zabel* C-103

Appendix D – *Hearing about the Conduct of the Honourable Justice John Keast* D-123

INTRODUCTION

The period of time covered by this Annual Report is from April 1, 2017 to March 31, 2018.

The Ontario Judicial Council investigates complaints made by the public about the conduct of provincially-appointed judges. In addition, it approves the continuing education plan for provincial judges. The Council has approved criteria for continuation in office and standards of conduct developed by the Chief Justice of the Ontario Court of Justice which are called the *Principles of Judicial Office.* The Judicial Council may make an order to accommodate the needs of a judge who, because of a disability, is unable to perform the duties of judicial office. Such an accommodation order may be made as a result of a complaint (if the disability was a factor in a complaint) or on the application of the judge in question. Although the Judicial Council itself is not directly involved in the appointment of provincial judges to the bench, a member of the Judicial Council serves on the provincial Judicial Appointments Advisory Committee.

The Ontario Judicial Council had jurisdiction over 370 provincially-appointed judges, including full-time and *per diem* judges during the period of time covered by this Annual Report. Most of the judicial officers whose conduct is under the jurisdiction of the Ontario Judicial Council preside over proceedings of the Ontario Court of Justice. The Ontario Court of Justice is the busiest trial court in Ontario, which is the province in Canada with the largest population. In 2017, the population was approximately 14,193,384. In an average year, judges of the Court deal with over 215,000 adult and youth criminal cases and approximately 20,000 new family law proceedings. The Court holds sittings at approximately 140 locations across Ontario, ranging from large courthouses in cities to fly-in locations in northern Ontario.

The Ontario Judicial Council received 31 new complaints in its twenty-third year of operation, as well as carrying forward 100 complaint files from previous years (81 of those complaints related to the conduct of one judge on one particular day). Of these 131 complaints, 111 files were completed and closed before March 31, 2018. Information about the files that were completed and closed is included in this Report. Twenty complaint files were carried over into the next year of operation to be addressed.

We invite you to find out more about the Council by reading this Annual Report, and by visiting the Council's website at **www.ontariocourts.ca/ocj/ojc/.** On the website, you will find the Council's current policies and procedures; updates about any public hearings; the *Principles of Judicial Office;* the Education Plan; and links to the governing legislation.

1. COMPOSITION AND TERMS OF APPOINTMENT

The *Courts of Justice Act* sets out the membership of the Ontario Judicial Council and terms of appointment:

- the Chief Justice of Ontario (or designate from the Court of Appeal)
- the Chief Justice of the Ontario Court of Justice (or designate from the Ontario Court of Justice)
- the Associate Chief Justice of the Ontario Court of Justice
- a Regional Senior Judge of the Ontario Court of Justice appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General
- two judges of the Ontario Court of Justice appointed by the Chief Justice of the Ontario Court of Justice
- the Treasurer of The Law Society of Ontario or another bencher of the Law Society who is a lawyer, designated by the Treasurer
- a lawyer who is not a bencher of The Law Society of Ontario, appointed by the Law Society
- four persons, neither judges nor lawyers, who are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General

The Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice chairs all proceedings dealing with complaints against particular judges that deal with applications for orders of accommodation of a judge's needs resulting from a disability or requests for continuation in office by a Chief Justice or an Associate Chief Justice. The Chief Justice of the Ontario Court of Justice, or

another judge of that Court designated by the Chief Justice, chairs all other meetings including review panel meetings.

The judges appointed by the Chief Justice, the lawyer appointed by the Law Society of Ontario, and the community members appointed by the Lieutenant Governor hold office for four year terms and may not be re-appointed. In the appointment of these members to the Council, the importance of reflecting Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance on the Council is recognized.

2. MEMBERS – REGULAR

The membership of the Ontario Judicial Council in its twenty-third year of operation (April 1, 2017 to March 31, 2018) was as follows:

Judicial Members:

CHIEF JUSTICE OF ONTARIO

The Honourable George R. Strathy ..... (Toronto)
Co-Chair

CHIEF JUSTICE OF THE ONTARIO COURT OF JUSTICE

The Honourable Lise Maisonneuve ..... (Toronto)
Co-Chair

ASSOCIATE CHIEF JUSTICE OF THE ONTARIO COURT OF JUSTICE

The Honourable Peter J. DeFreitas ..... (Oshawa)

REGIONAL SENIOR JUSTICE

The Honourable Sharon Nicklas..... (Hamilton)

TWO JUDGES APPOINTED BY THE
CHIEF JUSTICE OF THE ONTARIO COURT OF JUSTICE:

The Honourable Justice Howard Borenstein..... (Toronto)

The Honourable Justice Lise S. Parent..... (Brampton)

Lawyer Members:

DESIGNATED BY THE TREASURER

Mr. Christopher D. Bredt..... (Toronto)
Borden Ladner Gervais LLP

LAWYER MEMBER APPOINTED BY THE LAW SOCIETY OF ONTARIO:

Mr. David M. Porter ..... (Toronto)
McCarthy Tetrault

Community Members:

Mr. James Dubroy..... (Ottawa)
JAMES R. DUBROY LTD

Mr. Farsad Kiani.....(Markham)
President and Chief Executive Officer at ENSIL Canada Inc.
(until August 27, 2017)

Ms. Melikie Joseph, MSW, RSW .....(London)
The Office of the Children's Lawyer, Clinical Investigator
(effective November 15, 2017)

Mr. Ranjit Singh Dulai..... (Brampton)
President and Chief Executive Officer at Petroleum Plus

Ms. Judith LaRocque..... (Hawkesbury)
Government of Canada (retired)

Members – Temporary

Sections 87 and 87.1 of the *Courts of Justice Act* give the Ontario Judicial Council jurisdiction over complaints made about every provincial judge who was assigned to the Provincial Court (Civil Division) prior to September 1, 1990. When the Ontario Judicial Council deals with a complaint against a provincial judge of the former Civil Division, the judge member of the complaint subcommittee is replaced by a temporary member appointed by the Chief Justice of the Superior Court of Justice – a provincial judge who presides in "Small Claims Court", as the case may be.

During the period of time covered by this report, the following individuals served as temporary members of the Ontario Judicial Council to deal with any complaints against provincially-appointed judges to whom those provisions of the *Act* apply:

The Honourable Mr. Justice M. Don Godfrey ..... (Superior Court of Justice)

The Honourable Madam Justice Pamela Thomson ..... (Superior Court of Justice) (until August 27, 2017)

During the period covered by this report, the following judges of the Court of Appeal of Ontario were appointed by the Chief Justice of Ontario to serve on a Hearing Panel of the Ontario Court of Justice:

The Honourable Justice Eileen Gillese ..... (Toronto)

The Honourable Justice Robert Sharpe..... (Toronto)

Subsection 49(3) of the *Courts of Justice Act* permits the Chief Justice of the Ontario Court of Justice to appoint a provincial judge to be a temporary member of the Ontario Judicial Council to meet the quorum requirements of the legislation with respect to Judicial Council meetings, review panels and hearing panels.

During the period covered by this report, the following judges of the Ontario Court of Justice were appointed by the Chief Justice to serve as temporary members of the Ontario Judicial Council when required:

The Honourable Justice Barry Tobin ..... (Windsor)

The Honourable Justice Martin Lambert..... (Timmins)

The Honourable Justice Leslie Pringle ..... (Toronto)

3. ADMINISTRATIVE INFORMATION

Office space is utilized by both the Ontario Judicial Council and the Justices of the Peace Review Council. The Councils make use of financial, human resources and technology support staff in the Office of the Chief Justice, as needed, and computer systems without the need of acquiring a large staff.

Councils' offices are used for meetings of both Councils and their members, and as needed for meetings with judicial officers that may result as part of the disposition of complaints. The Councils have a shared telephone reception and fax number. They share a toll-free number for the use of members of the public across the province of Ontario and a toll-free number for persons using TTY/teletypewriter machines.

In the twenty-third year of operation, the staff of the Ontario Judicial Council and the Justices of the Peace Review Council consisted of a Registrar, one Counsel and Deputy Registrar, two Assistant Registrars and an Administrative Assistant as follows:

Ms. Marilyn E. King, LL.B. – Registrar

Ms. Isfahan Merali, LL.B. – Counsel and Deputy Registrar
(until June 30, 2017)

Ms. Michelle M. Boudreau – Assistant Registrar
(effective May 15, 2017)

Ms. Ana M. Brigido – Assistant Registrar

Ms. Kayla Babin – Administrative Assistant
(until December 15, 2017)

Ms. Rachel Doiron – Administrative Assistant
(effective December 18, 2017)

4. FUNCTIONS OF THE JUDICIAL COUNCIL

The *Courts of Justice Act* provides that the functions of the Judicial Council are:

- to establish complaint subcommittees from amongst its members to receive and investigate complaints about the conduct of judges, and report to the Judicial Council;
- to establish review panels to consider every complaint referred by the complaint subcommittees and decide upon dispositions under section 51.4(18);
- to hold hearings under section 51.6 when hearings are ordered by review panels pursuant to section 51.4(18);
- to review and approve standards of conduct;
- to consider continuing education plans;
- to consider applications under section 45 for orders that needs of judges arising from disabilities be accommodated; and,
- to consider requests by the Chief Justice or the Associate Chief Justices to continue in office beyond age sixty-five.

The Judicial Council's jurisdiction is limited to the investigation and imposition of dispositions of complaints about conduct. It does not have the power to interfere with or change a decision made by a judge. If a person believes that a judge made an error in assessing evidence or in making a decision, the proper way to proceed is through other legal remedies in the courts, such as an appeal.

Procedures

Under section 51.1 of the *Courts of Justice Act,* the Council may establish rules of procedure for complaint subcommittees, review panels and hearing panels and the Council must make the rules available to the public. The Council has established procedures containing rules for the complaints process which are posted on its website at the link for "Policies and Procedures" at **www.ontariocourts.ca/ocj/ojc/policies-and-procedures/.**

The Council operates under an Order to uphold the confidentiality framework intended by the statute that established the complaints process. The Order states:

> The Judicial Council has ordered that, subject to an order by the Council, a review panel or a hearing panel, any information or documents relating to a mediation or a Council meeting or hearing that was not held in public are confidential and shall not be disclosed or made public. The order applies whether the information or documents are in the possession of the Judicial Council, the Attorney General or any other person. The order of non-disclosure does not apply to information and/or documents that the *Courts of Justice Act* requires the Judicial Council to disclose or that have not been treated as confidential and were not prepared exclusively for the purposes of the mediation or Council meeting or hearing.

The Council amended its Procedures to explain the Council's rational for not confirming or denying whether a complaint has been received. The amendment explains that the Council has determined that in accordance with the statutory framework set out in the *Courts of Justice Act,* the complaints process is confidential. If it is determined that a hearing is warranted, the hearing process, by contrast, is public unless there are exceptional circumstances that require some or all of the hearing to be held in private.

During the period of time covered by this Annual Report, the Council retained external counsel, Paliare Roland Rosenberg Rothstein LLP, to assist the Council in updating its Procedures to increase public understanding of the complaints process. At the end of this reporting period, the Council was still considering possible revisions to address that objective, including improvements in style, added paragraph numbers throughout the document, and adding an overview of the process, an interpretation section and a definition section.

The current version of the Procedures is posted on the Council's website on the webpage "Policies and Procedures" at **www.ontariocourts.ca/ocj/ojc/policies-and-procedures/.**

The Council became aware that the Toronto Star brought an application against the Attorney General in the Divisional Court (in the case *Toronto Star v. AG Ontario,* 2018 ONSC 2586) seeking to establish that the "open courts principle" applies to processes before "quasi-judicial tribunals". The Toronto Star's court application did not define what tribunals would be included in or affected by the orders being sought. The Council noted that the application appeared to seek a broad declaration that the proceedings of all quasi-judicial tribunals in Ontario are presumptively open to the public at all stages, including the investigation. The Council brought a motion to intervene as a friend of the Court that could offer a useful contribution to the Court, from a different perspective than the parties to the application and other potential intervenors. The motion was granted and counsel representing the Council, Ms. Linda Rothstein and Mr. Andrew Lokan of the law firm Paliare Roland Rosenberg Rothstein LLP, made submissions to the presiding judge. In his decision, the judge, E. M. Morgan, J., remarked upon the "sage advice" from counsel for the Council. The decision of the Court makes clear that the *Dagenais/Mentuck* test (the leading Supreme Court of Canada case on public access to and publicity about court proceedings and court records) is to be applied case-by-case by tribunals, adapting to their particular circumstances and mandate.

An amendment was made to the Procedures to make it clearer that the Council has the primary responsibility for considering whether a judge should be suspended when there is a concern about conduct. Although the Chief Justice and the judiciary have jurisdiction over the assignment of judges, the Council is the body with exclusive authority to address complaints about the conduct of judges.

The Council considered the public nature of the complaints process after a Notice of Hearing has been filed. An amendment was made to the Procedures to provide for an exception to the general requirement of confidentiality if the criteria are met for a complaint to be referred to a hearing and for the judge to be suspended with pay under section 51.4 of the *Courts of Justice Act* pending the final disposition of the complaint. The amendment reflects that in such circumstances, the policy objectives of the statutory framework of preserving confidence in the judiciary and in the administration of justice are best achieved by disclosing that the judge has been suspended with pay or reassigned to a different location. Once the Notice of Hearing has been filed and the process has become

public, information will be disclosed on the website if the judge has been suspended or reassigned as the result of an interim recommendation during the complaints process.

5. EDUCATION PLAN

The Chief Justice of the Ontario Court of Justice is required by section 51.10 of the *Courts of Justice Act* to implement and make public a plan for the continuing judicial education of provincial judges and the education plan must be approved by the Judicial Council, as required by subsection 51.10(1). The continuing education plan is developed by the Chief Justice in conjunction with the Education Secretariat. In the most recent version, changes were approved that included:

- A new preamble that incorporates the important principle of judicial independence recognized in the *Constitution.*
- A new section incorporating the requirement for new judges to attend judicial education. This was always required but it was not previously stated in the Education Plan.
- Wording that clarifies the shared responsibilities of the Chief Justice and the Education Secretariat for judicial education.
- The core competencies, which were introduced in the 2012-2013 version, were moved to an Appendix. They are now well recognized and it is no longer necessary to introduce them in the main body of the document.

The most recent version of the continuing education plan can be found on the Council's website at: **www.ontariocourts.ca/ocj/ojc/education-plan/.**

6. COMMUNICATIONS

The website of the Ontario Judicial Council continues to include information regarding the Council, as well as information about any upcoming hearings. Updates on ongoing hearings are posted on the website under the link "Public Hearings". Copies of decisions for public hearings are posted on the website under the link "Public Hearings

Decisions" when released and all of the publicly available Annual Reports are included in their entirety.

A brochure to inform the public about the process to make complaints about judges and justices of the peace is available in hard copy at courthouses or by contacting the Council's office, and electronically on the website at **www.ontariocourts.ca/ocj/ conduct/do-you-have-a-complaint/.** The brochure, *"Do you have a complaint?"* provides information on what a judge does, on how to tell whether the presiding judicial officer is a judge or a justice of the peace, and on how to make a complaint about conduct.

7. PRINCIPLES OF JUDICIAL OFFICE

The Chief Justice of the Ontario Court of Justice was empowered to establish "standards of conduct for provincial judges" by section 51.9 of the *Courts of Justice Act.* A document entitled, the *Principles of Judicial Office* was prepared by the Judicial Conduct Subcommittee of the Chief Judge's Executive Committee in consultation with the Judges' Association and the judges of the court. The document was then submitted to the Ontario Judicial Council for its review and approval in the second year of the Council's operation, as required by subs. 51.9(1) of the *Courts of Justice Act.*

The *Principles of Judicial Office* serve as a guide to assist judges in addressing ethical and professional dilemmas. They may also serve in assisting the public to understand the reasonable expectations which the public may have of judges in the performance of judicial duties and in the conduct of judges' personal lives. A copy of the *Principles of Judicial Office* is attached as Appendix "C" and is posted on the website at **www.ontariocourts.ca/ocj/ojc/principles-of-judicial-office/.**

8. JUDICIAL APPOINTMENTS ADVISORY COMMITTEE

A member of the Ontario Judicial Council serves on the provincial Judicial Appointments Advisory Committee as its representative. The Honourable Justice Sharon Nicklas, Regional Senior Justice of the Central West Region, was appointed to act as the Judicial Council's representative on the Judicial Appointments Advisory Committee, effective August 11, 2016.

9. THE COMPLAINTS PROCEDURE

Any person may make a complaint to the Judicial Council about the conduct of a judge. Complaints must be made in writing. The governing legislation does not provide for the Judicial Council to act on anonymous complaints or to initiate inquiries into the conduct of a judicial officer. Rather, an investigation conducted by the Judicial Council must be in response to specific allegations submitted by a complainant. All correspondence is reviewed to determine whether or not the complaint is within the jurisdiction of the Judicial Council. If an individual is complaining about his/her lawyer, a Crown Attorney or another office, the complainant is referred to the appropriate office or authorities to make the complaints.

If the complaint raises allegations of conduct about a judge who is presiding over a court proceeding, the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This will ensure that any investigation by the Council is not interfering or perceived to be interfering with any on-going court matters.

In cases where the complaint is within the jurisdiction of the Judicial Council to consider, a complaint file is opened and a letter of acknowledgement is sent to the complainant, usually within a week of his or her letter being received by the Council. If the complainant expresses dissatisfaction with a decision that has been made by a judge, the letter of acknowledgment advises the complainant that the Judicial Council has no power to change a decision made by a judge. In such cases, the complainant is advised that he or she may wish to consult with legal counsel to determine what, if any, legal remedies may be available.

A brief outline of the complaints process follows below. A more detailed outline of the Judicial Council's Procedures can be found on the Judicial Council's website at: **www.ontariocourts.ca/ocj/ojc/policies-and-procedures/procedures-document/.**

A) Investigation and Review of Complaints

The complaint is assigned to a two-person complaint subcommittee for review and investigation. The complaint subcommittee, comprised of a provincially-appointed judicial officer (a judge, other than the Chief Justice of the Ontario Court of Justice) and a community member, is assigned to examine each complaint made to the Council.

Complaints are generally not assigned to members from the same region where the judge who is the subject of the complaint presides. This avoids any risk of or perception of bias or conflict of interest between a member of the Council and the judge.

Subsection 51.4(6) of the *Courts of Justice Act* states that the investigation must be conducted in private.

Subsection 51.4(3) empowers the complaint subcommittee to dismiss complaints which are either outside of the jurisdiction of the Council (e.g., it is a complaint about how a judge exercises his or her discretion, such as findings of credibility, or disagreement with the decision of a judge) or which, in the opinion of the complaint subcommittee, are frivolous or an abuse of process. All other complaints are investigated further by the complaint subcommittee.

Frequently, the subcommittee orders and reviews the transcript(s) of the court proceedings. The subcommittee may also order and listen to the audio recording. In some cases, the subcommittee may decide to conduct further investigation, such as interviewing witnesses. Under section 51.4(5), the subcommittee may retain external persons, including counsel, to assist it in the investigation by conducting interviews with witnesses.

The subcommittee may decide to request a response to the complaint from the judge. If a response is requested, a copy of the complaint, the transcript (if any), and the relevant materials considered by the subcommittee will be provided to the judge, together with a letter from the Judicial Council inviting a response. The judge may seek independent legal advice to provide him or her with assistance in responding to the Council.

Once the investigation is completed, under subsection 51.4(13) of the *Act,* the complaint subcommittee will report to a review panel of the Judicial Council. The subcommittee may recommend that the complaint be dismissed, that it be referred to the Chief Justice of the Ontario Court of Justice for discussion with the judge about his/her conduct, that it be referred for mediation, or that a hearing be held under section 51.6.

B) Dispositions of Review Panels

Review panels are composed of two provincial judges (other than the Chief Justice of the Ontario Court of Justice), a lawyer and a community member. A review panel will review the complaint, the report of the investigating complaint subcommittee and all materials

that are provided with the report of the subcommittee. At this stage of the process, only the two complaint subcommittee members are aware of the identity of the complainant and the judge who is the subject of the complaint. Complaint subcommittee members who participated in the investigation of the complaint do not sit on the review panel or, if a hearing is ordered, on the hearing panel at the subsequent hearing. Similarly, review panel members who dealt with a complaint's review or referral will not participate in a hearing of the complaint, if a hearing is ordered. By the end of the investigation and review process, all decisions regarding complaints made to the Judicial Council will have been considered and reviewed by a total of at least six members of Council – two members of the complaint subcommittee and four members of the review panel – including two community members and one lawyer. Of the six persons who consider each complaint, at least half of the members are not judges under subsection 51.4(18) of the *Act.* A review panel may decide upon the following dispositions:

- dismiss the complaint;
- refer it to the Chief Justice of the Ontario Court of Justice;
- refer it to a mediator; or
- order that a hearing into the complaint be held.

A complaint may be dismissed where, in the opinion of the review panel:

- it is frivolous or an abuse of process;
- it falls outside of the Judicial Council's jurisdiction because it is a complaint about judicial decision-making (the proper way to proceed in such cases is through other legal remedies in the courts);
- it does not include an allegation of judicial misconduct;
- the allegation is not supported by the evidence gathered during the investigation; or,
- the actions or comments of the judge do not rise to the level of misconduct that requires further action on the part of the Council.

A mediation process may be established by the Council and only complaints which are appropriate (given the nature of the allegations) will be referred to mediation. Under subsection 51.5(3) of the *Courts of Justice Act,* complaints of conduct may not be referred for mediation in the following circumstances:

- where there is a significant power imbalance between the complainant and the judge, or there is such a significant disparity between the complainant's and the judge's accounts of the event with which the complaint is concerned that mediation would be unworkable;
- where the complaint involves an allegation of sexual misconduct or an allegation of discrimination or harassment because of a prohibited ground of discrimination or harassment referred to in any provision of the Human Rights Code; or
- where the public interest requires a hearing of the complaint.

Provisions for temporary members have been made in order to ensure that a quorum of the Council is available to fulfill the requirements of the complaints process, including conducting a hearing into a complaint if a hearing has been ordered.

Because of the role of the Council in balancing judicial independence and accountability for judicial conduct, the legislation provides that proceedings, other than hearings to consider complaints against specific judges, are private and confidential.

C) Hearings under Section 51.6

Hearing panels are made up of four members of Council who have not been involved in the process up to that point. At least one member of a hearing panel is a community member. The Chief Justice of Ontario, or his or her designate from the Court of Appeal for Ontario, chairs the hearing panel. A judge of the Ontario Court of Justice and a lawyer also sit on the hearing panel.

A hearing into a complaint is public unless the Council determines, in accordance with criteria established under subsection 51.1(1) of the *Courts of Justice Act,* that exceptional circumstances exist and the desirability of holding an open hearing is outweighed by the desirability of maintaining confidentiality, in which case the Council may hold all or part of a hearing in private. In certain circumstances, for example, where a complaint involves allegations of sexual misconduct or sexual harassment, the Council also has the power

to prohibit publication of information that would disclose the identity of a complainant or a witness.

The *Statutory Powers Procedure Act,* with some exceptions, applies to hearings into complaints.

The Judicial Council engages legal counsel for the purposes of preparing and presenting the case against the judge. The legal counsel, called 'Presenting Counsel' operates independently of the Judicial Council. The duty of legal counsel retained under this part is not to seek a particular order against a judge, but to see that the complaint against the judge is evaluated fairly and dispassionately to the end of achieving a just result.

The judge has the right to be represented by counsel, or to act on his or her own behalf during the proceeding.

After a hearing, under subsection 51.6(11) of the *Courts of Justice Act* the hearing panel of the Council may dismiss the complaint (with or without a finding that it is unfounded) or, if it finds that there has been misconduct by the judge, it may impose one or more of the sanctions set out below or may recommend to the Attorney General that a judge be removed from office.

The sanctions which can be imposed under section 51.6 by the Judicial Council for misconduct, either singly or in combination, are as follows:

- a warning;
- a reprimand;
- an order to the judge to apologize to the complainant or to any other person;
- an order that the judge take specific measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
- suspension, with pay, for any period;
- suspension, without pay, but with benefits, for up to thirty days.

The hearing panel may also recommend to the Attorney General that the judge should be removed from office. A recommendation by the Council to the Attorney General that the judge be removed from office cannot be combined with any other disposition.

D) Removal from Office

A judge may be removed from office only if a hearing panel of the Judicial Council, after a hearing under section 51.6, recommends to the Attorney General that the judge should be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of:

- inability, because of a disability, to perform the essential duties of his or her office (if an order to accommodate the judge's needs would not remedy the inability, or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability);
- conduct that is incompatible with the due execution of his or her office; or,
- failure to perform the duties of his or her office.

Only the Lieutenant Governor in Council may act upon the recommendation and remove the judge from office.

10. NOTIFICATION OF DISPOSITION

The Judicial Council communicates its decision in writing to the person who made the complaint and to the judge. A judge may waive notice of the complaint if it is being dismissed and no response was requested from the judge by the Council. In accordance with the Procedures of the Judicial Council, if the Council decides to dismiss the complaint, brief reasons will be provided.

11. LEGISLATION

The official version of the *Courts of Justice Act,* which governs the work of the Ontario Judicial Council is posted on the government's e-laws website at:
www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90c43_e.html

12. COMPENSATION FOR LEGAL COSTS INCURRED

When the Judicial Council has dealt with a complaint, section 51.7 of the *Courts of Justice Act* makes provision for a judge to request compensation for costs of legal services incurred in connection with the investigation and/or mediation and/or hearing under sections 51.4, 51.5 and 51.6 of the *Act* respectively. Such a request would generally be submitted to the Council after the complaints process has been completed, along with a copy of the statement of account of legal services to support the request.

The Judicial Council may make a recommendation to the Attorney General that a judge be compensated, indicating the amount of compensation. Pursuant to section 51.7(7) of the *Act,* the Council's order for compensation may relate to all or part of the judge's costs for legal services and must be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services. The Attorney General is required to pay compensation to the judge if such a recommendation is made. Three recommendations for compensation were made to the Attorney General during the period covered by this report.

13. SUMMARY OF COMPLAINTS

The Ontario Judicial Council received 31 complaints in its twenty-third year of operation, as well as carrying forward 100 complaint files from previous years for a total of 131 open files. Eighty-one of the complaints were about the conduct of the Honourable Justice Zabel arising from one incident. One hundred and eleven files were addressed and closed during the period covered by this Report. Twenty complaint files remained open at the end of the reporting period and were carried over to the next reporting year (2018-2019) to be addressed.

