

NOVA SCOTIA COURT OF APPEAL

Citation: *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 94

Date: 20241126

Docket: CA 530978

Registry: Halifax

Between:

Donn Fraser

Appellant

v.

Nova Scotia Barristers' Society, including or as represented by the Complaints Investigation Committee of the Nova Scotia Barristers' Society, and the Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: September 17, 2024, in Halifax, Nova Scotia

Subject: *Legal Profession Act* - fresh evidence on appeal - procedural fairness - bias - *ex parte* proceedings - confidentiality orders

Cases Cited: *Nova Scotia Barristers' Society v. Fraser*, 2024 NSCA 63; *R. v. Wolkins*, 2005 NSCA 2; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.); *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; *Housen v. Nikolaisen*, [2002] 2

S.C.R. 235; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401; *Nova Scotia Health Authority v. Finkle and West*, 2024 NSCA 87; *Innocente v. Canada (Attorney General)*, 2012 NSCA 36; *Magee v. Lauzon*, 2024 NSCA 23; *Tufts v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2023 NSCA 50; *Groia v. Law Society of Upper Canada*, 2018 SCC 27; *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420; *Hanson v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 513 (Div. Ct.); *Mitelman v. College of Veterinarians of Ontario*, [2020] O.J. No. 2612; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52; *Régie [2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Old St. Boniface [Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)]*, [1990] 3 S.C.R. 1170]; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25; *Committee for Justice and Liberty, et al. v. National Energy Board, et al.*, [1978] 1 S.C.R. 369; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484]; *Miglin v. Miglin*, 2003 SCC 24]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Kane v. Board of Governors of the University of British Columbia* [1980] 1 S.C.R. 1105; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Sherman Estate v. Donovan*, 2021 SCC 25; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188

Statutes Cited: *Legal Profession Act*, S.N.S. 2004, c. 28, sections 28(2), 33, 34, 35A, 35 B, 36, 37, 37(3), 36-39, 37(1), 37(2), 37(4), 37(5), 37(7), 40, 40(1), 40(2), 40(2)(c)(iv)., 40(2)(c)(iii), 40(2)(g), 44(1), 44(2)(g), 44(2) to 44(9), 49, 49(5), 42-47, 49, 51, 51(1), 77; *Regulations Made Pursuant to the Legal Profession Act*, dated May 31, 2005, and amended to May 26, 2023 -- s. 8.1, 9.1.3, 9.2, 9.2.1, 9.2.4, 9.2.7, 9.2.8, 9.5, 9.5.2, 9.5.3, 9.5.4, 9.5.7, 9.5.8, 9.5.20, 9.8 to 9.14; *Public Inquiries Act*, R.S.N.S. 1989, c. 372, s. 36(2), 37, 39, 39(2), 42-47 – Regulations 9.5.4, 9.5.5, 9.5.6, 9.5.9, 9.8 – 9.14, 9.5.20; *Civil Procedure Rules*, 85.04, 85.04(1), 90.02(1), 90.37(15), 90.37(15)(c), 90.47, 90.47(1); *Nova Scotia Barrister’s Society Code of Professional Conduct* (approved by Council September 23, 2011); *Charter of Rights and Freedoms*, s. 2(b)

Authors Cited: *Injunctions and Specific Performance*, looseleaf, (Toronto: Thomson Reuters, 2023)

Facts: A lawyer, practicing for twenty years, faced several complaints alleging conduct unbecoming. The Nova Scotia Barristers’ Society’s Complaints Investigation Committee (CIC) investigated these complaints. The CIC imposed interim practice restrictions and later suspended the lawyer’s practicing certificate after an incident in a courtroom where the lawyer engaged in a physical altercation with sheriffs (paras [1](#), [11](#), [19-23](#)).

Procedural History: Nova Scotia Barristers’ Society, February 2, 2024: The CIC suspended the lawyer’s practicing certificate on an interim basis after an *ex parte* hearing (paras [27-29](#)). Nova Scotia Barristers’ Society, February 16, 2024: The CIC confirmed the interim suspension after an *inter partes* hearing (para 38). Nova Scotia Court of Appeal, March 4, 2024: Chief Justice Wood granted a stay of the CIC’s suspension pending the outcome of the appeal (para [41](#)).

Parties Submissions: Appellant: Argued that the CIC’s decision was based on no evidence, misinterpreted the law on civility, and imposed an excessive penalty. Also claimed procedural

unfairness and bias in the CIC's process (paras [65](#), [68](#), [73](#), [76](#)). Respondent (Nova Scotia Barristers' Society): Argued that the CIC acted within its statutory authority, the interim suspension was necessary to protect the public interest, and the process was fair and unbiased (paras [60](#), [124](#)).

Legal Issues:

- (1) Is fresh evidence admissible in the appeal?
- (2) Does the CIC's *inter partes* decision reflect an error of law?
- (3) Did the CIC deny procedural fairness or exhibit bias?
- (4) Was the *ex parte* decision defective?
- (5) Should the Court issue a confidentiality order for documents in the record?

Disposition:

The appeal was dismissed (para [161](#)). The interim stay ordered on March 4, 2024, was spent (para [161](#)). The motion for a confidentiality order was granted in part, sealing one document (para [163](#)).

Reasons:

The Court admitted fresh evidence from both parties to assess procedural fairness and provide background information (paras [50](#), [56](#)). The CIC's decision was based on evidence and did not misinterpret the law on civility or impose an excessive penalty. The stepped approach to interim suspension was justified (paras [66](#) - [75](#)). The CIC's overlapping functions were authorized by statute, and there was no evidence of bias or procedural unfairness. The CIC's reasons were adequate, and the disclosure to the appellant was sufficient (paras [82-116](#)). The *ex parte* process was flawed due to inadequate reasons and lack of notice, but the subsequent *inter partes* hearing cured these defects (paras [139-141](#)). The Court applied the principles of the Legal Profession Act and the open court principle, sealing only one document that did not play a role in the Court's reasoning or occupy the public domain (paras [158-160](#)).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 52 pages.

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v.

Nova Scotia Barristers' Society, including or as represented by the Complaints Investigation Committee of the Nova Scotia Barristers' Society, and the Attorney General of Nova Scotia

Respondents

Judges: Bourgeois, Fichaud and Derrick, JJ.A.

Appeal Heard: September 17, 2024, in Halifax, Nova Scotia.

Held: Appeal dismissed without costs per reasons for judgment of the Court, and sealing order issued for one document

Counsel: Donn Fraser, the appellant, on his own behalf
Ewa Krajewska and Brandon Pasternak for the respondent
Nova Scotia Barristers' Society
Edward A. Gores, K.C., for the respondent Attorney General
of Nova Scotia, not appearing

Reasons for judgment by the Court:

[1] For twenty years, Donn Fraser has practiced law as a member of the Nova Scotia Barristers' Society. Recently, he has been the subject of several complaints alleging conduct unbecoming. The Society's Complaints Investigation Committee is handling the investigations. The merits of the complaints have not been determined by a hearing panel and are not before this Court.

[2] This appeal involves the Complaints Investigation Committee's power to suspend Mr. Fraser's practising certificate in the interim, pending the determination of the complaints.

The Legislative Framework

[3] The Nova Scotia Barristers' Society ("Society") and its members are governed by the *Legal Profession Act*, S.N.S. 2004, c. 28 ("Act"). Section 4(1) says "[t]he purpose of the Society is to uphold and protect the public interest in the practice of law". Part III (ss. 27-54), titled "Protection of the Public", provides for conduct review. Its opening provisions include:

28(1) The Society has jurisdiction over

- (a) members of the Society in respect of their conduct, capacity and professional competence in the Province or in a foreign jurisdiction;

...

(2) The Council may make regulations

- (a) establishing or adopting ethical standards for members of the Society;
- (b) establishing or adopting professional standards for the practice of an area of law;

...

- (d) respecting the promotion of standards for the practice of law, including regulations setting mandatory requirements for some or all members of the Society for attendance and successful completion of programs of continuing legal education and professional development and prescribing the sanctions or restrictions that apply where a member fails to successfully complete the requirements.

...

33 The purpose of Sections 34 to 53 is to protect the public and preserve the integrity of the legal profession by

- ...
- (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;
- ...

[4] The legislation assigns to the Complaints Investigation Committee (“CIC”) both the power to investigate and the authority to issue an interim restriction. Here, both functions are in play.

[5] **Investigation:** The *Act* says:

Complaints Investigation Committee

34(1) The Council [of the Society] shall appoint a Complaints Investigation Committee made up of lawyers and persons who are not members of the Society and may make regulations

- (a) establishing processes for receiving and responding to complaints or other information concerning the conduct, practice, professional competence or capacity of members of the Society;
- (b) establishing processes for investigating the conduct, practice, professional competence or capacity of a member of the Society;

...

- (f) determining the means by which the Complaints Investigation Committee makes decisions;

...

Investigation of member

35 The conduct, capacity, practice or professional competence of a member of the Society may be the subject of an investigation pursuant to this Part.

[6] Regulation 9.2.1 of the Society’s *Regulations Made Pursuant to the Legal Profession Act*, dated May 31, 2005, and amended to May 26, 2023 (“*Regulations*”), says a member’s conduct may become the subject of an investigation in several ways, including the Society’s receipt of a complaint. Further to regs. 9.2.2 and 9.2.3, the Society’s Executive Director may either summarily dismiss the complaint, attempt to resolve it, refer it to the Fitness to Practice Committee, or commence an investigation. According to reg. 9.2.8(c), the Executive Director’s investigatory options include referring the complaint to the CIC.

[7] Section 36 of the *Act* says the CIC has the powers of a commissioner under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372. Regulation 9.5.4 authorizes the CIC to “assume responsibility for the investigation” and “provide direction to the Executive Director regarding the investigation of any complaint”. Regulation 9.5.5 says:

Committee determines process

9.5.5 Notwithstanding anything contained in this Regulation, and where the objects of the professional responsibility process require, the investigation of a complaint by the Executive Director and the Committee may be conducted in such manner as the Committee determines.

[8] After the investigation, the CIC may either authorize the Society’s Executive Director to lay a charge against the member or otherwise dispose of the complaint according to a menu of options prescribed by s. 36(2) of the *Act* and reg. 9.5.9.

[9] If a charge is laid, the matter proceeds to a hearing by a panel of the Hearing Committee. Sections 42-47 of the *Act* and regs. 9.8 through 9.14 deal with the hearing and a hearing panel’s powers. Further to s. 39(2) of the *Act* and reg. 9.5.20, the CIC’s jurisdiction continues until either the commencement of the hearing before the panel or the matter is settled.

[10] In Mr. Fraser’s case, at the date of the record in this appeal, there had been no appointment of a hearing panel and the complaints remained under the aegis of the CIC.

[11] **Interim restrictions:** The CIC may impose interim relief, pending the final determination of the complaint. In Mr. Fraser’s case, following complaints filed in 2021, the CIC initially issued interim practice restrictions, then reduced and cancelled them. After an episode on February 1, 2024, the CIC suspended Mr. Fraser’s practice certificate on an interim basis. This appeal challenges the interim suspension.

[12] Sections 37 and 39 of the *Act* govern the CIC’s interim powers:

Suspension of certificate or imposition of conditions

37(1) The Complaints Investigation Committee may, by resolution, where in its opinion it is in the public interest to do so,

- (a) suspend a practising certificate; or
- (b) impose restrictions or conditions on a practising certificate,

during or following an investigation until the suspension, restrictions or conditions are rescinded or amended by the Complaints Investigation Committee or a hearing panel.

(2) The power of the Complaints Investigation Committee pursuant to subsection (1) may be exercised with or without hearing the practising lawyer.

(3) The Complaints Investigation Committee shall, forthwith after passing a resolution pursuant to subsection (1), provide a copy of the resolution to the practising lawyer to whom the resolution applies, including the reasons for a decision to suspend the practising certificate or impose restrictions or conditions on the practising certificate.

(4) A lawyer who receives written notice pursuant to subsection (3) may request in writing, a meeting with the Complaints Investigation Committee.

