Federal Court  Cour fédérale

Date: 20210630

Docket: T-1505-20

Citation: 2021 FC 692

Ottawa, Ontario, June 30, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SILVANO LOCHNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Table of Contents

I. Overview

[1] The Applicant, Silvano Lochner [Mr. Lochner] seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the decision of the Canadian Judicial Council [CJC or the Council] dated November 18, 2020 [the Application]. The CJC dismissed Mr. Lochner's complaint, dated October 9, 2020, against the Honourable Sasha E. Pepall of the Court of Appeal of Ontario [Justice Pepall] pursuant to section 5(b) of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* [Review Procedures], finding that the complaint did not involve judicial conduct, rather a judicial decision. The CJC also advised Mr. Lochner that it would not respond to his future complaints about the decision of a judge.

[2] Mr. Lochner challenges the decision of the CJC dated November 18, 2020 and submits that the CJC's decision to not respond to future complaints constitutes a deemed decision by the CJC that his subsequent complaints dated November 2, 11, 17 and 25 [collectively, the November complaints] are also not matters of judicial conduct. As explained further below, the November complaints relate to the same matters raised in the October 9, 2020 complaint, with additional allegations and different characterizations of the allegations.

[3] Mr. Lochner accepts that the CJC cannot address matters of judicial decision-making; however, he argues that the CJC erred in dismissing his complaints. Mr. Lochner's view is that his allegations about four justices of the Ontario Court of Appeal are about their conduct and not about judicial decision-making. Mr. Lochner alleges that their findings of fact, interpretation of the law and the decisions they made demonstrate, among other things, disregard for the law, omission of facts or misstatement of facts, collusion with each other, and bias, which in his submission are matters of conduct demonstrating that the justices are incapable of executing their judicial duties and warranting investigation by the CJC.

[4] Mr. Lochner emphasized that this Court must review his several complaints to the CJC in their entirety to determine the nature of his complaints. The Court has indeed reviewed all the complaints, including those submitted after the October 9, 2020 complaint, which the CJC responded to on November 18, 2020. The Court has also read the decisions of the Ontario courts regarding the proceedings in which Mr. Lochner has been engaged, which Mr. Lochner attached to his complaints, for context.

[5] For the reasons set out below, I find that the CJC did not err in determining that the matters complained of by Mr. Lochner were about judicial decisions and did not warrant consideration. Therefore, the Application is dismissed.

[6] The Court's Reasons for Judgment are long and perhaps overly detailed in order to respond to Mr. Lochner's emphasis on the need for the Court to consider all his complaints. The

history of Mr. Lochner's engagement with the CJC is also addressed as it provides additional context for the CJC's decision.

A. *Preliminary comments regarding this Application*

[7] This Application focuses only on the reasonableness of the decision of the CJC. It is not an appeal, judicial review or other avenue to revisit the decisions of the Ontario Superior Court of Justice or the Ontario Court of Appeal about Mr. Lochner's several proceedings. Some of those decisions, which were included in Mr. Lochner's Application Record, are described below only to provide the context for this Court's review of the reasonableness of the decision of the CJC.

[8] The Respondent to this Application is the Attorney General of Canada [AGC] in accordance with Rule 303 of the *Federal Courts Rules*, SOR/98-106. Although Mr. Lochner appears to question the role of the AGC as the Respondent, he may not be aware that the AGC is the respondent on most applications for judicial review of decisions of federal boards and tribunals. As an example, the AGC would be the respondent on an application for judicial review of a decision of the Canadian Human Rights Commission, Canadian Transportation Agency or Social Security Tribunal, among others. There is nothing unusual about this. The federal board or tribunal as a decision-maker is not the respondent on a judicial review of its own decision. In this case, the CJC is not the respondent on the judicial review of its own decision.

[9] The hearing of this Application was conducted by teleconference. As at an in-person hearing, the Court advised Mr. Lochner that he would make his submissions first, followed by

those of the Respondent and that he would then have an opportunity to make submissions in reply. During the Respondent's submissions, Mr. Lochner repeatedly interrupted with comments disputing the Respondent. The Court reminded Mr. Lochner to remain quiet, again noting that he would have an opportunity to reply at the conclusion of the Respondent's submissions. After four disruptive interruptions by Mr. Lochner, the Court instructed the Registry Officer to mute Mr. Lochner's microphone. As a result, Mr. Lochner could hear the Respondent's submissions but could not interject. Although Mr. Lochner later stated that he had not heard all of the Respondent's submissions, there is no indication of any such impediment. Mr. Lochner's reply addressed and disputed the Respondent's submissions and belies any suggestion that he did not hear all of the Respondent's submissions. Moreover, the Respondent's oral submissions were consistent with the written submissions.

B. *Post-hearing correspondence*

[10] Mr. Lochner sent several emails directly to the Court's Registry Officer following the hearing of this Application requesting that these be provided to the Court. The emails are copies of other email correspondence to several other persons, including counsel for the Respondent, journalists, Crown Attorneys, the Minister of Justice and officers at the CJC. The emails appear to reiterate the allegations he made to the CJC and his submissions to this Court.

[11] The Court issued a Direction on June 11, 2021, noting that the Court's decision was under reserve and that "[t]he material provided by the Applicant by way of email is not properly before the Court. The Court's decision will be based on the Records properly filed in accordance with the *Federal Courts Rules* before the hearing and the oral submissions made at the hearing.

No other communications will be considered. The Applicant should refrain from further communication with the Court with respect to the determination of this Application."

[12] The emails sent to the Court following the hearing have not been considered as this material is not part of the record for the hearing of this Application and it is not otherwise properly before the Court. In any event, it is repetitive.