Of the 111 files closed during 2017-2018, 82 files were closed after public hearings (81 complaints about the conduct of Justice Bernd E. Zabel and one about the conduct of Justice John Keast).

Of the 29 other files closed during 2017-2018, 17 were opened in that year. Ten of the files were opened in 2016-2017. One was opened in 2015-2016 and one file was opened in 2014-2015. In these two latter cases, after the file was opened, the Council learned that court proceedings that gave rise to the complaint were not fully concluded.

In accordance with the Council's Procedures, if a complaint raises allegations of conduct about a judge who is presiding over a court proceeding, the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This is to ensure that any investigation by the Council is not interfering or perceived to be interfering with any on-going court matters. The three files were held in abeyance pending the conclusion of the court proceedings and then investigated and considered.

Of the 111 files that were closed during the period covered by this Report, 98 arose from proceedings under the *Criminal Code,* nine arose from family court proceedings, and four related to allegations about a judge's conduct outside of court.

Thirteen of the 111 complaint files closed by the Ontario Judicial Council during the period of time covered by this report were dismissed on the basis that they were found to be outside of the jurisdiction of the Council. This occurred if a complainant expressed dissatisfaction with the result of a trial or with a judge's decision, but the complaint contained no allegation of misconduct. While the decisions made by the trial judge in these cases could be appealed, the absence of any alleged misconduct meant that the complaints were outside of the jurisdiction of the Judicial Council.

Fourteen of the 111 files closed were dismissed by the Council on the basis that they contained allegations of misconduct that were unfounded or that did not amount to judicial misconduct. The complaints included allegations such as improper behaviour (e.g., rudeness, belligerence, etc.), lack of impartiality, conflict of interest or some other form of bias. The allegations contained in each of these files were reviewed and investigated in each case by a complaint subcommittee and considered by a review panel before a decision was made.

Two complaints were referred to the Chief Justice. A review panel will refer a complaint to a Chief Justice where the majority of the panel is of the opinion that there is some merit to the complaint and the disposition is, in the opinion of the majority of the review panel, a suitable means of informing the judge that his or her course of conduct was not appropriate in the circumstances that led to the complaint.

Two hearings were ordered in relation to 82 complaints. A review panel will order a hearing where a majority of the members of the review panel is of the opinion that there has been an allegation of judicial misconduct which the majority of the members believes has a basis in fact and which, if believed by the finder of fact, could result in a finding of

judicial misconduct. A hearing was ordered in relation to 81 complaints about Justice Bernd E. Zabel and a hearing was ordered in relation to one complaint about Justice John Keast. The decisions on each of those hearings are included in the appendices of this Annual Report. Information about hearings is available on the Council's website under the link "Public Hearings".

Twenty complaint files remained open to be carried over into 2018-2019.

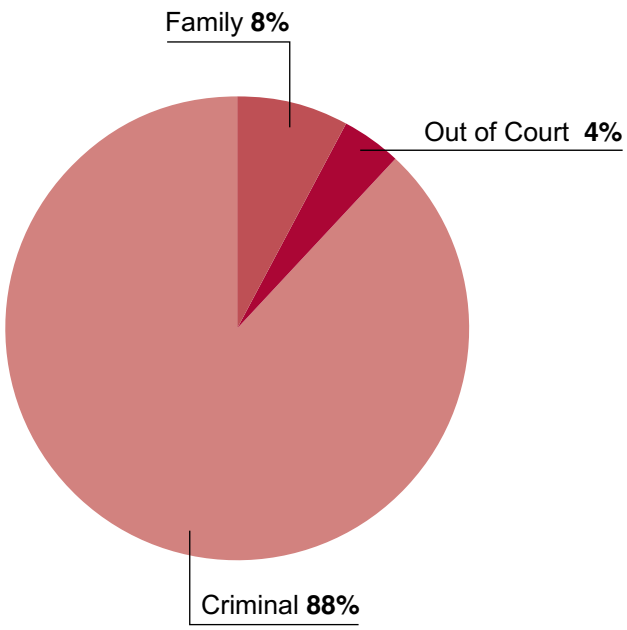
DISPOSITIONS ON FILES CLOSED IN 2017-2018

DISPOSITION	NUMBER OF CASES
Dismissed – out of jurisdiction	**13**
Dismissed – unfounded, not judicial misconduct, etc.	**14**
Referred to Chief Justice	**2**
Loss of jurisdiction	**0**
Hearing	**82***
TOTAL	**111**

* Two hearings took place: one in relation to 81 complaints about Justice Zabel; and, one hearing in relation to one complaint about Justice Keast

TYPES OF CASES CLOSED IN 2017-2018

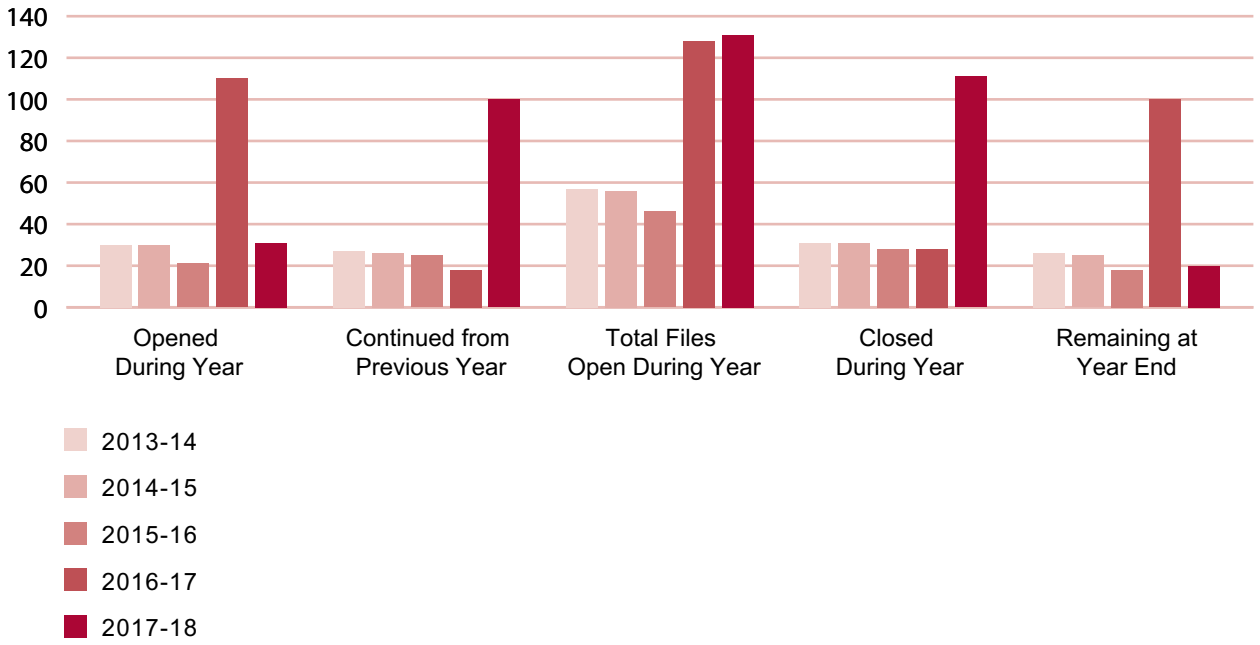
TYPES OF CASES CLOSED IN 2017-2018	
Criminal Court	**98**
Family Court	**9**
Other – Outside of Court	**4**
Small Claims Court	**0**
Provincial Offences Appeal	**0**
TOTAL	**111**



CASELOAD IN FISCAL YEARS

FISCAL YEAR	13/14	14/15	15/16	16/17	17/18
Opened During Year	**30**	**30**	**21**	**110**	**31**
Continued from Previous Year	**27**	**26**	**25**	**18**	**100***
Total Files Open During Year	**57**	**56**	**46**	**128**	**131**
Closed During Year	**31**	**31**	**28**	**28**	**111***
Remaining at Year End	**26**	**25**	**18**	**100**	**20**

* 81 complaints addressed by the hearing about the conduct of Justice Zabel that took place in August 2017. One additional complaint was addressed by the hearing about the conduct of Justice Keast took place in December 2017. The decisions in the hearings can be found on the Council's website at www.ontariocourts.ca/ocj/ojc/public-hearings-decisions/d2017/.



* 81 complaints received about the conduct of one judge arising from one incident were ordered to a hearing that took place in 2017. Information about the hearing can be found on the Council's website at http://www.ontariocourts.ca/ocj/ojc/public-hearings/

APPENDIX A

CASE SUMMARIES

Files are given a two-digit prefix indicating the year of the Council's operation in which they were opened, followed by a sequential file number and by two digits indicating the calendar year in which the file was opened (e.g., file no. 23-001/17 was the first file opened in the twenty-third year of operation and was opened in calendar year 2017).

Details of each complaint, with identifying information removed as required by the legislation, follow.

CASE NO. 20-008/14

The complainant alleged that when he was in the courtroom waiting for his trial on drug charges to proceed, the judge made remarks during the sentencing hearing of another offender that showed that the judge was biased against persons who have an addiction. The complainant also said that he read in a newspaper about other comments made by the judge during court proceedings and he alleged that those comments disclosed a bias against those charged with drug offences. As a result of the judge's bias, the complainant argues that he did not "*receive a fair trial".*

When the complainant filed his complaint with the Judicial Council, his own trial was underway before the judge. Staff of the Council informed him of the Council's policy that if a complaint raises allegations of conduct about a judge who is presiding over a court proceeding, the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This is to ensure that any investigation by the Council is not interfering or perceived to be interfering with any ongoing court matters.

After the trial ended, the complainant filed an appeal. The complaint subcommittee decided to hold the complaint in abeyance until the completion of the complainant's appeal.

The complainant subsequently contacted the Council and indicated that his appeal had concluded and was successful. As the matter was no longer before the court, the investigation into the complaint proceeded.

The subcommittee reviewed the complainant's correspondence, and ordered and reviewed the transcript of the sentencing proceedings that he had observed in the

courtroom prior to his trial. The subcommittee reviewed the newspaper article that was referred to by the complainant and ordered and reviewed the transcript of the proceedings that gave rise to the newspaper article. The subcommittee ordered and reviewed the transcripts of the proceedings of the complainant's trial and the judgment of the appeal court in his case. The subcommittee invited the judge to respond to the complaint and reviewed the judge's response. After completing its investigation, the subcommittee provided a report to the review panel.

The review panel reviewed the correspondence from the complainant, the transcript of the sentencing proceedings that gave rise to the complaint, the newspaper article, excerpts from the transcript of the proceedings that gave rise to the article, and the relevant excerpt of the judgment of the appeal court. The review panel also reviewed the response from the judge and the report from the complaint subcommittee. In accordance with the Council's Procedures, the review panel reviewed the judge's complaint history.

The review panel observed that the sentencing matter that preceded the complainant's trial involved an accused person with an addiction to gambling. In the course of giving his reasons for sentence, the trial judge said the following:

> *"This accused has, from the material in front of me and from listening to her counsel, an addiction. Her addiction is to gambling. I say is, not was, because every addict knows that it is a lifelong battle, a day at a time, until the end of your life to beat an addiction. Like every addict, whether it be drugs, or alcohol, or whatever it is; every addict that I have ever met and I have met thousands, and thousands and thousands of them; are liars, cheaters, and thieves, everyone. That is what their life is all about. They have a mask that they wear for some people, but down deep they know that in order to wear that mask they have to lie and they have to cheat and they have to steal, and that is exactly what she has done for many years."*

The review panel noted that the complainant alleged that the judge's comments demonstrated bias and showed that the judge "*condemns everyone who is an addict whether it is drugs or alcohol".* The complainant believed that as a result of his bias, the judge rejected the complainant's legal arguments in the case and ultimately convicted him.

The review panel observed that the complainant raised concerns about comments reported in the local newspaper. According to the article, the judge had stated *"Am I in*

Mars or am I in [redacted name of the city in which the judge was presiding that day]?" to an Assistant Crown Attorney who proposed a joint submission for sentence on a drug case. The transcript showed that the judge ultimately accepted the proposed sentence and said, *"I'll hold my nose and do it".* The transcript also showed that the judge asked a person in the courtroom whether he needed the services of Duty Counsel and he was told that the person was a newspaper reporter. The judge then said *"That doesn't mean you don't want to plea to something. Do you want to plead to something… You must be guilty of something".*

The review panel noted that one of the complainant's grounds of appeal against conviction was that the conduct of the trial judge gave rise to a reasonable apprehension of bias, thus the trial was unfair and constituted a miscarriage of justice. He argued that the trial judge's comments in the earlier sentencing proceedings constituted cogent evidence to rebut the presumption of integrity and to establish a reasonable apprehension of bias. He asserted that the comments amounted to stereotyping of addicts, whatever their addiction, as liars, cheats and thieves.

The review panel noted that the Court of Appeal for Ontario rejected the complainant's allegation of bias, finding that the trial judge neither did nor said anything during the complainant's trial to establish a reasonable apprehension of bias. The appeal court stated that while not condoning the trial judge's remarks in the unrelated sentencing proceeding, there was nothing in the trial record demonstrating that any of the trial judge's decisions in the complainant's case were grounded in prejudice, generalizations or stereotypical reasoning. The appeal court also indicated that while in some instances judicial comments in prior unrelated proceedings may be of service in subsequent cases, those comments should not be considered in the absence of their context.

The panel could see from the judge's response that his comments in the unrelated sentencing matter preceding the complainant's trial were intended to try to encourage that accused person to change her conduct and to break the pattern of addiction. The judge, who frequently presided in Drug Treatment Court, explained how the comments were made with a view to try to get the person to see that failing to admit the truth about herself was one of the reasons why she was in trouble with the law.

The panel observed that the judge had reflected upon his conduct and realized how his comments could be misconstrued when taken out of context. The judge indicated that he

had stopped making those references in regular court when he realized how easily they could be misconstrued when taken out of context.

The review panel carefully considered whether the comments made by the judge could be found to constitute judicial misconduct. The review panel was of the view that the comments made by the judge must be taken in context. The panel observed that the comments heard by the complainant were made during a sentencing after a guilty plea. The panel noted that there was nothing to suggest that the trial judge convicted that offender as a result of a credibility finding based on a bias against those suffering from addiction. The transcript showed that the judge considered a number of mitigating factors and did not punish the offender based on her addiction; rather, he imposed a more lenient sentence than he would have otherwise imposed.

The review panel noted that the judge's remarks quoted in the newspaper article also needed to be taken in context. The excerpts of the transcript of the court proceeding showed that the comments were made in the context where the judge was concerned that a joint sentencing submission was too low but, in the end, he accepted the joint submission and imposed the sentence proposed by counsel. The excerpt of the transcript indicated that the comment made to the news reporter appeared to be an attempt at humour.

The review panel noted that all judges must be and should appear to be impartial with respect to their decision making. The review panel agreed with the Court of Appeal for Ontario that the appearance of impartiality is assessed from the perspective of the reasonable, fair-minded and informed person. The panel noted that judicial misconduct is established where a judge's conduct is so seriously contrary to the impartiality required of the judiciary that it would undermine public confidence in the judge's ability to perform the duties of his or her office. After considering the judge's intentions, all of the circumstances and the response of the judge, the review panel concluded that the comments made by the judge did not constitute judicial misconduct.

The review panel agreed with the Court of Appeal for Ontario that the judge's comments did not support a conclusion that there was an apprehension of bias in this case. The review panel also agreed with the Court of Appeal for Ontario that it did not condone the language used by the judge to address the accused in the sentencing hearing that preceded the complainant's trial.

The complaints process through the Council is remedial in nature and through the review of one's conduct, improvements are made as to how situations and individuals are treated and handled in the future. The review panel observed that the response from the judge showed that he had reflected upon his conduct and that he better appreciated why his comments were not appropriate. The judge said that he has stopped making such comments outside of drug treatment court, as he understood how such comments can be misconstrued when taken out of context. The review panel concluded that no further steps were necessary.

The review panel further noted that determining the question of whether the complainant had a fair trial was a matter outside the jurisdiction of the jurisdiction of the Judicial Council. That matter was within the jurisdiction of the appeal court.

For the reasons set out above, the file was closed.

CASE NO. 21-009/15

The complainant was a defence lawyer, whose client appeared before the subject judge in two separate trials. The accused was convicted in both trials.

The complaint was filed while the second court case was ongoing. The complainant alleged that because of the judge's alleged misconduct, his client would be sentenced unduly harshly, primarily as a result of the judge's refusal to consider in mitigation the psychological impact of his client's mixed racial heritage.

The complainant was informed that if the complaint raises allegations of conduct about a judge who is presiding over a court proceeding, the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This is to ensure that any investigation by the Council is not interfering or perceived to be interfering with any on-going court matters.

The complainant advised that the sentencing had concluded and the complaint was assigned to a complaint subcommittee for review and investigation. Subsequently, the subcommittee became aware that an appeal of the second court case was ongoing in the courts. The investigation was held in abeyance pending the conclusion of the court proceedings. After the appeal was dismissed, the investigation of the complaint proceeded.

The complainant alleged, among other things, that the judge was "a racist bully" whose conduct brought the administration of justice into disrepute. The complainant said that his client was of mixed European and African heritage. The complainant said that he himself was also of mixed race. He said that he was ashamed and angered by the conduct of the subject judge. He described the judge as "out of control".

The complainant said that his complaint was focused on the judge's conduct during the first trial. His allegations included:

- The judge's behaviour "provides constant fuel for complaint and discussion in the local jurisdiction."
- The judge engaged in "racist bullying of a mixed race young man without any consideration whatsoever of the young man's psychological state, most notably, his racial identity issues".
- The judge summarily dismissed the opinion of a qualified mental health professional and substituted it with *"his own bigoted rhetoric".*
- The judge *"*went as far as to suggest that citing racial identity issues as a psychological problem amounts to an insult to the fabric of Canadian society. His comments prove that he is a racist and he is poised now to deliver a fatal blow to the young man's psyche, future prospects and liberty".
- "This is a case about torture, nothing less*"*.
- During the trial, the judge became aware that the accused suffers from a disability of emotional dysregulation which allows the accused to become angry and alarmed easily, and that the judge and Crown Attorney sought to exploit this condition to help secure a conviction.
- The judge "hijacked" his examination-in-chief, preventing him from asking certain questions and hijacked several of his questions during cross examination.

The complaint subcommittee reviewed all of the correspondence from the complainant and all of the materials that he provided. The subcommittee ordered and reviewed all of the trial transcripts, as well the pre-sentence report and the submissions and reasons for sentence in the first trial. The subcommittee also read all of the trial transcripts,

submissions and the reasons for judgment in the second trial, as well as the reasons of the appeal court.

The subcommittee observed that the transcripts did not support the allegations of bullying, torture, that the judge and Crown Attorney sought to exploit a disability of the accused to help secure a conviction, that the judge "hijacked" the complainant's examination-in-chief, or that the judge was "out of control".

The subcommittee noted that the allegation that the judge's behaviour "provides constant fuel for complaint and discussion in the local jurisdiction" constituted opinion.

The subcommittee noted that some allegations related to judicial decision-making and were out of the jurisdiction of the Council, including the allegations related to relevance of questions asked by the complainant during the trial and the judge's assessment of the evidence from the medical professional.

The subcommittee observed the following comments by the judge in the transcript of the first trial:

> "You know, Mr. [redacted name of the accused], between me and you - between this Court and you, I do not buy your suggestion that because your mother is white and your father is black, that you have this problem. This is one of the most multi-cultural countries in the world. There isn't anybody I know of who would look at you and say that you are unfit to be in our presence. I think you use it as an excuse. You need only look – if you follow any kind of sports, there is a wonderful player playing for the Toronto Maple Leafs right now, Mark Fraser. His dad is the Regional Senior Judge for the East Region in this Province. If my memory serves, Mr. Fraser – this defenceman's skin is no darker than yours. It has not hindered him and it should not hinder you. I will tell you your problem and it is right at page five of this [Pre-Sentence] report:
>
> '[The defendant] admits to having a significant drug problem. Prior to custody, he estimated he smokes two grams of marijuana on a daily basis. He admits that his drug use affects his ability to work and attend school. He stated, *'it slows me down'.* [The defendant] recalled starting to smoke marijuana in grade seven and was also ingesting pain killers known to him as *'Oxys'.* The pills were making him physically ill and very lethargic. He stopped taking the

> Oxy after he was charged with assault with a weapon causing bodily harm May 2011 as he recognized that things were really out of control. He has been clean and forced to detox since he was detained on August 28, 2013. He plans to remain drug free upon his release. His plan for success includes living at home where his drug use is not tolerated and the support of his girlfriend, who is not a drug user. He has tried drug and alcohol treatment in past; attended [redacted]; he's tried to quit on his own.' "

The judge then said:

> "You will not go anywhere in my opinion in this society - never mind your colour – nobody sees that in you. You are an athletic looking young man who has some ability. It is your commitment to illicit drugs that it putting you in custody. You have continuously come before this Court and when released, you go back to drugs. So, it is going to be for you, Mr. [redacted name of the accused], to decide that colour is not the issue for you and should not be an excuse and you should not use it. It insults the Court; it insults everybody in this building ... and it insults, by the way, or it, in my view, decreases the amount of reliability I place upon Dr. [name redacted]. I can understand the abandonment issue. That is to say, your father has never been a role model in your life. I do not understand whatever psychological problems you have arising from mixed-race ancestry – not in this day and age; not in this province, not in this country – because it does not – very rarely, if ever, hold people back now. It is all in your mind."

The subcommittee noted that all persons in the court process are observers of the comments and behaviour of a judge. Each and every comment made by a judge, and his or her tone and manner in the courtroom are all important elements of how he or she is perceived by members of the public. A judge has a unique role as exemplar and guardian of the dignity in the court.

A judge must be mindful of whether comments would be perceived as respectful and judicious. As indicated in the preamble of the *Principles of Judicial Office,* judges "recognize their duty to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence and integrity of their judicial office and to preserve the faith and trust that society place in the men and women who have agreed to accept the responsibilities of judicial office."

The subcommittee noted that public confidence in the administration of justice requires that a judge be, and be seen to be, impartial. The judge is a neutral adjudicator. The *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* include the following:

> 1.1 Judge must be impartial and objective in the discharge of their judicial duties.

The subcommittee noted that justice must not only be done; it must be seen to be done.

The complaint subcommittee invited the judge to respond to the complaint. The subcommittee received and reviewed the letter from the judge. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed all of the correspondence received from the complainant and the materials that he provided. The review panel reviewed the report from the subcommittee and the transcript containing the comments of the judge referred to above. The review panel also reviewed the letter from the judge responding to the complaint.

The review panel accepted His Honour's explanation that the intention of his remarks to the young person was to encourage him to believe in himself and to strive to better himself.

However, the review panel was concerned that His Honour may not fully appreciate how his comments and use of language may be perceived, irrespective of his intentions. The review panel noted that a judge must be mindful of whether comments would be perceived as respectful and judicious.

The review panel noted that in the leading case on judicial conduct, *Therrien v. Minister of Justice et al,* the Supreme Court of Canada provided a general description of the conduct expected of a judge and the importance of being seen to be impartial and objective:

> [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 …
>
> *Therrien v. Minister of Justice et al.,* [2001] 2S.C.R.3 at para. 110 to 111

The review panel noted that in the judge's response, he expressed his regret if his comments offended. He offered his apologies to the accused.

The review panel decided to refer the complaint to the Chief Justice of the Ontario Court of Justice for discussion as its disposition of the complaint, pursuant to section 51.4(17)(c) of the *Courts of Justice Act,* with the objective of precluding other incidents of this nature from occurring and restoring public confidence in the administration of justice. Under the Procedures of the Council, a review panel will refer a complaint to the Chief Justice of the Ontario Court of Justice in circumstances where the majority of members of the review panel are of the opinion that the conduct complained of does not warrant another disposition and there is some merit to the complaint and the disposition is, in the opinion of the majority of members of the review panel, a suitable means of informing the judge that his/her course of conduct was not appropriate in the circumstances that led to the complaint.

A review panel will recommend imposing conditions on its referral of a complaint to the Chief Justice of the Ontario Court of Justice where a majority of the members of a review panel agree that there is some course of action or remedial training of which the subject judge can take advantage of and there is agreement by the judge in accordance with subs. 51.4(15) of the *Act.* The review panel asked the Chief Justice to consider referring the judge to education such as a cultural sensitivity program.

After the Chief Justice's meeting with the judge, Her Honour provided a report to the review panel. After reviewing the report, the review panel could see that the judge was very remorseful about his comments. The panel noted that His Honour had a depth of experience working with racialized persons and communities, both as a lawyer and as a judge. The review panel was satisfied that in making the comments, the judge's hope was to encourage the accused to concentrate on changing his behaviour and move on from his drug addiction. The judge's hope was that the accused might see the hockey player as a positive role model.

The review panel noted that the Chief Justice had discussed with the judge the concerns raised by his comments. The review panel could see that the judge had taken this complaint very seriously. The Chief Justice informed the panel that the judge had been referred to and completed a cultural sensitivity program that included: cultural sensitivity, understanding systemic racism in Canada, racialized individuals and communities, using anti-racist language, and setting and maintaining professional boundaries.

After receiving the report from the Chief Justice, the review panel closed the file.

A

CASE NO. 22-008/16

This complaint arose in the context of family law proceedings.

The complainant alleged that the subject judge mishandled this matter by wasting significant court resources and which resulted in the complainant not receiving a fair hearing. He provided information about a dispute he had with the Canadian government and alleged that the dispute affected the family law matter.

The complainant further alleged that the subject judge made unenforceable orders against him during his hearing. At the time when the complainant wrote to the Judicial Council, his motion was before the court. The complainant was informed that if the complaint raises allegations of conduct about a judge who is presiding over a court proceeding, the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This is to ensure that any investigation by the Council is not interfering or perceived to be interfering with any on-going court matters. After the court matters were completed, a file was opened and the complaint was investigated.

The complainant alleged:

- He did not get a fair hearing before the subject judge due to influence being brought by the Canadian Government;
- He was discriminated against due to his ethnic roots or his age or due the events related to his dispute with the Government;
- The subject judge did not want to be involved in any controversy with the Canadian Government;
- He was not permitted to present evidence regarding misconduct of the Canadian Government to support his position within the family law proceedings;
- He was “set-up” by the subject judge so that he would never receive a fair hearing in the Superior Court of Justice;
- The subject judge declared him a “special party”, involved the Public Guardian and Trustee and imposed incompetent legal representation on him;

- The subject judge contravened the *Family Law Rules* on several occasions; and,
- The subject judge made unenforceable orders within the proceedings.