(5) Where a request is received pursuant to subsection (4), the Complaints Investigation Committee shall

- (a) provide an opportunity for the lawyer to meet with the Complaints Investigation Committee within ten days of the written request; and
- (b) after meeting with the lawyer, confirm, vary or terminate the suspension, restrictions or conditions imposed pursuant to subsection (1).

(6) Where the Complaints Investigation Committee holds a hearing before making a determination under subsection (1), or where a lawyer requests the opportunity to meet with the Complaints Investigation Committee pursuant to subsection (4), the lawyer has the right to

- (a) be represented by counsel, at the lawyer's expense;
- (b) disclosure of the nature of the complaint; and
- (c) an opportunity to present a response and make submissions.

...

Procedure and jurisdiction

39 (1) The Complaints Investigation Committee may set its own procedure for hearings pursuant to Sections 37 and 38.

[13] The *Regulations* give the CIC a broad scope over process:

Committee meetings

9.5.6 The Committee may conduct its meetings in person, by telephone or by electronic communications including email and videoconference, as determined by the Chair of the Committee.

[14] The *Regulations* permit an *ex parte* determination “in the public interest”:

Notice

9.5.7 Committee may exercise its powers under section 37 without notice to the practising lawyer when it is in the public interest to do so.

The Chronology

[15] The complaints history for Mr. Fraser is summarized in our companion decision, *Nova Scotia Barristers’ Society v. Fraser*, 2024 NSCA 63 (“*Fraser v. NSBS #1*”), paras. 4-8. The affidavit tendered by the Society as fresh evidence for this appeal attaches the CIC’s earlier disciplinary rulings respecting Mr. Fraser.

[16] In summary:

- In response to a complaint dated May 26, 2021, from four members of Mr. Fraser’s former law firm, the CIC issued a Decision dated August 13, 2021. The Decision cited evidence and found: “There is *prima facie* evidence that Mr. Fraser conducted himself in a threatening, abusive, discourteous and offensive manner in meetings and interactions with a number of other members of the law firm”. The CIC determined “it would not be proper to suspend Mr. Fraser at this time”. Rather, the CIC placed interim conditions on Mr. Fraser’s practice that restricted his communications with his former colleagues.
- On August 31, 2021, the CIC issued another Decision which recited that, on August 25, 2021, Mr. Fraser had been arrested the previous evening and charged with assault. The Decision gave details. The Decision found: “Mr. Fraser appears *prima facie* to have engaged in further conduct that is unbecoming of a member of the NS Barristers’ Society and contrary to the Code of Professional Conduct” and “conduct that has been abusive and offensive” and “Mr. Fraser conducted himself in a threatening and offensive manner”. The CIC suspended Mr. Fraser’s certificate to practice on an interim basis.
- On December 21, 2021, the CIC issued a further Decision that lifted the suspension on Mr. Fraser’s practice, subject to four conditions, including a restriction on Mr. Fraser’s direct contact with four former law partners. The Society had requested further conditions, which the CIC declined

because “[t]he Committee has determined that many of these conditions or restrictions are not required to protect the public interest ...”.

- Further complaints against Mr. Fraser were made in 2022.
- On April 21, 2023, under s. 37(4), the CIC imposed interim conditions that had been jointly recommended by the Society and Mr. Fraser. Mr. Fraser’s assent was without prejudice to his right to challenge the CIC’s jurisdiction. The new conditions replaced the earlier ones and required Mr. Fraser to “be civil and professional in his communications with all persons”.

[17] On November 26, 2023, the CIC issued a further Decision that removed the interim conditions of April 21, 2023. The Decision included:

Reasons:

[2] The Nova Scotia Barristers’ Society (the Society) currently has before it 5 complaints against Mr. Fraser. These complaints remain under investigation by the Society. Until that investigation is completed, there can be no decision by the Committee on the merits. This would exceed the role of the Committee and would be contrary to applicable legislation.

...

[7] The thrust of Mr. Fraser’s submissions is that his conduct was private in nature and had nothing to do with his practice of law and accordingly is outside the purview of the Society and the Committee. To agree with that submission, the Committee sitting in a Section 37 hearing would need to make findings of fact and adjudicate on the merits of the conduct that we are not permitted to make, and which is beyond our mandate at this interim stage.

...

Conclusion:

[9] Our sole function at a section 37 hearing is to determine what, if any interim actions ought to be taken against Mr. Fraser that are required for the protection of the public. Therefore, we decline to make any determination on the issue Mr. Fraser wishes adjudicated at this time.

...

[12] Mr. Fraser was under conditions and both Counsel indicated on November 17, 2023 that they wished us to remove them. We unanimously agreed to do so at that time.

...

[15] The Committee has advised Mr. Fraser that the conditions jointly requested by the parties on April 21, 2023 were removed as jointly requested by both parties, effective November 17, 2023.

[18] Next is the episode that precipitated this appeal.

[19] In the course of litigation to which he was a party, Mr. Fraser was to appear in the Supreme Court's chambers at the Pictou Courthouse on February 1, 2024. His opponents were his former law partners, who were represented by counsel. Mr. Fraser was responding to his opponents' motion for the appointment of a case management judge.

[20] Mr. Fraser's pre-hearing briefs of January 26 and 30, 2024 to the chambers judge describe his opponents' counsel as:

- “unethical, dishonest and Rule-flaunting”;
- displaying “a remarkable level of hypocrisy”;
- “scandalously unethical, unprofessional and dishonest”;
- “bellicose, ill-tempered and ill-mannered”;
- someone who “will say anything, regardless of its truth or veracity”;
- “completely hypocritical”;
- “poisonous”;
- a lawyer who “has acted scandalously and afoul of the notion of not misrepresenting matters or not trying to mislead the court”;
- a “proven unethical lawyer flagrantly disregarding the Rules and being out-of-control in such regard”;
- “willing to flagrantly breach the Rules and/or at times show incompetence in terms of the Rules”;
- “widely known as pompous and aggressive as well as a ‘blow-hard’ or ‘windbag’ ”;
- “an extremely unethical lawyer”;
- having “an off-kilter personality”.

[21] This temperament percolated into chambers on February 1, 2024. According to the material later filed with the Society, before the hearing started, Mr. Fraser berated opposing counsel as unethical and incompetent.

[22] On February 1 after the submissions, the judge retired to consider his ruling. In his absence, there was an incident in the courtroom. According to a witness' letter to the Society, Mr. Fraser called the opposing counsel "an unethical piece of shit". The CIC's ruling of February 12, 2024, which we will come to later, describes what followed:

[1] On February 2, 2024, the Complaints Investigation Committee (the Committee) was asked to reconvene the section 37 hearing as a result of an incident which occurred in the Pictou courthouse involving Mr. Donn Fraser, Mr. Joel Sellers, Ms. Mary Jane Saunders and several Sheriff's Deputies.

...

[3] On February 2, 2024, the Committee was provided with an e-mail from Mr. Joel Sellers dated February 1, 2024 about the incident at the Pictou courthouse ...

[4] In Mr. Sellers' e-mail, he stated the following:

Ms. Saunders is copied here. Please accept this correspondence on behalf of both of us.

Please consider this a new complaint. We will fill out the complaint form in the coming day or two but given the urgency of what happened today, we wanted to immediately advise you of today's events.

Ms. Saunders and I attended in Chambers in Pictou this afternoon before the Honourable Justice Hoskins to listen to submissions by our counsel, Gavin Giles K.C., on our motion for case management of various lawsuits filed against us and others by Mr. Fraser. Also in attendance was Michael Scott on behalf of other named defendants in those proceedings and in support of our motions. Mr. Fraser appeared to oppose part of the relief we were seeking.

I will spare you – at this time – the wildly unethical and improper behaviour of Mr. Fraser before the Court and during the hearing itself. Suffice to say he made openly derogatory comments about various members of the Bar including Mr. Giles, Ms. Saunders, Mr. Scott and myself both in his formal submissions and informally when the Justice was out of the room. It was fully in keeping with his improper behaviour at various junctures over the past several years. ...

After listening to submissions, Justice Hoskins took a break to gather his thoughts. During this break, Mr. Fraser entered the gallery and sat in

front of Ms. Saunders and myself. He immediately tried to engage us by making derogatory comments about us. We ignored him. Two deputy sheriffs advised him to return to the counsel table. He refused. The deputy sheriffs told him that if he did not return voluntarily they would physically move him. He advised them they had no such authority and if they attempted to move him, “it would not go well for them” as he would be entitled to act in self-defence. It was a clear threat. The deputy sheriffs advised him – calmly and professionally – that they did have authority to maintain peace in the Court room and reiterated that if he did not voluntarily go to his seat they would move him. Mr. Fraser then reluctantly returned to the counsel table but not before advising one of the deputy sheriffs that he did not know how to do his job and there would be consequences.

Justice Hoskins re-entered the court room shortly thereafter and, in brief comments, granted our motions for case management. His Lordship then departed the court room.

Ms. Saunders and I remained in our seats in the gallery. Mr. Fraser stood up, walked back into the gallery and, as he was passing my seated position, threw what appeared to be a full glass of water over Ms. Saunders and I soaking our suits, jackets and papers. The deputy sheriffs immediately advised Mr. Fraser to stop moving and that he was under arrest for assault. Instead Mr. Fraser began to move quickly toward the exit of the courtroom. The deputy sheriffs immediately moved to take Mr. Fraser into custody. It took four deputy sheriffs to bring him under control. They were required to physically bring him to the ground. While they held him in check they called for assistance. Other deputy sheriffs entered the area from elsewhere in the court building. They were required to hand cuff and shackle Mr. Fraser before they could safely bring him to his feet. They then escorted him to lock up.

[5] The memorandum reported that Mr. Fraser had been charged with assault and resisting arrest as a result of the incident. While the Committee respects that these are allegations that have not been adjudicated by a court, it does provide some corroboration that an incident of some serious nature did occur.

...

[23] After being taken into custody on February 1, Mr. Fraser was held for bail. The next day a Provincial Court judge released him on conditions.

[24] In the earlier CIC proceedings under s. 37, Mr. Fraser had been represented by Roderick (Rory) Rogers, K.C. At 1:06 p.m. on Friday, February 2, 2024, the Society emailed Mr. Rogers. The email attached a letter signed by Elaine

Cumming, the Society's Director of Professional Responsibility. Ms. Cumming's letter said:

Dear Mr. Rogers,

Re: Donn Fraser – Reconvened Section 37(1) Hearing

On February 1, 2024, Joel Sellers reported to the Society via email that on February 1, 2024, following an appearance in Pictou County Supreme Court that Donn Fraser assaulted Mr. Sellers and Mary Jane Saunders who were, at that time, sitting in the gallery of the courtroom. Mr. Sellers states that when the Sheriff intervened, Mr. Fraser attempted to exit the courtroom and had to be physically restrained by four Sheriffs.

The Society is aware that as a result of the foregoing, Mr. Fraser was arrested on February 1, 2024, and charged with two counts of assault pursuant to section 266(a) and one count of resisting arrest pursuant to section 129(a) of the *Criminal Code of Canada* and released on a Recognizance Order.

On this basis, the Complaints Investigation Committee has resolved to reconvene a hearing pursuant to section 37(1) and (2) of the *Legal Profession Act* to determine whether it is in the public interest to suspend Mr. Fraser's practicing certificate or impose conditions or restrictions on his practice. This hearing is being held on an urgent and *ex parte* basis.

You will receive communication from the Committee following the hearing.

[25] At 3:37 p.m. on February 2, another lawyer in Mr. Rogers' firm, Christopher Madill, emailed Ms. Cumming:

On behalf of Mr. Fraser, we would request the opportunity to attend the hearing. Please advise.

[26] The CIC met on the afternoon of February 2, 2024, by videoconference. Attending were Mr. Bailey, Acting Chair, Andrew Nickerson, Jamie Vacon and Natalie Borden, CIC members, and for the Society: Cheryl Hodder, the Society's CEO, Ms. Cumming and Suzanne Burgess, Executive Assistant Professional Responsibility. Messrs. Rogers and Madill had not been invited. The proceeding was transcribed.

[27] The transcript of February 2, 2024, includes:

...

MS. CUMMING: ... I can advise that we are requesting that the CIC reconvene the Section 37 hearing based on this new information that would

suggest that it's ... that there is a significant public interest in taking interim steps pending our continued investigation.