II. Background

[13] Mr. Lochner's several complaints to the CJC arise from his dissatisfaction with the results of many legal proceedings he has launched since 2007, following an incident in 2006 where the Toronto Police Service, in executing a warrant for Mr. Lochner's arrest, misidentified Mr. Lochner's brother, George Lochner, as the subject of the arrest. George Lochner was tasered by the police in the process. A civil claim against the Toronto Police Service was settled by the Public Guardian and Trustee [PGT], appointed as legal guardian of George Lochner. It appears from the record before the Court that Mr. Lochner and other family members opposed the appointment of the PGT and the settlement.

[14] Other proceedings launched by Mr. Lochner and family members arising from this same incident include several attempts to initiate private prosecutions against the officers who were involved in tasering George Lochner, and an application to the Ontario Civilian Police Commission to compel an investigation of the incident.

A. *Justice Corbett's decisions*

[15] On May 17, 2019, Justice Corbett of the Ontario Superior Court of Justice dismissed Mr. Lochner's application to compel the Ontario Civilian Police Commission to investigate. Pursuant to Rule 2.1.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 [the Ontario Rules]. Justice Corbett found that the proceeding was frivolous, vexatious or otherwise an abuse of process. Justice Corbett noted that Mr. Lochner and other family members had been engaged in many other proceedings arising from the same incident. (Justice Corbett cited at least 16 reported decisions regarding Mr. Lochner's attempts to have the police prosecuted for their conduct or other investigations pursued.) Justice Corbett ordered, among other things, that Mr. Lochner could not bring new proceedings against the Ontario Civilian Police Commission or otherwise related to the 2006 incident in the Ontario courts without leave from the court.

[16] On February 13, 2020, Justice Corbett refused to grant leave for the commencement of Mr. Lochner's application for *mandamus*, which sought to challenge the decision of the Attorney General of Ontario [AGO] to stay Mr. Lochner's fourth attempt to privately prosecute the officers involved in the 2006 incident. Mr. Lochner appealed Justice Corbett's decision to the Ontario Court of Appeal.

B. *Order of Chief Justice Strathy, Ontario Court of Appeal, dated September 9, 2020*

[17] As noted in the reasons for the Order, Chief Justice Strathy considered the motion of the AGO pursuant to Rule 13.01(1) of the Ontario Rules seeking leave for the AGO to be added as an intervener in Mr. Lochner's appeal of the decision of Justice Corbett in order for the AGO to

request that the appeal be dismissed in accordance with Rule 2.1.01 of the Ontario Rules. On September 9, 2020, Chief Justice Strathy granted the AGO's motion for leave to intervene. The Chief Justice also ordered the AGO to serve and file their material on the Rule 2.1.01 motion forthwith, "which shall be heard by the panel before the hearing of the appeal itself, or in such manner as the panel may direct." In the reasons for the Order, the Chief Justice noted: that the appeal at issue is from the order of Justice Corbett denying Mr. Lochner's request for leave to commence a proceeding in the nature of *mandamus* challenging a decision of the AGO to stay a private prosecution; and, that the AGC has an interest in the proceedings, because if the appeal were to succeed, the AGO would be the respondent.

C. *Judgment and Reasons of the Ontario Court of Appeal, dated November 9, 2020*

[18] Mr. Lochner made written submissions to the Ontario Court of Appeal in response to the AGO's motion to dismiss his appeal pursuant to Rule 2.1.01 of the Ontario Rules. The Ontario Court of Appeal (Justices Pepall, Benotto and Coroza) granted the AGO's motion on September 23, 2020 and dismissed Mr. Lochner's appeal of Justice Corbett's decision. The written reasons of Justice Pepall, concurred in by Justices Benotto and Coroza, were issued on November 9, 2020 and reported as *Lochner v Ontario Civilian Police Commission*, 2020 ONCA 720 [*Lochner 2020*].

[19] In *Lochner 2020*, Justice Pepall briefly described the background to the appeal with reference to some of the proceedings launched by Mr. Lochner and their outcome. Justice Pepall explained the issue on the appeal and on the Rule 2.1.01 motion, noted the purpose of Rule

2.1.01, and referred to articles and jurisprudence, which describe the nature of vexatious litigants and vexatious litigation and their impact on the administration of justice.

[20] Justice Pepall noted, at para 21, that the courts are gatekeepers to screen out abusive litigants so that parties with "justiciable disputes" may have them adjudicated. Justice Pepall added at para 22:

> That said, two points merit special emphasis. First, not all self-represented parties are vexatious litigants. Second, even a vexatious litigant may raise a legitimate issue that justifies consideration by a court. It is in part for this reason that r. 2.1.01 is intended for the clearest of cases.

[21] Justice Pepall found that Mr. Lochner's appeal of Justice Corbett's decision falls within the "clearest of cases" and explained why the appeal should be dismissed as frivolous, vexatious and an abuse of process.

[22] Justice Pepall then addressed the need to balance Mr. Lochner's access to the courts for future arguable proceedings with the need to protect the justice system and its stakeholders from abusive conduct and frivolous proceedings. Justice Pepall noted, among other considerations, the approaches that had been taken by the courts in other cases to achieve such a balance.

[23] Justice Pepall ordered that Mr. Lochner be prohibited from making any further motions unless he is represented by a lawyer, the materials have been prepared and filed by a lawyer, and leave of the Court has been obtained by the lawyer.

D. *Mr. Lochner's complaint to the CJC, dated October 9, 2020*

[24] On October 9, 2020, Mr. Lochner sent a fax to the CJC enclosing a copy of his letter to the Judicial Secretary of the Ontario Court of Appeal, also dated October 9, 2020. Mr. Lochner copied the October 9, 2020 letter to others, including the Registrar of the Ontario Court of Appeal, the Minister of Justice, two Crown Attorneys and Justice Corbett.