The subcommittee reviewed the correspondence from the complainant, including materials enclosed with his letters, and the transcripts of the proceedings before the subject judge. When they concluded their investigation, they submitted a report to the review panel.

The review panel reviewed the complainant's correspondence and materials, the transcript of the proceedings and the subcommittee's report.

The review panel observed that the transcript showed that throughout the proceeding, the complainant's behaviour focused on his attempt to convince the judge of the following:

- His position that he was unlawfully terminated as an employee of a federal body and the reasons why he was terminated;
- That he was requesting that the court award damages against the Government of Canada;
- That he has been treated unjustly by the Government of Canada, and
- Why he believed that his case was not a typical case given the actions initiated by the Government of Canada.

The review panel noted that its review of the transcript showed that the subject judge was patient yet firm in seeking clarification from the complainant regarding his position. The judge appropriately tried to re-direct and focus the complainant on the issue before the court, which was his ability to pay ongoing and accumulated arrears of child support. The judge sought details from the complainant regarding his financial circumstances, including his application to receive his employment pension.

The review panel observed that the transcript indicated that the complainant appeared to be evasive in his responses to the judge, choosing to reply by focusing on his right to damages from the Government of Canada. The judge respectfully and correctly advised the complainant, on several occasions, that the court did not have jurisdiction to address this claim. The judge directed the complainant to several community resources to obtain legal advice on his civil claim for damages and his family law proceeding to reduce

his child support arrears and ongoing obligation. The review panel could see from the transcript that the complainant displayed his frustration to the judge in not being able to have his alleged claim for damages from the Canadian government dealt with by the family law court.

The review panel found no evidence to support the allegations that the complainant did not receive a fair hearing or that the judge acted in any inappropriate way during the proceedings or in addressing the complainant. There was no evidence that the judge was influenced by the Canadian Government or that her decisions were made because of any desire to avoid involvement in controversy with the Canadian Government; rather, the transcript showed that the judge was making her decisions based upon the law that applied in the family law proceeding before her and her interpretation of her jurisdiction.

The panel found that there was no evidence that the complainant was discriminated against due to his ethnic roots or his age or due to the events related to the termination of his employment or beliefs of the federal government. The judge's decisions, including her decision that the complainant could not present evidence to try to establish misconduct of the Canadian Government and her decision to designate the complainant as a "special party" and involve the Public Guardian and Trustee, were decisions made based upon the judge's application of the law governing the family law proceeding and her understanding of her jurisdiction.

The review panel found no evidence that the complainant was "set-up" by the judge so that he would never receive a fair hearing in the Superior Court of Justice.

The orders made by the judge and her interpretation and application of the law and the *Family Law Rules* were matters of judicial decision-making outside the jurisdiction of the Judicial Council. The jurisdiction of the Judicial Council is limited to matters of conduct. Only a higher level of court has the jurisdiction to determine whether decisions made by a judge are incorrect and whether they should be changed.

This complaint was dismissed on the basis that the allegations related to conduct were not supported by the transcript and the allegations related to decisions made by the judge or her interpretation of the law were out of the jurisdiction of the Judicial Council. The file was closed.

CASE NO. 22-016/16

This complaint arose from a criminal trial. The complainant alleged that the presiding judge violated the accused's *Charter* right to be represented by counsel at the trial.

The complainant alleged that the judge was aware that the accused was in receipt of a certificate granted by Legal Aid Ontario and was unable to retain a lawyer who spoke in the language of the accused. The complainant alleged that the accused had been "black-balled" by the lawyers of the criminal defence bar who spoke the same language as the accused.

The complainant alleged that despite being aware of this information, the judge required the trial to proceed with the accused not being represented. The complainant stated that the judge refused to appoint an *amicus curiae* for the accused, order Legal Aid Ontario to appoint counsel or request assistance on behalf of the accused from Duty Counsel.

The complaint subcommittee reviewed the complainant's correspondence and the materials he provided. The subcommittee also requested and reviewed the transcripts of all the proceedings before the judge and the audio recording of the first appearance before the judge. The subcommittee provided a report on its investigation to the review panel.

The review panel reviewed the correspondence from the complainant, the materials he provided and the report from the subcommittee. The review panel also reviewed excerpts of the transcripts of the proceedings.

The review panel carefully reviewed all of the allegations made by the complainant.

The review panel accepted the findings of the complaint subcommittee that the transcripts showed that the presiding judge was fair, appropriate and empathetic to the accused throughout the proceedings. The presiding judge ensured that the accused was assisted by an interpreter who spoke his language during all three days of the proceedings.

The review panel noted that the transcript of the first appearance showed that the judge referred to the history of the court proceedings and that she noted that this matter had been before the court on a previous date. On the previous date, the judge had noted on the Information that the accused was not represented by counsel and the matter was to proceed to trial regardless of whether or not the accused was represented at the

next appearance. The transcript showed that the accused acknowledged on the record that he was present on the earlier date and that he understood on that day that the trial was to proceed on the subsequent date regardless of whether or not he had a lawyer representing him.

The review panel noted that the complaint subcommittee found that the court record showed that the subject judge found that the accused had taken minimal steps since his earlier court date to retain legal counsel, even though he knew the matter would proceed with or without counsel.

The review panel observed that the transcript showed that after the judge ruled that the trial was to proceed, she directed Crown counsel to provide the accused with the disclosure, even though the Crown Attorney indicated that disclosure had been provided twice before. The judge also requested that during the lunch break, the interpreter assist in the translation of the disclosure documents.

The panel noted that the transcript showed that the judge gave explanatory comments to the accused regarding the Crown's burden of proof, the trial process and the leading of the evidence. The judge informed the accused that if he had any questions throughout the trial, these could be asked at any time. The judge directed the Crown Attorney to give the accused a pen and paper to write down any questions for witnesses and/or the Court. The judge also gave time for the accused to speak with Duty Counsel.

The review panel noted that the subcommittee reported that throughout the trial, the judge explained the process when the Crown Attorney sought to introduce exhibits, witness notes and video recordings during the trial. The judge ensured that the accused saw the documents and was permitted to cross-examine. The judge also assisted the accused in formulating his questions for cross-examination purposes.

The review panel noted that the transcripts revealed that it was only on the third day of trial, that the accused raised the issue of a breach of his *Charter* rights. The transcript confirmed that this issue was raised by the accused providing a letter to the Crown Attorney which was written by the complainant.

The review panel observed that the transcript showed that the judge excused the witness and addressed the issue raised by the accused. The transcript confirmed that the judge read the letter provided by the accused and heard submissions by the accused and Crown counsel. The judge provided reasons to support the refusal of the accused's request for the adjournment of the trial on the basis that he did not have representation.

The panel noted that the subcommittee reported that at the close of the Crown's case, the judge explained to the accused his right to seek a dismissal or to call evidence in support of his position. The judge allowed the accused to speak with Duty Counsel on this issue. At the recalling of the matter, the judge accepted the accused's election not to call evidence. The judge directed Crown counsel to specifically refer to the legislative framework and case law in support of their position. The judge permitted the accused to make closing remarks. The transcript confirmed that the judge explained to the accused, in an appropriate and understandable manner, the reasons for the finding of guilt. Following the finding of guilt, the judge inquired, in an appropriate and understandable manner, whether the accused understood the Crown's submissions on sentence. The judge invited the accused to make remarks. The judge accepted the Crown's and the accused's submissions on sentencing, as the incarceration period ordered was to be served during weekends. The judge asked if the accused had any questions regarding sentencing.

The review panel noted that the judge's decisions that the trial should proceed and her decision that there was no *Charter* violation were matters of judicial decision-making outside the jurisdiction of the Council. The question of whether *amicus curiae* should be appointed was also a matter of judicial decision-making outside the jurisdiction of the Council.

The review panel accepted the findings of the complaint subcommittee that there was no indication in the transcripts of any judicial misconduct. Rather, the record was clear that the judge took care to ensure that the accused was aware and understood the proceedings at every step.

The review panel dismissed the complaint on the basis that the allegations were outside the jurisdiction of the Council and there was no evidence of judicial misconduct. The file was closed.

A

CASE NO. 22-017/16

This complaint arose in the context of child protection proceeding trial. The complainant alleged that he was not treated fairly throughout the proceedings by the presiding judge.

The complainant also alleged that the judge:

- was *"pre-occupied"* against him and his counsel;
- refused to admit additional documentary evidence and witnesses on his behalf throughout the trial;
- denied his request for a mistrial of the hearing;
- created a degree of acrimony between himself, his ex-wife and his counsel;
- was incompetent or may have acted in a collusive agreement with the other parties;
- showed gender or racial bias/preoccupation and/or prejudice against the complainant and/or his lawyer, and,
- referred to him as a jerk by stating he *"acted as a jerk"* then paused and said *"...And he is a jerk."*

The subcommittee read the letters from the complainant and ordered and reviewed the extensive transcripts of the proceedings. After the conclusion of their investigation, they submitted a report to a review panel.

The review panel reviewed the complainant's correspondence, an excerpt of a transcript and the subcommittee's report to them.

With respect to the allegation that the judge was *"pre-occupied"* against the complainant and his counsel, the subcommittee reported that the transcript demonstrated that the judge was equally inquisitive of all parties and counsel throughout the proceedings. The judge sought, in an equitable manner, guidance, relevant case law and legislative references from counsel for the parties and the children through the Office of the Children's Lawyer. The subcommittee reported that the transcript showed that the judge was transparent in advising all parties and counsel that his background was more in the context of criminal law proceedings. The judge was clear that his comments and questions were made with

the objective of ensuring the evidence and submissions made by counsel and the one self-represented litigant focused on providing the necessary details for a decision to be granted on all issues before the court, namely statutory findings, finding in need of protection and disposition as required pursuant to the *Child and Family Services Act.*

The subcommittee also reported that the transcript further revealed that the judge permitted, at the request of the complainant, an agent for the complainant to appear at the commencement of the trial on behalf of the counsel of record. The judge permitted a short adjournment, when counsel of record did attend, to facilitate a private discussion between the agent and counsel of record.

The review panel noted that the subcommittee reported to the review panel that the transcript showed that, at times, the judge engaged in the use of sporting analogies, lengthy commentary, and firm direction to the parties. The review panel accepted the finding of the subcommittee that it appeared that these actions were taken by the judge to focus them on the issues and the evidence. The panel accepted the finding of the subcommittee that there was no evidence of judicial misconduct.

The review panel noted that a number of the allegations were matters of judicial decision-making outside the jurisdiction of the Council, including that the judge refused to admit additional documentary evidence and accept evidence of witnesses who gave evidence on the complainant's behalf throughout the trial; and, that the judge denied the complainant's request for a mistrial of the hearing. The panel noted that if the complainant disagreed with the way the judge's decisions were made, the proper way to proceed was through a remedy in the courts, such as an appeal.

The complaint subcommittee reported that the transcript revealed that the judge granted counsel's request for written submissions with the additional opportunity to make oral submissions. The self-represented party was not required to file written submissions. The granting of this request further demonstrated the judge's equitable approach in ensuring that thorough submissions made by and on behalf of both parties and the children were put before the court in a manner which was appropriate.

With respect to the allegation that the judge referred to the complainant as "a jerk", the review panel found that the transcript showed that the judge did not use the term to describe the complainant or express his own view about the complainant. Rather, the judge used the term to try to clarify whether his understanding was correct of the evidence

being put forward by the ex-spouse of the complainant in support of the children's perception of their father.

The review panel accepted the findings of the complaint subcommittee that the transcripts indicated no evidence to support the complainant's allegations of bias, discrimination, preoccupation, prejudice, acrimony or other allegations of judicial misconduct.

The review panel accepted the findings of the complaint subcommittee that the transcripts showed that the judge was not incompetent and there was no evidence to suggest that the judge acted in collusion with the other parties. These allegations appeared to arise from the complainant's disagreement with the judge's assessment of the evidence, his application of the law and the decisions made in the case. As indicated above, these matters were outside the jurisdiction of the Council.

The review panel concluded that there was no evidence of judicial misconduct on the part of the judge and the allegations related to judicial decision-making were outside the jurisdiction of the Council. The complaint was dismissed and the file was closed.

CASE NO. 22-020/17

The complainant appeared before the subject judge for a case conference in a family law proceeding. The complainant alleged in his letter that he was not treated fairly throughout the proceedings, that the judge failed to consider evidence he submitted in this matter, that the judge made comments which favoured the opposing party and she placed him in a position of hardship. He also alleged that he was discriminated against. The complainant said that he did not have a lawyer and did not qualify for Legal Aid because of the amount of money he made and this was discrimination.

The complaint subcommittee members reviewed the letter from the complainant and ordered and reviewed the transcripts of the court proceedings. When the subcommittee completed the investigation, it submitted a report to a review panel.

The review panel reviewed the complainant's letter, the transcripts of the family law proceeding and the subcommittee's report.

The review panel noted that the decisions made by the judge were outside the jurisdiction of the Council.

The review panel found that the transcripts did not support the allegations that were raised by the complainant. The transcripts showed that the judge was fair, patient and she permitted the complainant to make submissions in full regarding the issues before the court. The judge explained to the complainant the need to abide by the court's orders, and directed him to community resources, including Duty Counsel services through Legal Aid Ontario, in order for him to get assistance for the matters before the court.

The review panel found that the transcript did not support the allegation that the judge favoured the opposing party over the complainant or that she discriminated against the complainant. Rather, the judge made efforts to discuss with both parties how their conflict was impacting the children and the ongoing litigation.

The review panel found no evidence that the judge acted inappropriately. The transcript indicated that the judge gave consideration to the complainant's submissions, reduced the payment of costs so as to ensure the continued existence of the proceedings before the court and she was clear to the complainant as to what steps had to be undertaken until the next appearance.

The review panel noted that a judge has no role in the levels of income used by Legal Aid to decide whether a person qualifies for a certificate to retain a lawyer.

The review panel dismissed this complaint as unsupported by the record and closed the file.

CASE NO. 22-021/17

The Council received a letter about a judge who presided over a criminal proceeding. The complaint letter was submitted by someone other than the accused. The letter indicated that contact information for the complainant was the home of the accused. It was also unclear as to whether the complainant attended the proceedings that were held over multiple days.

The letter set out allegations that included a number of themes:

1. That the delivery of justice was perverted by the judge and the lawyers involved. Specifically, the judge's management of the trial was criticized in relation to the evidence called, the assessment of credibility of witnesses, the findings of fact and the application of the burden of proof. Examples were provided which related to:
   a. The credibility findings relating to medical evidence available from the hospital.
   b. The evidence of the alleged victim.
   c. The judge could have done his own research instead of relying on the submissions of counsel.
   d. The judge should have reprimanded the lawyers "for their ineptitude and incompetency by questioning the complainants conflicting testimonial".
   e. The findings in relation to facts in issue as it related to the injuries alleged.
   f. Guilt was not proven beyond a reasonable doubt.
2. That the judge showed bias towards the accused and was not impartial. It was stated that "the re-examination of the evidence by this jurist is a model of an impaired deleterious or bias judicial decision." Further, it was alleged that the judge "consorted" with both lawyers for a conviction, and allowed improper comments during the closing arguments such as that the accused was a "drug dealer and an alcoholic". In the end, the complainant indicated that the judge referred to the accused having drug addictions when the sentencing took place, which the complainant referred to as "a false accusation made by the said jurist".
3. That the judge held private meetings in his chambers with the lawyer for the accused and with the Crown Attorney and this information was not recorded prior to the commencement of the trial. Further, the judge was part of numerous "private meetings" in his chambers with both lawyers prior to each court appearance. It was alleged that they discussed law and that the judge recited law in the private meetings. The legal procedure was questioned and a section of the law was quoted. The complainant alleged this was for the benefit of the lawyers, while at the same time, he realized that indicating that this was for the benefit of the lawyers was "merely speculation".

4. That the complainant's *Charter* rights were violated.
5. That the judge at one point was going to call a "mistrial", but later changed his mind, which was after one of the "private meetings".
6. That the trial took much longer than initially estimated, with the judge adjourning the case numerous times for unusual explanations, stating that he would read the transcripts and make decisions that did not happen.
7. That the complainant wonders if the court transcripts may have been "altered" in order to provide for a conviction in the appeal. However, he does not indicate whom he believes might have altered them.

The complainant wanted the Judicial Council to review the evidence and his trial in its entirety. He expressed the view that witnesses perjured themselves and that the offence was not proven beyond a reasonable doubt.

The complaint subcommittee reviewed the complainant's correspondence. The subcommittee provided a report on its investigation to the review panel.

The review panel reviewed the correspondence from the complainant and the report from the subcommittee.

The review panel reviewed all of the allegations made by the complainant. In considering the themes of the allegations noted above, the following observations were made:

1. With regard to the issues relating to the delivery of justice, all of the concerns raised related to the decisions made by the judge. Judicial decision-making involving assessments of credibility and medical evidence are outside of the jurisdiction of the Council. The judge's interpretation and application of the law and decisions made in the case were matters of judicial decision-making outside the jurisdiction of the Council.
2. Appellate case law indicates that it is not the responsibility of judges to carry out the research applicable to a case and judges should not reprimand counsel.
3. Concerning the allegation of bias, that related to the findings that the judge made in relation to the issues of substance abuse. Again, that issue related to the judge's findings in the case and decision-making which is not within the jurisdiction of the Council.

4. There were several comments made about the "private meetings" held off the record in chambers. In this instance, the accused was represented by Counsel so that if any concerns related to the rights or position of the accused arose in the meetings, the lawyer, as his advocate was present and could put any concerns, if any, on the record in court. Even if there was any error in this regard, it would be a matter within the jurisdiction of an appellant court.
5. The issue relating to the judge mentioning a "mistrial" was also related to decision-making and thus was outside the jurisdiction of the Council.
6. The delay in completing the trial was an issue that could have been raised as part of a *Charter* application under s. 11(b). *Charter* rights and a judge's decision on such rights are matters of law and judicial decision-making outside the jurisdiction of the Council.
7. With regard to the transcripts being altered that were used on the appeal, this appeared to be an allegation based on speculation. At the request of the complaint subcommittee, the Manager of Court Operations checked the court records and confirmed that there was no indication of any review or changes made by the judge. The review panel noted that although a judge may make grammatical corrections in a transcript, if that occurs, a record of any corrections is retained by court staff.

The review panel noted that the Council has no legal authority to grant the request of the complainant for the Council to review the court case. Only a higher level of court has the jurisdiction to determine whether a judge has made errors of law and change the decisions made by a judge.

The review panel concluded that the complaint should be dismissed on the basis that the allegations related to how the judge assessed the case, interpreted and applied the law, and made decisions in the case. These were matters outside of the jurisdiction of the Council. The file was closed.

CASE NO. 22-023/17

The complainant appeared before the subject judge in a criminal proceeding. The complaint alleged that he did not receive a fair trial due to the judge's conduct. The complainant alleged:

a) The judge recognized the complainant immediately upon walking into the courtroom;

b) The judge was aware that a relative of the complainant had recently passed away. The judge asked the complainant whether he would be attending his relative's funeral. The complainant stated that he wondered why the judge, who did not generally preside in the jurisdiction where this matter was heard, would be aware of his family background and the relevance of the complainant's intention to attend the funeral; and,

c) The complainant believed that another relative of his told the Crown Attorney that she did not want the complainant to attend the funeral and that the judge was likely aware of this.

The complainant said that for these reasons, the judge should have declared a conflict in the case and should not have presided over it.

The complainant informed the Assistant Registrar by telephone that he was not able to write a letter of complaint due to a medical condition. The Assistant Registrar assisted him by transcribing his allegations and having him confirm the accuracy of the complaint he sought to make.

The complaint subcommittee reviewed the letters setting out the allegations made by the complainant and ordered and reviewed the transcripts of the proceedings. When the subcommittee concluded its investigation, it submitted a report to a review panel.

The review panel reviewed the allegations made by the complainant, the transcripts of the proceedings and the subcommittee's report.

The review panel observed that the transcript showed that the complainant entered guilty pleas to the charges that were before the court. The transcript also showed that the judge confirmed with the complainant that the complainant had the opportunity to

discuss his options with his counsel and that he was pleading guilty voluntarily to the charges he was facing.

The review panel noted the following:

- The transcript of the first appearance before the judge indicated that the judge's first question referred to the complainant by his family name. The judge asked: *"How are you doing today Mr. [redacted name] …".* The review panel noted that such a manner of addressing the complainant did not indicate a level of familiarity which could give rise to a perception of bias or result in unfair treatment of the complainant. The review panel noted that it is appropriate for judges to address parties by their name rather than by *"accused", "respondent"* or *"applicant".*

- The transcripts showed that the judge mentioned in his decision that he reviewed medical reports that were provided to him. The review panel noted that it is likely that the medical reports contained significant personal information about the complainant.

- The transcripts did not support the allegation that the complainant was not dealt with fairly or that the judge showed any prejudice or bias. The complainant's lawyer and the Crown Attorney made submissions on sentence. The transcript showed that in providing his reasons for sentence, His Honour took into consideration all aspects of the complainant's behaviour leading up to and following his conviction, and the complainant's medical history, current medical symptoms and treatment plans.

  The judge did not order a surety despite a request from Crown counsel. The judge waived the victim fine surcharge when it was raised by Crown counsel. The judge also imposed probation, not incarceration. His decisions were supported by detailed reasons. Further, the transcript showed that the judge was fair and patient in addressing the complainant throughout the proceedings.

- There was no evidence that one of the complainant's relatives had communicated any information about the funeral to the Crown Attorney or that the judge had received such information from the Crown Attorney about the funeral.

- The transcript showed that during one of the court appearances, the complainant said to the judge, *"Well, I was forced to plead guilty in order to get out of jail on my [redacted] charge."* The review panel noted that the transcript showed that the judge fairly informed the complainant that the guilty plea could be struck and that

if that happened, the issue of bail would have to be re-addressed pending a trial of the matter. The judge explained to the complainant that he would have to return to custody pending a proper bail review. The complainant responded by stating, *"I'm responsible. I have no doubt that I did what I did."*

The review panel found that the judge appropriately explored whether or not the complainant was withdrawing his pleas and if so, the next steps to follow. The transcript also showed that the complainant did not seek a moment to speak with his counsel; nor did his counsel request to stand the matter down. The review panel noted that the judge's decision that the pleas should not be struck was a matter of judicial decision-making outside the jurisdiction of the Council.

The review panel observed that the transcript confirmed that the judge informed the complainant that over the weekend, he had read in a newspaper of the passing of the complainant's relative and that the judge expressed his favourable opinion about the deceased relative. The review panel noted that the transcript indicated that the judge raised the issue of the death of the complainant's relative again on the second date of appearance. The topic was raised by the judge simultaneously to the topics of the complainant's family's standing in the community.

The review panel noted that perceptions of impartiality are also important to preserve public confidence in the judiciary and in the administration of justice. Justice must not only be done; it must be seen to be done.

The review panel observed that the transcripts indicated that the judge appeared to assume a relaxed, casual and informal manner in addressing the complainant throughout the proceedings, including but not limited to inquiring about his relative's funeral, questioning why he would not be attending the funeral, commenting upon his family's reputation within the community, the complainant's liking of fast food, and inquiring as to which team was going to win the upcoming Super Bowl and the possible selling of the complainant's vehicle.

The review panel noted that persons in the courtroom may have perceived the judge's questioning of the complainant about the funeral to be insensitive to the emotions that he might be experiencing in relation to a personal matter.

The review panel observed that the judge's comments to the complainant were perceived by the complainant as suggesting a level of familiarity with and interest in his family which in his view gave rise to bias. The review panel noted that others in the courtroom may have perceived a level of familiarity between the judge and the complainant and/or his family given the judge's interaction with him during the court appearances. Such informality and apparent familiarity may lead other defendants, and perhaps their lawyers, to feel as though their cases would not receive as favourable a treatment because of the absence of familiarity or the lack of a well-known family in the community.

The review panel requested that the subcommittee invite the judge to respond to the complaint. The judge responded and his response was reviewed by the review panel.

The review panel observed from the judge's response that there was a telephone pre-trial between counsel for the complainant, the Crown Attorney and the judge. The panel noted that a criminal pre-trial is a practice in place in the courts that assists in resolving matters, identifies when there may be a guilty plea and assists in the proper use of trial time. The panel could see from the judge's response that during the pre-trial, the complainant's lawyer provided the judge with information about the complainant's medical condition. The judge explained that in court, he adopted a relaxed, informal manner when addressing the complainant because he believed that would assist the complainant to understand better.

The review panel observed that the information about the death of the complainant's relative was publicly referenced in the media. After reviewing the response, the panel concluded that the judge's reference to the funeral were made in the context of the judge's concern that the complainant may find himself in difficult or stressful circumstances where he might turn to alcohol. The comments made by the judge were not intended to be insensitive; rather, they were intended to be encouraging in the context of sentencing. The remarks were said with an objective of helping the complainant to cope with stressful events and encouraging the complainant from re-offending in the future. The review panel was satisfied that in the particular circumstances, the judge adopted a less formal approach because he considered such an approach to be helpful and he hoped the complainant would succeed in his desire to maintain sobriety.

The review panel could see that the judge had reflected carefully upon the concerns raised by the complaint. The panel was satisfied that the judge would be more careful in the future about how his comments might be perceived by persons in the courtroom.

The review panel concluded that there was no judicial misconduct and the allegations related to the decision-making of the judge were out of jurisdiction. The complaint was dismissed and the file was closed.

CASE NO. 22-024/17

The complainant alleged that he heard the subject judge giving a speech at a fundraiser for a local charity and the judge made inappropriate comments. The complainant alleged that the judge called the President of the United States of America, Donald Trump, “a buffoon” and the First Lady “a pole dancer”. The complainant expressed the view that the comments may suggest that the judge was biased.

The complaint subcommittee reviewed the letter from the complainant and retained independent counsel to interview persons present at the event who might be able to provide information about the alleged conduct. The subcommittee invited the judge to respond to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the complaint letter and the report from the complaint subcommittee, including information that the subcommittee retained independent counsel to interview persons with knowledge of the events that gave rise to the complaint. The review panel noted that some persons declined to be interviewed. Of those who were interviewed, other than the complainant, no-one could attest to the content of the judge’s speech.

The review panel considered the judge’s response to the complaint. The review panel noted that His Honour was not wearing his judicial robes at the time of his remarks and he was introduced as a private person. The panel also noted that His Honour acknowledged that some members of the audience would have known that he was a judge.

The review panel observed that the judge did not recall the specifics of his remarks but he did not dispute the complainant’s account. The judge had a planned speech but made the additional remarks spontaneously in an effort to be humourous. The review panel observed that the judge expressed regret for his comments and recognized that although he was speaking in a private capacity, and not as a judge, he should have realized that any controversial, critical or insulting comments could reflect upon him as a judge.