THE CHAIR: Can I interject there? Can I interrupt, Elaine? You're ... I think you're asking us to reconvene *ex parte*, are you not?

MS. CUMMING: Exactly. Thank you.

THE CHAIR: Okay. Carry on.

MS. CUMMING: But yes, so we are asking the Committee to reconvene on an *ex parte* basis based on new information that would suggest that there's a significant public interest in taking interim steps under Section 37 in relation to Mr. Fraser based on the conduct that he's engaged in most recently, yesterday.

As you know, the ... we have prior investigations in relation to Mr. Fraser that involve, generally speaking, issues of unprofessional or uncivil conduct. This new information from yesterday involves Mr. Fraser engaging in an assault of Joel Sellers and Mary Jane Saunders, who are Defendants in a piece of civil litigation ... one or more pieces of civil litigation that Mr. Fraser and his law corporation have brought against them. That's my understanding that that is what they were in court for yesterday before Justice Hoskins.

After the close of court Mr. Fraser did ... is alleged to have assaulted Mr. Sellers and Ms. Saunders by throwing water on them, and when the sheriff tried to restrain him from leaving the courtroom he refused to follow the instructions of the sheriff, which ultimately resulted in four sheriffs physically restraining him on the ground and he was allegedly put in shackles and handcuffs and removed from the courtroom.

We are aware that ... and have received confirmation from the Nova Scotia Public Prosecution Service that Mr. Fraser has, in fact, been charged with two counts of assault and one charge of resisting arrest. He was held for several hours last evening and released on his own recognizance as far as we're aware.

THE CHAIR: Okay.

...

QUESTIONS OF THE SOCIETY BY THE CIC

MR. VACON: So from reading the materials that we have here, it looks like ... is the Society dealing with him directly now – Mr. Fraser – or does he still have Mr. Rogers as a lawyer?

MS. CUMMING: Mr. Rogers has ... we've been dealing directly with Mr. Fraser on all complaint matters. Mr. Rogers' involvement was in relation to the Section 37 hearing. As far as I'm aware, Mr. Rogers is not representing him in matters not involving the Section 37 hearing.

...

THE CHAIR: Any other questions?

Okay. I think, then, we'll go to deliberate. ...

THE CHAIR: Okay. I can indicate that the Committee has deliberated. We are of the view that the Society has made out a *prima facie* case in relation to the alleged conduct of Mr. Fraser in respect of his conduct on February 1st, 2024 at the courthouse in ... was it Pictou, Elaine, or Antigonish?

MS. CUMMING: Pictou.

THE CHAIR: ... Nova Scotia?

INTERIM DECISION OF THE CIC

THE CHAIR: We have made the *prima facie* finding that the behaviour was both conduct unbecoming and also behaviour that was in connection with his practice and, therefore, amounted to a ... to professional misconduct.

We have reviewed the ... both the two documents that were provided to us, both the ... just a second here. The Public Interest Threshold Guidelines and the Investigative Proceedings. We have also taken into consideration the email that was sent by Mr. Fraser to Ms. Burchill, which we view as inappropriate.

We have regard ... we say this, that in a *prima facie* way, we view Mr. Fraser's conduct as following: that he ... during ... he attended a hearing in relation to several matters involving himself and the two complainants, that during a break he went up into the gallery and tried to engage with the complainants. He was advised by the sheriff to move back to counsel table. He resisted that direction and was quite inappropriate with ... his comments were quite inappropriate with the sheriff and included things like, "You don't know what you're talking about." "You have no authority to do what you're doing" and the sheriff acted professionally throughout.

At the conclusion of the hearing Mr. Fraser went back into the gallery and the outcome was he threw water on the complainants and then resisted ... and then I understood that he attempted to leave the courthouse and was restrained, resisted ... was arrested for assault and resisted that arrest. We view that conduct as sufficiently serious that we believe interim measures are required.

We have reviewed, as I said, the Public Interest Threshold Guidelines and the Investigative Procedures. We have also, then, reviewed a deci- ... made a decision concerning measures of an interim nature that are required. We did review whether there were lesser measures that were available to this committee that would be sufficient to protect the public interest. We have concluded that there are no measures less than or short of interim suspension that are available to us.

And I'm just specifically going to refer to section 4 of the Investigative Proceedings under Section 37, and we reviewed all of those things. We ... as I said, we review it as ... we view it as professional misconduct and conduct unbecoming Mr. Fraser.

And we reviewed 4(1.1), 4(1.2), 4(1.3), 4(1.4). We also reviewed the Public Interest Guidelines, in particular 1.11, 1.2, 1.3, 1.4, 1.5. We reviewed paragraphs 2.1, paragraph 2.2, and I note that there are relevant complaints ongoing, and I'll indicate that there was a hearing of the CIC yesterday and the determination was made that there would be charges laid in connection with, I think, a series of five complaints and that there was ... certainly, there were ... there was a concern by the members who attended that meeting that Mr. Fraser's behaviour was significant and worrisome.

So that's our decision Elaine. Now we ... and I think we have to ... do we have to draft up reasons for that?

MR. VACON: Mr. Chair, you may want to indicate that it was a unanimous decision.

THE CHAIR: Okay. Thank you Jamie, yes, and I do want to indicate for the record that the decisions I've referred to were all unanimous.

So what's next?

MS. CUMMING: We'll need a ... brief reasons from you. I can send you a draft ...

THE CHAIR: Would you, please?

...

[28] At 5:01 p.m. on February 2, the Society emailed Messrs. Rogers and Madill:

Please see the attached correspondence, and enclosures, from Brian Bailey, Acting Chair of the Complaints Investigation Committee.

The email enclosed a letter of February 2, 2024 from Mr. Bailey, as Acting Chair of the CIC, to Mr. Rogers and a Resolution of the CIC dated February 2, 2024.

[29] Mr. Bailey's letter to Mr. Rogers said:

I am writing as the Acting Chair of the Complaints Investigation Committee to provide you formal notice that Donn Fraser has been **suspended on an interim basis effective immediately pursuant to s. 37 of the *Legal Profession Act***.

The s. 37(1) panel reconvened virtually this afternoon. We received the reports and materials enclosed with this letter.

The Committee determined on the basis of this information that it was in the public interest to reconvene under s. 37 to consider these matters without notice to Mr. Fraser, and on an *ex parte* basis without hearing from Mr. Fraser, pursuant to our authority to do so under s. 37(2).

Mr. Fraser's conduct as described in the materials is *prima facie* very concerning. As a result, the Committee unanimously determined that it is in the public interest to suspend Mr. Fraser's practicing certificate effective immediately on an interim basis and that no lesser measure was sufficient to adequately protect the public. The Committee determined on a *prima facie* basis that Mr. Fraser's conduct has caused harm to the public, members of the Society, and the administration of justice.

Further, the Committee resolved to appoint a Receiver for Mr. Fraser's practice. The Receiver will be instructed by the Executive Director to take possession of Mr. Fraser's files, records and trust balances immediately. I request that you seek cooperation from Mr. Fraser with the Receiver in the interests of his clients.

In addition to the materials from the hearing this morning that are enclosed, I enclose the following:

1. The CIC Resolution respecting Mr. Fraser's suspension and appointment of a Receiver;
2. A copy of the Notice that will be posted on the Society's website and circulated to the Courts and Prothonotaries and others this afternoon;
3. A copy of the *Guidelines for Voluntary and Involuntary Cessation of Practice*, to which Mr. Fraser is required to strictly adhere; and
4. A copy of the Lawyers' Assistance Program brochure.

I refer you to s. 37(3)-(5) of the *Act* which provides as follows:

(3) The Complaints Investigation Committee shall, forthwith after passing a resolution to subsection (1), provide a copy of the resolution to the practicing lawyer to whom the resolution applies, including the reasons for a decision to suspend the practicing certificate or impose restrictions or conditions on the practicing certificate.

(4) A lawyer who receives written notice pursuant to subsection (3) may request in writing, a meeting with the Complaints Investigation Committee.

(5) Where a request is received pursuant to subsection (4), the Complaints Investigation [*sic* Committee] shall

- (a) provide an opportunity for the lawyer to meet with the Complaints Investigation Committee within ten (business) days of the written request, and
- (b) after meeting with the lawyer, confirm, vary or terminate the suspension, restrictions or conditions imposed pursuant to subsection (1).

The Committee was unanimous in its decisions today. This interim suspension will remain in effect until rescinded or amended by the Complaints Investigation Committee, or a Hearing Panel.

The Committee would like to remind Mr. Fraser of the availability of the Lawyers' Assistance Program <https://nslap.ca/>, and would encourage him to seek support from his family physician, friends, colleagues and family.

I trust the above clearly sets out the Committee's decision in this matter.

[bolding in Mr. Bailey's letter]

[30] The CIC's Resolution dated February 2, 2024, enclosed with Mr. Bailey's letter to Mr. Rogers, included:

BE IT RESOLVED by the Complaints Investigation Committee that it is in the public interest to suspend on an interim basis the practicing certificate of Donn Fraser on an *ex parte* basis and without notice to Mr. Fraser of the hearing, as permitted under the *Act*, effective immediately, and until further notice, pursuant to sections 37(1) and (2) of the *Act*;

AND BE IT FURTHER RESOLVED that pursuant to Section 51(1) of the *Legal Profession Act*, the Complaints Investigation Committee authorizes the appointment of a Receiver for the practice of Donn Fraser immediately, to take possession of the practice and protect, preserve and manage Donn Fraser's practice of law until further Order of this Committee or a Hearing Panel of the Society.

[31] On February 2, 2024, at 7:01 p.m., Mr. Fraser emailed Mr. Bailey:

I seek to have a reconvening immediately to reverse what the CIC has inappropriately done on an *ex parte* basis, to give an opportunity for me to be heard as was requested.

[32] On Monday, February 5, 2024, Mr. Bailey emailed Mr. Rogers to schedule the reconsideration meeting:

We are setting up a Zoom meeting for Mr. Fraser for February 8, 2024 from 1:00PM to 3:00 PM.

[33] On February 7, 2024, Mr. Madill, counsel for Mr. Fraser, submitted to the CIC a nine-page submission that requested the suspension be lifted and replaced with conditions on Mr. Fraser's practice.

[34] The CIC's reconsideration meeting began on February 8, 2024. Mr. Fraser was represented by Messrs. Rogers and Madill. The CIC had not yet provided

written reasons for its *ex parte* ruling on February 2. On February 8, counsel for Mr. Fraser requested those reasons to frame their submissions. Consequently, the CIC adjourned until February 16, 2024, with the written reasons to be provided before then.

[35] On February 12, 2024, the CIC delivered its written reasons for its *ex parte* ruling of February 2 (“*Ex Parte Decision*”). After reciting the events of February 2, (quoted above, para. 22), the *Ex Parte Decision* included:

[6] The Committee was asked to consider whether to proceed *ex parte* or with notice to Mr. Fraser. Due to the seriousness of the claims made and because of the ongoing complaints against Mr. Fraser, the Committee decided to proceed without notice to Mr. Fraser. The Committee did not make this decision lightly.

[7] The Committee then considered the “information on record” as to Mr. Fraser’s recent behaviour in accordance with the Guidelines cited below. It was noted that Mr. Fraser was verbally abusive, threatening and inflammatory virtually during the entire time the parties were at the courthouse, whether in session or not. The Committee considered Mr. Fraser to be excessively and unnecessarily confrontational, uncivil and discourteous. The Committee noted that Mr. Fraser’s behaviour elevated into assaultive conduct and an altercation with the Sheriff’s Deputies. The Committee considered that the reported conduct far exceeded that which can be characterized as “resolute advocacy”.

[8] The Committee considered *inter alia* the following provisions of the Investigative Proceedings under Section 37 Guideline:

4. Factors to consider when determining whether to suspend or impose conditions or restrictions

4.1 In determining whether it is in the public interest to suspend or impose conditions or restrictions on a lawyer’s practising certificate, the CIC should consider the following:

4.1.1 the seriousness of the alleged professional misconduct, conduct unbecoming, professional incompetence or incapacity;

4.1.2 whether there are any conditions or restrictions currently in place or that could be put in place to satisfy the public interest;

4.1.3 the probability of harm; and

4.1.4 such other factors set out in the Society’s Public Interest Threshold Guidelines.