[25] Mr. Lochner requested that the letter be provided to Justice Pepall, noting that: "despite dismissing my appeal on September 23, 2020…she seems to be having some difficulty in providing written reasons in support of her judgment, and her subsequent order declaring me a vexatious litigant." Mr. Lochner takes issue with that finding, noting, among other things: "a Rule 2.1.01 request must be limited to a determination as to whether or not the pleadings in question are, on their face, frivolous, vexatious or an abusive process" [Emphasis in original].

[26] Mr. Lochner asserted that Justice Pepall's written reasons must identify the core of his complaint argued on his appeal and explain why the core complaint was not legitimate. Mr. Lochner asserted that the core of his complaint is that a Crown Attorney improperly exercised their discretion in staying Mr. Lochner's private prosecution. Mr. Lochner alleged that the Court of Appeal ignored his submissions on the Rule 2.1.01 motion and dismissed his appeal without addressing whether there was a core complaint. He also asserted that this was why the Court of Appeal had not issued written reasons.

[27] Mr. Lochner's postscript to the letter asserted the justices "have decided to make a mockery of the justice system with their decision to dismiss my appeal as per the Attorney General of Ontario Rule 2.1.01 request without any reasons."

[28] The fax cover sheet to the October 9, 2020 letter includes the following:

> How is it possible that on September 18, 2020 Justice Mary Lou Benotto wrote that [a named person's] Notice of Application does not plead a cause of action and then five days later on September 23 2020, dismissed my appeal without providing any written reasons, some three weeks later? Does my Notice of Appeal not plead a cause of action?

[29] The CJC responded to the October 9, 2020 complaint on November 18, 2020.

E. *Subsequent Complaints from Mr. Lochner to the CJC in November 2020*

[30] Mr. Lochner's subsequent complaints to the CJC (November 2, 11, 17 and 25) also focus on the decision in *Lochner 2020* and the decision of Chief Justice Strathy in granting the AGO leave to intervene in the appeal for the purpose of bringing a motion pursuant to Rule 2.1.01.

[31] On this Application, Mr. Lochner regards the CJC's November 18, 2020 decision as a deemed decision on the November complaints.

[32] The allegations in the November complaints relate to the same issues. An overview of the allegations are set out below.

(1) November 2, 2020 Letter to the CJC

[33] Mr. Lochner's eight-page letter of complaint dated November 2, 2020 alleges, among other things, that Chief Justice George Strathy demonstrated bias, lack of impartiality and a total disregard for the rule of law in ordering that the AGO be added as a party to Mr. Lochner's appeal. Mr. Lochner alleges that Chief Justice Strathy's conduct is "so egregious and blatant that it should be referred to the police for possible criminal behaviour, such as breach of trust by a public official." Mr. Lochner refers to several cases regarding impartiality and the application of Rule 13.01 of the Ontario Rules and expresses his opinion about when a court should or should not grant intervener status. Mr. Lochner asserts that in granting intervener status to the AGO, Chief Justice Strathy exceeded the bounds of Rule 13.01 by permitting the AGO to bring a motion pursuant to Rule 2.1.01 in order to "hijack" his appeal. Mr. Lochner alleges that Chief Justice Strathy abused his powers and denied Mr. Lochner's rights.

[34] Mr. Lochner also complains that Chief Justice Strathy's behaviour is "corrupt" because he did not attach a citation to his Order, which prevented its publication and scrutiny "by the Courts and the public". He adds that Chief Justice Strathy's order makes a mockery of the justice system and suggests that the order is inconsistent with other jurisprudence and was made to protect a Crown Attorney.

(2) November 11, 2020 Letter to the CJC

[35] Mr. Lochner's letter of complaint dated November 11, 2020 is 15 pages in length and, among other things, describes the tasering incident, refers to several other decisions (e.g.

Lochner v Ontario (Attorney General), 2017 ONSC 5293, *Lochner v Ontario (Attorney General)*, 2018 ONSC 2994, *Lochner v Ontario (Attorney General)*, 2019 ONSC 1908, *Lochner v Ontario (Attorney General)*, 2019 ONCA 730), and describes Mr. Lochner's attempts to initiate a private prosecution.

[36] Mr. Lochner complains that in dismissing his appeal (*Lochner 2020*), Justices Pepall, Benotto and Coroza made a mockery of the justice system by failing to address his "core complaint", which he submits is a requirement in the determination of an appeal, and made "libelous statements" about him to justify their decision.

[37] Mr. Lochner asks the CJC to explain why the Ontario Court of Appeal concluded that his request for *mandamus* and his appeal, which in his submission alleges the flagrant impropriety of a Crown Attorney, is not a justiciable issue.

[38] Mr. Lochner alleges that the justices "willfully ignored the subject matter of the appeal" in order to deny him access to the justice system and to capitulate to the AGO.

[39] Mr. Lochner also asserts that the justices "committed a crime in providing a fraudulent decision…" He disputes Justice Pepall's characterization of him as a "lifestyle litigator". He asserts that the four justices have brought "disrepute to the justice system with their corrupt conduct".

(3) November 17, 2020 Letter to the CJC

[40] Mr. Lochner's seven-page letter of complaint dated November 17, 2020 notes that he is providing further evidence of judicial misconduct previously described in his letters of November 2 and 11, 2020. He notes the importance of the rule of law. He submits that the four justices conspired to reach a result proscribed by the rules governing judicial behaviour.

[41] Mr. Lochner refers to Chief Justice Strathy's Order and again alleges that Chief Justice Strathy refused to attach a citation, and that the reasons in *Lochner 2020* hide the facts about how and why the AGO was added as an intervener. Mr. Lochner also asserts that Justice Pepall misstated and ignored the basis of his appeal and "falsely" ruled that the appeal was vexatious, frivolous and an abuse of process.