The review panel noted the high standards of conduct that a judge is expected to uphold. A judge must be mindful of whether comments would be perceived as respectful and judicious. As indicated in the preamble of the *Principles of Judicial Office,* judges "recognize their duty to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence and integrity of their judicial office and to preserve the faith and trust that society place in the men and women who have agreed to accept the responsibilities of judicial office."

Paragraph 3.1 of the *Principles of Judicial Office* states that Judges "should maintain their personal conduct at a level which will ensure the public's trust and confidence."

In the leading case on judicial conduct, *Therrien (Re) v. Minister of Justice et al,* the Supreme Court of Canada described the conduct expected of a judge:

> [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 …
>
> *Therrien (Re) v. Minister of Justice et al.,* [2001] 2S.C.R.3 at para. 111

The complaints process through the Council is remedial in nature and through the review of one's conduct, improvements are made as to how situations and individuals are treated and handled in the future. The review panel decided to refer the complaint to the Chief Justice of the Ontario Court of Justice. Under the Council's Procedures, a review panel will refer a complaint to the Chief Justice in circumstances where the misconduct complained of does not warrant another disposition, there is some merit to the complaint and the disposition is, in the opinion of the review panel, a suitable means of informing the judge that his/her course of conduct was not appropriate in the circumstances that led to the complaint.

The Chief Justice met with the judge and reviewed with the judge the concerns about his conduct, as well as the high standard of conduct expected of a judicial officer. After the meeting, Her Honour provided a report to the review panel. After reviewing the report from the Chief Justice, the review panel concluded that the judge was very remorseful

and embarrassed. He recognized the inappropriateness of his conduct and realized how his conduct reflects on the bench as a whole. He recognized that he acted without consideration of his office, or consideration of how his conduct in the community reflects on how he, as a judge, is perceived by the public and on how the Court is perceived. The review panel concluded that the judge had learned from the complaint and the complaints process. His Honour expressed his sincere apology to the Chief Justice for the embarrassment caused to the Court and said that he would not again make any political comments in public.

After review of the report, the review panel closed the file.

CASE NO. 22-025/17

The complainant wrote a letter to the Council regarding his trial before the subject judge on a dangerous driving and drug offence charge. He was subsequently convicted of dangerous driving.

The complainant wrote to the Council alleging that the judge conducted a fake or mock trial, tampered with the court record, colluded with the Crown Attorney and defence lawyer and had lied to the complainant by praising the police officer's evidence.

In his letter, the complainant advised the Council that he had ordered the transcript and audio, and he alleged both were "doctored". He alleged the transcript and the audio recording did not include the stuttering of a Crown witness and comments which the complainant made in the body of the court that should have been heard on the microphone. The complainant believed that the judge ordered the doctoring or falsification of the record.

The complainant alleged that the trial did not include "an evidentiary process". He said that a police witness did not appear for the trial. He also alleged that the judge had her reasons for judgment ready prior to the commencement of trial and he alleged that she likely received submissions from the Crown Attorney and the complainant's lawyer whom the complainant believed had betrayed him.

He sent a further letter noting that as a result of his language barrier, he could not provide all the details of his allegations. He indicated that he preferred to provide his evidence to the Council verbally and be cross-examined "on the spot".

The complainant also expressed his reasons for disagreeing with the decision of the appeal court that dismissed his appeal. He alleged that the police officer committed perjury during the trial. The complainant felt that the appeal court did not provide him with a remedy.

The investigating complaint subcommittee reviewed the correspondence from the complainant, and requested and reviewed the transcripts and audio recording from the trial proceeding before the judge. Court staff informed the subcommittee that the complainant received a copy of the audio recording which was produced from the original court record. The subcommittee asked court staff to confirm whether the judge could or would have had access to the audio recording of the trial. The subcommittee also reviewed the decision of the appeal court that dismissed the complainant's appeal. When the subcommittee completed its investigation, the subcommittee submitted a report to a review panel.

The review panel reviewed the complainant's letters to the Council, the transcripts of the proceedings before the judge, the decision of the appeal court and the subcommittee's report.

The review panel observed that the judge delivered reasons for judgment immediately following the submissions. The panel noted that this is not unusual in straightforward cases. The transcript showed that the trial judge found that the case came down to credibility and she found the officers' evidence credible. The transcript confirmed that both counsel gave submissions in the courtroom before the judge rendered her decision. The review panel found no evidence to support the complainant's suspicion that the judge had her reasons for judgment ready prior to the commencement of trial or that she likely received submissions from the Crown Attorney and the complainant's lawyer ahead of time.

With respect to the allegation that the judge lied to the complainant by praising the officer's evidence, as indicated above, the transcript showed that the judge weighed the evidence and made findings of credibility. The review panel noted that the judge's assessment of credibility and findings of fact were matters of judicial decision-making outside the jurisdiction of the Council. If the complainant sought to try to change a decision made by the judge, the proper way to proceed is through his remedies in the courts, as he had done.

With respect to the allegations that the judge doctored or falsified the court record, the review panel noted that court staff confirmed that the process for storing court records does not enable a judge to alter the audio recording. The review panel concluded that there was no evidence to support the allegation that the judge doctored the record.

After reviewing the transcript of the trial, the review panel concluded that there was no evidence to support the allegation that the complainant had a mock trial or that the trial did not include "an evidentiary process". Two police officers testified, as well as the complainant. All witnesses were examined in-chief and cross-examined. With respect to the complainant's concern that a particular police witness did not appear for the trial, the review panel noted that the Crown Attorney decides which witnesses he or she will call to prove the charges.

The panel noted that with respect to the complainant's request to testify before the Council, there is no provision in the *Courts of Justice Act* that permits a complainant to give oral evidence during the investigation stage of the complaints process. The panel agreed with the findings of the subcommittee that the complainant's allegations were clearly understood from his correspondence.

The review panel dismissed the complaint on the basis that the allegations about conduct were unsupported by the evidence, there was no evidence of judicial misconduct and the allegations related to judicial decision-making were outside the jurisdiction of the Council. The file was closed.

CASE NO. 22-028/17

The complainant who filed a letter to the Judicial Council was concerned about the line of questioning by defence counsel in a preliminary hearing on a charge of sexual assault where the alleged victim was a youth. The complainant alleged that the Crown Attorney objected that consent for a minor was not an issue but the judge allowed the line of questioning by the defence lawyer to continue on the basis that the defence had a right to explore how the alleged offence took place. The complainant also alleged that when the Crown Attorney objected a second time in a quieter and more deferential fashion, she was ignored by the judge and the questions along the same line continued.

The complainant was of the view that the questions asked by defence counsel were aimed at establishing that the child consented. The complainant was of the view that it should have been clear to the judge. He alleged that the "incompetent ruling" of the judge re-victimized the child by making him believe that he was partly to blame for the alleged assault.

The complaint subcommittee read the letter sent by the complainant. The subcommittee requested and reviewed the transcript of the trial. After completing its investigation, the subcommittee provided a report to the review panel.

The review panel read the letter from the complainant, the excerpt of the transcript that related to the questions asked by defence counsel and the objections made by the Crown Attorney, and the report from the subcommittee.

The review panel noted that the transcript indicated that the judge showed sensitivity to the nature of the questions. He ruled that "as unfortunate as this circumstance is" he could not prevent the defence from exploring exactly how the alleged assault took place. The panel further noted that the transcript showed that the judge was aware of the sensitive nature of the matter and he cautioned defence counsel accordingly. He cautioned the defence counsel that he was dealing with a young person. When the witness again took the stand, the judge told the witness to take whatever time he needed to answer the questions.

The review panel concluded that the judge's ruling on the objection was a matter of judicial decision-making outside the jurisdiction of the Council.

With regard to the allegation that the judge ignored the second objection by the Crown Attorney, the review panel observed that the transcript showed that the Crown Attorney stated that she was restating the same objection. The judge said that the objection was noted and he then permitted defence counsel to continue his cross-examination. The review panel noted that in a criminal trial, when a lawyer reiterates an objection that has already been ruled upon, it is not unusual for a judge to note the objection for the record but not require the submissions to be re-argued. The review panel concluded that the judge's decision to note that the Crown Attorney was restating her objection without having further submissions on the point already ruled upon was a matter of judicial-decision-making outside the jurisdiction of the Council.

Thus, the review panel dismissed the complaint on the basis that the decisions made by the judge were outside the jurisdiction of the Council and there was no evidence of judicial misconduct. The file was closed.

CASE NO. 22-030/17

The complainant filed a complaint against the Case Management judge who presided over a family law proceeding concerning the complainant and his former partner. When the complainant first contacted the Council, his case was still actively before the court. He was informed by staff of the Council's policy that the Council will not generally commence an investigation until that court proceeding and any appeal or other related legal proceedings have been completed. This is to ensure that any investigation by the Council is not interfering or perceived to be interfering with any on-going court matters.

After the court case concluded, a file was opened and an investigation commenced.

The complainant and his former partner were the parents of a young child. Following their separation, the child resided primarily with the former partner. When disagreement arose over the post-separation parenting arrangement, the complainant brought proceedings in which he sought, among other relief, custody of the child. The former partner responded to the court proceedings and also sought custody of the child.

The complainant provided a number of letters to the Judicial Council detailing his complaints against the judge. The allegations included:

1. The judge "lost all kinds of perception and engaged in unconscionable and brutal acts";
2. Instead of enforcing "normative" conduct of the former partner, the judge started to issue "bizarre orders";
3. The use of the complainant's mental health, to appoint the Public Guardian and Trustee, to deal with the complainant's "opposition/dissent is in the best traditions of totalitarianism and authoritarianism"; and,
4. The judge turned the court into a "conduit of spousal abuse".
5. The judge had "obsessional and delusional thinking";

6. The judge's conduct was abusive, and including child abuse and even worse;
7. The judge made a "mentally incapable and delusional argument" about the complainant;
8. The judge's endorsement of representation impersonation voided and nulled the whole proceeding;
9. The judge "used his authority to prop [sic] move further and further away from normalization." His custody related reasoning is collateral;
10. The judge gave appointments to a bully in breach of trust and her fiduciary duty. He promoted the one who failed to provide necessities as per public policy;
11. The judge's licensing conditions on the complainant were "analogous to bribes";
12. The judge's final endorsement was bizarre. The judge issued directives which apply at times of mental incapacity;
13. The judge intentionally left vague what the mother had been doing so that "form and content" process was responsible for whatever concise order said, not him.
14. The judge admitted to making confusing and unhelpful to restoration of normative operational directions and/or advisories in absence of evidence, exceptional circumstances or actionable problems/wrongs;
15. The judge "contributes to proliferation of spousal abuse and child abuse even as established by condemnation of residential schools";
16. The judge's statement that he had no evidence of the former partner's possible interference with the child's relationship with the complainant is absurd, given that the judge barred the complainant from filing any evidence at all. The judge also "conducted business in such a way that scrutinizing and referencing of evidence already filed with the court would not occur";
17. The judge admitted to making orders without the presence of requisite exceptional circumstances in support;

18. The judge introduced fresh sources of bodily harm causing worries, stress, and trauma of a similar and/or more aggravated nature. The judge made it “final” and palpably riddled with artificial obstacles to gaining remedies (change, etc.);

19. In the absence of an expected document, the judge manufactured a “deemed motion”; and

20. The judge failed to manage the case in line with directives of “section 2.” “His newly found expediency is palpably driven, even by his own admission, by collateral reasons – anti-corruption initiatives.”

21. The judge “engaged into exceptionally unsound and inappropriate governance practices”;

22. The judge “spent 2 years engineering the poisonous work environment akin to the one which governments are rushing to mitigate in Attawapiskat by sending emergency help as seeking longer term solutions. My treatment has been analogous to “waterboarding torture” with psychological effect”;

23. The complainant disagreed with the judge’s decision to find him incapable of looking after his son;

24. The judge relied on collateral artefacts and exaggerations in order to produce at least illusion of appropriateness in order to produce at least illusion of appropriateness;

25. The judge’s misconduct plagued the official decisions that were made. Various procedural principles were grossly misused;

26. The judge “forged even such simple detail as “on consent” status of the very first endorsement”;

27. Instead of doing simple and proper things, the judge was preoccupied with accommodation and maintenance of parental malpractice. The judge failed to enforce an environment conductive to collaborative work and participation of both parents. The judge failed to enforce information sharing;

28. Instead of capitalizing on positive elements, the judge “chose to forge [the] way to chattel treatment of the [child] and slicing-dicing by blowing on the disability – [the judge’s] findings lost the air of reality”;

29. The judge showed absolutely no respect and deference to the normative. The judge's *modus operandi* is "butcher like". "[The judge] treats [the child] like slave owners treated those born into slavery";

30. The judge disparaged the complainant in [the child's] eyes;

31. The judge made an enforcement order that was unambiguously in support of the former partner's irresponsible behaviours;

32. The judge knew that the complainant suffered from exposure to long lasting stress trauma and is recovering from it, but failed to provide accommodation by enabling a normative healthy environment. The judge persecuted the complainant;

33. The case was "ripe with discrimination, prohibited inferences and outright insults." The judge engaged in insults analogous to insulting gays, to sexual harassment and to racial profiling;

34. The judge's approach to supervised centres and the Public Guardian and Trustee was not the way in which disability claims are normally accepted and accommodation/ assistance is advanced;

35. The judge "palpably promotes hate and intolerance";

36. The judge made inappropriate comments in respect of the proceeding involving the Ontario Teachers' Pension Plan;

37. The judge's comments raised a great deal of concern about the judge's value system and the judge being fit for a judicial appointment;

38. It was obnoxious for the judge to say that the complainant's Notice of Action was "some obsessional or delusional thinking";

39. The judge failed to live up to the principles of judicial independence and compliance with the law. The judge showed propensity for abuse of process. "In view of [the judge's] sadistic inclinations, atrocities, and abuse of authority [the judge] ought to be removed." The case highlighted "utmost disrespect for citizenry."

40. The judge showed utter lack of professionalism in the reasons given; and,

41. The judge "engineered a Chinese water torture."

In its investigation of the complaint, the subcommittee reviewed:

a) all correspondence from the complainant;
b) correspondence to the complainant from Council staff;
c) the transcripts of eleven attendances before the judge;
d) the judge's reasons for finding the complainant a special party; and
e) the decision of the appeal court.

Following the investigation the subcommittee submitted a report to a review panel.

The review panel reviewed the complainant's correspondence, correspondence from the Council staff to the complainant, all transcripts of the court proceedings, and the report from the complaint subcommittee.

The review panel noted that at the initial court appearance, which was an emergency case conference, the complainant was represented by counsel. The transcript disclosed that at the conclusion of the case conference a consent order was made that, in part, provided the complainant with supervised access to the child.

The review panel also noted that at the third appearance before the judge, the former partner brought a motion requesting that the complainant be found to be a "special party" and that the Office of the Public Guardian and Trustee be appointed as his representative. In the context of family law proceedings a "special party" means one who appears to be mentally incapable when not able to understand information that is relevant to making a decision regarding an issue in the litigation, or unable to appreciate the reasonable foreseeable consequences of a decision or lack of a decision regarding the issue.

The review panel noted that the judge found the complainant to be a "special party" and the Public Guardian and Trustee was appointed to represent him. The judge held that while the complainant was an intelligent man able to understand a legal proceeding, he failed to appreciate the reasonable foreseeable consequences of his decisions or actions.

The complainant appealed the decision to declare him a "special party" to the Superior Court of Justice and Court of Appeal. His appeals were not successful.

The review panel noted that the family law case remained outstanding and before the judge for a period in excess of three years. In that time, the complainant's status as a special party never changed.

The review panel noted that the allegations could be generally categorized as:

1) abuse of power and position by the judge;

2) the judge demeaned the complainant; and

3) the judge's decisions were wrong.

With respect to the allegations, the review panel found the following:

1) Allegations related to alleged abuse of power and position by the judge

The review panel found court record showed that the judge acted in an appropriate manner in all dealings with the complainant. The review of the transcripts showed that the judge was patient and polite throughout the many court appearances. For example, the judge acted with composure when on one occasion the complainant gave the judge a "Kangaroo Award" for what the complainant described as "an information process and distinction award."

The review panel observed that the judge allowed the complainant to participate even though he was represented by counsel from the office of the Public Guardian and Trustee. The judge also received documents and heard from the complainant directly. The review panel found that the record did not support any of the allegations related to abuse of power or position by the judge. The review panel dismissed these allegations.

2) Allegations related to the suggestion that the judge demeaned the complainant

The review panel found no evidence in the transcripts for any of the allegations that suggested that the judge demeaned the complainant. The review panel dismissed these allegations.

3) The judge's decisions were wrong

The review panel noted that the allegations related to the judge's assessment of the evidence and his decisions in the case were matters of judicial decision-making outside the jurisdiction of the Judicial Council, not matters of conduct. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge. The allegations relating to the judge's decisions were dismissed.

The review panel considered all of the allegations made by the complainant in his various pieces of correspondence and found no evidence of misconduct. The complaint was dismissed and the file was closed.

CASE NO. 23-001/17

The complainant was an accused in a criminal trial held before the subject judge. He was represented by defence counsel and was found guilty after the trial.

He made the following allegations to the Council:

1. The trial judge ignored some valid evidence and only accepted evidence to justify the arrest. The judge ignored evidence that it was dark at the time of the events.
2. Because personal recording devices were not allowed in court, the complainant was not able to have a fair trial or appeal.
3. The judge modified the transcripts and also modified the transcript disk or caused it to be modified as key evidence was removed or replaced which would have had an impact on appeal. The complainant specifically pointed out that:
   a) He recalled one officer stating that 'he appeared to be getting drunker' which was not found in the transcript or audio recording of the proceeding.
   b) He recalled before sentencing, he was asked if he had anything to say and he made remarks that were not included in the transcript or recording.
   c) He felt that the judge removed evidence that proved the complainant was innocent, such as there was no open alcohol, rather it was an ashtray.
4. The judge was close to court employees who were associated to certain police officers. The complainant asserted that this could be considered to be a conflict of interest and facilitated the judge to be biased against him.

The complaint subcommittee reviewed the complainant's letter and ordered and reviewed the transcript of the proceeding, listened to the audio recording and compared it to the transcript. Following the investigation, the subcommittee submitted a report to a review panel.

The review panel reviewed the complainant's letter of complaint, the transcript, the judge's reasons and the subcommittee's report. The review panel found the following:

1. The issues relating to the findings of the judge were outside of the jurisdiction of the Judicial Council. The assessment of the evidence including findings of credibility and fact, were matters of decision-making outside the jurisdiction of the Council. If a person disagrees with a judge's decision, the proper way to proceed is to seek a remedy through the courts, such as an appeal.

2. The transcript showed that there was no request by the complainant or his lawyer at the trial to use a personal recording device as allowed by the *Courts of Justice Act.* A judge has discretion to permit personal recording of the proceedings to supplement notes. In any event, the decision of the judge to permit or not permit the complainant to record the proceedings was a matter of judicial decision-making, and so outside the jurisdiction of the Ontario Judicial Council.

3. With regard to the allegations that the judge modified the transcripts and modified the transcript disk or caused it to be modified, the review panel noted that it is common practice that judges be provided with a transcript of Reasons for Judgment to review it for errors in grammar, punctuation or spelling.

   Court Services provided a copy of the edits made by the judge in this case. They were three very minor grammatical corrections: inserting the word "is" in one place, inserting the word "and" in one place and adding an "s" that was missing on the word Constables.

   The complaint subcommittee reported that Court Services advised that all audio recordings are saved to a network such that the judge would not have been provided with or have access to the audio recording on the network. A copy of the network recording was reviewed by the subcommittee while reading the transcript. The subcommittee found that the transcript matched the audio recording word for word.

4. In relation to the concern that there may be some local associations between justice participants that would have led to the judge being biased, there was no evidence to support that allegation.

The review panel dismissed the allegations on the basis that there was no support for the allegations of misconduct and the allegations related to decision-making were outside the jurisdiction of the Council. The file was closed.

CASE NO. 23-003/17

The complainant unsuccessfully attempted to schedule a hearing of a constitutional argument in criminal court. He then wrote a letter to an administrative judge to request that the judge intervene in the court process and have a hearing scheduled. When the judge did not assist him in having the hearing scheduled, he filed a complaint with the Judicial Council. With his letters of complaint, he enclosed documents setting out legal arguments that he believed to be relevant if he succeeded in obtaining a court hearing.

The subcommittee reviewed the complainant's letters and obtained and reviewed court decisions that he referred to in his letters. The subcommittee then provided a report to the review panel.

The review panel read the complainant's letters and the report of the subcommittee. The review panel observed that the subcommittee found that the complainant had been declared a vexatious litigant by more than one level of court and the matters referred to in his correspondence appeared to be a continuation of his vexatious conduct.

The review panel noted that it was not misconduct for a judge to decline to take action to intervene in a court matter in response to a letter from a litigant.

The review panel noted that the Judicial Council had no authority to intervene in a court matter or to compel a judge to intervene to schedule a hearing. Those were matters related to judicial decision-making, judicial scheduling and matters of law, all of which are outside the jurisdiction of the Council.

The review panel concluded that the complainant's letters did not reveal any evidence of judicial misconduct on the part of the administrative judge. It appeared to the review panel that the complainant was attempting to use the complaint process to try to have a

hearing scheduled in court, which is an abuse of the complaints process. The review panel dismissed the complaint on the basis that there was no evidence of judicial misconduct, the remedies he sought were outside the jurisdiction of the Council and the complaint was an abuse of the complaints process. The file was closed.

CASE NO. 23-004/17

The complainant was the Respondent in a family law proceeding. This complaint was filed against the judge who presided over a Motion to Change an existing order for access and child support.

In the Motion to Change, the complainant sought additional time with his child and a reduction of his child support obligation. After argument of the Motion to Change, the judge increased the amount of time the complainant could spend with his child but not as much as requested. The judge did not grant the complainant's request to reduce the amount of child support.

The judge presided over three appearances in this matter: two case conferences and the argument of the Motion to Change. The complainant was self-represented at the two case conferences and was represented or assisted by counsel when the Motion to Change was argued.

In his letter to the Council, the complainant made the following allegations:

1. The order of the judge on the Motion to Change was wrong in that it exceeded "the wide ambit of reasonable solutions" and had "flaws" in it;
2. The judge did not send him a copy of the final order; and
3. During argument on the Motion to Change, the judge told the complainant to "shut up" or that he would be facing contempt of court.

In the review of this complaint, the subcommittee considered the complainant's letter and all supporting documents; and ordered and reviewed the transcripts of the three attendances before the subject judge. Following the investigation the subcommittee submitted a report to a review panel.

The review panel reviewed the complainant's letter, supporting documents, the transcript of the Motion to Change date and the subcommittee's report. With respect to the allegations listed above, the review panel made the following observations:

1. *The order of the judge on the Motion to Change was wrong in that it exceeded "the wide ambit of reasonable solutions" and had "flaws" in it*

The review panel noted that the complainant also stated in his letter that the judge "saw the evidence", but chose to ignore "all factual evidence presented". The review panel observed the judge's reasons to be comprehensive and focused on the issues that were before the Court.

The review panel found that this allegation related to judicial decision-making and how the judge weighed the evidence which were matters outside the jurisdiction of the Ontario Judicial Council. This allegation was dismissed.

2. *The judge did not send the complainant a copy of the final order*

The review panel observed that at the end of the argument of the Motion to Change, the judge stated that a written decision would probably be provided sometime within the next month. The judge further stated that once released "I'll get it out to both of you". As promised, the decision was released within that timeframe. Included in the decision was a direction that the lawyer of record for the complainant take out the order within thirty days.

The review panel accepted the finding of the complaint subcommittee that it was not apparent in the court record why the decision or a copy of the final order was not provided to the complainant. The review panel noted that the responsibility for doing so would, in the normal course, fall upon the complainant's counsel. They noted that Rule 25 (13) of the *Family Law Rules* provides that unless the court orders otherwise, the person who prepared an order is to serve it on every other party.

The review panel noted that the subcommittee found no evidence in the court record or documents provided by the complainant to suggest that the judge directed that a copy of the reasons or the final order not be given to the complainant. This allegation was dismissed as unsupported by the evidence.

3. The judge told the complainant to "shut up" or face contempt of Court

The review panel observed that its review of the transcript of the Motion to Change did not support this allegation. The review panel found that nowhere within the transcript of the argument of the Motion to Change did the record show that the judge told the complainant to "shut up". The panel observed that the transcript showed that at one point during argument, the judge called for security because of the complainant's persistent interrupting of the other party and Duty Counsel during their submissions. During their submissions, the complainant referred to "this hypocrite Court". In an attempt to maintain order of the courtroom, the judge directed the complainant to speak through his lawyer. The complainant advised that his lawyer was assisting him, not representing him. It did not appear to the panel from the record that the complainant took the necessary steps required under the *Family Law Rules* to change representation and to act in person.

The review panel noted that the transcript showed that the judge asked the complainant to sit down on three separate occasions before calling for security. The judge then took a short recess to give the complainant time to reflect. Upon returning from the recess, the judge confirmed with the complainant's lawyer that they were ready to proceed. The Motion to Change then proceeded without any further incident.

The review panel noted that a judge is responsible for controlling how trials unfold in his or her courtroom. The panel observed that the judge was carrying out his responsibility by dealing with the complainant's interruption of the opposite party's submissions, and this was not inappropriate conduct. The review panel dismissed this allegation as unsupported by the evidence.

For the reasons noted above, the review panel dismissed this complaint and closed the file.

CASE NO. 23-005/17

The complainant appeared before the subject judge for a Settlement Conference in a family law proceeding. His allegations were related to two issues, which he described as 'informational' and 'attitudinal':

1. With regard to the 'informational' concerns, he alleged that he had disabilities and that the judge was aware of one of them and did nothing to accommodate him during the course of the proceedings. He asserted that the judge allowed the other party to use bullying tactics as the other party knew how to 'impair him'. Particular examples were provided such as:

    a) His symptoms were particularly acute when the judge asked a question about what he had done for his child. This caused him to have an anxiety attack and he was not able to function to answer the question. He alleged that the judge did not take a recess at that point for him to compose himself and thus, he felt that he was at a disadvantage.

    b) He tried to tell the judge about special coping mechanisms employed by him and his son, and that the judge responded by saying that "that was disgusting".

    c) His lawyer knew about his disability but did not seek accommodation of his needs on his behalf.