4.2 The CIC should be satisfied that there is a *prima facie* case supporting the allegations, and that having regard to such material

and evidence as is put before the CIC, the public requires protection through an interim order for suspension or practice conditions or restrictions.

4.2.1 A *prima facie* case is one which substantiates the allegations in the complaint and which, if believed, is sufficient to constitute professional misconduct, conduct unbecoming, professional incompetence or incapacity. In assessing a *prima facie* case, the CIC should not seek to decide the merits of a disputed allegation or decide disputed issues of fact in relation to the substantive allegations. Accordingly, the CIC should discount evidence that is inconsistent with objective or undisputed evidence or evidence that is manifestly unreliable, but should consider evidence in respect of the allegations that establishes that an allegation is manifestly unfounded or manifestly exaggerated.

In light of this, the CIC is not required nor expected to conduct a “mini-trial”. The CIC should determine whether the information on record establishes that intervention is required to protect the public interest during the investigation and prior to final adjudication of the matter by the Hearing Committee.

[9] The Committee reviewed *inter alia* regulation 9.1.3 of the *Legal Profession Act* which states:

9.1.3 When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes:

- (a) conduct unbecoming, if it involves conduct in a member’s personal or private capacity that tends to bring discredit upon the legal profession.
- (c) professional misconduct if it involves conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession.

[10] The Committee unanimously agreed that *prima facie*, Mr. Fraser’s behaviour amounted to professional misconduct and conduct unbecoming a member of the Society. The Committee was mindful that the guideline allows it to act on the *[sic]* “the information on record” and made no decision as to what the final outcome may be. The Committee then considered whether it was necessary for the protection of the public to resort to any interim measures and we concluded unanimously that it was necessary to do so. The Committee regards Mr. Fraser’s behaviour on February 1, 2024 to be a culminating event of a pattern of behaviour

that has continued and is the subject of the other complaints. We do not view his conduct as isolated. Instead, we regard it as ongoing misconduct.

[11] Also, notwithstanding that Mr. Fraser was representing his own interests at the hearing, the Committee decided that he was acting in the professional capacity as a barrister.

[12] The Committee then considered whether interim measures against Mr. Fraser were required and if so, what interim measures would be necessary.

[13] The Committee also considered *inter alia* the following provisions of the Public Interest Definition Guideline:

Pursuant to section 37(1) of the *Legal Profession Act*, the Complaints Investigation Committee may suspend a practicing certificate, or impose restrictions or conditions on a practicing certificate where, in its opinion, it is in the public interest to do so. In determining the public interest, the CIC will consider the objects of the professional responsibility process which are to protect the public and preserve the integrity of the legal profession, and the Regulatory Objectives of the NSBS in order to instill public confidence in the regulation of the legal profession.

Considerations of the CIC in section 37(1) proceedings may include an assessment of the following factors:

1. Risk to the public if the member is permitted to continue practice without restriction. Relevant to this may be:
 - 1.1 The nature of the alleged misconduct or lack of competence:
 - 1.1.1 Whether the conduct is repetitive/ongoing or only one instance;
 - 1.1.2 Whether the conduct is recent or in the past;
 - 1.1.3 If proven, the range of likely disciplinary outcomes;
 - 1.1.4 Whether the conduct arose in the course of the member's practice; and
 - 1.1.5 Whether Society intervention is necessary to prevent misconduct pending a hearing.
 2. The member's circumstances:
 - 2.2 Any relevant complaints or discipline history;
 - 2.5 The impact of an order to suspend or restrict a license on the member and the member's clients.
 3. Whether public confidence in the ability of the Society to regulate the legal profession is likely to be harmed if the lawyer continues to practice unrestricted pending the completion of the

investigation or adjudication of the matter. This may involve consideration of:

- 3.1 The significance of the alleged misconduct;
 - 3.2 The level of notoriety of the matter, or in other words, how a reasonable member of the public might regard the matter;
 - 3.3 Whether the alleged misconduct relates to the member's practice;
 - 3.5 Any evidence demonstrating an impact on the public confidence.
4. Whether public confidence in the ability of the Society to regulate the legal profession is likely to be harmed if the Society suspends a member and it later appears that suspension was not warranted.
 5. Could the public interest, including confidence in the regulation of the Society, be protected through restrictions and conditions instead of a suspension?
 6. Is the proposed order proportional to the identified risk of harm?
 7. Are there access to justice issues with respect to the clients of the member that should be considered by the CIC.

[14] The Committee determined that all relevant factors cited above were unfavorable to Mr. Fraser, except the concern for Mr. Fraser's clients. The Committee concluded that the access to justice factor did not outweigh all the other relevant factors.

[15] The Committee unanimously agreed that an interim suspension was required and that no lesser measure was sufficient to protect the public. The public nature of the misconduct and Mr. Fraser's prior pattern of conduct was considered as significant and demanding of a prompt and significant response. The Committee's decision to suspend Mr. Fraser was only made after determining that no other or lesser measure was sufficient.

[16] The Committee was of the view that it was more likely than not that Mr. Fraser's pattern of conduct would continue, and possibly escalate unless an interim suspension was imposed. The pattern of behaviour has not abated as a result of prior complaints, and prior restrictions which were removed by the Committee and we are unable to conclude that lesser measures will be effective. The Committee concluded that its order is proportional to the identified risk of harm from continued conduct.

[17] In addition, the Committee considered that to impose lesser interim measures would adversely affect public confidence in the ability of the Society to regulate the profession generally and specifically Mr. Fraser.

DECISION MADE at Halifax, Nova Scotia this 2nd day of February, 2024.

REASONS issued on the 12th day of February, 2024.

Brian Bailey
Acting Chair
Complaints Investigation Committee

[36] The CIC’s *Ex Parte* Decision quoted from the “Investigative Proceedings under Section 37 Guideline” and the “Public Interest Definition Guideline”. These documents, written by the Society, are included in the Society’s Professional Responsibility Guidelines.

[37] The written reasons having been provided to Mr. Fraser’s counsel, the CIC’s reconsideration meeting resumed on February 16, 2024. Mr. Fraser and his counsel made submissions, as did the Society, represented by Lynn Murray, K.C.

[38] On February 19, 2024, the CIC issued its written “Decision & Reasons February 16, 2024” (“*Inter Partes* Decision”), signed by Mr. Bailey as Acting Chair. The CIC found Mr. Fraser’s actions on February 1 went “beyond uncivil speech and have nothing to do with ‘resolute advocacy’ ” (para. 16). As to the relief, the *Inter Partes* Decision of February 19 found:

[21] This brings us to the question of suspension or practice restrictions.

[22] The Committee notes that there are five complaints that have been recently referred for formal hearing. These included allegations of uncivil behavior. It is for this reason that the Committee is of the view that Mr. Fraser has engaged in a pattern of behavior and has not moderated his behavior in any way. In addition, he has escalated to more than uncivil speech.

[23] To maintain the public’s respect for the legal profession demands that the Society act. Mr. Fraser gave no assurances to the Committee that he would in any way change his behavior. He offered no suggested conditions beyond what have been imposed by the Provincial Court in relation to the charges he faces.

[24] The Committee also considered the Society’s Public Interest Definition Guideline. We quote the Guidelines and give a brief comment on our views as to the factors in **bold underline**.

Pursuant to section 37(1) of the Legal Profession Act, the Complaints Investigation Committee may suspend a practicing certificate, or impose restrictions or conditions on a practicing certificate where, in its opinion, it is in the public interest to do so. In determining the public interest, the CIC will consider the objects of the professional responsibility process which are to protect the public and preserve the integrity of the legal profession,

and the Regulatory objectives of the NSBS in order to instil public confidence in the regulation of the legal profession.

Considerations of the CIC in section 37(1) proceedings may include an assessment of the following factors:

1. Risk to the public if the member is permitted to continue practice without restriction. Relevant to this may be:

1.1 The nature of the alleged misconduct or lack of competence:

The admitted behavior involved conduct that resulted in criminal charges. In addition, Mr. Fraser continued in a pattern of significant incivility which has resulted in five formal charges in the process of being proceeded with.

1.1.1 Whether the conduct is repetitive/ongoing or only one instance: **The incivility has been repeated. The lack of anger management has escalated to a physical act.**

1.1.2 Whether the conduct is recent or in the past; **The conduct is both recent and in the past.**

1.1.3 If proven, the range of likely disciplinary outcomes; **The potential discipline could be quite severe.**

1.1.4 Whether the conduct arose in the course of the member's practice; and. **It was in the course of self-representation before the court.**

1.1.5 Whether Society intervention is necessary to prevent misconduct pending a hearing. **We believe that there is a danger to the persons Mr. Fraser interacts with for serious incivility, or potentially harassment, or assault.**

2. The member's circumstances: **Mr. Fraser is an experienced lawyer who should be well aware of the civility standards of the profession.**

2.2 Any relevant complaints or discipline history; **Five complaints referred for hearing.**

2.5 The impact of an order to suspend or restrict a license on the member and member's clients. **The Hebert report indicates only two files where alternate representation cannot be easily found. The Society has agreed to assist in finding counsel for those two.**

3. Whether public confidence in the ability of the Society to regulate the legal profession is likely to be harmed if the lawyer continues to practice unrestricted pending the completion of the investigation or adjudication of the matter. This may involve a consideration of:

3.1 The significance of the alleged misconduct; **Mr. Fraser's conduct is very significant and highly detrimental to the public respect of the profession.**

3.2 The level of notoriety of the matter, or in other words, how a reasonable member of the public might regard the matter; **This incident occurred in public courtroom and will undoubtedly become publicly known.**

3.3 Whether the alleged misconduct relates to the member's practice; **It occurred when he was acting as an advocate before the court.**

3.5 Any evidence demonstrating an impact on the public confidence. **The Committee can take notice that the public ought to be able to have confidence that lawyers will be civil and will not resort to physical altercations.**

4. Whether public confidence in the ability of the Society to regulate the legal profession is likely to be harmed if the Society suspends a member and it later appears that suspension was not warranted. **We believe that there is a high likelihood that Mr. Fraser will be subject to discipline as a result of this complaint.**

5. Could the public interest, including confidence in the regulation of the Society, be protected through restrictions and conditions instead of a suspension? **There [is – sic] a public interest in ensuring that a repeated pattern of incivility, and now physical altercations, are not tolerated. The public ought to have confidence that the Society can effectively regulate its members.**

6. Is the proposed order proportional to the identified risk of harm? **There is a likelihood of escalating behavior. Mr. Fraser's therapy focuses on anger management. This incident indicates that there are serious concerns that the inability to control his anger is ongoing, indeed may be escalating.**

7. Are there access to justice issues with respect to the clients of the member that should be considered by the CIC. **There are access to justice issues but these can be addressed by actions that the Society can take.**

[25] It must be remembered that there are several goals in the Public Interest Definition Guideline, namely:

- to protect the public
- to preserve the integrity of the legal profession

- the Regulatory Objectives of the NSBS in order to instill public confidence in the regulation of the legal profession

[26] The “public” includes all those Mr. Fraser comes in contact with in his dealings. Continued aggressive and uncivil communications are not in the public interest, let alone physical altercations. The Society has a duty to protect those persons.

[27] The integrity of the profession is at stake when a member fails to repeatedly meet the standards of behavior expected of its members. Even more so when inappropriate physical actions have taken place.

[28] The public must have confidence that the Society can and will act to ensure those standards are upheld.

[29] While the Committee appreciates the submissions of Mr. Madill as to other cases where suspension was not imposed, we distinguish those cases on the basis that in those cases there apparently was reason to believe that the concerning behavior had ceased and/or could be monitored. Here, there is an acknowledged anger management problem. The Committee has no assurance from Mr. Fraser that he will alter his behaviour. Indeed, he generally asserts he did nothing wrong. He offers to abide by no conditions beyond those imposed by the Provincial Court to secure his release from custody. He offers no undertaking to accept any moderation of his behavior or conduct, even on an interim basis until he has had a decision of a Hearing Panel.

[30] The Committee has not found a basis to change its findings made on February 2, 2024. Mr. Fraser has admitted the assault and that he was advised he was under arrest. Incivility is an ongoing concern. We make no determination beyond that there is a *prima facie* case and that suspension is warranted.