[42] Mr. Lochner alleges that this result is only because Chief Justice Strathy and Justice Pepall were acting together "to ensure that nobody other than the appellant knew that the Attorney General had a direct interest in the subject matter of my appeal and was added as a party under r. 13.01 (1)."

[43] Mr. Lochner also asserts that Justice Pepall "falsified facts" in order to avoid dealing with the core complaint of his appeal (the Crown Attorney's decision to stay his private prosecution of the police involved in the tasering incident).

[44] Mr. Lochner also asserts that Justice Pepall misstated or misconstrued case law cited in *Lochner 2020*, which demonstrates her disregard for the rule of law.

[45] Mr. Lochner again asserts that the Ontario Court of Appeal refused to comply with Rule 2.1.01(5) by not providing him with a copy of the Order as soon as possible.

[46] Mr. Lochner concludes by asserting the four justices have shown "disregard for the rule of law to achieve their own personal interests and biases resulting in judicial conduct unworthy of their profession…."

(4) November 25, 2020 Letter to the CJC

[47] Mr. Lochner's letter of November 25, 2020 is 15 pages long and begins with an allegation of "judicial criminal misconduct" of the four justices.

[48] Mr. Lochner acknowledges receipt of the CJC's decision of November 18, 2020 and complains that it fails to address his subsequent complaints.

[49] Mr. Lochner requests that the CJC investigate the conduct of the four justices pursuant to subsection 63(2) of the *Judges Act*, RSC, 1985, c J-1 [*Judges Act*]. He asserts that their conduct has undermined public confidence in the administration of justice and that the justices should be removed from office in accordance with subsection 65(2).

[50] Mr. Lochner reiterates the same information and the same allegations against the four justices that were set out in the previous November complaints. He argues that the Order of Chief Justice Strathy and the decision in *Lochner 2020* are not in line with other jurisprudence.

[51] Mr. Lochner alleges, for example, that Justice Pepall "fraudulently" misstated the factual background regarding the AGO as intervener. He also claims that he did not receive any notice of the AGO's proposed intervention.

[52] Mr. Lochner asserts that Justice Pepall used her judicial office for an improper purpose—to deflect the focus from the subject matter of his complaint against the police and to avoid having the Court scrutinize the conduct of a Crown Attorney.

[53] Mr. Lochner concludes by again asserting that the conduct of the four justices, who conspired against him to deny him access to the justice system, have undermined public confidence in the administration of justice, demonstrated that they are incapable of executing their judicial office and that an investigation is called for.

III. The Decision Under Review

[54] The decision of the CJC was issued by way of letter dated November 18, 2020 from the Acting Executive Director of the CJC, Justice Michael MacDonald.

[55] Justice MacDonald noted that Mr. Lochner's complaint was first, that Justice Pepall had dismissed his appeal and had not yet issued her reasons in *Lochner 2020*, and second, that the

reasons should be drafted in the manner suggested by Mr. Lochner. Justice MacDonald noted that the appeal had been heard on September 23, 2020 and that Justice Pepall had issued reasons on November 9, 2020, reported as 2020 ONCA 720, for the dismissal of Mr. Lochner's appeal as frivolous, vexatious and an abuse of process. Justice MacDonald added that the issuance of Justice Pepall's reasons fell within the recommended six-month timeframe for the issuance of reasons.

[56] Justice MacDonald noted that the CJC had previously communicated to Mr. Lochner about the scope of its mandate in investigating complaints and the multi-step process for the review of complaints to determine whether an investigation was warranted. Justice MacDonald pointed to the Review Procedures and to the decision of the Federal Court of Appeal in *Cosgrove v Canadian Judicial Council*, 2007 FCA 103, which described the steps in the process.

[57] Justice MacDonald also noted that the CJC had previously corresponded with Mr. Lochner, explaining its mandate and that it was not a court and has no authority to review a judicial decision.

[58] Justice MacDonald reiterated that the conduct of the hearing, the assessment of evidence and the legal decisions are within the authority of the presiding judge. Justice MacDonald explained that the role of the CJC is not to review how a judge exercises his or her discretion in the conduct of the case or how the judge reached findings of fact and law. He also noted that this same information had been clarified in previous correspondence with Mr. Lochner many times.

[59] Justice MacDonald stated that he had considered Mr. Lochner's complaint as required by section 4.1 of the Review Procedures and concluded that the complaint fell within section 5(b) as the matters complained of do not involve the judge's conduct.

[60] Justice MacDonald concluded that the CJC would not respond to any future correspondence from Mr. Lochner regarding complaints about the decision of a judge.

IV. The Applicant's Submissions

[61] Mr. Lochner submits that the issue on judicial review is whether his November complaints involve the conduct of the four justices of the Ontario Court of Appeal.

[62] Mr. Lochner seeks a declaration that section 5(b) of the Review Procedures does not apply to his November complaints. He seeks to have the complaints remitted to the CJC for consideration.

[63] Mr. Lochner described several of his legal proceedings in his Memorandum of Fact and Law and in his oral submissions, including his pursuit of private prosecutions against the police officers involved in the tasering of his brother and his allegations that the police officers' notes misstated the number of times that the police tasered his brother. He describes the litigation that arose from a Crown Attorney's decision to stay his private prosecutions, which culminated in the decision of the Ontario Court of Appeal in *Lochner 2020*.

[64] Mr. Lochner submits that the CJC erred by deeming that his November complaints were not matters of judicial conduct. He argues that the November complaints are different as they are about the reasons in *Lochner 2020*. He submits that the November complaints clearly pertain to judicial conduct.