Ultimately, the complainant stated that his rights were violated under the *Accessibility for Ontarians with Disabilities Act,* the *Human Rights Act,* the *Children's Protection Act,* as well as a United Nations Treaty. It was alleged that this has led to an additional year of abuse and neglect of his son, as allegedly supported by a report from the Office of the Children's Lawyer.

2. With regard to the 'attitudinal concerns', the complainant alleged that the judge was unprofessional and her actions in some areas were questionable. He stated that the judge gave her opinion in an aggressive, and insensitive manner by asking him why they were there.

The subcommittee reviewed the transcripts of the two days of court proceedings. As part of their investigation the complaint subcommittee confirmed with Court Services that the transcripts were accurate. When the subcommittee concluded its investigation, it submitted a report to a review panel.

The review panel reviewed the complainant's correspondence, the transcripts and the subcommittee's report. The review panel agreed with the complaint subcommittee that

there was no evidence to support the allegation that the judge altered the transcripts of the proceedings.

The review panel observed that, according to the transcripts, the following transpired.

On the first day of the proceedings, the judge met with the parties and was told that the child suffered from autism. The parties told the judge that they had been sharing custody of the child 'a week about', although the mother had a custody order. The child had lived with the complainant, who is the child's father, for a year after that order was made as the mother had been evicted from her home. The child went back to live with his mother after that. Although the father wanted an order for the 'week about' arrangement to continue, the judge was of the view that because of the child's medical condition, that such an order would be 'absolutely wrong'. There was a discussion on what type of access should be specified for the father.

The review panel observed that the transcript showed it was the child's mother who raised the fact that the father claimed to have the same medical condition as the child. As a result, the complainant's lawyer stated that the complainant was told by his doctor that he had adult ADHD and might be on the autism spectrum. The lawyer indicated to the judge that he had a report indicating this diagnosis. The judge then stated what her position was in relation to the parties' dispute and the parties were to discuss settlement before the next court date. The review panel noted that this was the ordinary course in a settlement conference.

On the next court date, the complainant's counsel stated that the father was 'agreeable that he's going to trial without counsel' and counsel asked that he be removed from the record, which the complainant agreed to. When the complainant was asked by the judge about his view on the custody issue, he responded 'I'm just, sorry, I'm just experiencing a bit of anxiety, which is right now impairing my capacity to function at the moment'. The mother responded that she had been seeking a copy of a report of his mental assessment and only had a version from 2007. The complainant then continued to speak without asking for any accommodation or recess. In the opinion of the review panel, the complainant continued to speak to the issues in an articulate and reasoned fashion. The panel noted that the complainant stated: 'my disability does not fully impact my life. The only time it impacts my life is either when I'm learning or when I'm under extreme stress and in a circumstance like this, because I have not had the supports in place to support

me to assist me in the court proceedings'. Discussion ensued between the judge and the complainant until such time as the complainant asked 'just give me a second here while I collect my thoughts'. The complainant then suggested that he and the child 'support each other'. The judge asked 'what are we looking for, parentification of a child to support you'? At that point, the complainant indicated that he was experiencing anxiety and that his mind was 'getting distorted again'. The judge responded: 'Well I don't want that to happen. I can tell you if you go to a hearing that you're going to be in a similar situation... so the best thing to do is to resolve it'. The complainant agreed and said that his biggest issue was that the mother wanted to take the child out of the province.

The review panel also noted that the discharged lawyer assisted the complainant when the issue of child support was raised. The panel found that the complainant was very responsive to questions posed and indicated that he was willing to sit down and negotiate. He was asked for his position on issues, positions which he, in the opinion of the review panel, articulated clearly. Near the end of the proceeding, the complainant commented to the judge: 'now I just want to thank you for giving me clarity', and he thanked her again 'for clearing things up'.

The review panel's findings in response to the complainant's allegations were as follows:

1. With regard to the issues relating to the accommodation of the complainant's disability, after a careful review of the transcripts, the panel found that:

    a) The complainant's disability was initially raised by the mother and not by the complainant or his lawyer. Although there were no particular steps taken by the judge to accommodate him, there was no request for accommodation. As well, at all times, the complainant spoke in a manner that showed that he was fully engaged and understanding of the process and the issues. There was no evidence that the other party used 'bullying tactics' or that the complainant's symptoms were at a point where he was not able to function to answer questions, to provide his views or where he appeared to be at a disadvantage.

    b) The review panel confirmed with Court Services that the transcript was accurate. Nowhere in the transcript did it show that the judge said that the special coping mechanisms employed by the complainant and his son were 'disgusting' as alleged by the complainant.

c) Any allegations about the actions of the complainant's lawyer relating to his disability could be addressed by this Council as this was a matter that is outside of the Council's jurisdiction. The Council's jurisdiction is limited to complaints about the conduct of provincial judges. The complainant was informed that the body with the authority to receive and investigate complaints about a lawyer's conduct is with the Law Society of Upper Canada.

Thus, the review panel concluded that, in relation to the issues surrounding whether there was misconduct by the judge for not accommodating the disability of the complainant, the judge acknowledged the disability and the proceedings progressed in a manner that does not suggest that there was a need for the judge to have altered the process that occurred. The review panel concluded that there was no misconduct or discrimination by the judge. This allegation was dismissed.

2. With regards to the allegations of 'attitudinal concerns', that the judge was unprofessional, and her actions in some areas were aggressive and insensitive, the review panel found no evidence to support these allegations. In the view of the panel, the transcripts showed that the judge was business-like and direct with both parties but was open to hearing both of their perspectives. As mentioned, the complainant thanked her twice for her approach at the end of the proceedings. These allegations were also dismissed as not supported by the evidence.

For the reasons noted above the review panel dismissed this complaint and closed the file.

CASE NO. 23-006/17

The complainants asked the Judicial Council to review the conduct of a judge who presided over a criminal trial. The male complainant was charged with assault and convicted after trial by the judge, and his wife was the other complainant. They took issue with a number of aspects of the trial:

1. They had concerns about the quality of representation by a paralegal at trial, and by a lawyer on appeal. They also expressed that the Crown Attorney compromised all court appearances and influenced the paralegal.

2. They named an Assistant Crown Attorney as being a close friend of the judge.
3. It was alleged that during the trial:
    a. The judge ordered everyone out of the courtroom and proceeded to call the complainants liars.
    b. The judge ruled against him because he was late and there was no chance for a fair trial.
    c. The conviction would impact on the male complainant's ability to travel to the United States where they live in the winter.
4. After the trial, transcripts were ordered by the complainants. They alleged that:
    a. The transcriber had the same surname as the judge, casting doubt on the accuracy of the transcript.
    b. Getting transcripts for the appeal was "stalled and rebuffed over the next year", until finally their lawyer obtained them.
    c. The transcripts were tampered with and missing many words.

The complaint subcommittee reviewed all of the correspondence received from the complainants and the materials they enclosed. The subcommittee ordered and reviewed the transcript and audio recording of the court appearances. When the subcommittee completed its investigation, it provided a report on its investigation to the review panel.

The review panel reviewed the correspondence and documents received from the complainants, the report from the complaint subcommittee and excerpts from the transcript.

The review panel noted that Judicial Council has no authority over complaints about counsel or paralegals. The Law Society of Upper Canada was the governing body of Ontario's lawyers and paralegals and is responsible for their discipline. The complainants were referred to that body to pursue such concerns.

The review panel observed that the court records showed that the Assistant Crown Attorney named by the complainants was not the individual who was involved in prosecuting the case at trial. Further, the allegation was based upon speculation. There was no evidence that the named individual had any influence over the judge in this matter.

1. With regard to the allegations that related to the trial:

   a. The review panel observed from the transcript that the judge did make an order excluding witnesses at the commencement of the trial. The panel noted that this occurs in almost every criminal case where credibility is in issue. It is done to ensure that each witness' evidence is not impacted by hearing the testimony of the other. The panel observed that this trial involved assessments of credibility of the witnesses, including both complainants; therefore, it was appropriate for the judge to make that order.

      The review panel observed that the transcript showed that the judge asked questions of the spouse of the accused, who was the female complainant, over several pages of the transcript in order to seek clarification of the evidence. In the end, the judge did not accept the evidence of the accused and found that his evidence was not consistent with that of his spouse. The review panel found that this was a decision outside the jurisdiction of the Council. If the complainants disagreed with decisions made by the judge, the appropriate way to proceed is through an appeal.

   b. The panel noted that the subcommittee found there was no basis in the transcripts to support the contention that the judge ruled against the complainant because of lateness. The process followed by the judge was that followed in any criminal trial. The review panel accepted the findings of the subcommittee that there was no evidence of unfairness in the court record.

   c. The review panel noted that the Council has no jurisdiction to consider that the conviction may affect the ability of the accused to travel to the United States.

2. With regard to the issues surrounding the transcripts:

   a. The panel noted that the subcommittee instructed the Registrar of the Council to contact the transcriber for further information. The subcommittee reported that the transcriber and the judge were cousins. The transcriber confirmed that her work was in no way affected by the judge who was presiding over the matter before the court. She indicated that the judge was permitted to review the judgment for any errors in grammar, and he made grammatical edits. The review panel noted that this was an accepted and common practice in courts.

b. With respect to the length of time taken to obtain the transcript, the panel noted the time from when the transcript was ordered to when it was completed was not unreasonable.

c. Concerning the allegation that the transcripts were tampered with and missing many words that were remembered, the subcommittee reported that the transcript was compared to the audio recording of the proceedings and found that the transcript was an authentic copy of that recording. The review panel accepted the subcommittee's findings that there were no missing words or substantial changes.

For the reasons set out above, the review panel dismissed the complaint and the file was closed.

CASE NO. 23-008/17

This complainant made allegations about the conduct of a judge (hereafter referred to as the "judge") that allegedly occurred several years before the judge's appointment to the Ontario Court of Justice. The complainant alleged that while still a lawyer, the subject of the complaint threatened the complainant.

The complaint subcommittee read the correspondence and enclosures provided by the complainant, including documents on investigations that took place at the time of the alleged misconduct. After completing its review, the subcommittee provided a report to the review panel.

The review panel reviewed all of the materials provided by the complainant and the report from the subcommittee. The review panel noted that the allegations were investigated by the complainant's employer and the Law Society of Upper Canada ("the Law Society"), and, according to the complainant, by the local police.

The review panel observed that at the time of the alleged misconduct, the judge denied making any threats against the complainant but acknowledged that she had raised her voice when speaking with her and apologized for doing so.

The review panel noted that the Law Society is the body with the jurisdiction to address complaints about the conduct of lawyers. The review panel observed that the documents

provided by the complainant showed that the Law Society investigated the allegations about the conduct of the judge while she was a lawyer and closed its file, determining that further action was not required. The complainant's employer completed its investigation and, according to the complainant, the local police closed their investigation without laying charges.

The panel noted that generally, the Council's jurisdiction extends only to conduct of a person that occurs while he or she is a judge. The panel considered the exception established by the Supreme Court of Canada in *Therrien (Re),* [2001] 2 SCR 3, 2001 SCC 35. The Court held that failure to disclose a material fact during the application process to become a judge may bring a complaint within the jurisdiction of a Judicial Council.

The panel noted that in Ontario, in the application process to become a judge of the Ontario Court of Justice, each candidate is asked:

> Question 7. Please disclose any matter that you reasonably and objectively feel might adversely reflect on the Ontario Court of Justice.

The review panel noted that the documents from the complainant showed that the judge was appointed more than a decade after the alleged conduct took place in circumstances where a complaint was made to the Law Society while that body had jurisdiction to conduct an investigation into the allegations.

The review panel was of the view that given the outcomes of the investigations carried out while the judge was a lawyer, it would have been reasonable for her to believe that the complainant's allegations would not "adversely reflect on the Ontario Court of Justice."

The review panel agreed with the findings of the complaint subcommittee that there was insufficient evidence to support a conclusion that the judge failed to disclose information during the application process which would bring the complaint within the *Therrien* exception. On the contrary, the evidence supported a conclusion that there was no jurisdiction to proceed with the complaint. The *Courts of Justice Act* states that a complaint must be dismissed if it falls outside of the Council's jurisdiction.

The review panel dismissed the complaint on the basis that it was outside of the Council's jurisdiction.

CASE NO. 23-009/17

The complainant was a victim in a court case where the accused was acquitted of sexual assault.

The complainant wrote to the Council to ask that the conduct of the subject judge in the court case be reviewed in relation to his use of *"stereotypical assumptions in his reasons regarding the credibility of the complainants and his lack of understanding of the impact of trauma on the memory and recall, or other conduct, of sexual assault survivors".*

The complainant pointed to three main concerns:

A. Stereotypical Assumptions Regarding Character and Credibility Display Lack of Information on the Known Effects of Trauma on Memory and Conduct.

   Within this section, the complainant referred to three specific issues:

   1. Credibility assessment indicated lack of information regarding the impact of trauma on memory.

      Passages of the judgment were quoted, as well as statements from social science literature relating to the connection between trauma and the law, written in part by law professors. There was reference to *"other judicial councils having considered the need for additional education on this subject".*

   2. Credibility assessment indicated lack of information regarding the impact of trauma on survivors' conduct post-assault.

      The complainant wrote that *"according to well established psychological research, conduct with an aggressor after an assault is not either unusual or inconsistent with trauma or its common effects. Again, these findings from research and clinical practice on trauma psychology have been recognized in the legal context".* Reference was made to an article on the issue in the Canadian Journal of Women and the Law.

   3. Credibility assessment indicates assumptions regarding the supposed animus or motivation of the complainant's coming forward.

Passages of the reasons for judgment were quoted in this section, contrasting the decision in this case with that of another sexual assault case where the accused was convicted. The complainant felt that the other judge's reasons in the other decision were clearly more in line with the social science literature quoted.

B. Role of a Judge in the Cross-Examination of Sexual Assault Complainants.

   The complainant was critical of the subject judge for not having employed a *"trauma-informed approach"* to the case.

C. Inaccuracies in the Characterization of Evidence Presented by the Complainants.

   Examples were provided by the complainant.

D. Pattern of the Judge's Decisions When Presiding over Cases Dealing with Sexual Assault.

   The complainant felt that a *"troubling pattern emerges where in [the subject judge's] analysis and ultimate decision, he has diminished the impact of sexual assault and displays an outdated understanding of human sexuality and sexual assault dynamics".* Reference was made to one judgment where an accused was acquitted by this judge and another sentencing decision of this same judge to illustrate these points. Contrast was made again to the other sexual assault decision made by a different judge previously mentioned where the accused was convicted.

In concluding, the complainant made reference to *"continuing gaps in judicial and police education and accountability when dealing with women who have experienced violence or who are bringing forward a sexual assault complaint."* She spoke of the *"hopeful way forward"* when mentioning the case authored by the other judge.

The subcommittee reviewed the letter of complaint and the decision issued by the judge. The subcommittee also looked at the additional materials provided by the complainant which included authorities and secondary research. In addition, the subcommittee further considered the case mentioned several times by the complainant written by another judge, and the appeal of that decision, which overturned the conviction of the accused in that case. The subcommittee also considered the decisions made in the other two cases referred to by the complainant. Upon conclusion of its investigation, the complaints committee reported to a review panel.

The review panel reviewed the materials received from the complainant, the judgment of the judge who was the subject of the complaint and the report from the complaint subcommittee.

The review panel noted that the points raised in section A by the complainant all related to the judge's assessment of credibility of witnesses and the allegation that the judge failed to consider the effects of trauma on memory and behavior. The panel further noted that a judge has a duty to base his or her decision upon the evidence presented before him or her. The review panel noted that the commentaries in the *Principles of Judicial Office* state:

> Judges have a duty to apply the relevant law to the facts and circumstances of the cases before the court and render justice within the framework of the law".
>
> "The primary responsibility of judges is the discharge of their judicial duties.

The review panel observed that the *Commentaries on Judicial Conduct* (Canadian Judicial Council, 1991) state: "Judicial duty often requires a judge to make critical findings about the credibility or past conduct of a litigant or witness in a case before the court. Findings of that sort are an unfortunate but essential part of the trial process."

The review panel concluded that the judge's assessments of credibility of the witnesses did not cross the threshold from decision-making into the realm of judicial misconduct. In this instance, in the review panel's opinion, the judge made his assessments and findings clearly referencing the evidence, as was his duty.

As previously mentioned, there was considerable attention paid by the complainant to another court case where an accused was convicted by another judge of sexual assault. It appeared to the review panel that the complainant hoped that other judges should or would follow the approach taken by the other judge to whom she referred. The review panel noted, however, that the referenced case was successfully appealed, and that the appellate judge was very critical of that judge's reliance on academic literature that was not presented neither nor to the parties. The review panel observed that in that appeal, the appellate judge stated that all witnesses are entitled to have their credibility assessed on the basis of the evidence in the case, rather than on assumptions about human behaviour derived from a judge's personal reading of social science literature.

The review panel concluded that the allegations about the credibility assessments of the judge in the case that gave rise to this complaint were outside of the jurisdiction of the

Judicial Council. If a party disagreed with the assessment of credibility, the proper way to proceed was through an appeal.

The review panel observed that the points raised in section B related to the role of a judge in the cross-examination of sexual assault complainants. As stated, the complainant commented that the judge did not employ a *"trauma-informed approach"* to the case.

The review panel noted that cross-examination is noted in case law to be the ultimate manner in which an opposing party can look for the truth. Wide latitude is granted to opposing counsel to question witnesses. The review panel concluded that if a person believed that the judge made errors in law in the manner in which cross-examination occurred, that would be a matter outside the jurisdiction of the Council.

The review panel noted that section C related to the complainant's allegations that the judge was inaccurate in his characterization of the evidence. The review panel found that these were matters of judicial decision-making outside of the Council's jurisdiction.

With respect to section D, the review panel observed that these allegations were related to the judge's decisions in two other sexual assault cases. The review panel noted that a judge has a duty to make his or her decision based on his or her assessment of the facts and interpretation and application of the law in each case. If a party is of the view that a decision made by a judge establishes a legal precedent that is incorrect, the way to proceed is through an appeal.

The review panel observed in relation to the first case mentioned, there was concern that the judge said *"the dynamics of human sexual behavior are not something that lends itself to scientific understanding, let alone judicial notice or a measurement against the standard of common sense".* In the second case, the complainant was concerned about the sentence imposed in a child luring case and the judge's reasons for the sentence. In the review panel's view, the allegations related to matters of judicial decision-making outside the jurisdiction of the Council. The review panel found no judicial misconduct or any pattern thereof.

The review panel concluded that the allegations raised by the complainant all related to matters of judicial decision-making, not judicial misconduct. Matters of judicial decision-making are outside of the jurisdiction of the Council. The Council has no discretion to act on complaints that do not fall within its jurisdiction. The *Courts of Justice Act* states that

the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

The review panel dismissed this complaint on the basis that it was outside the jurisdiction of the Judicial Council and the file was closed.

CASE NO. 23-011/17

The complainant appeared before the subject judge and was tried and convicted of charges of stunt driving and refusing to provide breath sample. She was represented by counsel. She wrote to the Council alleging that she was treated unfairly and that she told the truth in her evidence which was rejected by the judge. She also alleged that the police were unfair in charging her and her lawyer was incompetent. She enclosed a copy of a letter addressed to the judge in which she expressed her frustration with the impacts of the convictions, and her frustration with being arrested, with the police, with the lawyer and with the trial. She also included affidavits, copies of correspondence with her lawyer, a supplementary notice of appeal and a copy of a notice of abandonment of her appeal.

The Registrar wrote back explaining that the Council's jurisdiction was limited to complaints about the conduct of judges and that it appeared that her allegations were outside the Council's jurisdiction. The Registrar explained that if a person disagreed with a decision made by a judge, the proper way to proceed was through an appeal.

The complainant wrote again re-framing her complaint, alleging that the judge was not impartial, he was biased against her and her lawyer, he was rude, he discriminated against her due to her accent, and he made decisions that were not based on fact. She assumed that he had improper discussions with counsel for "one side" before the trial.

The subcommittee reviewed her correspondence, and ordered and reviewed the transcript of the trial and of the judge's reasons for judgment. When the subcommittee completed its investigation, it provided a report to a review panel.

The review panel reviewed the correspondence from the complainant, the transcript and the subcommittee's report.

The review panel concluded that the complaint was essentially a complaint about how the judge assessed the evidence and decided the case, which are matters of judicial decision-

making outside the Council's jurisdiction. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

The review panel observed that allegations related to conduct were not supported by the transcript. The judge was not rude, demonstrated no bias, and asked questions that showed he wanted to understand the evidence. His reasons for judgment showed that he made his decision based on his assessment of the facts.

The review panel noted that the Council has no jurisdiction over complaints about the police or lawyers. The Council's jurisdiction is limited to complaints about the conduct of provincially appointed judges. The complainant was informed of the Office of the Independent Police Review Director (OIPRD) which has jurisdiction over complaints about the police, and the Law Society of Ontario which has jurisdiction over complaints about lawyers.

For the reasons set out above, the review panel dismissed the complaint and closed the file.

CASE NO. 23-016/17

The complaint arose from a newspaper article about a sentencing matter in criminal court. The complainant alleged that the judge's decision to adjourn the sentencing and his reasons for sentencing amounted to misconduct. He alleged that in his reasons for sentence, the judge demonstrated bias and prioritized the interests of the accused over the lives of women.

The complaint subcommittee read the complainant's letter and ordered and reviewed the transcripts of the sentencing proceedings, as well as the newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the complainant's letter, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

With respect to the comments made by the judge during the proceedings and the allegations of bias and that the judge prioritized the concerns of the accused over the

victim and the lives of women, the review panel noted that the judge's comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

The review panel noted that the transcript showed that the guilty plea to the lesser offence was part of a joint submission on sentence. The procedure for an accused to plead guilty to a lesser offence is provided for in the *Criminal Code* and, as in this case, generally results from an agreement reached between the Crown Attorney and the accused. The Crown Attorney exercises a discretionary authority in deciding whether to accept the plea to a lesser offence and trial judges are bound to give substantial weight to the decision of the Crown Attorney to do so. As a result, the judge was legally entitled to accept the guilty plea. The review panel found that the judge's decision to do so was outside the Council's jurisdiction.

With respect to the judge's decision to adjourn the sentencing, the review panel observed that the transcript showed that the lawyer for the accused requested the adjournment. The judge gave both counsel an opportunity to make submissions and then took a recess to consider his decision. In allowing the adjournment, the judge stated that he had a broad discretion in deciding the application but acknowledged that his discretion was constrained by his obligation to consider "…all relevant interests and factors, and determine what is the most appropriate ruling to make in this matter."

The review panel observed that the transcript showed that the judge considered the interests of the offender and the victim in his application of the law, and gave reasons for his decision to grant the adjournment. The review panel noted that the correctness of his decision to adjourn the sentencing hearing was a matter of judicial decision-making outside the jurisdiction of the Council. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

The review panel noted that the transcript showed that during the sentencing proceeding, the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge acknowledged the impacts on victims.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments were within its jurisdiction. As indicated above, matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the judge's comments in the full context of the proceedings, the review panel concluded that the comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties. The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

CASE NO. 23-017/17

The complainant read about a sentencing in a news article. He expressed concern that the judge downgraded and postponed the sentencing. He alleged that the judge demonstrated bias and that the remarks by the judge enabled the crime and prioritized the interests of the accused over the victim and the future of other women in the community.

The complaint subcommittee read the letter of complaint and ordered and reviewed the transcripts of the sentencing proceedings, as well as the newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the letter of complaint, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

With respect to the allegation that the judge was biased and prioritized the concerns of the accused over the victim and the lives of women, the review panel noted that the judge's comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

The review panel noted that the transcript showed that the guilty plea to the lesser offence was part of a joint submission on sentence. The procedure for an accused to plead guilty to a lesser offence is provided for in the *Criminal Code* and, as in this case, generally results from an agreement reached between the Crown Attorney and the accused. The Crown Attorney exercises a discretionary authority in deciding whether to accept the plea to a lesser offence and trial judges are bound to give substantial weight to the decision of the Crown Attorney to do so. As a result, the judge was legally entitled to accept the guilty plea. The review panel found that the judge's decision to do so was outside the Council's jurisdiction.

With respect to the judge's decision to adjourn the sentencing, the review panel observed that the transcript showed that the lawyer for the accused requested the adjournment. The judge gave both counsel an opportunity to make submissions and then took a recess to consider his decision. In allowing the adjournment, the judge stated that he had a broad discretion in deciding the application but acknowledged that his discretion was constrained by his obligation to consider "…all relevant interests and factors, and determine what is the most appropriate ruling to make in this matter."

The review panel observed that the transcript showed that the judge considered the interests of the offender and the victim in his application of the law, and gave reasons for his decision to grant the adjournment. The review panel noted that the correctness of his decision to adjourn the sentencing hearing was a matter of judicial decision-making outside the jurisdiction of the Council. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

The review panel noted that the transcript showed that during the sentencing proceeding, the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge acknowledged the impacts on victims.

The review panel noted that the complainant expressed concern with respect to the judge's use of the phrase "mob mentality" in hockey. The review panel observed that the transcript disclosed that the day the plea was entered, Crown counsel made reference to a hockey culture that did not do enough to rein in the offender's conduct. The Crown Attorney said that he would ask the judge to take judicial notice of the role of hockey culture in the offence before the court. In his submissions on sentence, the Crown

Attorney returned to the issue. The review panel observed that it was in response to, and in the context of the submissions by the Crown Attorney that the judge started his reasons for sentence by acknowledging a "mob mentality" that can exist in hockey culture.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments were within its jurisdiction. As indicated above, matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the judge's comments in the full context of the proceedings, the review panel concluded that the comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties. The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

CASE NO. 23-018/17

The complainant read about a court decision in the newspaper. She alleged that the judge's conduct in determining the sentence was shameful. She raised concern about remarks made by the judge and alleged that the judge shielded the accused and ignored the struggles of the victim. She alleged that if the Council permitted the judge to remain in office and "continue to engage in such vicious behaviour", the Council would "be like the Catholic priests who shield their colleagues who rape children."

The complaint subcommittee read the letter of complaint and ordered and reviewed the transcripts of the sentencing proceedings, as well as the newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the letter, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

With respect to the comments made by the judge during the proceedings, the review panel noted that the judge's comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

The review panel noted that the transcript showed that the guilty plea to the lesser offence was part of a joint submission on sentence. The procedure for an accused to plead guilty to a lesser offence is provided for in the *Criminal Code* and, as in this case, generally results from an agreement reached between the Crown Attorney and the accused. The Crown Attorney exercises a discretionary authority in deciding whether to accept the plea to a lesser offence and trial judges are bound to give substantial weight to the decision of the Crown Attorney to do so. As a result, the judge was legally entitled to accept the guilty plea. The review panel found that the judge's decision to do so was outside the Council's jurisdiction.