[31] The Committee did not come to this decision lightly, and fully understands the impact on Mr. Fraser, however, given all of the circumstances, suspension was the only reasonable option.

[32] The Committee therefore orders that Mr. Fraser’s suspension remains in place.

[bolding in CIC Decision]

[39] Sections 37(7) and 49 of the *Act* permit an appeal to the Court of Appeal:

37 (7) A lawyer may appeal to the Nova Scotia Court of Appeal on any **question of law** from a decision of the Complaints Investigation Committee pursuant to this Section, in accordance with Section 49.

...

49(1) Subject to this Section, every order or decision of a Complaints Investigation Committee or a hearing panel is final and shall not be questioned or reviewed in any court.

(2) A party may appeal to the Nova Scotia Court of Appeal **on any question of law** from the findings of a hearing panel, following the rendering of a decision pursuant to subsections 45(4) or (5) or **from a decision of the Complaints Investigation Committee under Section 37** or 38.

...

(5) The Civil Procedure Rules governing appeals from the Supreme Court of Nova Scotia to the Nova Scotia Court of Appeal that are not inconsistent with this Act, apply mutatis mutandis to appeals to the Court of Appeal pursuant to this Section.

[bolding added]

[40] On February 21, 2024, Mr. Fraser filed a Notice of Appeal (Tribunal) to the Court of Appeal from the CIC's *Ex Parte* Decision and *Inter Partes* Decision.

[41] On March 4, 2024, Chief Justice Wood granted Mr. Fraser's motion to stay the CIC's suspension of Mr. Fraser's practising certificate pending the outcome of this appeal (2024 NSCA 26).

[42] This Court heard the appeal on September 17, 2024. The last supplementary brief was filed on September 27, 2024.

Issues

[43] After the notice of appeal, the issues evolved. Both parties tendered fresh evidence. They contested whether a confidentiality order should issue. Mr. Fraser withdrew a ground of appeal that had been determined by this Court's ruling in *Fraser v. NSBS #1*. The eventual slate of issues is:

1. Further to *Civil Procedure Rule 90.47*, should the Court admit the fresh evidence offered by both parties?
2. Should the Court overturn the interim suspension of Mr. Fraser's practice certificate, by the *Inter Partes* Decision, for an error of law? Mr. Fraser cited four grounds.
3. Should the Court overturn or vary the interim suspension in the *Inter Partes* Decision for a denial of procedural fairness? Mr. Fraser cited numerous grounds, including actual bias and reasonable apprehension of bias.

4. Was the *Ex Parte* Decision defective?
5. Should the Court issue a confidentiality order for documents that are in the record for this proceeding?

[44] We will discuss the standards of review as we come to each issue.

First Issue: Is Fresh Evidence Admissible?

[45] *Civil Procedure Rule* 90.47(1) says:

90.47(1) The Court of Appeal, on the motion of a party, may on special grounds authorize evidence to be given to the Court of Appeal on the hearing of an appeal on any question as it directs.

[46] **Mr. Fraser’s motion:** On June 24, 2024, Mr. Fraser filed a Notice of Motion for the admission of his Affidavit dated June 17, 2024. Mr. Fraser’s affidavit outlines what he describes as the history of adversity and conflict between him and the Society or the Society’s Director of Professional Responsibility, Ms. Cumming.

[47] Mr. Fraser says this evidence is relevant to his allegations respecting procedural fairness, bias and reasonable apprehension of bias. He submits the evidence is “directed to the validity of the trial process itself” and is admissible under *R. v. Wolkins*, 2005 NSCA 2, para. 61, per Cromwell J.A. (as he then was) for the Court.

[48] In *Wolkins*, Justice Cromwell said that fresh evidence may be admitted if it relates to a ground of appeal that challenges the process of the court or tribunal under appeal. The appeal court acts at first instance on the issue of process. Consequently, the fresh evidence does not impugn the merits of the appealed decision and need not satisfy the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at page 775.

[49] The approach in *Wolkins* has often been followed by this Court. For instance, in *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, varied on another issue 2020 SCC 21, this Court said:

[73] On the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal: *Association of Universities and Colleges of Canada v.*

Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, para. 20(b), per Stratas J.A.; *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.), leave to appeal refused [1980] 2 S.C.R. viii (note). ...

[50] We admit Mr. Fraser's affidavit of June 17, 2024, for the purpose of assessing his submissions on procedural fairness, including actual or reasonable apprehension of bias.

[51] **The Society's motion:** The Society filed a motion for the admission of an affidavit of Elaine Cumming dated July 22, 2024. Ms. Cumming's affidavit sets out the CIC's disciplinary history respecting Mr. Fraser and attaches the CIC's decisions and resolutions. That history is the focus of Mr. Fraser's fresh evidence, which we have admitted. The Society submits the evidence is admissible as background.

[52] In *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, Justice Stratas explained the "background information exception" that admits fresh evidence on appeal from an administrative decision:

[23] The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying the rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

[53] We agree with this passage.

[54] The CIC's *Inter Partes* Decision said the interim suspension was based on Mr. Fraser's "pattern of behaviour" that had "escalated" to a physical confrontation in the courtroom on February 1, 2024, undeterred by the CIC's restrictions in the earlier proceedings. The Society offers the fresh evidence to show the pattern, escalation and restrictions in its past rulings.

[55] The content of the tendered evidence affected the CIC's *Inter Partes* Decision and would assist this court's task of reviewing that ruling. The fresh evidence qualifies under the background information exception. Further, it is admissible in reply to Mr. Fraser's fresh evidence that discusses his disciplinary history.

[56] We admit Ms. Cumming's Affidavit of July 22, 2024, and its exhibits for the purpose of appreciating what the Society alleges is Mr. Fraser's escalating pattern of behaviour and the earlier restrictions.

Second Issue:
Does the Inter Partes Decision Reflect an Error of Law?

[57] The *Inter Partes* Decision replaced the *Ex Parte* Decision and is the only existing ruling that suspends Mr. Fraser's certificate to practice. We will focus on the *Inter Partes* Decision.

[58] Sections 37(7) and 49 of the *Act* permit an appeal on a question of law. A statutory appeal invokes the appellate standard of review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 36-52; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, paras. 4, 34-35.

[59] The appellate standard is correctness for issues of law, including legal points that are extractable from issues of mixed fact and law, and palpable and overriding error for issues of fact and mixed issues with no extractable legal point: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 8, 10, 19-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, paras. 65 and 69; *Nova Scotia Health Authority v. Finkle and West*, 2024 NSCA 87, at para. 58.

[60] A discretionary ruling is reviewed for error in legal principle or whether it results in a patent injustice. It is presumed that judicial discretion will not be exercised to cause an avoidable patent injustice. Consequently, the "patent injustice" standard is a subset of legal error. See *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 22, 26-29 and *Magee v. Lauzon*, 2024 NSCA 23, para. 31 and authorities there cited.

[61] Mr. Fraser challenged the CIC's *Inter Partes* Decision on four substantive grounds.

[62] **Personal or private conduct:** The complaints against Mr. Fraser alleged conduct unbecoming. Regulation 9.1.3(c) defines “conduct unbecoming”:

9.1.3 When considering complaints or charges, the Complaints Investigation Committee and hearing panel may determine that conduct constitutes:

(a) conduct unbecoming, if it involves conduct in a member’s personal or private capacity that tends to bring discredit upon the legal profession, including one (1) or more of the following:

- (i) committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or competence as a member of the Society,
- (ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person,
- (iii) engaging in conduct involving dishonesty;

[63] Mr. Fraser initially submitted “conduct unbecoming” does not encompass his personal or private conduct, which he says includes his self-representation in chambers on February 1, 2024. In *Fraser v. NSBS #1*, this court rejected that proposition:

[31] In summary, under Regulation 9.1.3(a), “conduct unbecoming” extends to personal or private conduct that tends to bring discredit upon the legal profession. If one or more of items (i), (ii) or (iii) is shown, that is “conduct unbecoming”. If none is shown, then proof of other personal or private conduct that tends to bring discredit upon the legal profession may establish “conduct unbecoming”.

[64] Before the hearing of this appeal, Mr. Fraser withdrew his submission.

[65] **No evidence:** Mr. Fraser says the CIC made findings based on “no evidence”, which would be an error of law, citing *Tufts v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2023 NSCA 50, paras. 15 and 19, and authorities there cited. The principle is that a finding based on no evidence is arbitrary and a tribunal errs in law by acting arbitrarily, even respecting fact-finding.

[66] The CIC’s interim ruling makes only a *prima facie* finding. As a basis, the CIC had correspondence and emails from witnesses to the events in the Pictou courtroom. There was an audio recording of the hearing of February 1. The recording included Mr. Fraser’s scuffle with the sheriffs. The CIC had Mr. Fraser’s unsworn version of the events in his presentation on February 16. Section 39(1) of

the *Act* permits the CIC to set its own procedure for an interim hearing. Regulation 9.5.13 permits the CIC, in its discretion, to accept unsworn evidence.

[67] There was evidence for the findings in the *Inter Partes* Decision. The CIC did not act arbitrarily and there was no error of law.

[68] **Civility:** Mr. Fraser submits the CIC misinterpreted the law that defines appropriate standards of “civility”. He characterizes the water-throwing incident as an isolated “lapse of judgement”. He says little about his brawl with the sheriffs.

[69] In *Groia v. Law Society of Upper Canada*, 2018 SCC 27, para. 3, Justice Moldaver for the majority said:

... A lawyer’s duty to act with civility does not exist in a vacuum. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer’s behaviour. Care must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility.

[70] Mr. Fraser’s comments and behaviour are discussed above (paras. 20-22).

[71] In the courtroom, Mr. Fraser tossed water on his opponents, physically resisted the sheriff’s direction to move away, and threatened then fought the sheriffs. The audio playback is bedlam. Concerted force by four sheriffs should not be required for a lawyer to respect a court’s decorum.

[72] The *Inter Partes* Decision concluded Mr. Fraser’s invective and actions “went beyond uncivil speech and have nothing to do with ‘resolute advocacy’ ”. The CIC made no error of law.

[73] **Excessive penalty:** Mr. Fraser cites the standard of review for administrative penalties, *i.e.* that the penalty may not be “clearly unreasonable”, “manifestly excessive” or a “substantial and marked departure” from penalties in similar cases: *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, para. 56; *Hanson v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 513 (Div. Ct.), para. 36; *Mitelman v. College of Veterinarians of Ontario*, [2020] O.J. No. 2612 , para. 18. Mr. Fraser says suspension was excessive and a restriction on his practice would have been more proportionate.

[74] The CIC’s *Inter Partes* Decision found *prima facie* that Mr. Fraser’s conduct had escalated to a physical altercation in the courtroom. The CIC’s lesser practice

restrictions for the earlier incidents had not deterred him. The *Act* mandates the CIC to protect the public interest. To do so, the CIC issued more severe relief.

[75] The CIC's stepped approach displayed no error of law.

***Third Issue:
Did the CIC Deny Procedural Fairness or Exhibit Bias?***

[76] Mr. Fraser contends the CIC infringed principles of procedural fairness, was biased or displayed a reasonable apprehension of bias. He makes numerous submissions.

[77] **Overlapping functions:** Mr. Fraser notes the CIC acted as both an investigator, to recommend whether a charge be laid, and an adjudicator, to decide whether to suspend his practice certificate on an interim basis. He submits there is an "impermissible level of merger and overlap of the investigative and adjudicative aspects of the functions of the CIC" and this "flawed structuring and implementation of functions of the CIC" shows "bias or a reasonable apprehension of bias" (factum, paras. 62 and 64).

[78] We respectfully disagree.

[79] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, Chief Justice McLachlin for the Court said:

20 ... It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.

...

23 This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to provincial courts: [citations omitted]

42 Further, **absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise**

contravene the rule against bias. Gonthier J. alluded to this possibility in *Régie* [2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919], at para. 47, quoting from the opinion of L'Heureux-Dubé J. in *Brosseau* [*Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301], at pp. 309-10:

As with most principles, there are exceptions. One exception to the “*nemo iudex*” principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.