[65] In Mr. Lochner's written submissions, he states that "it is apparent that the Canadian Judicial Council has decided to improperly dismiss the Applicant's complaints contained in his November 2nd, 11th, 17th and 25th, 2020 letters as per section 5 (b) of its Procedures for the Review of Complaints even though those complaints clearly pertain to the judicial conduct of [the four justices] so as to cover up their misconduct."

[66] In his oral submissions, Mr. Lochner disputed that the statement in his written submissions is an acknowledgement that the CJC was not required to respond to his November complaints. He clarified that his position is that all the complaints are about misconduct, including that the justices colluded, conspired to prevent his appeal and to prevent holding the Crown Attorney accountable, misrepresented facts to justify their conduct, and made slanderous statements about him.

[67] Mr. Lochner's submissions include that: the private prosecutions he launched were improperly stayed by the Crown, which provides the Crown with immunity from Court supervision; Chief Justice Strathy erred in granting the motion of the AGO to be added as an intervener; and, Chief Justice Strathy refused to report the Order which granted intervener status

to the AGO, resulting in a denial of Mr. Lochner's rights in accordance with Rule 13.01 of the Ontario Rules.

[68] Mr. Lochner submits that Chief Justice Strathy refused to publish the Order and argues that this is *prima facie* evidence that the Chief Justice colluded with Justices Pepall, Benotto and Coroza to deny Mr. Lochner his right to challenge the motive of the AGO in staying his private prosecution.

[69] Mr. Lochner also argues that this "collusion" is demonstrated by Justice Pepall's reasons in *Lochner 2020*, which he alleges hid the fact that the Order granting the AGO intervener status was illegal. Mr. Lochner submits that the reasons omit relevant facts including that: the AGO brought a motion seeking leave to intervene; Chief Justice Strathy was satisfied that the AGO met the test for intervention pursuant to Rule 13.01 of the Ontario Rules and granted the motion; Chief Justice Strathy was aware that once the AGO was added as a party, the AGO would bring a motion pursuant to Rule 2.1; and, Mr. Lochner's appeal was from the decision of Justice Corbett who refused his request to commence an application for *mandamus* challenging the decision to stay his private prosecution.

[70] Mr. Lochner also suggests that Justice Pepall erred in some way by referring to him at some point as an applicant rather than an appellant.

[71] Mr. Lochner submits that there is no continuity between the decision of Chief Justice Strathy, because it is unreported, and the decision of Justice Pepall in *Lochner 2020* and, as a

result, “the Ontario Court of Appeal is refusing to issue an order as per r. 2.1.01(5) of the Rules of Civil Procedure”. [Rule 2.1.01 (5) provides that “[t]he registrar shall serve a copy of the order by mail on the plaintiff or applicant as soon as possible after the order is made.”]

[72] Mr. Lochner submits that the conduct of Chief Justice Strathy and Justices Pepall, Benotto and Coroza is “corrupt and criminal” which he submits is “confirmed by the fact no court in Canada has ever granted someone party status for the sole purpose of dismissing the proceeding, especially one in which the intervener was added to protect an interest.”

[73] More generally, Mr. Lochner submits that the matters he raises show that the four justices are incapacitated and unable to execute their judicial office.

V. The Respondent’s Submissions

[74] The Respondent submits that the November 18, 2020 decision is reasonable. The CJC applied the relevant provisions of the *Judges Act* and the Review Procedures and reasonably concluded that the matters complained of did not relate to judicial conduct but rather to judicial decision-making. As a result, the complaint did not warrant consideration by the CJC. The Respondent submits that the same finding applies to Mr. Lochner’s November complaints.

[75] The Respondent notes that the CJC had responded to many other complaints by Mr. Lochner with respect to other judges and the CJC had repeatedly provided similar explanations. The Respondent submits that given this history, the CJC was justified in stating that it would not respond to further complaints and in not responding to the November

complaints. In addition, the November complaints raise matters of judicial decision-making, which do not fall within the grounds set out in subsection 65(2) of the *Judges Act* for the CJC to recommend removal of a judge from office.

[76] The Respondent points to the jurisprudence, which has noted the importance of judicial independence and has distinguished judicial conduct and judicial decision-making. The Respondent notes the guidance of the Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 [*Moreau-Bérubé*], the Federal Court of Appeal in *Cosgrove*, and this Court in *Singh v Canada (Attorney General)*, 2015 FC 93 [*Singh*], *Best v Canada (Attorney General)*, 2017 FC 1145 and *Cosentino v Canada (Attorney General)*, 2020 FC 884, among other cases.

[77] The Respondent submits that the *Judges Act* and the Review Procedures do not require that the Executive Director of the CJC respond to every complaint that does not warrant consideration. The Respondent submits that given that the CJC clearly stated it would not respond to future complaints that raised matters of judicial decision-making and given that the CJC had repeatedly explained its role and the distinction between judicial conduct and judicial decision-making, it was reasonable for the CJC not to respond further.

[78] The Respondent further submits that Mr. Lochner appears to acknowledge that the CJC's decision also addresses his subsequent complaints dated November 2, 11, 17 because he alleged in his Memorandum of Fact and Law that the CJC had improperly dismissed these complaints, which in his view pertain to judicial misconduct.

VI. The Standard of Review

[79] The issues raised by Mr. Lochner in this Application are about the CJC's interpretation and application of the *Judges Act*, bylaws and Review Procedures to the facts. There is no dispute that the standard of reasonableness applies. (*Singh* at paras 32-36; *Moreau-Bérubé* at paras 37-60, *Girouard v Canada (Attorney General*), 2020 FCA 129 at para 38) [*Girouard*].