With respect to the judge's decision to adjourn the sentencing, the review panel observed that the transcript showed that the lawyer for the accused requested the adjournment. The judge gave both counsel an opportunity to make submissions and then took a recess to consider his decision. In allowing the adjournment, the judge stated that he had a broad discretion in deciding the application but acknowledged that his discretion was constrained by his obligation to consider "…all relevant interests and factors, and determine what is the most appropriate ruling to make in this matter."

The review panel observed that the transcript showed that the judge considered the interests of the offender and the victim in his application of the law, and gave reasons for his decision to grant the adjournment. The review panel noted that the correctness of his decision to adjourn the sentencing hearing was a matter of judicial decision-making outside the jurisdiction of the Council. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

The review panel noted that the transcript showed that during the sentencing proceeding, the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge acknowledged the impacts on victims.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the judge's comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments were within its jurisdiction. As indicated above, matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the comments referred to in the complaint letter in the full context of the proceedings, the review panel concluded that the comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties.

The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

CASE NO. 23-019/17

The complainant alleged that the judge in a criminal matter seemed biased against the victim and in favour of the accused. She noted that the judge postponed the sentencing over the objections of the Crown Attorney. She expressed the view that the case reinforced her loss of faith in the criminal justice system taking such criminal behaviour seriously.

The complaint subcommittee read the letter of complaint and ordered and reviewed the transcripts of the sentencing proceedings, as well as the newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the letter of complaint, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

With respect to the allegations that the judge showed bias in favour of the accused, the review panel noted that the judge's decisions and comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

With respect to the judge's decision to adjourn the sentencing, the review panel observed that the transcript showed that the lawyer for the accused requested the adjournment. The judge gave both counsel an opportunity to make submissions and then took a recess to consider his decision. In allowing the adjournment, the judge stated that he had a broad discretion in deciding the application but acknowledged that his discretion was constrained by his obligation to consider "…all relevant interests and factors, and determine what is the most appropriate ruling to make in this matter."

The review panel observed that the transcript showed that the judge considered the interests of the offender and the victim in his application of the law, and gave reasons for his decision to grant the adjournment. The review panel noted that the correctness of his decision to adjourn the sentencing hearing was a matter of judicial decision-making outside the jurisdiction of the Council. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

The review panel noted that the transcript showed that during the sentencing proceeding, the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge acknowledged the impacts on victims.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the judge's comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments and decisions were within its jurisdiction. Matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the allegations in the letter of complaint in the full context of the proceedings, the review panel concluded that the judge's decisions and comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties.

The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

A

CASE NO. 23-020/17

The complainant was the Applicant in a family law case. She and her former partner were the parents of a young child. She sought custody of the child and permission to move the child's residence. This request was opposed by the child's father. The judge who was the subject of this complaint presided at the trial.

The judge ordered that the parties share joint custody of the child with his principal residence being in the home of the complainant. She was not given permission to move as she had requested.

The complainant included a copy of the judge's Reasons for Judgment with her letter, and alleged that the judge's decision reflected "pretty bold and misogynistic assumptions." Her allegations included the following:

1. The judge found that the parties were able to communicate effectively with respect to sharing time with the child. This finding did not take into account that the complainant was terrified of her former partner, so much so, that she gave in to appease him;
2. The judge decided that both parties had the opportunity to learn from past relationships that had broken down. The judge also was of the opinion that once the complainant and her former partner had a child together, they both needed to "change previous behaviours that may have contributed to those breakdowns in order to keep this [one] from also breaking down." These statements did not take into account the abuse she suffered from her former partner.
3. The judge found that neither parent was able to put the child's needs ahead of their own. This finding as it related to her was "insensitive and inappropriate."
4. The judge minimized the abuse the complainant suffered. She found this to be hurtful because it "undermined the continual and ongoing abuse [she] received."
5. The judge was persuaded, after considering the complainant's evidence, that she was not intimidated by her former partner and that she could hold her own in the relationship using verbal persuasion. This finding "undermines the abuse" she faced and "further victimized" her.

6. The complainant encouraged her former partner to be involved with the child despite the abuse she suffered. This was held against her by the judge when finding that a move would undermine the time the child could spend with the former partner.
7. The judge failed to appreciate that after years of abuse, the complainant had diminished self-confidence and the ability to advocate for herself.

The complainant summarized her complaint by stating that the judge's decision made her feel like she was being "forced to be abused all over again" and that the Court condoned "the abuse by siding with [her] abuser and forcing [her] to stay in a city where [she is] in a constant state of fear."

The complaint subcommittee reviewed the correspondence from the complainant, the judge's Reasons for Judgment, the trial record and the transcript of the trial. After completing its investigation the subcommittee provided a report to the review panel.

The review panel reviewed the correspondence from the complainant, excerpts from the trial transcript, the judge's Reasons for Judgment and the report from the complaint subcommittee.

The review panel noted that the complaint subcommittee reported that during the trial, the complainant gave evidence of a history of domestic abuse inflicted upon her by the former partner and that following their separation, she remained intimidated and afraid of him. They separated following an incident of domestic violence. As a result of this incident, the former partner pleaded guilty to assaulting the complainant and entered into a twelve-month recognizance to keep the peace. The former partner was eventually granted an absolute discharge, following a joint submission made at the criminal proceeding.

The complainant's former partner gave evidence that both were able to jointly arrange for the time he spent with the child following the separation. The former partner minimized the extent of any domestic violence claiming that he and the complainant were argumentative.

The investigation showed that after a three day trial, the judge found that:

1. The complainant was primarily responsible for the care of the child;
2. The complainant and her former partner were able to cooperate and make joint decisions concerning the child; and

3. In this case, the domestic abuse did not result in the complainant being intimidated by her former partner. The judge found that the complainant was able to "hold her own…using verbal instead of physical persuasion".

The review panel noted that the judge's assessment of the evidence and his decision in the case were matters of judicial decision-making outside the jurisdiction of the Council. Judges have decision-making independence in accordance with the *Constitution Act, 1867.* The Council has no authority to change a decision of a judge.

After reviewing the judge's Reasons for Judgment, the review panel concluded that the reasons did not demonstrate a misogynistic attitude, domestic violence and their relevance to post-separation parenting. Rather, the Reasons for Judgment reflected that the evidence related to domestic violence was considered and findings of fact were made based upon a consideration of all the evidence presented at the trial. The review panel was of the view that the Reasons for Judgment showed that the judge did not rely upon stereotypes, or improper or preconceived notions about domestic violence.

The review panel found no evidence of inappropriate comments by the judge in the excerpts of the transcript reviewed by the panel, and accepted the finding of the complaint subcommittee that the remainder of the transcript did not show any evidence that the judge asked questions evidencing misogynistic attitudes.

The review panel observed that the judge's comments about relationships and expectations of parties in their role as parents were child-focused. The review panel noted that the comments did not diminish or ignore the very serious issue of domestic violence.

The complaint was dismissed on the basis that the allegations related to judicial decision-making were outside the jurisdiction of the Council, and there was no evidence of judicial misconduct. The file was closed.

CASE NO. 23-021/17

The complainants were the step-grandparents of two young children whose mother died. Their step-son, the father, left the children in their care. The maternal grandmother and her spouse brought a custody application to have the children move to live with them. Following the trial, the judge granted custody to the maternal grandmother and

her spouse. In their letter of complaint to the Council, the complainants took issue with a number of aspects of the decision.

They felt that they were mentally and emotionally abused by the court system, the judge, the lawyers and the investigator of the Office of the Children's Lawyer. They expressed concerns about the conduct of their lawyer and specifically raised a concern that the judge, when he was a lawyer, had represented the father of the children. They asserted that their lawyer never brought a motion of conflict of interest.

The complaint subcommittee read the letter from the complainants and ordered and reviewed the trial transcript and the Reasons for Judgment. Upon completion of the investigation, the subcommittee submitted a report to a review panel.

The review panel reviewed the complainants' correspondence, excerpts of the transcript of the proceedings, the judge's Reasons for Judgment and the subcommittee's report.

The review panel observed in the excerpts of the trial transcript that on the third day of the trial, the judge raised the issue of whether there was a conflict of interest. His Honour indicated that the evidence had made him aware of the biological father's name and that he had represented him a number of years earlier while he was a lawyer. The panel observed that the transcript showed that the judge had raised the matter in chambers with the lawyers for the parties and informed them that he would consider a recusal motion if any party or the Office of the Children's Lawyer wished to bring one. The judge then provided the lawyers with time to obtain instructions from their clients on the matter. Subsequently, all of the lawyers confirmed that the parties were prepared to proceed with the trial. The panel noted that the judge also said that if anyone changed their mind, they could raise it again, and it was not raised. The review panel agreed with the findings of the subcommittee that there was no misconduct in the manner in which the judge dealt with the issue.

With respect to the complainant's allegations about their lawyer, the panel noted that if a person sought to make a complaint about a lawyer, he or she should contact the Law Society of Ontario. The panel observed that the complainants had been referred to the Law Society of Ontario by Council staff.

Similarly, the review panel noted that in their letter, the complainants raised other concerns about the lawyers involved in the case. Those concerns were not within the

jurisdiction of the Council and would need to be pursued through the Law Society of Ontario or other legal remedies, such as an appeal.

The review panel noted that the complainants took issue with the decision made by the judge and his reasons. The panel found that those allegations were matters related to judicial decision-making outside the jurisdiction of the Council. If the complainants disagreed with the decision, the proper way to proceed was through an appeal.

The review panel observed that the request by the complainants for compensation for the mental and emotional abuse that they allegedly suffered from the court system was not a matter within the jurisdiction of the Judicial Council.

The review panel dismissed the complaint on the basis that it was outside of the jurisdiction of the Council. The file was closed.

CASE NO. 23-023/17

This complaint arose from testimony given by the subject judge at a public proceeding.

The complainant alleged that a statement that was made by the subject judge during her testimony, if carried out, would amount to an assault. The complainant stated in his letter to the Council that, “Judges should be held to a higher standard and her statement sends a message that it would have been OK to commit this act of violence because it offended [the subject judge’s] judicial or political beliefs.”

The complaint subcommittee reviewed the letter from the complainant and obtained and reviewed the relevant portion of the transcript of the judge’s testimony at the proceeding. Following the investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the complainant’s letter, the excerpt of the transcript containing the judge’s testimony and, the subcommittee’s report.

The review panel observed that when the judge’s testimony was considered in the context of all of the circumstances that were being described, it did not show that the judge intended to commit an act of violence. The review panel concluded that there was no judicial misconduct and dismissed the complaint. The file was closed.

CASE NO. 23-024/17

The complainant alleged that during a criminal sentencing, the judge's comments displayed a gender bias, as well as a significant degree of partisanship. She alleged that the judge actively concerned himself with the accused and he showed no concern for the victim. She referred to comments that she alleged were an example of the judge violating the impartiality that is essential for the judiciary to be fair to all parties involved.

She alleged that the judge demonstrated gender bias that directly impacted the feelings of safety and inclusion of all female Canadians. She alleged that the judge's extremely poor judgment was not representative of the values of the Canadian justice system.

The complaint subcommittee read the letter of complaint and ordered and reviewed the transcripts of the sentencing proceedings, as well as the newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the complainant's letter, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

With respect to the comments made by the judge during the proceedings, the review panel noted that the judge's comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

With respect to the allegations that the judge displayed gender bias and partisanship, the review panel noted that the transcript showed that during the sentencing proceeding, the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge referred to the impacts on victims.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments were

within its jurisdiction. Matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the comments referred to in the complainant's letter in the full context of the proceedings, the review panel concluded that the comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties. The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

CASE NO. 23-025/17

The complainant expressed "shock and disappointment" in the remarks of a judge at a sentencing hearing. She stated, "My concern is that leniency was granted; it was the brazen immorality of how it was justified, promoting and accommodating old boys' club (so-called) ethics, while demonstrating a deeply sexist, bordering on criminal attitude."

She alleged that, "Warning the offender to not let himself "get into" such a situation again flies in the face of the fact that the offender created the situation himself." She noted that other males did not conduct themselves in the same manner.

She alleged that the judge aligned himself morally with the perpetrator and complimented him on his achievements. She alleged that this was "simple self-service for the privileged while male club."

The complaint subcommittee read the letter of complaint and ordered and reviewed the transcripts of the sentencing proceedings, as well as a newspaper article that gave rise to the complaint. After completing its investigation, the subcommittee provided a report to a review panel.

The review panel reviewed the letter of complaint, the newspaper article, the transcripts of the sentencing proceedings and the report from the complaint subcommittee.

The review panel noted that the transcript showed that there was a guilty plea to a lesser offence was part of a joint submission on sentence. The procedure for an accused to plead guilty to a lesser offence is provided for in the *Criminal Code* and, as in this case,

generally results from an agreement reached between the Crown Attorney and the accused. The Crown Attorney exercises a discretionary authority in deciding whether to accept the plea to a lesser offence and trial judges are bound to give substantial weight to the decision of the Crown Attorney to do so. As a result, the judge was legally entitled to accept the guilty plea. The review panel found that the judge's decision to do so was outside the Council's jurisdiction.

With respect to the comments made by the judge during the proceedings and the allegations that the judge showed a sexist attitude aligned with the accused, the review panel noted that the judge's comments must be assessed in the context of the entire sentencing hearing and bearing in mind a judge's role in sentencing an offender. The review panel noted that the media report provided a brief summary of the proceedings without providing significant detail or context.

The review panel noted that the transcript showed that the judge weighed both the mitigating and aggravating factors, and he considered the damage caused by the offender. The transcript also showed that the judge acknowledged the impacts on victims.

Mindful of the need to respect the right of constitutionally-protected judicial independence, the review panel carefully considered the judge's comments in the context of the entire proceedings as set out in the transcripts, while taking into account the role of a judge in a sentencing hearing and whether the allegations about the judge's comments and decisions were within its jurisdiction. Matters of judicial decision-making are outside the jurisdiction of the Council. The *Courts of Justice Act* states that the Council must dismiss a complaint without further investigation if it falls outside of the Judicial Council's jurisdiction.

After considering the allegations in the complaint letter in the full context of the proceedings, the review panel concluded that the judge's decisions and comments were intricately connected to the exercise of judicial discretion in carrying out judicial duties.

The review panel dismissed the complaint on the basis that it was outside the jurisdiction of the Council. The file was closed.

Back to Table of Contents

APPENDIX B

PRINCIPLES OF JUDICIAL OFFICE

"Respect for the Judiciary is acquired through the pursuit of excellence in administering justice."

PRINCIPLES OF JUDICIAL OFFICE

PREAMBLE

A strong and independent judiciary is indispensable to the proper administration of justice in our society.

Judges must be free to perform their judicial duties without fear of reprisal or influence from any person, group, institution or level of government.

In turn, society has a right to expect those appointed as judges to be honourable and worthy of its trust and confidence.

The judges of the Ontario Court of Justice recognize their duty to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence and integrity of their judicial office and to preserve the faith and trust that society places in the men and women who have agreed to accept the responsibilities of judicial office.

The following principles of judicial office are established by the judges of the Ontario Court of Justice and set out standards of excellence to which all judges subscribe.

These principles are not exhaustive. They are designed to be advisory in nature and are not directly related to any specific disciplinary process. Intended to assist judges in addressing ethical and professional dilemmas, they may also serve in assisting the public to understand the reasonable expectations which the public may have of judges in the performance of judicial duties and in the conduct of judges' personal lives.

PRINCIPLES OF JUDICIAL OFFICE

1. THE JUDGE IN COURT

1.1 Judges must be impartial and objective in the discharge of their judicial duties.

Commentaries:

Judges should not be influenced by partisan interests, public pressure or fear of criticism.

Judges should maintain their objectivity and shall not, by words or conduct, manifest favour, bias or prejudice towards any party or interest.

1.2 Judges have a duty to follow the law.

Commentaries:

Judges have a duty to apply the relevant law to the facts and circumstances of the cases before the court and render justice within the framework of the law.

1.3 Judges will endeavour to maintain order and decorum in court.

Commentaries:

Judges must strive to be patient, dignified and courteous in performing the duties of judicial office and shall carry out their role with integrity, appropriate firmness and honour.

2. THE JUDGE AND THE COURT

2.1 Judges should approach their judicial duties in a spirit of collegiality, cooperation and mutual assistance.

2.2 Judges should conduct court business with due diligence and dispose of all matters before them promptly and efficiently having regard, at all times, to the interests of justice and the rights of the parties before the court.

2.3 Reasons for judgment should be delivered in a timely manner.

2.4 Judges have a duty to maintain their professional competence in the law.

Commentaries:

Judges should attend and participate in continuing legal and general education programs.

2.5 The primary responsibility of judges is the discharge of their judicial duties.

Commentaries:

Subject to applicable legislation, judges may participate in law related activities such as teaching, participating in educational conferences, writing and working on committees for the advancement of judicial interests and concerns, provided such activities do not interfere with the judges' primary duty to the court.

3. THE JUDGE IN THE COMMUNITY

3.1 Judges should maintain their personal conduct at a level which will ensure the public's trust and confidence.

3.2 Judges must avoid any conflict of interest, or the appearance of any conflict of interest, in the performance of their judicial duties.

Commentaries:

Judges must not participate in any partisan political activity.

Judges must not contribute financially to any political party.

3.3 Judges must not abuse the power of their judicial office or use it inappropriately.

3.4 Judges are encouraged to be involved in community activities provided such involvement is not incompatible with their judicial office.

Commentaries:

Judges should not lend the prestige of their office to fund-raising activities.

APPENDIX C

HEARING ABOUT THE CONDUCT OF THE HONOURABLE JUSTICE BERND E. ZABEL

ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF 81 complaints respecting
The Honourable Justice Bernd E. Zabel
A Judge of the Ontario Court of Justice in the Central West Region

REASONS FOR DECISION

Before:

The Honourable Justice Robert Sharpe, Chair
Court of Appeal for Ontario

The Honourable Justice Leslie Pringle
Ontario Court of Justice

Mr. Christopher D. Bredt
Borden Ladner Gervais LLP
Lawyer Member

Mr. Farsad Kiani
Community Member

Hearing Panel of the Ontario Judicial Council

Counsel:

Ms. Linda Rothstein and Mr. Michael Fenrick
Paliare Roland Rosenberg Rothstein LLP
Presenting Counsel

Mr. Ricardo G. Federico and Ms. Giulia B. Gambacorta
Counsel for the Honourable Justice Bernd E. Zabel

Hearing about the conduct of the Honourable Justice Bernd Zabel

REASONS FOR DECISION

[1] On November 9, 2016, the day after the United States presidential election, Justice Bernd Zabel went into court wearing a red "MAKE AMERICA GREAT AGAIN" baseball hat, the campaign signature of the successful candidate, Donald Trump. The incident attracted media attention and public criticism of Justice Zabel. On November 15, 2016, Justice Zabel apologized and acknowledged that he should not have worn the hat in court.

[2] Eighty-one complaints concerning Justice Zabel's conduct were filed after the incident. This panel of the Ontario Judicial Council ("OJC") was convened to hear the allegations of Justice Zabel's misconduct pursuant to s. 51.6 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (the *"Act"*).

[3] There is no real dispute as to the facts giving rise to these complaints. The essential facts are set out in an Agreed Statement of Facts signed by Presenting Counsel and Justice Zabel. At the hearing, Justice Zabel testified and two additional witnesses were called on his behalf. The panel was also provided with the 81 complaints, a brief of media articles and opinions, and 63 letters and two cards written in support of Justice Zabel.

[4] Justice Zabel admits that his actions were contrary to the standard of conduct expected of a judge and contrary to the *Principles of Judicial Office* for judges of the Ontario Court of Justice, established and approved pursuant to s. 51.9 of the *Act.* Justice Zabel also admits that his conduct constitutes judicial misconduct that warrants the imposition of one or more of the sanctions under s. 51.6(11).

FACTS

[5] Justice Zabel is a judge of the Ontario Court of Justice assigned to preside in the Central West Region. Justice Zabel, now 69 years old, immigrated to Canada from Germany as a young child in 1953. In his evidence, he described himself as a refugee from communism. He was appointed to the Ontario Court of Justice on April 2, 1990 and has served as a judge in Hamilton for 27 years. Prior to his appointment to the bench, he practised criminal and family law for 11 years. There have been

no previous findings of judicial misconduct against him. The record before us demonstrates that he is highly regarded by his judicial colleagues and by members of the Hamilton bar and considered to be a valued, hardworking, fair minded and impartial judge.

Events of November 9, 2016

[6] Justice Zabel testified that he ordered six red baseball hats with the phrase "MAKE AMERICA GREAT AGAIN" inscribed in white on the front from Amazon in June 2016. These hats were associated with Donald Trump's presidential election campaign. When Justice Zabel purchased the hats, Donald Trump was on his way to securing the Republican Party's nomination but was not expected to win the presidency. He returned one of the hats that was defective, gave four of the hats to friends, and put one in a desk drawer in his office. He testified that he purchased the hats as historical memorabilia and not as a Trump supporter. He also stated that he has a portrait of former president John F. Kennedy hanging in his office.

[7] Justice Zabel testified that he once wore the hat in the judges' common room. His colleagues laughed and he put the hat back in his desk. As the presidential election campaign progressed, Justice Zabel formed the view that Trump was likely to win the presidency.

[8] On November 8, 2016, the day of the U.S. presidential election, Justice Zabel watched the live televised election results until late into the night.

[9] Justice Zabel testified that, on the morning of November 9, 2016, he thought people in the courtroom would be discussing Trump's stunning victory. He stated that he thought "it would add a bit of humour by starting off the day with the hat, which was very ill-fitting – it looks very silly on me". He put on his "MAKE AMERICA GREAT AGAIN" hat as he left his chambers. On the way to court, he encountered two of his fellow judges, Justices Culver and Agro. Both commented adversely on the fact that he was going into court wearing the hat. Justice Agro testified that she told him: "Are you out of your mind?" Justice Zabel said that he was wearing the hat as a joke to mark a moment in history.

[10] There were several criminal matters on Justice Zabel's list and ten lawyers made appearances as the morning progressed. Members of the public and court staff were also present in the courtroom. There was some laughter when Justice Zabel entered the courtroom wearing the hat. After the clerk registrar announced that court was in session, Justice Zabel stated: "Just in celebration of a historic night in the United States. Unprecedented." He took off the hat and placed it on the dais with the phrase "MAKE AMERICA GREAT AGAIN" visible to those in the courtroom. Crown counsel responded "Yes." One of the defence counsel, Michael Wendl, stated "I should have worn my shirt, Your Honour."

[11] Justice Zabel proceeded to deal with the first matter on the scheduling list. Mr. Wendl appeared for the accused and noted that the proposed date was the U.S. Inauguration Day. Justice Zabel stated: "…when is that? Were you planning on being down there, Mr. Wendl?" Mr. Wendl replied: "I am not going to the United States for four years, Your Honour." Justice Zabel responded: "Uh oh, I won't get into that."

[12] Justice Zabel then dealt with several matters in a routine fashion without further incident or reference to the hat. Five accused persons entered guilty pleas. Contrary to media reports, Justice Zabel took the hat when he left the courtroom for the morning break and did not wear or bring the hat after the break.

[13] By lunch time Justice Zabel had completed his list. He asked the clerk registrar to see whether any other court needed assistance and was informed that none did. Justice Zabel adjourned court until after lunch so that a further check could be made to see if there was any other need for assistance in other courts.

[14] He went back into court at 2:20 p.m. and was advised that no other court needed assistance. The clerk registrar called "All rise" and as Justice Zabel was leaving the court room, Crown counsel stated: "You've lost your hat." There was some laughter. Justice Zabel replied: "Brief appearance for the hat. Pissed off the rest of the judges because they all voted for Hillary, so *[sic].* I was the only Trump supporter up there, but that's okay." Justice Zabel testified that he did not mean to say he was a Trump supporter, but rather that he was the only one among his colleagues who had predicted that Trump would win.

[15] We do not accept Justice Zabel's submission that this exchange should be regarded as an "off the record" exchange with Crown counsel. While the court had completed its business, Justice Zabel was still in court and wearing his gown. He was expected to conduct himself accordingly.

The Events of November 15, 2016

[16] On Friday, November 11, 2016, the *Globe and Mail* published a story reporting what had occurred in Justice Zabel's court on November 9. The *Globe* story reported that Kim Stanton, the legal director of the Women's Legal Education and Action Fund ("LEAF"), had expressed serious concerns that Justice Zabel had associated himself with Trump's campaign. Ms. Stanton stated that she was concerned about Justice Zabel's capacity to judge fairly since Trump made derogatory comments during his campaign about women, proposed a temporary ban on Muslims from entering the U.S., the deportation of undocumented immigrants, and planned to build a wall along the Mexican border. A Muslim lawyer was quoted as stating that many in his community would fear bias if they appeared in front of Justice Zabel. The Dean of Osgoode Hall Law School was quoted as stating that the incident did not amount to misconduct but required a warning. A prominent criminal lawyer indicated that Justice Zabel was a fine judge and suggested that the matter should be dealt with internally.

[17] Justice Zabel testified that the *Globe* article was the first indication he had that his conduct had given rise to concern. He stated that he was "surprised and shocked at the response to my ill-considered joke" and that he reviewed the audio tape of the day's proceedings.

[18] On Tuesday, November 15, 2016, his first day in court after the *Globe* story, Justice Zabel went into court, observed that there were members of the press present, and made the following statement:

> This is the first time I've presided since the *Globe and Mail* article on Friday, November 11th, reporting that on Wednesday, November 9, I opened court wearing Mr. Trump's signature campaign hat. The article was factually correct except that I did not come back with the hat after the morning break.

> What I did was wrong. I wish to apologize for my misguided attempt to mark a moment in history by humour in the courtroom, following the surprising result in the United States election. This gesture is not intended in any way as a political statement or endorsement of any political views, and in particular, the views and comments of Donald Trump. I very much regret that it has been taken as such. I apologize for any offence or hurt caused by my thoughtlessness. I acknowledge that wearing the hat is a breach of the principles of judicial office and a lapse in judgment that I sincerely regret. I apologize for my actions to the public I serve, the institution I represent, my judicial colleagues, members of the bar, and all persons serving the administration of justice. I will humbly continue to treat all persons that appear before me fairly and impartially as I have done since my appointment to this honourable bench in 1990.