[bolding added]

[80] The Chief Justice’s ruling reflects a tenet of procedural fairness. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L’Heureux-Dubé for the majority said:

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. ...

...

24 A second factor is the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”: *Old St. Boniface [Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)]*, [1990] 3 S.C.R. 1170], *supra*, at p. 1191. **The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made.** ...

[bolding added]

[81] Earlier, we set out the legislative framework for the CIC’s functions. Under s. 36 of the *Act*, the CIC investigates to the point where a charge is laid. Under s. 37, the CIC determines whether to levy interim relief.

[82] The CIC’s performance of these functions applies the intent of the legislature. The duality does not exhibit an apprehension of bias or offend the principles of procedural fairness.

[83] **Acceding to requests from the Director:** Mr. Fraser’s factum, para. 104(c), says there was “a repeated and ongoing pattern of the CIC being willing to accede to requests” by Ms. Cumming despite that “the CIC knew she was in a position of

conflict, adversity and bias relative to the Appellant and should not be involved”. This, says Mr. Fraser, was procedurally unfair and displays the CIC’s actual or reasonably apprehended bias.

[84] The *Act*, e.g. ss. 34, 35B, 36-39, and the *Regulations*, e.g. regs. 9.2 and 9.5, contemplate that the Executive Director may refer matters to the CIC and the CIC may give direction to the Executive Director.

[85] Section 9(3) of the *Act* permits the Society’s Executive Director to delegate her functions. The Executive Director has delegated the administration of conduct review to the Society’s Director of Professional Responsibility, Ms. Cumming.

[86] As a delegate, the Director of Professional Responsibility assists the CIC to gather information and presents the CIC with the case that enables the CIC to consider whether there should be a charge or an interim sanction. The CIC directs the Society whether to lay a charge. The Director’s activity may spark friction with the member. However, the colloquy between the Society and CIC implements the legislature’s intent and does not bias the CIC by association. We refer to the passages from *Ocean Port* and *Baker*, quoted above.

[87] **Inconsistency:** Mr. Fraser next submits the CIC’s “inconsistent positioning” reflects bias. He points to the CIC’s ruling of November 26, 2023, para. 7 (quoted above, para. 17), where the CIC declined to “make findings of fact and adjudicate on the merits of the conduct that we are not permitted to make”. Mr. Fraser contrasts this comment to the CIC’s *Ex Parte* Decision of February 12, 2024 (above, para. 35), para. 11, where the CIC said, “the Committee decided that he was acting in the professional capacity as a barrister”.

[88] Mr. Fraser submits this inconsistency is “tailored and designed dependent upon which party the CIC wish to favour and what result the CIC wish to reach”, and “demonstrate[s] bias or at a minimum a reasonable apprehension of bias” (factum, paras. 80-81).

[89] With respect, Mr. Fraser’s submission disregards the differing contexts of the CIC’s two rulings.

[90] The CIC’s Decision of November 26, 2023, adopted the joint position of the Society and Mr. Fraser that the pre-existing conditions on his practice should be removed. The issue Mr. Fraser had sought to litigate – *i.e.* whether his allegedly private activity could be “conduct unbecoming” – was no longer active for the

CIC. The CIC is not tasked to make declaratory rulings on moot questions. The CIC's Decision said:

[9] Our sole function at a section 37 hearing is to determine what, if any interim actions ought to be taken against Mr. Fraser that are required for the protection of the public. Therefore, we decline to make any determination on the issue Mr. Fraser wishes adjudicated at this time.

[91] By contrast, in February 2024, there was no agreement and all the issues were active. To perform its statutory function of determining whether to issue interim relief, the CIC made a *prima facie* finding.

[92] The suggested "inconsistent positioning" neither offended procedural fairness nor supports a finding of bias or reasonable apprehension of bias.

[93] **Demands for production:** Mr. Fraser's factum, para. 104b, cites a prior demand from the CIC for production in 2021 when the CIC was investigating a complaint of unprofessional conduct filed against Mr. Fraser. The subject of the complaint was before the Provincial Court in a criminal proceeding. The CIC requested file material that had been provided to Mr. Fraser by the Crown in *Stinchcombe* disclosure. Mr. Fraser objected, citing his implied duty not to use the Crown disclosure for an ulterior purpose. Mr. Fraser says the episode demonstrates the CIC's "ignorance and incompetence" and supports his allegation of bias.

[94] The Society and the CIC were investigating a complaint. They have broad authority to seek information, documents and cooperation from a member during an investigation: *Act*, ss. 35A, 36 and 77; *Regulations*, ss. 9.2.4, 9.2.7, 9.2.8, 9.5.2, 9.5.3, 9.5.4, 9.5.8. For instance, s. 35A and reg. 9.2.4 say:

35A For the purpose of conducting an investigation of a member pursuant to this Part, the Executive Director, the Complaints Investigation Committee or any person designated by either of them may request, and is entitled to obtain, **any file or record regarding a client or former client of the member that is reasonably required to further the investigation**, whether or not the file or record or any part of it is

- (a) subject to solicitor-client privilege; or
- (b) the subject of a charge or complaint.

[bolding added]

9.2.4 If the Executive Director commences an investigation pursuant to sub-regulation 9.2.3(c), a member of the Society must fully cooperate with the Society in the investigation by:

(a) unless otherwise directed, providing a **full** and substantial **response** which must:

...

(ii) provide copies of **all relevant file materials** the member relies upon;

...

(iv) provide **any additional information** and materials required by the Executive Director;

...

(c) responding to **all requests** from the Society during the investigation.

[bolding added]

[95] The CIC sought to implement its investigatory mandate. Whether or not the material was subject to production to the CIC, after a thorough analysis of *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, the episode does not establish bias or the reasonable apprehension of bias by the CIC.

[96] **Knowing the case to be met:** Mr. Fraser says he was not informed of the case he had to meet.

[97] The Society's case was not complicated. The Society submitted to the CIC: (1) Mr. Fraser's conduct on February 1, 2024 offended the standard of behaviour expected of a lawyer in the courtroom; and (2) as his escalated behaviour was undeterred by the CIC's earlier lesser restrictions, the more severe relief of interim suspension was appropriate.

[98] Mr. Fraser or his counsel were provided with the Society's material on the first point, *i.e.* the events of February 1, 2024. The material includes witness statements and the audio recording.

[99] As to the second point, the CIC's earlier Decisions are summarized above (paras. 16-17). This material is not new to Mr. Fraser. He participated in earlier proceedings, on occasion with counsel, and received the CIC's Decisions as they were issued. His fresh evidence affidavit discusses those Decisions.

[100] Mr. Fraser says he was not given the CIC's investigation reports on the earlier charges. Under reg. 9.5.9, the CIC determines whether to direct the Society's Executive Director to lay charges. By February 1, 2024, the CIC had investigation reports, prepared by Kelly McMillan, respecting the earlier complaints. The reports were to assist the CIC to determine whether charges should be laid.

[101] On February 8, 2024, Mr. Fraser's counsel, Mr. Madill, wrote to Mr. Bailey, Acting Chair of the CIC. Mr. Madill requested the investigation reports. The reports were not provided before the *Inter Partes* hearing concluded on February 16, 2024. At the hearing of February 16, Mr. Bailey said he had no authority to disclose the investigation reports. Mr. Madill expressed his concern about the non-disclosure.

[102] A document that advises whether to lay a charge is prepared in contemplation of litigation. Normally, such a document is privileged and not disclosable, particularly before the charge is laid.

[103] Nonetheless, if these investigation reports did play a role in the CIC's decision to suspend Mr. Fraser's certificate to practice, they were used for a purpose other than contemplated litigation, and procedural fairness requires that they be disclosed.

[104] However, there is no basis to conclude that the investigation reports affected the CIC's decision to suspend Mr. Fraser in February 2024.

[105] The decisive points in the *Inter Partes* Decision were: (1) Mr. Fraser had, for the first time, acted violently in the courtroom, and (2) he had not been deterred by the lesser restrictions in the CIC's earlier Decisions. The first point derives from the evidence relating to February 1, 2024, which was disclosed to Mr. Fraser or his counsel. The second is apparent from the face of the CIC's earlier Decisions, which Mr. Fraser possessed. Whether or not the Executive Director should charge Mr. Fraser for his behaviour in 2021 and 2022 was not a factor in the CIC's *Ex Parte* or *Inter Partes* Decisions in February 2024.

[106] The disclosure to Mr. Fraser satisfied the principles of procedural fairness.

[107] **Insufficient reasons:** Mr. Fraser says the CIC's inadequate reasons show "a deliberate and calculated attempt to duck, dodge and tailor purported justification" (factum, para. 52). The inadequacy resulted from "vague, nebulous and

unarticulated assertions of a so-called ‘pattern of behaviour’, or ‘pattern of conduct’...” (factum, para. 58).

[108] We disagree. The CIC’s reasons for the *Ex Parte* and *Inter Partes* Decisions are quoted above (paras. 35 and 38, respectively). The CIC’s reasoning was: Mr. Fraser should be suspended because his behaviour offended a member’s required standard of conduct and had escalated to a serious physical confrontation in the courtroom on February 1, 2024, undeterred by the CIC’s earlier rulings.

[109] The CIC’s reasoning path is clearly marked.

[110] **Bias or reasonable apprehension of bias:** Mr. Fraser submits the CIC was biased or exhibited a reasonable apprehension of bias.

[111] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, Justice Abella for the Court summarized the principles:

[20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [citation omitted]

(*Committee for Justice and Liberty, et al. v. National Energy Board, et al.*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))

...

26 The inquiry into whether a decision-maker’s conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum [Wewaykum Indian Band v. Canada]*, [2003] 2 S.C.R. 259, at para. 77; *S. (R.D.) [R. v. S. (R.D.)]*, [1997] 3 S.C.R. 484, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:

... allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Justice Abella’s underlining]

...

37 But whether dealing with judicial conduct in the course of a proceeding or with “extra-judicial” issues like a judge’s identity, experiences or affiliations, **the test remains**

whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge’s conduct gives rise to a reasonable apprehension of bias [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. (Citations omitted; *Miglin* [*Miglin v. Miglin*, 2003 SCC 24], at para. 26).

[bolding added]

[112] Mr. Fraser cites the cumulative effect of the points we have discussed earlier, *i.e.*: (1) whether the CIC’s *prima facie* findings were supported by any evidence; (2) overlapping functions; (3) inconsistency; (4) demands for production; (5) acceding to requests from Ms. Cumming; (6) insufficient disclosure; (7) inadequate reasons (factum, para. 104).

[113] For the reasons we have discussed, these factors, individually or cumulatively, do not support a finding of bias or reasonable apprehension of bias.

[114] Mr. Fraser also points to “adverse mannerisms and antics” by CIC members. His factum puts it this way:

104o behaviours by CIC members even involving adverse [*sic*] certain adverse mannerisms and antics such as:

- (i.) in the course of the Appellant giving honest explanation and comment, Andrew Nickerson, raising his eyebrows and smirking in a matter [*sic* – manner?] implying disbelief to what the Appellant was candidly in a forthright manner trying to explain, (page 625, Tab 25 of Appeal Book);
- (ii.) nearly immediately thereafter, Brian Bailey reacting and injecting with a raised voice with no basis to do so, giving directions to the effect that the Appellant had to “contain” himself and “be courteous”, ostensibly appearing to try to falsely manufacture the impression for a transcript that there is something that needed to be contained or was discourteous on delivery, when there absolutely was not and when the actual recording would have reflected calm level and appropriate dialogue that and [*sic*] did not warrant the impression Mr. Bailey tried to create as it would show up in a transcript (page 625, Tab 25 of Appeal Book);

(iii.) Brian Bailey at various points injecting and pressuring the Appellant’s counsel to effectively move along rather than respectfully taking in the submissions (see Appeal Book, Tab 25, page 600, as an example)

[115] Litigation can be an exacting crucible. In the hearing room, occasionally an eyebrow may be raised. We have read the transcripts of the hearings of February 2, 8 and 16, 2024, focussing on the passages noted by Mr. Fraser, and the correspondence between the CIC and Mr. Fraser or his counsel. The Acting Chair managed the hearings in a respectful fashion. A reasonable and informed person, approaching it realistically and practically, would not conclude the CIC was biased or behaved in a manner that reflects a reasonable apprehension of bias.