[80] As the Federal Court of Appeal noted in *Girouard*, at para 38:

> [38] There seems to me to be no doubt that constitutional issues and procedural fairness issues are subject to the standard of correctness, while the Council's findings on questions of fact or of interpretation of its enabling statute or the 2015 By-laws must be assessed on a standard of reasonableness. These standards have been applied since at least *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], and the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], has not changed the law in this regard. On the contrary, the Supreme Court reiterated the presumption that reasonableness is the generally applicable standard in judicial review, with certain well-defined exceptions (*Vavilov*, at para. 16). These are precisely the standards that the Federal Court adopted in its reasons, and the appellant does not seem to question the choice of these standards.

[81] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada provided guidance regarding the reasonableness standard of review, confirming that reasonableness requires that that the decision is justified, transparent and intelligible (paras 99, 100).

[82] The Court conducting a judicial review begins by examining the reasons for the decision with respectful attention, seeking to understand the reasoning process followed by the decision-maker to arrive at a conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105-110).

[83] In *Vavilov*, at para 100, the Supreme Court of Canada notes that decisions should not be set aside unless there are serious shortcomings:

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

[84] Two types of fundamental flaws that will render a decision unreasonable are noted at para 101: "[t]he first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it."

VII. The Process for Complaints to the CJC

[85] Subsection 60(1) of the *Judges Act* provides that the objects of the CJC are to promote efficiency and uniformity, and to improve the quality of judicial services in the superior courts.

In furtherance of these objects, subsection 60(2) of the *Judges Act* provides that the CJC may, among other things, make inquiries and investigate complaints or allegations concerning judges as described in section 63 of the *Judges Act*.

[86] Subsection 63(1) provides that the CJC "shall" commence an inquiry into a complaint if the Minister of Justice of Canada or the Attorney General of a province so asks. Subsection 63(2) governs cases, such as this one, where the complaint is made by someone other than the Minister of Justice of Canada or the Attorney General of a province. Subsection 63(2) provides that the CJC "may" investigate such a complaint.

[87] Paragraph 61(3)(c) of the *Judges Act* provides that the CJC may make by-laws respecting the conduct of inquiries and investigations described in section 63.

[88] The CJC has also established and published policies and procedures regarding investigations and inquiries, including the Review Procedures.

[89] The Review Procedures, together with the Canadian Judicial Council Inquiries and Investigations By-laws, SOR/2002-371, set out a multi-stage process for the determination of complaints.

[90] The first stage requires the Executive Director of the CJC to review the complaint and decide whether the matter warrants consideration. Early screening criteria are set out in the Review Procedures. Section 4.1 of the Review Procedures requires that the Executive

Director review all correspondence that "appears intended to make a complaint to determine whether it warrants consideration". Section 5 sets out early screening criteria and provides three categories of matters that do not warrant consideration:

(a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;	(a) les plaintes qui sont futiles, vexatoires, faites dans un but inapproprié, sont manifestement sans fondement ou constituent un abus de la procédure des plaintes.
(b) complaints that do not involve conduct; and	(b) Les plaintes qui n'impliquent pas la conduite d'un juge; et
(c) any other complaints that are not in the public interest and the due administration of justice to consider.	(c) Toutes autres plaintes qu'il n'est pas dans l'intérêt public et la juste administration de la justice de considérer.
[Emphasis added]	[Je souligne]

[91] Following the review of the correspondence and the application of the early screening criteria, if the Executive Director determines that a matter warrants consideration, the Executive Director will refer the matter to the Chairperson (or Vice-Chairperson) of the Judicial Conduct Committee for review. The Chairperson may then dismiss the matter, with reference to the same early screening criteria set out in section 5, or seek additional information. Where additional information is requested, including submissions from the judge, the Chairperson will review the information.

[92] If the complaint proceeds, the next stages provide for a Review Panel and possibly an Inquiry Committee. Where an Inquiry Committee is established, it would report to the CJC. The CJC would then make a recommendation to the Minister of Justice.

[93] In the present case, the Executive Director screened out Mr. Lochner's complaint at the first stage, applying section 5(b), finding that the complaints do not involve conduct.

VIII. The Decision of the CJC is Reasonable

[94] The CJC's decision to dismiss Mr. Lochner's complaint dated October 9, 2021 and not to respond to his future complaints about the decision of a judge is reasonable. The decision bears all the hallmarks of reasonableness as noted in *Vavilov.* The decision shows a rational chain of analysis; the CJC reviewed the complaint, applied the relevant law, and explained why the matters complained of did not warrant further consideration. The decision is justified, transparent and intelligible.

[95] The CJC's decision clearly conveyed to Mr. Lochner why his October 9, 2020 complaint would not be considered. The decision also clearly conveyed that the CJC would not respond to future complaints that were about the decision of a judge. As noted below, the November complaints, which repeat the same allegations, with colourful assertions about how these matters are judicial conduct, are the same or similar to each other and raise the same or similar issues that the CJC explained are about judicial decisions. The CJC's decision not to respond is reasonable.

[96] In *Moreau–Bérubé* the Supreme Court of Canada explained the distinction between matters of judicial conduct, falling within the mandate of judicial councils and matters that can be addressed through the appeal process.

[97] The Supreme Court noted, at para 58, that a disciplinary process must only be launched when the conduct of an individual judge "has threatened the integrity of the judiciary as a whole" and when "[t]he harm alleged is not curable by the appeal process" (*Moreau–Bérubé* at para 58).