The Complaints

[19] Following the media coverage of the events of November 9 and 15, 2016, the OJC received 81 complaints with respect to Justice Zabel's conduct. The complaints came from public interest organizations, law professors, lawyers, paralegals, and members of the public. Nine complaints came from legal organizations: LEAF; the Ontario Bar Association; the Canadian Bar Association of Black Lawyers; the Criminal Lawyers' Association; the South Asian Bar Association of Toronto; the Canadian Muslim Lawyers Association jointly with the Canadian Association of Muslim Women in the Law; the Rights Advocacy Coalition for Equality; the HIV & Aids Legal Aid Clinic of Ontario jointly with the Canadian HIV/AIDS Legal Network; and the Roundtable of Diversity Associations.

[20] The common theme of all these complaints is that Justice Zabel's conduct represented an unacceptable expression of partisan political views by a judge. Most complainants indicate a heightened concern as they perceive many of the things Trump said during his campaign to indicate misogynistic, racist, homophobic, and anti-Muslim attitudes. The complainants state that Justice Zabel has associated himself with those views by his conduct and that women and members of various vulnerable groups would reasonably fear that they would not be treated fairly and impartially by Justice Zabel.

[21] None of the complaints came from any of the people in Justice Zabel's court on November 9, 2016, which included representatives of both the provincial and federal Attorneys General. Michael Wendl, one of the defence counsel who was before Justice Zabel on that date, wrote one of the many letters of support. He describes Justice Zabel as "the paradigm of judicial deportment" and adds:

> I am in the unique position that I was in the courtroom the day of the hat incident. It is my view that Justice Zabel was joking. In fact, I was joking with him. It is my view that Justice Zabel's conduct was likely just a bi-product of the collegial atmosphere that exists in Hamilton. I have no concerns running any of my future matters in front of Justice Zabel, I have no concerns about his impartiality, nor do I have any concerns about having a fair hearing.

Ontario Judicial Council Proceedings

[22] In December 2016, the Regional Senior Justice suspended Justice Zabel with pay pursuant to s. 51.4(8) on the recommendation of an OJC Complaints Subcommittee pending the resolution of the complaints against him.

[23] Pursuant to its complaints procedures, the OJC provided Justice Zabel with copies of the complaints and gave him the opportunity to respond. Through his legal counsel, Justice Zabel responded very briefly and stated that he made a public apology on November 15, 2016, that he remained contrite, and that he was looking forward to resuming his judicial duties.

[24] The OJC Complaints Subcommittee ordered that the complaints be the subject of a hearing pursuant to s. 51.6 of the *Act.* Presenting Counsel served and filed a Notice of Hearing summarizing the events of November 9 and 15, 2016 and alleging that Justice Zabel's actions: were contrary to the standard of conduct expected of a judge; had negatively impacted on public confidence in the administration of justice; had compromised the public's perception of the independence of the judiciary from politics and constituted an expression of his own and his colleagues' political views. It is also alleged that his November 15 explanation was not consistent with the

comments he made in court on November 9. The Notice of Hearing alleges that Justice Zabel's actions constitute judicial misconduct that warrants a disposition under s. 51.6(11) of the *Act* to preserve public confidence in the judiciary.

ANALYSIS

Judicial Misconduct

[25] This panel must first determine whether Justice Zabel's actions constitute judicial misconduct. We are satisfied on the basis of the Agreed Statement of Facts, Justice Zabel's admissions, and the additional evidence we have heard that they do.

[26] Canadian judges are held to a high standard. In *Re Therrien, 2001* SCC 35, [2001] 2 S.C.R. 3, at para. 108, the Supreme Court of Canada described the judicial function as "absolutely unique." Judges resolve disputes, determine rights, and defend the fundamental rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms. As the Supreme Court stated at para. 109, the "judge is the pillar of our entire justice system".

[27] Maintaining confidence in the judiciary is essential to our democratic form of government. This means that "[t]he public will … demand virtually irreproachable conduct from anyone performing a judicial function" and that judges "must be and must give the appearance of being an example of impartiality, independence and integrity": *Re Therrien,* at para. 111.

[28] The separation of politics from the judiciary is a cornerstone of the rule of law and our democratic system of government. One of the most basic and fundamental principles of our justice system is that the judiciary is independent from politics. Judges must, at all times, remain above the political fray and they must conduct themselves so as to avoid any perception that the administration of justice will be influenced by their political views. Citizens must feel secure that the judge will decide their fate according to the law and the evidence. The expression of political views by judges, particularly in the courtroom, is inimical to these basic values.

[29] These principles are well-known and clearly stated in ethical guidelines for judges. The *Principles of Judicial Office* for judges of the Ontario Court of Justice state:

> 3.1 Judges should maintain their personal conduct at a level which will ensure the public's trust and confidence.
>
> 3.2 Judges must avoid any conflict of interest, or the appearance of any conflict of interest, in the performance of their duties.
>
> *Commentaries*
>
> Judges must not participate in any partisan political activity.
>
> Judges must not contribute financially to any political party.

[30] A similar statement can be found in the Canadian Judicial Council's *Ethical Principles for Judges,* at p. 28: "All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity."

[31] Justice Zabel made no comment on Canadian politics and Canadians have no say and cannot vote in U.S. elections. However, given our proximity to the U.S. and the enormous impact that our powerful neighbour has upon our daily lives, Canadians take a very lively interest in American politics. Our economic well-being and our sense of peace and security is affected by the President of the United States. Canadians have strong views on who should be elected to that office.

[32] The 2016 U.S. presidential election campaign was highly partisan and bitter. The candidates advocated strongly divergent policies. Many of Trump's positions were provocative and controversial. If adopted, his policies on matters such as free trade, climate change, immigration, and national security would affect the daily lives of many Canadians. His views attracted wide attention in Canada and many Canadians expressed their strong disagreement with his policies. It was often stated that Trump's policies were contrary to Canada's interests and contrary to basic Canadian values. Many Canadians found his views on women, racialized minorities, and other vulnerable groups to be highly offensive. For a judge to appear to endorse Trump's views would be perceived by the public to be an expression of opinion on issues of profound importance to Canadians.

[33] Justice Zabel insists that he did not intend to indicate his support for Donald Trump. He testified that he was trying to make a joke about a result few had expected and that he was not expressing support for Trump, but rather celebrating his prediction that Trump would win the election.

[34] While Justice Zabel's intentions are relevant, his conduct must be measured by an objective test. As the Canadian Judicial Council states at p. 27 of its *Ethical Principles for Judges:* "The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person."

[35] What would a reasonable member of the public think upon seeing Justice Zabel enter the courtroom wearing Trump's signature red "MAKE AMERICA GREAT AGAIN" hat and state that he did so "in celebration of an historic event"? In our view, and indeed as Justice Zabel himself now acknowledges, a reasonable member of the public would think that Justice Zabel was making a political statement and endorsing Donald Trump's campaign.

[36] We agree with Presenting Counsel's submission that the 2016 decision of the Chairperson of the Canadian Judicial Council's Judicial Conduct Committee not to proceed with a complaint against a judge who wore a Trump t-shirt while shopping is distinguishable from the case before us. In that case, the conduct occurred out of court, there was nothing to indicate to the public that the person wearing the t-shirt was a judge, the judge said nothing to indicate support for Trump, and he had apparently put on the t-shirt earlier in the day and went shopping without giving it more thought.

[37] We have no hesitation in finding that Justice Zabel's actions amounted to a serious breach of the standards of judicial conduct, that it had an adverse impact upon public confidence in the judiciary and the administration of justice, and that it warrants a disposition under s. 51.6(11) of the *Act.*

Appropriate Disposition

[38] This brings us to the most difficult issue that we must decide: what is the appropriate disposition in the circumstances of this case?

[39] Section 51.6(11) defines the possible sanctions this panel can order to restore public confidence in the administration of justice:

(a) warn the judge;

(b) reprimand the judge;

(c) order the judge to apologize to the complainant or to any other person;

(d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;

(e) suspend the judge with pay, for any period;

(f) suspend the judge without pay, but with benefits, for a period up to thirty days; or

(g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.

[40] Section 51.6(12) provides that our order may include any combination of these sanctions, except that a recommendation that the judge be removed from office cannot be combined with any other sanction.

[41] In *Re Chisvin,* (OJC, November 26, 2012), at para. 38, the following list of factors was identified as being relevant to the assessment of the appropriate sanction for judicial misconduct:

i. Whether the misconduct is an isolated incident or evidenced a pattern of misconduct;

ii. The nature, extent and frequency of occurrence of the acts of misconduct;

iii. Whether the misconduct occurred in or out of the courtroom;

iv. Whether the misconduct occurred in the judge's official capacity or in his private life;

v. Whether the judge has acknowledged or recognized that the acts occurred;

vi. Whether the judge has evidenced an effort to change or modify his conduct;

vii. The length of service on the bench;

viii. Whether there have been prior complaints about this judge;

ix. The effect the misconduct has upon the integrity of and respect for the judiciary; and

x. The extent to which the judge exploited his position to satisfy his personal desires.

[42] In addition to these factors, we must also be mindful of two principles, identified in *Re Baldwin,* (OJC, May 10, 2002), that should guide the choice of the appropriate sanction or disposition.

[43] The first principle is that the purpose of judicial misconduct proceedings is "essentially remedial". When determining the appropriate sanction, the OJC should focus on what is "necessary in order to restore a loss of public confidence arising from the judicial conduct in issue." The object is not to punish the judge. Rather, the purpose is to repair any damage to the integrity and repute of the administration of justice.

[44] The second principle is proportionality. *Re Baldwin* holds that "the Council should first consider the least serious [disposition] – a warning – and move sequentially to the most serious – a recommendation for removal – and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally."

[45] In this case, there are both aggravating and mitigating factors.

[46] The aggravating factors are that the judicial misconduct occurred in the courtroom while Justice Zabel was acting in his official capacity. As we have already observed, we consider this misconduct to be serious. It contravened the fundamental principle that judges must not express political views and that the administration of justice must remain separate from and above the fray of political debate. Justice Zabel's conduct attracted wide attention in the media, in the public and in the legal profession and it has harmed the reputation of justice in this province.

[47] There are, however, several mitigating factors.

[48] Justice Zabel acknowledged that he violated the expected standard of judicial conduct. He publicly apologized for his conduct on November 15, 2016 and he apologized again before this panel: "I wish to say to the panel that I find it very difficult to find the words to express my profound regret about what I did that day and the effect it had on the administration of justice. It was ill-considered, ill-thought out and I've obviously learned a lot from that." He added that he understands how his attempt at humour was construed by many Ontarians as an endorsement of Donald Trump and an expression of support for his controversial views. He also agreed that his conduct had a negative impact on the administration of justice.

[49] That said, we agree with Presenting Counsel's submission that there are lingering concerns about the adequacy of Justice Zabel's November 15 apology. In that statement, Justice Zabel insisted that his conduct was a misguided attempt at humour and was not intended to show support for Donald Trump's views. Whatever Justice Zabel may have intended, his statement as he entered court on November 9 that he was wearing the hat "in celebration of an historic event" and his statement as he left court at the end of the day that he was the only Trump supporter amongst his fellow judges was bound to be taken as expression of support for Donald Trump's campaign.

[50] We also agree with Presenting Counsel's submission that Justice Zabel should have explicitly apologized for attributing political views to his colleagues when he stated that they had "voted" for Hillary Clinton. He had listened to the tape of the November 9 proceedings before he made his November 15 statement and he should have included an apology for that aspect of his conduct.

[51] We are, however, satisfied that Justice Zabel now recognizes and accepts that his conduct was perceived as an expression of support for a controversial political candidate despite whatever intentions he had when he wore the hat into court. He realizes that his conduct was unacceptable and inconsistent with the standard expected of a judge. He profoundly regrets his actions on November 9 and we are satisfied that there is no risk that he will engage in similar conduct in the future.

[52] We are also satisfied that Justice Zabel has shown an effort to change or modify his conduct. He attempted to take a course on judicial ethics and when he learned that the course was not available in 2017, he asked Justice James Turnbull, a senior

member of the Superior Court of Justice, to provide him with one-on-one training based on the materials prepared for the course. Justice Turnbull has written a letter of support indicating the nature of his mentorship with Justice Zabel, stating that he is satisfied that Justice Zabel clearly understands the ethical principles applicable to judges and that his conduct breached those principles. Justice Turnbull concluded that he is fully confident that Justice Zabel will never again be the subject of an OJC complaint for breach of judicial ethics.

[53] This brings us to what we regard as the most significant mitigating factor – Justice Zabel's 27 year record of unblemished and exemplary service on the bench. He has not been the subject of any prior OJC proceedings. It is clear from the 63 letters of support from his judicial colleagues, members of the bar, court staff, and members of the public that he enjoys an enviable reputation as a highly professional, competent, courteous, fair minded, and compassionate judge.

[54] Justice Zabel is praised for his hard work, professionalism, integrity, and for being helpful to other judges and to counsel. Young lawyers praise him for his help and encouragement. The president of the Hamilton Criminal Lawyers' Association states that her group does not support the Criminal Lawyers' Association complaint, that she has frequently appeared before Justice Zabel, and that she has always found him to be fair and impartial. Female colleagues say that he encouraged them when they were at the bar and has been entirely supportive since they joined him on the bench. Fellow judges and members of the bar insist that he is an open minded and impartial judge who does not exhibit polarized, misogynistic, racist or homophobic views.

[55] Justice Marjoh Agro testified before the panel and explained how Justice Zabel helped her when she was a young female lawyer at a time when she was one of a very few female litigators in Hamilton. He encouraged her to apply for the bench and he has supported her since her appointment. She recognizes that Justice Zabel made a very bad mistake but she is anxious to see him return to the bench.

[56] Lidia Narozniak, a retired Assistant Crown Attorney, testified that she had prosecuted many difficult cases before Justice Zabel involving domestic violence, child abuse, and sexual assaults involving accused, complainants, and witnesses from a variety of socio-economic levels, nationalities, races, sexual orientations, and gender identities. At no time did she witness a whisper of racism, sexism,

misogyny, or lack of impartiality. She testified that Justice Zabel treated those before him with courtesy and respect at all times. Those comments are echoed in many other letters of support, including letters from a South Asian lawyer and a number of female lawyers.

[57] A number of the complaints reflect the fears of litigants who are susceptible to discrimination because of their gender, race, (dis)ability, sexual orientation, national origin, or immigration status. It is suggested that Donald Trump made many well-publicized statements perceived to indicate misogynistic, racist, anti-Muslim, anti-immigrant, and homophobic views, which are completely at odds with Canadian values. The complainants submit that individuals who might suffer discrimination would fear that they would not be fairly treated by a judge who expressed support for Donald Trump's candidacy.

[58] Here we are faced with a stark contrast between the perception created by the November 9 incident and the reality of an experienced and fair minded judge. Justice Zabel's conduct that day gave rise to a perception by many that he was a Trump supporter and that he agreed with Trump's views and policies. In doing so, he violated a fundamental principle of judicial ethics and, particularly in view of the controversy surrounding Donald Trump's campaign, engaged in serious misconduct when he wore the "MAKE AMERICA GREAT AGAIN" hat into court on November 9, 2016.

[59] On the other hand, we have the reality of the person Justice Zabel is. His conduct on November 9, 2016 was completely at odds with the exemplary judge he has been for the past 27 years. We are satisfied that Justice Zabel does not hold any of the discriminatory views that the complainants attribute to Donald Trump. We are satisfied that members of vulnerable groups need have no fear about the treatment they would receive from Justice Zabel. Whatever Justice Zabel may have thought about the U.S. presidential election, and however serious his actions of November 9, 2016 may have been, his record on the bench and his reputation with his judicial colleagues and the bar demonstrates that he is an entirely fair minded and impartial judge who is dedicated to the highest ideals of his calling.

[60] Perceptions matter. It is a long-standing principle that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R. v. Sussex Justices; Ex parte McCarthy,* [1924] 1 K.B. 256 at 259.

[61] But reality also matters. The test for judicial bias laid down by the Supreme Court of Canada is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude": *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369 at 394-95; and *R. v. S. (R.D.),* [1997] 3 S.C.R. 484, at para. 31. The reasonable observer is not "very sensitive or scrupulous": *S. (R.D.),* at para. 36. Rather, as one leading English decision puts it, the reasonable observer is the "sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument" and "who takes the trouble to read the text of an article as well as the headlines:" *Helow (AP) v. Secretary of State for the Home Department and another,* [2008] U.K.H.L. 62, at paras. 2 and 3.

[62] The reader of the headline – "Judge wears 'MAKE AMERICA GREAT AGAIN' hat into court" – would be very concerned about the capacity of that judge to carry out his judicial duties in an acceptable manner. But the reader of the whole story of the judge's exemplary 27 year career, his sensitivity to matters such as race and gender, and the absence of any indication of prejudice or bias, might well see things differently.

[63] The choice of the appropriate disposition is a difficult one. On the one hand, Justice Zabel's conduct on November 9 was a serious breach of judicial ethics. On the other hand, it is difficult to imagine how or why a judge of Justice Zabel's experience and record of service conducted himself as he did and there appears to be no risk that he would ever be motivated by any of the political views that he appeared to endorse.

[64] Given the gravity of Justice Zabel's conduct, it is our view that none of the less serious sanctions – warning, reprimand, ordering an apology, ordering remedial measures, or suspension with pay – are adequate. The choice we face is between the second most serious sanction, suspension without pay for 30 days, perhaps combined with other less serious sanctions, and recommending removal from office.

[65] The Supreme Court of Canada stated in *Re Therrien,* at para. 147 (citing Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: 1995), a report prepared for the Canadian Judicial Council, at pp. 80-81):

> [B]efore 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.

[66] After giving careful consideration to our difficult decision, we have come to the conclusion that a recommendation for removal from office is neither appropriate nor necessary in the circumstances of this case.

[67] In this case, a judge with a lengthy and stellar record of service committed a single aberrant and inexplicable act of judicial misconduct. A reasonable and informed member of the public, considering Justice Zabel's conduct in the context of his entire career, and in the context of the evidence we have heard, would not think it necessary to remove him from office because of this single transgression in order to restore public confidence in the justice system. We add that absent the strong evidence of Justice Zabel's long record of impeccable service as a fair and impartial judge, the result may well have been different.

[68] We make the following disposition.

[69] We impose the most serious sanction permitted by law short of removal from office and suspend Justice Zabel without pay for 30 days.

[70] Combined with the suspension, we also reprimand Justice Zabel for his breach of the fundamental principle of judicial conduct that judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

[71] We note that Justice Zabel has already been suspended from his judicial duties since December 2016. He has been deeply affected by the public shame he has brought upon himself and the justice system he serves. He is a man proud of his professional achievements and his record of judicial service, and he is paying a very public price for his transgression.

DISPOSITION

[72] Accordingly, we make the following order pursuant to s. 51.6(11) of the *Act*:

1. Justice Zabel is reprimanded for his breach of the standards of judicial conduct;
2. Justice Zabel is suspended for 30 days without pay.

[73] Justice Zabel, quite appropriately in our view, did not request compensation for the costs of these proceedings.

Date: September 11, 2017

Hearing Panel of the Ontario Judicial Council:

The Honourable Justice Robert Sharpe, Chair
Court of Appeal for Ontario

The Honourable Justice Leslie Pringle
Ontario Court of Justice

Mr. Christopher Bredt
Lawyer Member

Mr. Farsad Kiani
Community Member

Back to Table of Contents

APPENDIX D

HEARING ABOUT THE CONDUCT OF THE HONOURABLE JUSTICE JOHN KEAST

ONTARIO JUDICIAL COUNCIL

WARNING

Justice Act directs that the following notice be attached to the file:

> The Hearing Panel has ordered that there shall be no publication of any information that identifies or tends to identify the child or children or any family member involved in any child protection matter.

ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the *COURTS OF JUSTICE ACT,* R.S.O. 1990, c. C. 43, as amended

Concerning a Complaint about the Conduct of the Honourable Justice John Keast

Before:

Justice Eileen E. Gillese, Chair
Court of Appeal for Ontario

Justice Lise S. Parent
Ontario Court of Justice

Mr. Christopher D. Bredt
Lawyer Member

Ms. Judith A. LaRocque
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION

Counsel:

Ms. Marie Henein, Mr. Scott Hutchison and Ms. Christine Mainville,
Presenting Counsel

Mr. Paul Stern, counsel for Justice Keast

Mr. Chris Kinnear Hunter, counsel for the Children's Aid Society of the Districts of Sudbury and Manitoulin

Mr. Sean A. Moreman, counsel for the Canadian Broadcasting Corporation

Hearing about the conduct of the Honourable Justice John Keast

REASONS FOR DECISION

OVERVIEW

[1] Justice John Keast was appointed to the Ontario Court of Justice (OCJ) in the North East Region in July 2001. At the time of his appointment, he had a reputation as a person of integrity who worked tirelessly for both his clients and the greater community. Justice Keast rapidly gained a similar reputation for his work as a judge.

[2] And yet, between January 8 and March 17, 2016, Justice Keast exchanged text messages with a friend in which he undeniably acted contrary to the standard of conduct expected of a judge and to the Principles of Judicial Office for Judges of the OCJ, established and approved pursuant to section 51.9 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (the "Act").

[3] The Children's Aid Society for the District of Sudbury and Manitoulin (the "CAS") came into possession of the text messages. The CAS made a complaint to the Ontario Judicial Council (the "Council"), attaching to it a copy of the text messages. In the complaint, the CAS alleged that Justice Keast had engaged in conduct and acted in a manner contrary to the impartiality, integrity and independence of the judiciary.

[4] After investigating the complaint, pursuant to s. 51.6 of the Act, the Council ordered a hearing into the allegations. This panel of the Council was convened to conduct the hearing (the "Hearing Panel").

[5] Justice Keast admits that his actions between January 8 and March 17, 2016, constitute judicial misconduct.

[6] Based on a consideration of the totality of the evidence, including the Agreed Statement of Facts filed in this hearing and Justice Keast's admissions, the Hearing Panel had no hesitation in finding that Justice Keast's actions amounted to misconduct. Further, it found that the misconduct was a serious breach of the standards of judicial conduct that had an adverse impact upon public confidence in the judiciary and the administration of justice. Consequently, the Hearing Panel found that the misconduct warranted a disposition under s. 51.6(11) of the Act.

[7] After announcing these findings, the Hearing Panel heard submissions on the difficult question of disposition.

[8] Presenting Counsel submitted that an appropriate disposition was to suspend Justice Keast, without pay, for a period of 15 days.

[9] Counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition.

[10] For the reasons that follow, the Hearing Panel has concluded that the following sanctions are the appropriate disposition: a reprimand; an order that Justice Keast make certain apologies; and, an order suspending Justice Keast, without pay, for a period of 30 days.

BACKGROUND

[11] Before the Notice of Hearing was filed in this matter, Justice Keast brought a motion in which he sought, among other things: to have the hearing held in private; and to treat as confidential his name, the details of the complaint, and all related documents. He contended that unless such steps were taken, privacy interests recognized in s. 45(8) of the *Child and Family Services Act,* R.S.O. 1990, c. 11, would be violated.

[12] Presenting Counsel did not agree that the hearing should be held in private and that all aspects of the proceeding should be cloaked by confidentiality. Presenting Counsel did agree, however, that measures had to be taken to protect those with affected privacy interests.

[13] The Hearing Panel recognized the strong presumption in favour of openness and public accessibility in the hearing of the complaint. At the same time, we recognized that the privacy interests of one or more children involved in child protection matters were engaged by these proceedings and warranted protection.

[14] We concluded that the openness principle required that the hearing be held in public, and that Justice Keast's name and the nature of the alleged misconduct had to be made public. However, we took steps to protect the privacy interests in

question. Among other things, we ordered that the particulars of the complaint, contained in Appendix "A" to the Notice of Hearing, be redacted in such a fashion that matters that might identify a child or children in child protection matters were removed.

[15] We also granted interim relief in respect of the confidentiality aspects of the motion. We ordered that all documentation filed in the proceeding up to the filing of the Notice of Motion, including all materials filed on the motion and submitted at the oral hearing of the motion (the "Materials"), were to be treated by all parties as confidential for all purposes. In addition, we ordered that the Materials were to be sealed and not form part of the public record.

[16] Justice Keast was informed that if he wished to pursue his request that the hearing be conducted in private, he would have to bring a motion on notice to the media. He pursued the motion, on proper notice to the media. Notice of the motion was also posted on the Council's website.

[17] Later in these proceedings, on the consent of all parties, including the sole media intervenor, the Canadian Broadcasting Corporation (the "CBC"), the Hearing Panel made a publication ban (the "Publication Ban"). The Publication Ban was made to protect the privacy interests engaged by these proceedings.

[18] The Publication Ban reads as follows:

> There shall be no publication of any information that identifies or tends to identify the child or children of any family member involved in any child protection matter.

[19] Later yet in these proceedings, Justice Keast brought a motion asking that the interim sealing order remain in effect and that all the materials filed after that order be sealed and not form part of the public record. The CBC objected.

[20] The Hearing Panel dismissed the motion, noting again the strong presumption in favour of openness and public accessibility in the hearing of a complaint involving alleged judicial misconduct. Further, we found that clear and convincing evidence had not been adduced to show that restrictions in addition to the Publication Ban were necessary. Accordingly, we made an order lifting the sealing order.

[21] The Publication Ban remains in effect. It is designed to protect the privacy interests of vulnerable persons. In light of that ban, the following description of the events which led to the complaint has been, of necessity, significantly curtailed.

[22] In early January 2016, Justice Keast learned that a young person whom he knows was at immediate risk of harm. He had faced similar situations three times before (the "prior situations"). As before, Justice Keast turned for help and advice from a long-time friend who had training and experience with such matters. He reached out to his friend, who worked for the CAS, in a text message. It is the series of text messages that the two exchanged over the following 3 months that lies at the heart of these proceedings.

[23] In the prior situations, Justice Keast and his friend worked openly to resolve the situation. This time was different, however. Justice Keast was seized of a CAS case that itself was pressing and at a critical stage. He was concerned that the witnesses in the case before him might also become involved in resolving his personal situation. He hoped that he could both assist in resolving his own personal situation and see the case before him through to completion. Consequently, Justice Keast and his friend did not disclose their ongoing text communications.

[24] Within two or three days, Justice Keast went to his Regional Senior Justice (the "RSJ") for advice. He told the RSJ something of the challenging personal situation in which he found himself. However, he did not fully disclose all that was going on and how it might impact on the case over which he was presiding.

[25] As time passed and nothing appeared to have been done in relation to his personal situation, Justice Keast got increasingly frustrated. In his text messages to his friend, he "vented", saying intemperate and inappropriate things about two individuals and the CAS, all of whom he thought were not doing their jobs.

[26] Ultimately, an individual became suspicious about Justice Keast's personal situation and what he might be doing in relation to it. That individual took copies of the text messages on Justice Keast's cell phone. This was done without Justice Keast's knowledge or consent.

[27] The individual then went to the CAS and gave them copies of the text messages. Based on the text messages, the CAS filed the complaint giving rise to these proceedings.

[28] The improprieties revealed through the text messages can be summarized as follows. Justice Keast improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about the CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[29] During this hearing, Justice Keast moved to have the text messages excluded from evidence. The Hearing Panel dismissed the motion and advised that reasons would follow. The promised reasons are set out later in these reasons.

[30] Once the text messages were ruled admissible, the matter proceeded by way of an Agreed Statement of Facts. In the Agreed Statement of Facts, Justice Keast admits the content of the text messages and their authenticity. He also admits that his actions between January 8 and March 17, 2016, constitute judicial misconduct.

[31] Based on the Agreed Statement of Facts and Justice Keast's admissions, the Hearing Panel made a finding of judicial misconduct warranting a disposition. We then heard submissions on the appropriate disposition.

[32] As indicated above, Presenting Counsel submitted that an appropriate disposition was a suspension, without pay, for a period of 15 days. Counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition. He also advised that Justice Keast is seeking compensation for the legal costs of these proceedings.

[33] Before turning to the issue of disposition, the Hearing Panel will give its reasons for admitting the text messages.

ADMISSIBILITY OF THE TEXT MESSAGES

[34] Justice Keast's argument in favour of excluding the text messages can be summarized as follows. The individual who made a copy of the text messages on Justice Keast's cell phone did so without his consent. In making the copy, the individual acted unlawfully and/or illegally. At the time that the CAS received the copy of the text messages from the individual, it knew that the text messages had been "stolen" from Justice Keast's cell phone. Further, the CAS made assurances to the individual that the text messages would not be disclosed outside the CAS without the individual's consent. The CAS is a state agent. When the CAS provided the text messages to the Council, it breached both its undertaking to the individual and Justice Keast's *Charter* rights. As the text messages were obtained in a manner that infringed the *Charter,* pursuant to s. 24(2) of the *Charter,* the text messages should be excluded from evidence because its admission would bring the administration of justice into disrepute.

[35] The Hearing Panel rejects this submission. We see no basis on which to exclude the text messages from evidence.

[36] The initial search of Justice Keast's cellphone and subsequent seizure of the text messages (by copying) was carried out by an individual, acting in his or her private capacity. The state did not search or seize Justice Keast's cellphone. Any reasonable expectation of privacy that Justice Keast had in the contents of his cell phone was intruded on by the individual who copied the text messages, not by a state actor.

[37] The CAS had nothing to do with the search and seizure of the text messages. There was no state action involved in the initial copying of the text messages or in their voluntary provision to the CAS. The CAS's only action was to receive the text messages and - acting upon legal advice – to provide them to the Council when it filed the complaint.

[38] Section 32 of the *Charter* stipulates that its provisions apply to the Parliament and government of Canada, and to the legislature and government of the provinces. Accordingly, for Justice Keast to succeed in excluding the text messages on the basis that they had been obtained in breach of his *Charter* rights, he had to establish that the search or seizure of the text message was performed by the government or someone acting on behalf of the government. See *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 25. He fails in this regard.

[39] Therefore, it cannot be said that the text messages were obtained in a manner that infringed Justice Keast's *Charter* rights and s. 24(2) of the *Charter* is not engaged.

[40] We would conclude on this issue by observing that, in any event, in a hearing to determine whether judicial misconduct took place, it is virtually inconceivable that the administration of justice would be better served by excluding the evidence of the alleged misconduct, rather than admitting it.

[41] The Hearing Panel wishes to make two further points.

[42] First, the record does not support the allegation that the CAS made assurances to the individual that the text messages would not be disclosed outside of it. On the contrary, the transcription of the meetings in which the text messages were given to the CAS makes it clear that the individual voluntarily gave the CAS the text messages despite the absence of such assurances and with the express recognition that release of the text messages might have an adverse impact on Justice Keast's judicial position.

[43] Second, the CAS's conduct throughout this matter has been exemplary. From the moment that the individual first approached it, with the text messages in hand, through and including the filing of its complaint with the Council, the CAS discharged its obligations with the utmost integrity. The CAS has continued to display that same level of integrity and sensitivity to the various competing considerations and interests throughout this hearing.

ANALYSIS

1. The Relevant Legal Principles

[44] Where, as here, the Judicial Council finds misconduct by the judge, s. 51.6(11) of the Act empowers it to:

(a) warn the judge;

(b) reprimand the judge;

(c) order the judge to apologize to the complainant or to any other person;

(d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;

(e) suspend the judge with pay, for any period;

(f) suspend the judge without pay, but with benefits, for a period up to thirty days; or

(g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.

[45] Section 51.6(12) permits the Council to make any combination of the dispositions in clauses (a) to (f). However, a recommendation for removal pursuant to clause (g) cannot be combined with any other disposition.

[46] *Re Chisvin,* (OJC, November 26, 2012), at para. 38, identifies the following factors as relevant to an assessment of the appropriate sanction for judicial misconduct:

i. whether the misconduct is an isolated incident or evidenced a pattern of misconduct;

ii. the nature, extent and frequency of occurrence of the acts of misconduct;

iii. whether the misconduct occurred in or out of the courtroom;

iv. whether the misconduct occurred in the judge's official capacity or in his private life;

v. whether the judge has acknowledged or recognized that the acts occurred;

vi. whether the judge has evidenced an effort to change or modify his conduct;

vii. the length of service on the bench;

viii. whether there have been prior complaints about this judge;

ix. the effect the misconduct has upon the integrity of and respect for the judiciary; and

x. the extent to which the judge exploited his position to satisfy his personal desires.

[47] In considering the approach to be taken to disposition, *Re Baldwin,* (OJC, May 10, 2002), at p. 8, said this:

> Once it is determined that a disposition order under s. 51.6(11) is required, the Council should first consider the least serious – a warning- and move sequentially to the most serious … a recommendation for removal – and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally.

[48] In R*uffo v. Conseil de la magistrature,* [1995] 4 S.C.R. 267, at para. 68, the Supreme Court of Canada stressed that the role of a body dealing with matters of judicial misconduct is remedial in nature. The object is not to punish the judge but to repair any damage done to the integrity and repute of the administration of justice. See also *Baldwin,* at p. 8, to the same effect.

[49] Case law establishes that a recommendation for removal from office is to be resorted to only in circumstances where the judge's ability to discharge the duties of office is irreparably compromised such that he or she is incapable of executing judicial office. In *Re Therrien,* 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 147, the Supreme Court of Canada explained:

> The public's invaluable confidence in the justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, 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.

2. Application of the Legal Principles

[50] Public confidence in the justice system is at the heart of a hearing into judicial misconduct. In determining the appropriate disposition, the Hearing Panel's focus must be on what sanction, or combination of sanctions, is sufficient to restore public confidence both in Justice Keast and in the administration of justice generally. At the same time, we must consider Justice Keast's actions in context.

[51] That contextual assessment is provided through the following consideration of the factors set out in *Chisvin*:

i. The misconduct was not isolated, in that it took place over a three-month period. However, there is no evidence of a pattern of misconduct by Justice Keast because the text messages all flowed from a single, albeit ongoing, personal situation;

ii. The nature and extent of the misconduct is set out above as part of the background and need not be repeated here. Suffice to say that the text messages amounted to a number of types of misconduct, including the creation of an appearance of bias in relation to the CAS, an institution that regularly appears before Justice Keast;

iii. While Justice Keast's actions did not take place in the courtroom, they traversed his judicial role and his personal life;

iv. The misconduct did not occur in Justice Keast's official capacity. However, the text messages were made in a situation that blurred his official and personal lives;

v. When Justice Keast was made aware of the complaint, his response was a full acknowledgment, in writing, of his actions and their impropriety. That same acknowledgment and recognition is evident in the Agreed Statement of Facts filed in this hearing;

vi. Justice Keast has demonstrated an effort to change his behaviour. He sought out – and completed – a period of counselling. Those who did the counselling provided the Hearing Panel with a report (the "Counselling Report") which concludes with the following:

> We believe that Justice Keast, with the benefit of psychological counselling, our discussions with him, and by far most importantly, with his own objective and deep self-reflection, fully appreciates the errors in his conduct. He fully recognizes and has insight into the requirement to separate the judicial obligation of actual and perceived impartiality and independence from his personal circumstances. He has an abiding respect for the system of justice that he serves. He deeply regrets and is distressed by his conduct and its many and varied ramifications for others. We are confident that he will not again put himself in such a compromising situation;

vii. Justice Keast has a 17-year record of unblemished, exemplary service on the Bench;

viii. Justice Keast has no prior incidents of judicial misconduct;

ix. In assessing the effect of the misconduct on respect for Justice Keast and the judiciary, the Hearing Panel had regard to a dossier containing 60 letters of support for Justice Keast. We return below to a discussion of the dossier; and

x. Justice Keast's actions were not an exploitation of his judicial position nor were they done to satisfy his personal desires.

[52] After due consideration of the above, the Hearing Panel was unable to accept the submission of either Presenting Counsel or counsel for Justice Keast as to the appropriate disposition. It will be recalled that Presenting Counsel submitted that

the appropriate disposition was to suspend Justice Keast, without pay, for a period of 15 days, and counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition.

[53] In our view, given the nature and extent of the misconduct, the real choice was between the second most serious sanction available – suspension without pay for 30 days – and recommending that Justice Keast be removed from office.

[54] In the end, we concluded that a recommendation for removal was not necessary to restore public confidence in Justice Keast and in the administration of justice generally. Justice Keast has been an exemplary judge for 17 years. His conduct in the text messages is at odds with the balance of his career, both before and after he was appointed to the Bench. We are satisfied that conduct of this sort will never occur again. We are also satisfied that his reputation as an entirely fair-minded and impartial judge dedicated to the highest ideals of judicial conduct is warranted.

[55] Our understanding of Justice Keast's reputation was informed by the dossier of 60 letters of support from judicial colleagues and superiors, members of the Bar, members of the court staff, and community members filed with the Hearing Panel. The authors of these letters make it clear that they understand the nature and extent of Justice Keast's actions. Yet they praise him for his hard work on the Bench and in judicial education, his professionalism, his integrity, and his impartiality. To a person, they offer the view that the misconduct arose from Justice Keast's desire to protect a young person who was at immediate risk of harm. His concern for the person at risk, coupled with his long-time friendship with the recipient of the text messages, led him to lose judgment and inappropriately blur boundaries between his judicial role and his personal life.

[56] The text messages are an isolated incident within a 17-year unblemished judicial career. They were the product of exceptional, difficult personal circumstances, in which Justice Keast was striving to protect a vulnerable person. The acts did not take place in the courtroom or in public. While the text messages reflect a serious lack of judgment, no one questions that Justice Keast was well-intentioned throughout. And, Justice Keast did take steps to try and address some of the apparent conflict of interest concerns by approaching his RSJ and seeking advice on how to handle his ongoing cases.

[57] On his initiative, Justice Keast undertook – and completed – counselling which has given him the necessary insight and tools to prevent such actions from occurring again.

[58] In the circumstances, we are satisfied that Justice Keast will not repeat this sort of conduct and that the CAS need have no fear about the treatment it would receive from Justice Keast.

[59] As indicated above, the Hearing Panel concluded that the following sanctions are the appropriate disposition: a reprimand; an order that Justice Keast make certain apologies; and, an order suspending Justice Keast, without pay, for a period of 30 days. We note that these sanctions are in addition to Justice Keast having been non-assigned for fifteen months and that the non-assignment has caused Justice Keast much anguish.

[60] A reprimand is warranted, given the gravity of the misconduct.

[61] And, while Justice Keast has apologized in writing for his inappropriate and disparaging comments and has again offered those apologies during this hearing, in our view, he should make those apologies directly both to the two individuals unfairly treated by him in the text messages and to the CAS.

[62] Further, while removal from office is not warranted, in our view, imposition of the most serious sanction permitted by law short of removal is. For that reason, we would also impose the sanction of a suspension, without pay, for 30 days.

DISPOSITION

[63] Accordingly, we make the following order, pursuant to s. 51.6(11) of the Act:

a. Justice Keast is reprimanded for his breach of the standards of judicial conduct;

b. Justice Keast shall apologize in writing to the two individuals unfairly treated by him in the text messages and to the CAS. The letters of apology shall be delivered to the Council's Registrar who will transmit them to counsel for the CAS for delivery to the intended recipients; and,

c. Justice Keast is suspended for 30 days, without pay.

Released: this 15th day of December 2017.

"Justice Eileen E. Gillese"

"Justice Lise S. Parent"

"Mr. Christopher D. Bredt"

"Ms. Judith A. LaRocque"

ONTARIO JUDICIAL COUNCIL

WARNING

The Hearing Panel hearing this matter under section 51.6 of the *Courts of Justice Act* directs that the following notice be attached to the file:

> The Hearing Panel has ordered that there shall be no publication of any information that identifies or tends to identify the child or children or any family member involved in any child protection matter.

ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, as amended Concerning a Complaint about the Conduct of the Honourable Justice John Keast

Before:

Justice Eileen E. Gillese, Chair
Court of Appeal for Ontario

Justice Lise S. Parent
Ontario Court of Justice

Mr. Christopher D. Bredt
Lawyer Member

Ms. Judith A. LaRocque
Community Member

Hearing Panel of the Ontario Judicial Council

**REASONS FOR DECISION –
Compensation for legal costs**

Counsel:

Ms. Marie Henein, Mr. Scott Hutchison and Ms. Christine Mainville,
Presenting Counsel

Mr. Paul Stern, counsel for Justice Keast

Mr. Chris Kinnear Hunter, counsel for the Children's Aid Society of the Districts of Sudbury and Manitoulin

Mr. Sean A. Moreman, counsel for the Canadian Broadcasting Corporation

REASONS FOR DECISION – Compensation for legal costs

OVERVIEW

[1] Justice John Keast is a judge of the Ontario Court of Justice (the "OCJ") in the North East Region. A complaint of judicial misconduct against Justice Keast led to a hearing (the "Hearing") under s. 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "Act").

[2] In reasons for decision dated December 15, 2017 (the "Decision"), this hearing panel (the "Panel") of the Ontario Judicial Council (the "Council") found that certain conduct on the part of Justice Keast between January 8 and March 17, 2016, constituted judicial misconduct warranting a disposition under s. 51.6(11) of the Act.

[3] In these reasons, the Panel deals with Justice Keast's request that, pursuant to section 51.7 of the Act, the Council recommend to the Attorney General that he be compensated for his costs for legal services incurred in connection with the complaint and Hearing process (the "Legal Costs").

[4] Justice Keast seeks compensation for Legal Costs of $149,585.92.

[5] For the reasons that follow, the Panel recommends that Justice Keast be given $50,000 compensation for Legal Costs.

BACKGROUND

[6] Between January 8 and March 17, 2016, Justice Keast exchanged text messages with a long-time friend who worked for the CAS, in which he acted contrary to the standard of conduct expected of a judge and to the *Principles of Judicial Office* for judges of the OCJ, established and approved pursuant to s. 51.9 of the Act. This Panel found that Justice Keast's actions were a serious breach of the standards of judicial conduct that had an adverse impact upon public confidence in the judiciary and the administration of justice.

[7] At para. 28 of the Decision, we gave the following summary of the improprieties revealed through the text messages. Justice Keast improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about a CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[8] The Panel also concluded that the text messages created an appearance of bias in relation to the CAS, an institution that appeared regularly before Justice Keast (at para. 51(ii) of the Decision).

[9] The Hearing took place over approximately six days between April and November 2017. The majority of the Hearing time was devoted to motions brought by Justice Keast.

[10] Justice Keast brought a partially successful confidentiality motion. In the confidentiality motion, Justice Keast sought to have treated, as confidential, his name, the details of the complaint, and all related documents.

[11] The Panel accepted that the privacy interests of a child or children involved in child protection matters engaged by these proceedings had to be protected and made various orders accordingly. One such order was a publication ban decreeing that there be no publication of any information identifying, or tending to identify, the child or children of any family member involved in any child protection matter. The Panel also made an interim sealing order in respect of certain materials filed to that point in the process. The purpose of the interim sealing order was to protect those with affected privacy interests.

[12] Apart from the orders made to protect those with affected privacy interests, the confidentiality motion was unsuccessful.

[13] Justice Keast's later motion seeking to have the interim sealing order remain in effect was dismissed. The Panel found that clear and convincing evidence had not been adduced to show that restrictions in addition to the publication ban were necessary. We also ordered that the interim sealing order be lifted.

[14] Justice Keast's motion to have the Hearing held in private was dismissed. In dismissing the motion and ordering that the Hearing be held in public, the Panel noted the strong presumption in favour of openness and public accessibility in the hearing of a judicial misconduct complaint.

[15] Justice Keast's *Charter* application to exclude the text messages from evidence was also unsuccessful, for reasons set out in the Decision.

THE ISSUE

[16] The issue for this Panel is whether to recommend that Justice Keast receive compensation for his Legal Costs and, if so, in what amount (the "Issue").

THE LEGAL FRAMEWORK THAT GOVERNS

[17] The legal framework governing the Issue comes from the relevant legislation and case law.

[18] Because there was a finding of judicial misconduct in this matter, the relevant legislative provisions are ss. 51.7(1), (4), (7) and (8) of the Act. The effect of these provisions can be summarized as follows.

[19] The Panel must consider whether Justice Keast should be compensated, in whole or in part, for his costs for legal services incurred in relation to the complaint process, including the Hearing. If the Panel is of the opinion that Justice Keast should be compensated for his Legal Costs, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. The Attorney General shall pay compensation in accordance with the recommendation.

[20] The relevant provisions read as follows:

> 51.7 (1) When the Judicial Council has dealt with a complaint against a provincial judge, it shall consider whether the judge should be compensated for his or her costs for legal services incurred in connection with all the steps taken under sections 51.4, 51.5 and 51.6 and this section in relation to the complaint.
>
> (4) If the Judicial Council is of the opinion that the judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.
>
> (7) The amount of compensation recommended under subsection (4) or (5) may relate to all or part of the judge's costs for legal services, and shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.
>
> (8) The Attorney General shall pay compensation to the judge in accordance with the recommendation.

[21] *Massiah v. Justices of the Peace Review Council,* 2016 ONSC 6191 (Div. Court) provides guidance on how this Panel should approach the Issue. In *Massiah,* the judicial officer in question was a justice of the peace, rather than – as in this case – a judge of the OCJ. The principles enunciated in *Massiah* are, nonetheless, relevant to this case.

[22] In *Massiah*, the Divisional Court heard a judicial application from the decisions of the Justices of the Peace Review Council (the "JPRC") removing Errol Massiah from the office of justice of the peace and denying him compensation for the legal expenses he incurred through the complaints process.

[23] Justice Nordheimer (as he then was), writing for the Divisional Court, upheld the JPRC removal decision but set aside its decision on compensation and remitted that matter to the JPRC hearing panel for reconsideration. At para. 49 of *Massiah*, Nordheimer J. states that the JPRC started from a flawed presumption in making its

compensation decision. The JRPC's flawed presumption was that because it had made findings of judicial misconduct, a recommendation for compensation should not be made.

[24] At para. 56 of *Massiah*, Nordheimer J. states that when deciding the matter of compensation for Legal Costs, the decision-maker should start from the premise that the costs of ensuring a fair, full and complete process ought usually to be borne by the public purse (the "Starting Premise"). This is the proper starting point because it is the public interest that is being advanced and maintained by the complaint process and because it is in the best interests of the administration of justice that the judicial officer subject to a complaint has the benefit of legal counsel.

[25] The Starting Premise rests on the principal objective of the complaint process, which is to restore and maintain public confidence in the integrity of the judiciary, not to punish the judicial officer holder (*Massiah*, at para. 51). The Starting Premise operates regardless of whether there has been a finding of judicial misconduct on the part of the judicial officer (*Massiah*, at para. 49).

[26] However, as *Massiah* makes clear at para. 57, compensation for Legal Costs in cases of successful complaints is not automatic. The decision whether to recommend compensation must be made after due consideration of the particular circumstances of the case, viewed in the context of the objective of the process:

> Chief among those circumstances will be the nature of the misconduct and its connection to the judicial function. For example, misconduct that is more directly related to the judicial function may be more deserving of a compensation order than conduct that is less directly related. In contrast, conduct that any person ought to have known was inappropriate will be less deserving of a compensation decision than would conduct that is only determined to be inappropriate as a result of the ultimate decision in a particular case. Further, misconduct where there are multiple instances may be less deserving of a compensation recommendation than would a single instance of misconduct. Similarly, repeated instances of misconduct may be less deserving of a compensation recommendation than one isolated incident.

[27] Further, the decision-maker may include in its recommendation that compensation should not include the costs associated with steps which the decision-maker views as unmeritorious or unnecessary *(Massiah,* at para. 60).

APPLICATION TO THIS CASE

[28] In accordance with *Massiah,* the Panel began its deliberations from the Starting Premise that it should recommend payment of the Legal Costs.

[29] With the Starting Premise squarely in mind, the Panel then considered: (a) the nature and seriousness of the misconduct, (b) the connection of the misconduct to the judicial function; (c) whether the conduct was such that any person ought to have known it was inappropriate; (d) whether the misconduct consisted of a single instance or multiple instances; (e) whether there had been prior instances of misconduct; and (f) whether steps taken in the Hearing process were unmeritorious or unnecessary (the "conduct of the Hearing").

[30] **Nature and seriousness of the misconduct –** In terms of the nature of the misconduct, it is important to note that the misconduct in this case was not of a single type. Justice Keast's acts constituted various types of misconduct. As summarized above, through the text messages that Justice Keast sent to his friend, he improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about a CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[31] Further, as the Panel concluded at para. 51(ii) of the Decision, the text messages created an appearance of bias in relation to the CAS, an institution that appeared regularly before Justice Keast.

[32] It will be readily apparent that each of these forms of misconduct is serious. The Panel viewed the misconduct as constituting such a serious breach of the standards of judicial conduct that the only real choice when deciding sanction was between the first and second most serious sanctions available – either a recommendation for removal from office or suspension without pay for 30 days (at para. 53 of the Decision).

[33] **Connection of the misconduct to the judicial function –** The misconduct did not take place in the courtroom nor did it occur in Justice Keast's judicial capacity. The text messages arose from a situation in Justice Keast's personal life and the text messages were exchanged with his personal friend, a CAS employee, by means of Justice Keast's personal cell phone.

[34] However, the situation in which the misconduct took place did blur the lines between Justice Keast's judicial and personal lives. This was so because Justice Keast's personal situation related to a CAS matter and, as a judge, Justice Keast routinely heard CAS matters. Indeed, one act of misconduct related to a CAS matter of which Justice Keast was then seized (he expressed his views of that matter to his friend).

[35] **Whether the conduct was such that any person ought to have known it was inappropriate –** In our view, it is self-evident that any person ought to have known that it was inappropriate to improperly communicate confidential information and gain access to such information. Any person ought also to know that it is inappropriate to use derogatory language when describing individuals and institutions. Given that Justice Keast himself sought to conceal the text messages and urged the recipient of those messages to keep them confidential, there can be little doubt that he knew the text messages were inappropriate.

[36] In the circumstances of this case, we think the following is also relevant as part of this consideration. The nature of the misconduct is such that any judge would have known it was inappropriate. Judges know that immediately upon appointment, they may no longer give legal advice. They know that they cannot express, to members of the public, their views about a matter of which they are seized. They know the strictures governing access to, and disclosure of, confidential information.

[37] **Whether the misconduct consisted of a single instance or multiple instances –** The misconduct was not a single instance. While it all flowed from a single, ongoing personal situation, there were multiple acts of misconduct committed over a three-month period.

[38] **Whether there had been prior instances of misconduct –** There are no prior findings of misconduct in relation to Justice Keast.

[39] **The conduct of the Hearing –** The Hearing process did not begin with an admission of misconduct. On the first day of the Hearing, on the consent of the parties, the Panel ordered that certain steps were to be taken to protect the affected privacy interests. The balance of the Hearing was largely devoted to hearing motions brought by Justice Keast, described above. It was only after the Panel ruled that the text messages were admissible that the Agreed Statement of Facts was tendered into evidence and Justice Keast admitted before the Panel that his actions constituted judicial misconduct.

[40] In our view, the steps that Justice Keast took prolonged the Hearing – certainly, they did not expedite it. However, given the complexity of the issues and the privacy interests involved, we do not view them as unmeritorious or unnecessary.

CONCLUSION

[41] The Panel began with the Starting Premise. That premise, it will be recalled, is that the costs of ensuring a fair, full and complete complaint process ought usually to be borne by the public purse because that process advances the public interest and because it is in the best interests of the administration of justice that the judicial officer in question has the benefit of legal counsel during the process. However, after weighing the particular circumstances of this case within the context of the objective of the complaint process, we have concluded that the appropriate recommendation is that Justice Keast be given approximately one-third of his Legal Costs.

[42] As we explain above, the first three considerations speak against a recommendation for a full, or even substantial, indemnity of the Legal Costs.

[43] First, Justice Keast committed a number of different types of serious misconduct. Second, the misconduct was not directly related to his judicial function. It arose from a situation in his personal life and it took place in his personal life. While there was a connection to his judicial function, the acts were largely connected to his personal life. As *Massiah* indicates at para. 57, because the judicial misconduct in this case was not directly related to the judicial function, it is less deserving of a compensation order. Third, the fact that any person ought to have known that the acts were inappropriate also makes this case one that is less deserving of a recommendation for compensation.

[44] We weighed against those considerations, Justice Keast's otherwise lengthy, distinguished and unblemished judicial record.

[45] Finally, we treated as neutral the conduct of the Hearing process. Justice Keast did not acknowledge his misconduct in the Hearing process until after the Panel determined the text messages were admissible. That, combined with the largely unsuccessful motions that he brought, prolonged the Hearing process. However, the motions cannot be said to have been unmeritorious or unnecessary. And, as we learned after the Agreed Statement of Facts was entered, on learning of the complaint, Justice Keast had immediately acknowledged to the Council that his actions constituted misconduct.

THE RECOMMENDATION

[46] For these reasons, the Panel recommends, to the Attorney General, that Justice Keast be given $50,000 compensation for Legal Costs.

Released: this 6 of February, 2018.

"Justice Eileen E. Gillese"

"Justice Lise S. Parent"

"Mr. Christopher D. Bredt"

"Ms. Judith A. LaRocque"