[116] Lastly, Mr. Fraser cites the *ex parte* proceeding of February 2, 2024. We will discuss that point separately in the next issue. Though we fault aspects of the *ex parte* process, there is no basis for a finding of bias or reasonable apprehension of bias by the CIC under the test in *Yukon Francophone School Board*.

Fourth Issue: Was the Ex Parte Decision Defective?

[117] Mr. Fraser challenges the CIC’s *ex parte* process on February 2, 2024. The point was not fully canvassed by the factums. At the Court’s request, the parties filed post-hearing submissions and replies.

[118] **Chronology:** We recapitulate the pertinent facts:

- On Friday, February 2, 2024, at 1:06 p.m., the Society’s Ms. Cumming emailed Mr. Fraser’s counsel, Mr. Rogers, saying the CIC has “resolved to reconvene a hearing pursuant to section 37(1) and 37(2) of the *Legal Profession Act*”, and:

The hearing is being held on an urgent and *ex parte* basis.

You will receive communication from the Committee following the hearing.

The email treats the decision to proceed *ex parte* as a *fait accompli*.

- At 3:37 p.m. that day, Mr. Rogers’ co-counsel Christopher Madill emailed Ms. Cumming:

On behalf of Mr. Fraser, we would request the opportunity to attend the hearing. Please advise.

Mr. Madill did not request a delay. He asked to attend the scheduled videoconference.

- There was nothing from Ms. Cumming or the Society to Messrs. Rogers or Madill until after the CIC had made its decision.
- The transcript does not state the time of day of the CIC’s hearing. Mr. Bailey’s letter of February 2, 2024, to Mr. Rogers said it was in the afternoon. The CIC held the hearing by videoconference. The relevant passages of the transcript are extracted above (para. 27). Ms. Cumming informed the CIC:

MS. CUMMING: ... we are asking the Committee to reconvene on an *ex parte* basis based on new information that would suggest that there’s a significant public interest in taking interim steps under Section 37 in relation to Mr. Fraser based on the conduct that he's engaged in most recently, yesterday. ...

- At the hearing, the only exchange respecting Mr. Fraser’s legal representation was:

MR. VACON: So from reading the materials that we have here, it looks like ... is the Society dealing with him directly now – Mr. Fraser – or does he still have Mr. Rogers as a lawyer?

MS. CUMMING: Mr. Rogers has ... we’ve been dealing directly with Mr. Fraser on all complaint matters. Mr. Rogers’ involvement was in relation to the Section 37 hearing. As far as I’m aware, Mr. Rogers is not representing him in matters not involving the Section 37 hearing.

Nothing on the transcript indicates Ms. Cumming informed the CIC of her email correspondence with Mr. Fraser’s counsel earlier that day.

- At the hearing, Ms. Cumming explained the events of February 1 at the Pictou courthouse. The CIC retired, deliberated and returned. Then the Acting Chair, Mr. Bailey, read the CIC’s “Interim Decision” onto the record. The Decision is quoted earlier (para. 27). It suspended Mr. Fraser’s practicing certificate but said nothing about whether the process should have been *ex parte*. After reading the Interim Decision, Mr. Bailey said “So that’s our decision Elaine.” Then Mr. Bailey asked, “So what’s next?” to which Ms. Cumming said, “We’ll need a ... brief reasons from you. I can send you a draft ...”, and Mr. Bailey replied, “Would you, please?”

- At 5:02 p.m. on February 2, the Society emailed Messrs. Rogers and Madill, enclosing a letter from Mr. Bailey. The letter said the CIC had suspended Mr. Fraser on an interim basis and:

The Committee determined on the basis of this information that it was in the public interest to reconvene under s. 37 to consider these matters without notice to Mr. Fraser, and on an *ex parte* basis without hearing from Mr. Fraser, pursuant to our authority to do so under s. 37(2).

- On February 12, 2024, the CIC delivered its formal *Ex Parte* Decision (above, para. 35). The Decision’s only comment on the *ex parte* process was:

[6] The Committee was asked to consider whether to proceed *ex parte* or with notice to Mr. Fraser. Due to the seriousness of the claims made and because of the ongoing complaints against Mr. Fraser, the Committee decided to proceed without notice to Mr. Fraser. The Committee did not make this decision lightly.

[119] **The legislation and the Society’s guidelines:** To summarize the legislation on the process:

- Section 37(1) of the *Act* permits the CIC to suspend a practicing certificate “where in its opinion it is in the public interest to do so”.
- Section 37(2) says the CIC’s power under s. 37(1) “may be exercised with or without hearing the practising lawyer”.
- Section 37(3) requires the CIC to provide reasons for its decision under s. 37(1).
- Sections 37(4) and (5) permit the lawyer, represented by counsel, to reconvene a meeting with the CIC, within ten days, after which the CIC may confirm, vary or terminate the interim suspension.
- Regulation 9.5.7 under the *Act* says:

Notice

9.5.7 The Committee may exercise its powers under section 37 without notice to the practising lawyer when it is in the public interest to do so.

[120] The Society has written an “Investigative Proceedings under Section 37 Guideline” and a “Public Interest Definition Guideline”. They are not regulations, but they purport to guide the CIC. The Guidelines are quoted in the CIC’s *Ex*

Parte Decision, paras. 8 and 13, and *Inter Partes Decision*, paras. 24-25 (quoted above, paras. 35 and 38).

[121] **The submissions:** Mr. Fraser’s supplementary factum cites (the Honourable Justice) Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Thomson Reuters, 2023), section 2.2. The passage says:

2.2 Ex parte injunctions

...

Notice of an application for an interim injunction must be given as a matter of “elementary justice” and exceptional circumstances are required to warrant making an order without notice. **To justify an *ex parte* injunction, there must be such urgency that the delay necessary to give notice might entail serious and irreparable injury to the plaintiff.** The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. Granting an injunction before the plaintiff’s right has been established at trial often entails a serious risk of infringing the rights of the defendant. That risk is significantly heightened if an injunction is granted without even giving the defendant notice and an opportunity to be heard. For this reason, the courts are especially cautious in granting *ex parte* injunctions. There are two categories of extraordinary urgency where courts are willing to order *ex parte* injunctions. The first is where urgency arises because there is reason to believe that the defendants, if given notice, will act to frustrate the process of justice before the motion can be decided. This category includes *Anton Pillar* orders and *Mareva* injunctions. The second is where there is such exigency that any delay will defeat the plaintiff’s claim and there is simply no time to provide notice. The second category must be applied with caution. ...

[bolding added]

[122] The Society’s factum acknowledges:

60. ... The Respondents acknowledge that the Appellant was entitled to a high degree of procedural fairness in respect of proceedings under s. 37 based on the factors outlined by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.

[123] This comment refers to *Baker*, p. 839, where Justice L’Heureux-Dubé adopted the following statement by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia* [1980] 1 S.C.R. 1105, p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. ... A disciplinary suspension can have grave and permanent consequences upon a professional career.

[124] The Society submits the principles that govern *ex parte* proceedings in courts do not apply to the CIC. Rather, it says “[a]n administrative body’s discretion must ultimately comply with the rationale and purview of the statutory scheme under which it is adopted” (supplementary factum, para. 5). For this point, the Society cites *Vavilov*, at para. 108. The Society’s position is:

- the *Legal Profession Act*, s. 37(2) and Reg. 9.5.7 permit the CIC to act without hearing Mr. Fraser if the CIC determined it was in the “public interest” to do so,
- the CIC made that determination,
- the assessment of “public interest” is discretionary, and
- the Court should defer to an exercise of discretion.

(supplementary factum, para. 7)

[125] **Analysis:** To prefix the analysis, we note the Supreme Court of Canada’s view resembles that in Justice Sharpe’s para. 2.2:

- In *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, Chief Justice Dickson for the Court upheld an *ex parte* injunction to restrain picketing at courthouses. The Chief Justice cited the criteria:

44 Similarly, there is ample authority for the issuance of *ex parte* injunctions in those situations where **the delay** necessary to give notice to the party sought to be enjoined **will entail the irreparable loss** of rights.
... [bolding added]

- Similarly, in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, Justice Arbour for the Court said:

25 ... The circumstances in which a court will accept submissions *ex parte* are **exceptional** and limited to those situations in which **the delay associated with notice would result in harm** or where there is fear that the other party will act improperly or irrevocably if notice were given. ...

[bolding added]

[126] Further, we note the *ex parte* applicant’s duty of full disclosure, as described in Justice Sharpe’s text:

2.2.10 The requirement of full and frank disclosure

A party seeking an *ex parte* order is required to be “fastidious” and to make full and frank disclosure of all material facts and point out any defences that might be available to the opposing party. A fact may be material even if not determinative: **“any fact that would have been weighed or considered** by the motion’s justice in deciding the issues, **regardless of whether its disclosure would have changed the outcome,** is material.” ... [bolding added]

[127] We agree with the Society that:

- Under *Baker*, the CIC owed Mr. Fraser a high degree of procedural fairness.
- Common law principles on *ex parte* hearings do not simply transpose to an administrative proceeding, such as the CIC’s interim ruling under s. 37.
- Rather, as *Vavilov*, para. 108, puts it, whether the CIC may proceed *ex parte* “must ultimately comply ‘with the rationale and purview of the statutory scheme under which it is adopted’ ” – *i.e.* the scheme of the *Legal Profession Act*.
- Section 37(2) and Reg., 9.5.7 permit the CIC to proceed without notice “when it is in the public interest to do so”, and the assessment of “public interest” involves the exercise of discretion by the CIC, to which some deference is due on appeal.

[128] However, the CIC’s discretion is not untrammelled. The full passage from *Vavilov*, cited by the Society, says:

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. ... Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision **must ultimately comply “with the rationale and purview of the statutory scheme under which it was adopted”**: [citation omitted]. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, **“there is no such thing as absolute and untrammelled ‘discretion’ ”, and any exercise of discretion must accord with the purposes for which it was given**: [citations omitted] [bolding added]

[129] What is the “rationale and purview” of the *Legal Profession Act*’s scheme as it pertains to the CIC’s discretion to proceed *ex parte*?

[130] Sections 4(1) and 4(2)(b) of the *Act* say the “purpose of the Society is to uphold the public interest in the practice of law” and “in pursuing its purpose, the Society shall ... establish standards for the professional responsibility and competence of members in the Society”. Clearly, the *Act* expects those standards to reflect the “public interest”.

[131] Section 28(2) of the *Act*, quoted earlier, permits the Society’s Council to make regulations establishing those “standards”. Regulation 8.1 establishes the standards by adopting the *Code of Professional Conduct*:

STANDARDS

8.1 Code of Professional Conduct

8.1.1 The ethical standards contained in the rules and commentaries of the *Code of Professional Conduct*, as amended, are adopted as ethical standards for all members of the Society, including Articled Clerks, law firms and lawyers who are subject to the rules governing members.

[132] The *Code of Professional Conduct* is formally titled the “Nova Scotia Barristers’ Society Code of Professional Conduct, approved by Council September 23, 2011” (“*Code*”). Its preface explains how its standards reflect the “public interest”:

Self-regulatory powers have been granted to the legal profession **on the understanding that the profession will exercise those powers in the public interest**. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public’s reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. **This Code attempts to define and illustrate that responsibility** in terms of a lawyer’s professional relationships with clients, the justice system and the profession. [bolding added]

[133] Chapter 5 of the *Code* is titled “Relationship to the Administration of Justice”. It includes the following Standard and Commentary respecting *ex parte* proceedings:

Ex Parte Proceedings

5.1-2B In an *ex parte* proceeding, a lawyer **must** act with utmost good faith and **inform the tribunal of all material facts, including adverse facts**, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

[1] *Ex parte* proceedings are **exceptional**. The obligation to inform the tribunal of all material facts includes an obligation of **full, fair and candid disclosure** to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer **should ensure** that the proceedings are permitted by law and **are justified** in the circumstances. **Where no prejudice would occur, a lawyer should consider giving notice** to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

[bolding added]

[134] In our view, Standard 5.1-2B and its associated Commentary pertain to the rationale and purview of the *Legal Profession Act* respecting the propriety of an *ex parte* proceeding and to the “public interest” in that subject.