[98] The Supreme Court also noted, at para 55, that most matters can be dealt with through the appeal process:

> 55 While the Canadian Judicial Council and provincial judicial councils receive many complaints against judges, in most cases these are matters properly dealt with through the normal appeal process. There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council. […]

[99] The Court explained at para 60:

> Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Act. The separation of functions between judicial councils and the courts, even if it could be said that their expertise is virtually identical, serves to insulate the courts, to some extent, from the reactions that may attach to an unpopular council decision. To have disciplinary proceedings conducted by a judge's peers offers the guarantees of expertise and fairness that judicial officers are sensitive to, while avoiding the potential perception of

> bias or conflict that could arise if judges were to sit in court regularly in judgment of each other. As Gonthier J. made clear in *Therrien*, other judges may be the only people in a position to consider and weigh effectively all the applicable principles, and evaluation by any other group would threaten the perception of an independent judiciary. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, must in my view attract in general a high degree of deference. [Emphasis added]

[100] In other words, judicial councils have the expertise to make the distinction between matters that constitute judicial decision-making — that can be addressed by an appeal — and matters that threaten "the integrity of the judiciary as a whole"—that cannot be addressed by an appeal. Deference is owed to the decisions of judicial councils, including the CJC.

[101] In *Singh*, the applicant made similar arguments to those of Mr. Lochner, asserting that: the matters he complained including rulings and decisions were not made in accordance with the rule of law; the judge had failed to follow precedents; the wrong legal test had been applied; and, the evidence had not been properly dealt with. The Court considered the mandate and objectives of the CJC as set out in subsection 60(1) of the *Judges Act,* which include the promotion of efficiency and uniformity and improvement of the quality of judicial service.

[102] In *Singh*, the Court found that there was no evidence of improper judicial conduct and that the CJC reasonably found that it did not have the jurisdiction to review the complaint about the decision of the judge at issue. The Court considered the relevant provisions of the *Judges Act*, in particular, the reasons for which a judge could be removed from office, and stated at para 51:

> In my opinion, [section 65(2)] makes it clear that the Council's mandate is limited to reviewing improper judicial conduct that affects the ability of judges to execute his or her duties as a judge.

> It does not include broad jurisdictional power to review the decisions and judgments of judges.

[103] In the present case, the CJC applied the relevant provisions of the *Judges Act* and the Review Procedures and the jurisprudence. The CJC's decision is justified by the facts and the law. The CJC does not have a mandate to address matters of judicial decision-making and the facts demonstrate that the matters complained of were about judicial decisions.

[104] The decision of the CJC is transparent and intelligible. The CJC explains that it considered the complaint as required by section 4.1, which requires the Executive Director to review all correspondence "that appears intended to make a complaint" and to determine whether the complaint warrants consideration. The CJC's conclusion that the complaint falls within section 5(b) of the Review Procedures conveys that the CJC applied the early screening criteria and found that the matters complained of do not involve a judge's conduct and do not warrant further consideration. The CJC also explained — as it had in the past — that the conduct of the hearing, assessment of evidence and the decisions made are matters of judicial decision-making.

[105] As explained in the jurisprudence (e.g. *Moreau-Bérubé, Girouard v Canada (Attorney General)*, 2019 FC 1282), the complaints process of the CJC respects the distinction between judicial independence, which recognises the need for judges to fulfill their role and make judicial decisions without fear of reprisals, and the oversight role of the CJC to address complaints of judicial misconduct that go to the integrity of the judiciary as a whole. In the present case, the distinction is clear, given the nature of the matters complained of by Mr. Lochner.

[106] The record that Mr. Lochner placed before this Court fully supports the CJC's determination that the complaints are about judicial decision-making. Mr. Lochner's complaints are about rulings and decisions made by the four justices that arise from their consideration of the facts before them and their application of the relevant law to the facts and to their control of the proceedings, i.e., judicial decisions.

[107] As described in more detail above at paragraphs 24–53, Mr. Lochner's complaints repeatedly alleged, among other similar assertions, that the four justices ignored the core issue of his appeal, misstated and "falsified" the facts, failed to follow the case law, misconstrued the case law, improperly exercised their discretion, erred in adding the AGO as intervener, exceeded their jurisdiction, and "falsely" ruled that his appeal was vexatious, frivolous and an abuse of process. Mr. Lochner also alleges that these matters show bias and collusion, disregard for the rule of law, breach of trust of a public official, constitute a crime of making a fraudulent decision, and bring disrepute to the justice system. However, the matters complained of are clearly all about judicial decisions. Mr. Lochner's perception and characterization of the judicial decisions and his dissatisfaction with the decisions does not transform a judicial decision into judicial misconduct. The record clearly supports the CJC's finding that the complaints fall within section 5(b) of the Review Procedures.

[108] In addition, the CJC's decision notes that it had informed Mr. Lochner on many previous occasions, in response to his past complaints, that complaints related to judicial decision-making were not within the mandate of the CJC. Those complaints also alleged that other judges had, among other things, ignored his submissions, improperly exercised discretion and shown bias.

The CJC explained that all these complaints were about judicial decisions that could be addressed by way of an appeal. Mr. Lochner has been well informed about what does and does not constitute judicial decision-making.

[109] The Respondent's Record includes examples of correspondence from the CJC to Mr. Lochner, which confirms that the CJC had repeatedly explained the complaints process and the difference between judicial decision-making and conduct to Mr. Lochner.

[110] The record shows that upon receipt of correspondence from Mr. Lochner, the CJC acknowledged by email that it would be reviewed within three to six months, following which the CJC would communicate with Mr. Lochner. These emails also noted that further information about the CJC's mandate and complaint process was on its website. The following examples demonstrate that the CJC responded to many specific complaints and repeatedly informed Mr. Lochner about the CJC's role and that the matters he complained of, which are very similar to the matters he now complains of, were about judicial decision-making.