[135] The rationale for Standard 5.1-2B and its Commentary shares the principles espoused by Justice Sharpe's text, and those by Chief Justice Dickson and Justice Arbour in *B.C.G.E.U.* and *Ruby*. The common ground, as it applies to this case, includes:

- Whether there should be an interim order turns largely on the seriousness of the issue, as discussed in the Society's *Investigative Proceedings under Section 37 Guideline* and the *Public Interest Definition Guideline* (quoted in the *Ex Parte* Decision, paras. 8 and 13).
- However, whether the *process* leading to the interim ruling should be *ex parte* involves additional factors: *i.e.* hearing both sides is procedurally fair and assists the search for truth. Fairness and truth are as important in a serious case as in a trivial one. We do not conduct murder trials *ex parte* just because the issue is “serious”. This is why an *ex parte* proceeding is “exceptional”.
- Nonetheless, if the delay involved with giving notice would cause “irreparable loss”, “harm” or “prejudice”, notice may be dispensed with. In

this case, Mr. Fraser’s counsel asked only to attend the already scheduled videoconference. There is no suggestion of consequential prejudice.

- The *ex parte* process involves a duty of full disclosure. When the Society communicates with the member’s lawyer respecting the hearing later that day, the CIC should be so informed before the CIC decides whether to proceed *ex parte*.

[136] There is a further point. Section 37(3) of the *Act* says the CIC must provide reasons for its decision under s. 37(1). That requirement includes reasons why the process under s. 37(1) was *ex parte*.

[137] *Vavilov*, says the following about the content of reasons:

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: [citation omitted]. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power [citation omitted]. ...

[80] **The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking** and to better articulate their analysis in the process; *Baker*, at para. 39. This is what Justice Sharpe describes – albeit in the judicial context – as the “discipline of reasons” [citation omitted].

...

[102] ... **Reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” will rarely assist a reviewing court** in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment”: (citation omitted). [bolding added]

[138] When the CIC decides the need to proceed without notice supersedes procedural fairness and the search for truth, the CIC’s Decision should explain why. Those reasons, to be authored by the CIC, should do more than “simply repeat statutory language, summarize arguments made and then state a peremptory conclusion”.

[139] **Conclusion:** In our view, the process that led to the *Ex Parte* Decision was flawed for the following reasons:

- Including Mr. Fraser’s lawyer in the already scheduled videoconference on the afternoon of February 2, 2024, would have caused no delay, harm or prejudice. That should have been done.
- Given that the hearing was *ex parte*, the Society should have informed the CIC of Ms. Cumming’s correspondence with Mr. Fraser’s counsel earlier on February 2, 2024. Then the CIC could assess the impact of the correspondence.
- The CIC’s expressed reasons for proceeding *ex parte* were inadequate. The transcribed oral decision of February 2, 2024, was silent. Mr. Bailey’s letter of February 2, to Mr. Rogers, merely recited the statutory criterion with a peremptory conclusion.
- In the *Ex Parte* Decision, the CIC erred in legal principle by saying: merely because the claim was “serious” and the complaints were “ongoing”, the hearing should be *ex parte* (para. 6). This, despite that an *inter partes* process would have incurred no delay and caused no harm or prejudice. Notwithstanding the deference due on appeal, the CIC’s interpretation of “public interest” in the legislation reflected an extractable error of law.

[140] However, these views do not change the ultimate outcome. That is because on February 16, 2024, the CIC held an *inter partes* hearing, after receiving written submissions from Mr. Fraser’s counsel. On February 16, Mr. Fraser and his counsel had a full and fair opportunity to participate and respond. Then the CIC issued its *Inter Partes* Decision which supplanted the *Ex Parte* Decision.

[141] The *Ex Parte* Decision is spent. As we have discussed, the *Inter Partes* Decision contains no appealable error.

Fifth Issue: Should the Court Issue a Confidentiality Order?

[142] On June 17, 2024, Mr. Fraser filed a Notice of Motion for a confidentiality order to seal a number of documents in the Appeal Book. He sought this relief under *Civil Procedure Rules* 85.04 and 90.37(15). On June 18, 2024, the Court issued an Interim Confidentiality Order, pending a full hearing of the confidentiality motion.

[143] On July 22, 2024, the Society moved to admit fresh evidence, as we discussed earlier. This evidence comprised the CIC’s disciplinary rulings involving Mr. Fraser, attached as exhibits to Ms. Cumming’s affidavit of July 22, 2024. Mr.

Fraser took the view that, if those documents were admitted as fresh evidence, they should be sealed further to a confidentiality order.

[144] Rule 90.37(15)(c) permits a chambers judge of the Court of Appeal to “require a sealing of a court file” on an interim basis “until the Court of Appeal provides a further order”. On July 12, 25 and 30, 2024, Justice Derrick, as chambers judge in the Court of Appeal, ordered that whether there should be a confidentiality order would be decided by this Court on the appeal proper and, until then, the interim confidentiality order would remain.

[145] Our decision on the motion for a confidentiality order is as follows.

[146] **The Civil Procedure Rules:** Rule 90.02(1) says the *Rules* governing the Supreme Court of Nova Scotia “that are not inconsistent with this Rule apply to proceedings in the Court of Appeal with necessary modifications as directed by the Court of Appeal or a judge of the Court of Appeal”.

[147] Rule 85.04 governs confidentiality orders in the Supreme Court:

85.04(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is **in accordance with law** to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

(a) sealing a court document or an exhibit in a proceeding.

...

[bolding added]

[148] Rule 90.02(1) incorporates Rule 85.04(1) for the Court of Appeal, subject to “necessary modifications”.

[149] *Rule* 85.04(1) says a confidentiality order may issue “only if the judge is satisfied that it is in accordance with law to do so”. The “law” cited by Rule 85.04(1) includes, in this case, the *Legal Profession Act*.

[150] **The Legal Profession Act:** We turn to the *Act*. Section 40 governs confidentiality. It includes:

Complaints to be confidential

40(1) All complaints received or under investigation and all proceedings of the Complaints Investigation Committee **shall be kept confidential** by the Society.

(2) **Notwithstanding subsection (1),**

(a) subject to any order of a hearing panel, a complaint or information with respect to a complaint that forms part of the notice of hearing pursuant to the regulations, may be disclosed to the public when notice of hearing is published in accordance with the regulations;

(aa) subject to any order of a hearing panel, a complaint or information with respect to a complaint **may be disclosed** to the public **if such complaint or information is disclosed in the course of a hearing;**

...

(c) The President or the Executive Director, or a person designated by either of them, **may disclose**

(i) that a complaint about the conduct, capacity or competence of a member of the Society has been received,

(ii) that a complaint is or will be under investigation,

(iii) **information that is otherwise available to the public,** or

(iv) where Section 37 applies, that conditions or restrictions have been imposed on a practising certificate, or that a lawyer's practising certificate has been suspended, pending completion of the investigation and any disciplinary proceeding that may follow;

...

(g) **disclosure of information with respect to a complaint may be made for the administration of this Act or to comply with the purpose of this Act.**

[bolding added]

[151] Section 40(1) addresses confidentiality “by the Society”. The provision focuses on the Society’s proceedings, *i.e.* those before the CIC or hearing panel.

[152] However, s. 49(5) of the *Act* says the *Civil Procedure Rules* “that are not inconsistent with this *Act*” govern appeals from the CIC to the Court of Appeal. Consequently, in an appeal under ss. 37(7) and 49 of the *Act*, this Court’s powers respecting confidentiality orders under Rules 90.02(1) and 85.04 should be consistent with the principles that underlie s. 40 of the *Legal Profession Act*.

[153] From s. 40, several principles emerge:

- Before the CIC, the default is confidentiality. That is apparent from s. 40(1): *i.e.* the material “shall be kept confidential” unless an exception in s. 40(2) exists. According to s. 33 of the *Act*, a purpose of s. 40 is to “protect the public”. The Legislature’s appraisal of the public interest, at the interim stage, has assigned weight to confidentiality. In contrast, according to s. 44(1) of the *Act*, “a hearing before a hearing panel shall be open to the public” subject to the exceptions stated in ss. 44(2) through 44(9). Once the charge reaches the hearing panel, the default flips to disclosure.
- If an item is otherwise available to the public, the rationale for confidentiality is spent: s. 40(2)(c)(iii).
- Interim conditions or restrictions on practice may be disclosed: s. 40(2)(c)(iv).
- Disclosure at the interim stage is permitted as an incident of the “administration of this Act”: s. 40(2)(g). “Administration of this Act”, in our view, includes an appeal under ss. 37(7) and 49.

[154] **The Open Court Principle:** The application of these principles is consistent with the open-court principle. *Sherman Estate v. Donovan*, 2021 SCC 25 summarized the seminal rulings in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

[155] In *Sherman Estate*, para. 38, Justice Kasirer for the Court stated a three-step test for the exercise of a discretionary power that would limit the open-court principle. The test requires proof of a proportionate response that addresses a serious risk to an important public interest. Justice Kasirer’s passage concluded with:

... Only where all three of these prerequisites have been met can a discretionary limit on openness – for example a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, **subject only to valid legislative enactments** (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22). [bolding added]

[156] There is no claim that s. 40 of the *Legal Profession Act* offends the *Charter of Rights and Freedoms*. Section 40 is a “valid legislative enactment” which, according to s. 33 of the *Act*, aims to “protect the public”. Section 40 reflects the Legislature’s appraisal of the public interest in the balance of confidentiality *versus*

disclosure at the interim stage which is administered by the CIC. It is appropriate that this Court defer to the Legislature's appraisal.

[157] Consequently, we will apply the principles, noted earlier, that underlie s. 40.

[158] **Disposition:** With those principles in mind:

- A document respecting the CIC's interim proceedings that (1) either played a role in this Court's reasoning to determine issues on this appeal, or (2) occupied the public domain already, is disclosable, *i.e.* a confidentiality order will be denied. The former relates to the "administration of this Act" under s. 42(2)(g). The latter follows from s. 40(2)(c)(iii).
- A document respecting the CIC's interim proceedings that satisfies neither condition should remain confidential, further to the default directive in s. 40(1).

[159] Our ruling relates only to interim proceedings before the CIC that are appealed to this Court. We make no comment on confidentiality *versus* disclosure either before the CIC or in the event the Society's hearing panel assumes jurisdiction.

[160] Mr. Fraser's Notice of Motion of June 17, 2024 requests sealing of the documents in tabs 3, 4, 5, 9(c), 13, 23, 24 and 25 of the Appeal Book. Mr. Fraser also requests that the exhibits to Ms. Cumming's affidavit of July 22, 2024, if they are admitted as fresh evidence, be sealed. Of those documents:

- Tab 13 of the Appeal Book, (p. 352) played no part in this Court's analysis and is not in the public domain. Tab 13 should be sealed.
- The other documents subject to the motion, either from the Appeal Book or exhibited to Ms. Cumming's affidavit, relate to Mr. Fraser's disciplinary history with the Society and CIC. Those documents played a role in this Court's analysis. The basis of the Court's analysis should be publicly available (1) as it involves the "administration of this Act" under s. 40, and (2) under the open court principle, sourced in s. 2(b) of the *Charter*. We dismiss the confidentiality motion for the materials other than tab 13.

Conclusion

[161] We dismiss the appeal. The interim stay ordered on March 4, 2024, is spent.

[162] Mr. Fraser requested a further stay in the event his appeal was dismissed. The CIC found that Mr. Fraser's conduct had escalated. This Court has no current evidence since the appeal record, early in 2024, and is not positioned to assess the matter. We decline to order a further stay.

[163] With this Court's order, the interim confidentiality order expires. We order that tab 13 of the Appeal Book (page 352) be sealed. We dismiss the motion for a confidentiality order respecting the other documents.

[164] Administrative appeals often are determined without costs. That is because there is a public interest in a party's freedom, undeterred by the prospect of prohibitive costs awards, to test the limits of governmental authority. Here, the Society's submissions were largely, but not entirely successful. In these circumstances, the parties should bear their own costs.

Bourgeois J.A.

Fichaud J.A.

Derrick J.A.