[111] In April 2019, Mr. Norman Sabourin, Executive Director and Senior General Counsel, responded to Mr. Lochner's complaint that three justices of the Ontario Court of Appeal had ignored Mr. Lochner's submissions, and summarily dismissed his appeal without properly considering its merits. Mr. Sabourin's response notes, among other things: the CJC's multi-step process for reviewing a complaint, with reference to the Review Procedures; that the CJC is not a court and does not review judicial decisions; that decisions pertaining to the procedure, the conduct of the hearing and the assessment of evidence and the related decisions all fall under the

authority of the judge; and, that it is not the role of the CJC to review how a judge exercises their judicial discretion or their findings of fact and law.

[112] On July 19, 2018, Johanna Laporte, Acting Executive Director, responded to Mr. Lochner's complaint about two justices of the Superior Court of Justice of Ontario. The letter reiterates the same information noted above regarding the mandate of the CJC and the process to review complaints. Ms. Laporte noted that Mr. Lochner had filed complaints against other justices of the Superior Court of Justice of Ontario, and restated that the CJC does not review judicial decision-making. With respect to Mr. Lochner's allegations of lack of impartiality, Ms. Laporte advised Mr. Lochner that such allegations require credible evidence and, moreover, that an allegation of bias is a legal issue to be addressed by the courts. Ms. Laporte concluded that the complaint did not warrant consideration; it fell within section 5(b) of the Review Procedures as it did not involve the conduct of a judge.

[113] On April 27, 2016, Mr. Sabourin wrote to Mr. Lochner responding to his complaint about a justice of the Superior Court of Justice of Ontario. Mr. Sabourin noted that disagreement with a judge's decision is a matter for an appeal, and that Mr. Lochner had launched an appeal. Mr. Sabourin concluded that the complaint did not warrant consideration.

[114] On May 29, 2014, Mr. Sabourin wrote to Mr. Lochner in response to several emails regarding Mr. Lochner's complaint about a justice of the Ontario Court of Justice. Mr. Sabourin noted the mandate of the CJC and that the *Judges Act* sets out the reasons for removal of a judge. Mr. Sabourin also noted that the CJC is not a court and does not have a mandate to review a

judicial decision and that any disagreement with how a judge exercised their judicial discretion is a matter for an appeal. The CJC concluded that the complaint fell outside the mandate of the CJC as it did not involve conduct.

[115] Mr. Lochner's current allegations are all of the same nature as his past complaints about other judges of the Ontario Court of Appeal and Superior Court of Justice, including that they were oblivious to the facts, ignored his submissions, lacked impartiality, erred in the exercise of discretion, and denied him justice.

[116] On this Application, Mr. Lochner asked the court to carefully review all his complaints. The role of the Court is not to determine whether his complaints should be investigated, but to determine if the decision of the CJC is reasonable. However, this requires consideration of the nature of the complaints. The Court has carefully reviewed the complaints and, as noted above, finds that the CJC reasonably determined that the complaints relate to judicial decision-making and fall within section 5(b) of the Review Procedures and do not warrant further consideration.

[117] As an observation, Mr. Lochner's repeated arguments on this Application that the reasons in *Lochner 2020* "hid" the background to the appeal, including how the AGO was added as a party, are without merit. The reasons do not hide anything. At the very outset of the reasons, under the style of cause, it states "[d]etermination pursuant to r. 2.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and on appeal from the judgment of Justice David L. Corbett of the Superior Court of Justice, dated February 13, 2020, with reasons reported at 2020 ONSC 944". Justice Pepall then sets out a brief background which notes that the AGO's motion

pursuant to Rule 2.1.01 is, in its capacity as intervener, based on the endorsement of Chief Justice Strathy.

[118] While Mr. Lochner appears to lack confidence in the courts and in the CJC, he has been directed to the CJC's website on many occasions. The CJC website would have informed him of the outcome of the CJC's investigations into matters of judicial conduct, which demonstrates that the CJC does not avoid such investigations where they are warranted. This information would have further highlighted the distinction between matters of judicial conduct and judicial decision-making.

[119] Mr. Lochner has repackaged his complaints about the four justices of the Ontario Court of Appeal in different ways in his October and November complaints and in his submissions on this Application. He has labelled the rulings, decisions and reasons as fraudulent, criminal, corrupt, collusion and as demonstrating that the four justices are incapacitated and unfit to exercise their judicial function. While Mr. Lochner is entitled to his perspective, it is not objective. The matters he complains of all relate to judicial decisions and his recourse would be an appeal, if grounds for appeal exist.

IX. Costs

[120] Generally, costs are awarded to the successful party. There is no reason to depart from this basic principal, and as a result, the Respondent is entitled to costs. However, the Respondent did not make submissions regarding the amount of costs it seeks.

[121] Rule 400 of the *Federal Courts Rules* provides that the Court has discretion to determine whether costs should be awarded and in what amount. The non-exhaustive factors set out in Rule 400(3) provide guidance to the Court in making this determination (*Francosteel Canada Inc v African Cape (The)*, 2003 FCA 119).

[122] Lump sum cost awards are within the discretion of the Court. As noted in *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25, at para 19, the discretion to award a lump sum should be exercised prudently and the amount should be justified in relation to the circumstances of the case and the objectives underlying costs.

[123] Considering the factors set out in Rule 400(3) and considering that although the issues were not complex, the record was extensive and the Respondent invested time and effort in successfully defending the Application, I find that an amount of $1000 in costs is appropriate as a contribution to the costs incurred by the Respondent.

JUDGMENT in file T-1505-20

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The Applicant shall pay the Respondent costs in the amount of $1000.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1505-20
STYLE OF CAUSE:	SILVANO LOCHNER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY TELECONFERENCE
DATE OF HEARING:	JUNE 7, 2021
JUDGMENT AND REASONS:	KANE J.
DATED:	JUNE 30, 2021

APPEARANCES:

Silvano Lochner	THE APPLICANT ON HIS OWN BEHALF
Samantha Pillon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT