Federal Court Cour fédérale

Date: 20230704

Docket: T-245-22

Citation: 2023 FC 922

Ottawa, Ontario, July 4, 2023

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

DR. SATYAM PATEL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Dr. Satyam Patel [Applicant], is an orthopaedic surgeon from Regina, Saskatchewan. He seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of two decisions rendered on January 10, 2022 [Decisions] by Mr. Marc Giroux, the Interim Executive Director [Executive Director] of the Canadian Judicial Council [CJC], to

screen out two separate complaints he submitted to the CJC on September 29, 2021 against Justice Michael D. Tochor and Justice Megan McCreary [Complaints].

[2] At the time the Applicant made his Complaints, the targeted judges were members of the Court of Queen's Bench (now Court of King's Bench) for Saskatchewan. For the sake of simplicity, it will be referred to in these reasons as "the SKQB." Justice McCreary has since been elevated to the Court of Appeal for Saskatchewan [SKCA].

[3] In his Complaints, the Applicant expresses concern that, prior to their appointment to the bench in 2018, Justice Tochor and Justice McCreary worked at MLT Aikins LLP [MLT Aikins], a law firm that represented the Saskatchewan Health Authority [SHA] in disciplinary proceedings involving himself. In a nutshell, the Applicant complains that the two judges presided over the same or related matters involving the same or related parties "in violation of a very clear rule in the Canadian Judicial Council Ethical Principles for Judges which prohibits judges from presiding over matters in which their firm was involved in litigation."

[4] The Executive Director concluded in separate decision letters that the Complaints did not warrant consideration as they did not concern judicial conduct, but rather issues related to judicial decision-making and the exercise of judicial discretion.

[5] The Applicant challenges the Decisions and asserts that the CJC and its Executive Director, "(a) refused to exercise its jurisdiction over the conduct of Justice McCreary and Justice Tochor; (b) failed to observe a principle of natural justice, procedural fairness or other

procedure that it was required by law to observe; (c) erred in law in making their decision; (d) based its decision or order on an erroneous finding of fact specifically that the complaints did not concern conduct, that it made in a perverse or capricious manner or without regard for the material before it; or (f) acted to dismiss the complaint without transparent, intelligible, and justifiable reasons, which is contrary to prevailing administrative law."

[6] For the reasons set out below, I find that the Executive Director did not err in determining that the matters complained of by the Applicant were about judicial decisions and did not warrant consideration. It was the Applicant's burden to persuade this Court that the Decisions on review are unreasonable, and I am not satisfied that the Applicant has met his burden. The applications are accordingly dismissed, with costs in favour of the Respondent.

II. Preliminary Comment

[7] Before proceeding further, I wish to address an administrative matter.

[8] Although the present applications were not formally consolidated, the Applicant elected to file a joint record and the two applications were heard together. Since many of the facts leading to the Applicant's complaints to the CJC are common and/or intertwined, and the arguments advanced by the parties at the hearing were essentially the same in both cases, only one set of reasons is rendered, the original of which will be filed in docket T-245-22, and a copy in docket T-246-22.

III. Background

[9] The material submitted by the Applicant in support of his Complaints to the CJC are extremely voluminous and cover a lengthy period of time. To place the Complaints in context, I have set out below a brief recital of the events that took place over a period of five years that led to the Complaints in September 2021. The facts are culled from the records that were before the Executive Director when he made the Decisions.

[10] Dr. Patel is a member of the practitioner staff of what was formerly the Regina Qu'Appelle Regional Health Authority [RQRHA]. The RQRHA and eleven other health authorities, including the Sun Country Regional Health Authority and the Saskatoon Health Region, were eventually subsumed into the SHA in 2017.

[11] On June 11, 2016, the Applicant's surgical privileges were suspended by a Senior Medical Officer [SMO] of the RQRHA pursuant to section 86 of *The Regina Qu'Appelle Regional Health Authority Practitioner Staff Bylaws (2009)* [*Bylaws*] using emergency powers based on a claim that there was urgent concern regarding patient safety.

[12] On July 7, 2016, after conducting a hearing, the RQRHA Board [Board] confirmed the Applicant's suspension and referred the matter to a discipline committee for a hearing. The Board's decision was conveyed by email to the Applicant by Ms. Eileen Libby. Q.K., a partner of MLT Aikins.

[13] One week later, the Applicant filed a notice of appeal from the Board’s decision with the Practitioners Staff Appeals Tribunal [PSAT]. Instead of advancing his appeal before the PSAT, the Applicant chose to proceed with the hearing before the five-person discipline committee that was constituted pursuant to s. 76 of the *Bylaws* [Discipline Committee], which commenced on November 24, 2016.

[14] In July of 2017, after 24 days of hearings before the Discipline Committee, but prior to the conclusion of those proceedings, the Applicant commenced an application for judicial review in the SKQB seeking various orders, including an order quashing the Board’s decision to uphold the SMO’s suspension of his operating privileges, and granting a stay of the proceedings against the Discipline Committee’s proceedings.

[15] In response to the Applicant’s application, the SMO moved for an order that the originating application be dismissed in its entirety as an abuse of process. The Board participated in the hearing in support of the SMO’s motion, once again represented by Ms. Libby.

[16] On December 18, 2017, Justice Jennifer Pritchard of the SKQB dismissed the Applicant’s application for judicial review as premature (*Patel v Carson*, 2017 SKQB 377). She determined that the comprehensive regulatory framework in place for dealing with the type of dispute in issue was an adequate alternative remedy and there were no other extraordinary circumstances that made judicial review appropriate.

[17] The Applicant appealed the December 18, 2017 decision to the SKCA. The appeal was dismissed (*Patel v Carson*, 2018 SKCA 98). The Applicant applied for leave to appeal to the Supreme Court of Canada. That application was also dismissed (*Patel v Carson*, 2019 CanLII 55708 (SCC)).

[18] While the Applicant's appeal from Justice Pritchard's decision was pending before the SKCA, the proceedings before the Discipline Committee continued to run their course. In accordance with its mandate, the Discipline Committee made a recommendation to the Board Practitioner Hearing Committee [BPHC] of the SHA. The majority of the Discipline Committee recommended that the suspension of the Applicant's surgical privileges continue, subject to a proviso that he be permitted to reapply for privileges after completing a period of supervised training.

[19] On June 15, 2018, the BPHC rendered a written decision in which it accepted the recommendations made by the majority of the Discipline Committee.

[20] The Applicant filed an appeal of the June 15, 2018 decision of the BPHC with the PSAT.

A. *Proceedings before the PSAT*

[21] Pursuant to the provisions of the *The Practitioner Staff Appeals Regulations,* RRS, c R-8.2 Reg 5, a three-person panel was appointed to hear the Applicant's appeal [Panel]. The appeal hearing began before the Panel on September 18, 2018.

[22] On October 9, 2020, the Panel issued a summons to a former patient of the Applicant, directing him to attend before the Panel and to disclose certain documents to the Applicant in relation to the PSAT proceedings. The patient is identified in these reasons by his initials C.L. to protect his privacy.

[23] C.L. obtained a stay of the summons before the PSAT and applied to the SKQB to quash the summons. The Applicant, in turn, filed an application for enforcement of the summons with the SKQB.

[24] The SHA applied for standing to participate in the hearing of the Applicant's application for the enforcement of the summons.

B. *Proceedings before the SKQB*

[25] On November 19, 2020, the parties appeared before Justice McCreary. That same day, Justice McCreary issued a fiat from the bench granting the SHA standing to appear and make submissions (*Standing Decision*).

[26] The Applicant alleges that prior to the hearing, on November 18, 2020, Justice McCreary and Justice Tochor met privately to discuss matters concerning the Applicant.

[27] On November 30, 2020, Justice McCreary dismissed the Applicant's application for the enforcement of the summons [*Summons Decision*]. She ruled that the Applicant had no standing to bring the application, that the summons could not be subject to enforcement while it was

stayed, and that the application amounted to a request for judicial review of an interim decision. At paragraph 19 of her reasons, Justice McCreary added:

> [19] […] it is my view that Dr. Patel s current application is completely and obviously without merit. I realize that Dr. Patel is self-represented and has limited knowledge of the complexities of administrative law. Still, this application borders on, and perhaps even infringes into, the area of frivolous and vexatious litigation. As I said, the application has no merit, but even if it did, the issue of the validity of the Summons is to be determined by this Court in another proceeding – the application for which was filed prior to Dr. Patel's application. In this context, Dr. Patel's application was utterly unnecessary, resulting in unwarranted expense to all the parties.

[28] Justice McCreary ordered the Applicant to pay $5,000 to C.L.

C. *Proceedings before the SKCA*

[29] The Applicant appealed five decisions of the SKQB to the SKCA, including the *Summons Decision* and *Standing Decision*. On appeal, the Applicant alleged that Justice McCreary had erred in a number of ways, including granting standing to SHA even though C.L. had previously been represented by current SHA counsel in his individual action against the Applicant. He also asserted that Justice McCreary ought not to have heard the matter, because prior to her appointment to the bench, the law firm at which she practiced had represented SHA. The Applicant sought various forms of relief, including an order upholding the summons, an order disqualifying Justice McCreary from hearing his matters, and the assignment of an out-of-province judge to hear all of his matters.

[30] As part of his appeal of the November 30, 2020 decision, the Applicant also asked for the recusal of Justice Tochor from a civil action brought by the Applicant against Mr. Evert Van Olst, legal counsel with the SHA, and a civil action brought by the Applicant against Mr. Reginald Watson, with Miller Thomson LLP, and Miller Thomson LLP. It bears noting that none of the decisions under appeal before the SKCA had been rendered by Justice Tochor.

[31] On October 29, 2021, following an application brought by the SHA, the SKCA ordered that the Applicant be managed as a vexatious litigant (*Saskatchewan Health Authority v Patel*, 2021 SKCA 140). The Court noted at para 117 that: “It was not only patently obvious that Dr. Patel had not established a factual basis for any of this relief, but equally clear that there was no basis in law upon which this relief (directed towards Justice Tochor) could be granted in the context of the appeal in which it was sought.”

[32] On August 31, 2021, the SKCA dismissed two of the appeals, allowed one in part, with regard to an order for costs against a solicitor, and quashed both appeals of the *Summons Decision* and *Standing Decision* on the basis of mootness: *Saskatchewan Health Authority v Patel*, 2021 SKCA 140 [*Patel FCA*].

[33] In quashing the two appeals as moot, the Court wrote:

> [184] Dr. Patel seeks an order reversing the *Summons Decision* and alternatively seeks a rehearing of the matter before a different judge. However, the fact remains that the summons can no longer be enforced because it has been stayed and the Panel that issued the summons has recused itself. Thus, a new hearing will be necessary. At present, there is no hearing to which C.L. can be summonsed as the Panel no longer exists and the hearing, and the summons order, are null and void. The issue is moot, as the

> substratum of the legal issues before us have disappeared and there is no live controversy.
>
> [185] The same conclusion holds with respect to the *Standing Decision*. The underlying *lis* – the enforcement of the summons – has disappeared and the issue of whether SHA should be added as a party is therefore moot.
>
> [186] Turning now to the question of whether the Court should nevertheless go on and hear these matters, in our view, as stated, there is no longer a live controversy between the parties on either of these matters. When the summons was stayed and the Panel later recused itself, any issue surrounding the enforcement of the summons became moot as did the issue of whether SHA was properly a party at the Court of Queen's Bench. Under these circumstances, proceeding to hear these matters on appeal – where no practical relief could be achieved – would amount to a further waste of judicial resources. Simply put, none of the factors outlined above weigh in favour of hearing these two appeals. The appeals should therefore be quashed on this basis.

[34] As a footnote to its conclusion on mootness, the SKCA acknowledged that the Applicant had also appealed the award of costs under the *Summons Decision*. The Court concluded that there was no basis to intervene or set aside the award of costs, commenting as follows at paragraph 190:

> […] we see no error of principle, nor any material misapprehension of matters on the part of the Chambers judge, that would allow us to interfere with the award of costs under the *Summons Decision*. As already noted, a Court of Queen's Bench judge has a broad, discretionary authority to award costs. Rules 11-1(4)(g) and (i) state, quite plainly, that in exercising her discretion the Chambers judge was permitted to consider "the conduct of any party that tended… to unnecessarily lengthen the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary". Having read her reasons, and with due regard for the record, we are not persuaded that the Chambers judge stepped outside her authority when making the costs award.

[35] The Respondent reports that the Applicant subsequently sought leave to appeal to the Supreme Court of Canada and that leave was dismissed: *Satyam Patel v Saskatchewan Health Authority, et al.*, (24 February 2022) 39896 (SCC).

D. *Civil Actions brought by the Applicant*

[36] The Applicant brought two separate civil actions in the SKQB.

[37] The first one was against Dr. Robert McMurtry, the Medical Officer who provided an opinion to the SHA about the medical care provided by the Applicant to certain patients. The Applicant claimed that Dr. McMurtry was liable for damages based on negligence, negligent misrepresentation, defamation, and wrongful interference with economic relations. The Applicant later amended his claim to add the Western Medical Assessment Corp [WMAC]: *Satyam Patel v Robert McMurtry and Western Medical Assessment Corp*, (24 March 2021) Regina, QBG 240/2020 (Sask QB).

[38] The WMAC brought a motion for an order striking the Applicant's claim and for summary judgment, made returnable on April 1, 2021. Justice Tochor was scheduled for civil chambers on that date and asked for a teleconference to be arranged to discuss some management issues with the parties in advance of the hearing, including the need for setting the matter to be heard on a special date instead of hearing it in conjunction with the regular chambers list. The teleconference was scheduled to take place on March 24, 2021.

[39] Prior to the teleconference, Justice Tochor learned that the Applicant had indicated earlier to the Local Registrar he was contemplating bringing a motion requesting that Justice Tochor recuse himself from hearing the matter. Justice Tochor understood the Applicant's concern in this regard arose from his prior involvement with MLT Aikins before his appointment to the court. Justice Tochor intended to address this issue during the teleconference.

[40] However, late on March 23, 2021, the Applicant filed a letter with the Registrar raising a another issue: he suggested that the defendants, in contacting the Local Registrar prior to filing the motion returnable on April 1 , 2021, were "judge-shopping" because those communications were made without his knowledge or participation.

[41] During the teleconference on March 24, 2021, counsel for the defendant submitted that the issues of conflict of interest or "judge shopping" were unfounded. However, for the sake of expedience and to avoid delaying the matter further to hear the application for recusal, counsel submitted to Justice Tocher that another judge should hear the application to strike.

[42] Justice Tochor agreed to request the Registrar to arrange a hearing date before a different judge to hear the application to strike. Justice Tochor reported his reluctance on the basis that agreeing to do so could be interpreted as potentially supportive of the merits of an application for recusal. However, he adjourned the matter, noting that the interests of the parties in the litigation had to be considered and respected and that the Applicant's recusal application could take several weeks to address and determine.

[43] The second action was brought against Mr. Evert Van Olst, legal counsel with the SHA: *Satyam Patel v Evert Van Olst*, Regina, (7 April, 2021) QBG 3187/2019 (Sask QB). The Applicant raised the issue of Justice Tochor's recusal on the same basis as in his civil action against Dr. McMurtry and the WMAC.

[44] The Applicant's motion for recusal or disqualification was heard by Justice Tochor at a special sitting on May 6, 2021. At the time the Applicant submitted his complaint against Justice Tochor to the CJC, the decision was under reserve.

IV. Particulars of the Complaints

[45] In his letters of complaint to the CJC, the Applicant writes that the "fundamental basis" of his complaints against Justice Tochor and Justice McCreary are allegations that both judges are in violation of a very clear rule in the CJC's *Ethical Principles for Judges* [*Ethical Principles*] which prohibits judges from presiding over matters in which their firm was involved in litigation.

[46] The Applicant states that Justice McCreary and Justice Tochor were partners at MLT Aikins when the firm represented the SHA in proceedings against him and that he "made every effort to resolve theses issues within the court processes." According to the Applicant, the potential for a "cover up" concerns him more than the potential for a "crime." He claims that the conversation between Justice Tochor and Justice McCreary the day before the hearing of his application for enforcement of the summons directed at C.L. "raises concern about collusion and reasonable apprehension of bias, given the comments made orally and in writing by these judges

and their shared prior practice history/prior representation of the Saskatchewan Health Authority."

A. *Allegations against Justice Tochor*

[47] Specific allegations against Justice Tochor are that he:

a) Acted in violation of the *Ethical Principles*, which prohibit judges from presiding over matters in which their former firm was involved in litigation prior to their appointment to the bench;

b) Violated the *Ethical Principles* numerous times as the underlying actions that he was presiding over concern the spouse of a Queen's Bench judge and the uncle of a Queen's Bench judge;

c) Is guilty of misconduct, failed in the due execution of the office of judge and has been placed by his conduct or otherwise in a position incompatible with the due execution of that office;

d) Failed to disclose proactively his own potential conflict of interest;

e) Encouraged and allowed opposing counsel to judge shop via the Registrar on numerous files;

f) Reserved the decision on his own recusal application since May 6, 2021;

g) Ignored the case law regarding the provisions of transcripts in recusal applications; and

h) Possibly received correspondence from counsel in separate legal matters requesting permission to observe a hearing in the civil action brought by the Applicant against Mr. Van Olst and the civil action brought by the Applicant against Mr. Watson.

[48] The Applicant argues in his complaint that "[t]o a reasonable, dispassionate, properly informed observer it would be plain and obvious based on the above information that the likelihood of Mr. Van Olst [Legal Counsel with the SHA] and Mr. Tochor (as he was at the time) being considered colleagues would be very high."

B. *Allegations against Justice McCreary*

[49] Specific allegations against Justice McCreary are:

a) Her involvement in the summons proceedings before the SKQB falls afoul of the *Ethical Principles*;

b) She practiced in the area of health care law at MLT Aikins while a colleague was acting as counsel for the RQRHA in the proceedings against the Applicant;

c) She did not give any reasons for the order granting standing to SHA;

d) She failed to hear arguments on the SHA's application for standing;

e) She labeled the Applicant's action as vexatious and frivolous without formal consideration or reason;

f) She disregarded her duty to adjudicate the matter before her on the facts in front of her;

g) She violated the Applicant's rights by discussing with Justice Tochor;

h) She conducted herself in a way that raised concerns of collusion, reasonable apprehension of bias and potential cover-up; and

i) She should have disclosed that she was in a conflict of interests because of her previous employment with MLT Aikins.

V. Mandate of the CJC

[50] Subsection 60(1) of the *Judges Act*, RSC 1985, c J-1 [*Judges Act*], provides that "[t]he objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial services, in superior courts."

[51] In furtherance of these objective, the CJC has the authority to make inquires and investigate complaints or allegations concerning superior court judges as described in section 63 of the *Judges Act.* Subsection 63(2) provides that the CJC "may investigate any complaint or allegation made in respect of a judge of a superior court." The CJC may constitute an Inquiry Committee for the purposes of conducting an inquiry into allegations of judicial misconduct (*Judges Act*, s 63(3)). An Inquiry Committee has all the powers of a superior court, including the power to compel the attendance of any person to appear before it and give evidence (*Judges Act*, s 63(4)).

[52] 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. The CJC has enacted the *Canadian Judicial Council Inquires and Investigation By-Laws*, 2015 [CJC By-laws] and established a policy defining the procedures for the review of complaints or allegations about federally-appointed judges: *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, effective 29 July 2015 [Review Procedures]. The CJC By-laws and Review Procedures set out a multi-stage process for the investigation and determination of complaints against judges.

[53] Once a complaint about a judge is received, the Executive Director of the CJC must review it and determine whether the matter warrants further consideration in light of the CJC's screening criteria found in section 5 of the Review Procedures:

5. Early Screening Criteria	**5. Critères d'examen préalable**
For the purposes of these Procedures, the following matters do not warrant consideration:	Aux fins de ces procédures, les affaires suivantes ne justifient pas un examen :
(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.

[54] If the matter warrants further consideration, the Executive Director must refer the matter to the Chairperson or Vice-Chairperson of the Judicial Conduct Committee (Review Procedures, s 4.3). If the Executive Director determines that the matter does not warrant further consideration, the complainant is informed and the matter does not proceed.

VI. Decisions under Review

[55] As noted earlier, on January 10, 2022, the Executive Director dismissed the Complaints after reviewing them in compliance with the Review Procedures and the CJC's *Ethical Principles* that was then in effect. The Executive Director found that both Complaints do not warrant consideration by the CJC as they did not concern judicial conduct.

[56] The key part of the Executive Director's decisions are the same in both decision letters:

> It is important to understand that Council has no supervisory role as regard decisions or judgments issued by judges. In other words, it is not the role of Council to review issues related to judicial decision-making and the exercise of judicial discretion. Council is not a court, nor an appeal body. Council has no authority to interfere with a judicial proceeding, nor to review the judge's decision. It is also important to understand that in reaching their decisions, judges exercise judicial decision-making authority. This includes decisions pertaining to procedure, the assessment of the evidence, the application of the law, the control of the hearing as well as the control of the proceedings. Such functions fall within the ambit of judicial discretion and are not issues of conduct. A party who disagrees with a judge's decision must bring the matter before an appellate court.
>
> In regard to conflict of interest, it must be noted that impartiality is the fundamental qualification of a judge and a core attribute of the judiciary. It is key to our judicial process, and it is presumed. This

> presumption of impartiality carries considerable weight. When acting in the course of judicial duties, judges are presumed, unless the contrary is demonstrated, to have acted in good faith and with due and proper consideration of the issues before them.
>
> If the potential for conflict of interest exists, the matter must be reviewed by the judge and it is for the judge to decide whether disqualification is appropriate. Council's publication *Ethical Principle for Judges* provides that there are three main factors to be considered. "First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts." In any case, such determination must be raised in Court, as you indicated you have done, and does not fall within the mandate of the Council.
>
> The Council's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* provide an early screening process of complaints that falls under my responsibility. Having reviewed your complaint, it is my view that it does not warrant consideration by the Council as it does not concern judicial conduct.

VII. Issues

[57] The Applicant frames the issues to be determined in the present proceedings as follows:

> a. Failure of the CJC to investigate objective and undeniable breaches of its own Ethical Principles by artificially labeling the issue of judicial impartiality as a decision rather than as conduct is improper.
>
> b. There is clear precedent for judicial recusal in settings of prior knowledge, extraneous knowledge, and prior firm involvement in litigation, including the recusal of Leurer JA, a nearly identical situation.
>
> c. The CJC Decisions regarding the complaints against Mr. Justice Tochor and Madam Justice McCreary are not transparent, not

> intelligible, and not justifiable, as required of administrative decision makers by the Supreme Court per *Vavilov*.
>
> d. The Application had a legitimate expectation that Judicial Impartiality would be addressed meaningfully by the CJC which the CJC failed to do both substantively and procedurally. These decisions undermine the purpose of the CJC's governing legislation and policy documents, which in turn undermines the perceived impartiality of Canadian judges.
>
> e. The CJC's failure to produce a meaningful record of proceedings undermines meaningful judicial review and an adverse inference should be drawn.

[58] The above read more like arguments than a list of issues. In any event, they all come down to the same proposition: that the Decisions are unreasonable.

[59] It is important to bear in mind that the role of this Court on judicial review is not to address the merits of the Applicant's Complaints against Justice Tochor and Justice McCreary to the CJC, but rather to determine if the conclusion of the Executive Director that the Complaints do not warrant consideration by the CJC as they do not concern judicial conduct is reasonable: *Cosentino v. Canada (Attorney General),* 2020 FC 884 at para 31; *Turner-Lienaux v Canada (Attorney General)*, 2021 FC 1483 [*Turner-Lienaux*] at para 12. This is the determinative issue in these proceedings.

VIII. Analysis

A. *Standard of Review*

[60] This Court and the Federal Court of Appeal have affirmed that decisions of the Executive Director exercising the CJC's screening function must be reviewed against the reasonableness

standard: *Girouard v Canada (Attorney General)*, 2020 FCA 129 at para 38; *Lim v Canada (Attorney General)*, 2022 FC 140 at para 12; *Lochner v Canada (Attorney General)*, 2021 FC 692 [*Lochner*] at para 79; *Turner-Lienaux* at para 4.

[61] 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": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 85. It must be based on reasoning that is both rational and logical: *Vavilov* at para 102.

[62] Reasonableness review does not call on the Court to decide the issue anew, nor to conduct its own assessment of the evidence, or assess how it would have decided the case: *Vavilov* at paras 75, 125, 288–291. Rather, the Court reviews the decision of the administrative decision maker and the reasons given, seeking to understand the reasoning and assessing whether the decision as a whole bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 15, 83–86, 94–100.

B. *Whether the Decisions are Reasonable*

[63] The Applicant submits that the Executive Director erred by deeming that the Complaints were not matters of judicial conduct. He submits that the Complaints clearly pertain to judicial conduct.

[64] The Applicant's submissions are essentially a rehash of arguments already made to the Executive Director. The gist of his arguments is that judges have obligations to disclose potential

conflicts pro-actively and have obligations not to rule on matters which they or their former firms were involved in litigation prior to being appointed to the bench. He argues that this is a basic expectation that is objectively codified in the *Ethical Principles*, but not enforced here.

[65] The Applicant submits that the distinction between conduct, which is the purview of the CJC, and a decision, which is allegedly outside the purview of the CJC, is whether the action violates ethical principles broader than the decision rendered. The Applicant asserts that even if the judges were to have ruled in his favor, presiding over a case in which a previous client was a party is still unethical and improper. Further, it is not clear that just because something is a decision, it cannot simultaneously be considered conduct. Overlapping jurisdiction is not uncommon in administrative oversight of ethical issues.

[66] The Applicant claims that the Executive Director incorrectly assumed that the ability to bring the matter before an appellate court exists or is at all relevant. He submits that the Executive Director failed to consider the entirety of the CJC's own *Ethical Principles* document, failed to consider objective violations of the *Ethical Principles* an issue of conduct, and failed to consider violations of precedent about judicial disclosure, the necessity for a decider of fact to have a "fresh mind," and the ability of the Courts to quash decisions where the prior relationships of the deciders of fact raises reasonable apprehension of bias.

[67] The Applicant cites the Alberta Court of Appeal decision in *Carbone v McMahon*, 2017 ABCA 384 at para 94, for the proposition that a judge must disclose information that might

cause an objective observer to conclude that a judge may not be impartial. In the same decision, the court emphasized the importance of judicial impartiality:

> [46] Judicial impartiality is the cornerstone of our ancient and sturdy judicial structure."[P]ublic confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so".

[68] The Applicant also relies on the decision in *De Cotiis et al v De Cotiis et al*, 2004 BCSC 117, where the court said the following :

> [5] A judge, on appointment to the bench, must be very concerned about apprehensions of bias. Normally, a period of time will elapse before a judge will hear cases brought before him or her by counsel from his or her former firm.
>
> [6] There is neither in law nor in guidelines any set period of time that must elapse before a judge is able to hear a matter in which a party is represented by counsel from his or her former firm. Rather, the question is one of whether a reasonable person with knowledge of the circumstances would perceive that there might be a predisposition or bias resulting from the past relationship.
>
> [7] Clearly, in the interests of justice, a judge must not hear any matter where there is any reasonable apprehension that he or she might be biased. To do so would bring the administration of justice into disrepute. A previous association between a judge and a law firm can, in some circumstances, raise such an apprehension.

[69] The Applicant claims that the Executive Director "artificially labe[led]" the issue of judicial impartiality as a judicial decision rather than judicial conduct. He maintains that the concurrent failure of the SKCA and the CJC to address the issue of judicial impartiality on its merits is concerning and can now only be addressed by the Federal Court. I disagree. The

Applicant conflates and confuses two separate matters: judicial conduct that entails decision-making and judicial misconduct.

[70] In the present case, the CJC determined the complaint to be about judicial decision making. Under subsection 63(2) of the *Judges Act*, the CJC may investigate a complaint, other than complaints filed by the Minister of Justice of Canada or the Attorney General of a province, which are the subject of subsection 63(1). For this purpose, the Executive Director screens the complaints to determine if they warrant consideration.

[71] In *Moreau-Bérubé v New Brunswick (Judicial Council),* 2002 SCC 11 [*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.

[72] The Supreme Court noted, at paragraph 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." The Supreme Court also noted, at paragraph 55 that most matters involving the conduct of a judge can be dealt with through the appeal process.

[73] The Supreme Court explained:

> [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.

[74] In *Lochner*, Justice Catherine Kane confirmed at para 100 that "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.

[75] Here, the Applicant submitted his Complaints to the CJC shortly after his appeals of the *Summons Decision* and *Standing Decision* were quashed by the SKCA. The Applicant raised many of the same allegations of misconduct against Justice McCreary and Justice Tochor in his appeals and sought to disqualify them from hearing his matters on the same grounds of conflict of interest and bias that he then raised before the CJC. While the SKCA may have disposed of the appeals on the grounds of mootness, it did not disturb Justice McCreary's cost disposition, presumably rejecting the Applicant's allegations of misconduct. The SKCA also concluded that

the Applicant had not established a factual basis for disqualifying Justice Tochor from hearing any of his matters.

[76] Further, the Applicant brought a motion for recusal of Justice Tochor raising the very same allegations he made in his complaint against the judge to the CJC. I am advised that Justice Tochor dismissed the Applicant's motion on August 28, 2022: *Patel v Van Olst*, 2022 SKQB 199.

[77] The CJC is not a court; in fulfilling its mandate, it must take care not to usurp the functions of appellate courts. Accordingly, matters that constitute judicial decision-making and that can be fully addressed by an appeal fall short of the mandate of the CJC.

[78] Issues that arise as part of decisions made in the judicial process, including in the context of motions for recusal, are part of the judicial decision-making process, and any concerns stemming from them can generally be fully addressed on appeal.

[79] There are limited and exceptional types of cases where a judge's conduct in the course of judicial decision-making can give rise to judicial conduct that must be addressed under the *Judges Act*. However, these exceptional cases are limited to occurrences where the conduct created a loss of public trust and concerns about the integrity of the judicial function itself: *Moreau-Bérubé*, para 58, 70; *Best v Canada (Attorney General),* 2017 FC 1145 [*Best*], para 39. The conduct reproached in the Complaints do not, in my view, fall within this category.

[80] As was found to be the case in *Cosentino v Canada (Attorney General),* 2020 FC 884, the Applicant's reliance on the *Ethical Principles* to argue that the Executive Director erred in finding that the Complaints did not relate to judicial misconduct is misplaced. It is based on isolated passages that ignore the other guidance provided. Justice Kane noted at para 92: "Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or list of prohibited behaviours. They do not set out standards defining judicial misconduct." (Her emphasis.)

[81] To be clear, the *Ethical Principles* do not, as alleged by the Applicant, prohibit judges from presiding over matters in which their firm was involved in litigation. They simply provide at E.19 that "the judge should not deal with cases concerning which the judge actually has a conflict of interest" and caution that "circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial."

[82] The Executive Director found that "If the potential for conflict of interest exists, the matter must be reviewed by the judge and it is for the judge to decide whether disqualification is appropriate."

[83] The Applicant's Complaints are premised on the existence of an actual or potential conflict of interest or a reasoned suspicion of impartiality on the part of Justice McCreary and Justice Tochor by virtue of their "prior practice history/prior representation" of the SHA. However, as noted by the Executive Director "judges are presumed, unless the contrary is

demonstrated, to have acted in good faith and with due and proper consideration of the issues before them.” Those who challenge the presumption of impartiality must present cogent and substantial evidence to justify the conclusion on a balance of probabilities that the judge was, in fact, biased or that a reasonable, right-minded and properly informed person would conclude that the judge did not decide the case impartially: *Carbone* at para 62, citing *R v S (RD),* [1997] 3 SCR 484 at para 49.

[84] In the cases at hand, the Applicant’s allegations of conflict of interest and bias rely largely on speculation and conjecture, or on unsupported bald assertions.

[85] By way of example, the Applicant raises concerns about a meeting that took place on November 18, 2020, prior to the hearing of *Summons Decision*, between Justice McCreary and Justice Tochor, allegedly to discuss matters concerning him. However, the information was based on hearsay and the Applicant acknowledges in his Complaints that “the subject and extent of that discussion remain unknown despite (his) requests for clarification.”

[86] Moreover, in his first affidavit in support of his application for recusal of Justice Tochor as the presiding case management judge, the Applicant states “it is not known when Mr. Justice Tochor's financial ties to MLT Aikins formally concluded.” In a second affidavit filed in support of his application for recusal and disqualification of Justice Tochor, the Applicant states that the exact dates that MLT Aikins participated in litigation against him and the exact role that the law firm played “is not known to me as a result of solicitor client privilege asserted by the SHA.”

[87] I see no error in the Executive Director’s conclusion that the Applicant's allegations raised as part of his complaint against Justice McCreary all concern the exercise of discretion or conduct in the context of judicial decision-making. They are similar in nature to the allegations raised against a judge in *Lochner*, as described in paragraph 107

> [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.

[88] In *Lochner*, the Court concluded that the matters complained of were clearly all about judicial decisions and that the applicant’s perception and characterization of the judicial decisions and his dissatisfaction with the decisions did not transform a judicial decision into judicial misconduct.

[89] The Applicant submits that it is noteworthy that when the very same conflict allegations he made against Justice McCreary were raised with Justice Robert Leurer of the SKCA, he immediately recused himself from that matter, and a day later from a subsequent matter, involving the Applicant and the SHA despite stating, on the record, that he never personally worked on the Applicant’s file and that he maintained a broad area of practice which did not focus on healthcare law. In my view, this is a false analogy. Every matter before a court has to be adjudicated by considering the facts of that particular case.

[90] As for the allegations of conflict of interest and bias against Justice Tochor, they were clearly premature when the Complaints were submitted. Justice Tochor quite properly took the matter under advisement after being asked to recuse himself. If the Applicant disagrees with Justice Tochor's decision, the proper recourse is an appeal, and not a complaint to the CJC.

C. *Other Issues*

[91] At paragraphs 6, 13 and 39 of the Applicant's memorandum of fact and law, the Applicant argues that, by screening out the Applicant's Complaints, the Executive Director failed to observe the requirements of procedural fairness. If I understand the argument correctly, the Applicant is claiming that the Executive Directive violated his procedural fairness rights by failing to investigate and sanction clear allegations against Justice Tochor and Madam Justice McCreary, which were fully supported by evidence of their prior legal practices and unrefuted.

[92] However, a procedural fairness argument was never raised in the Notices of Application. Therefore, this issue cannot be the subject of the review before this Court.

[93] In any event, it is well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown. The Applicant's argument that the Decisions of the Executive Director did not disclose exactly what was considered and lacked detail must also fail. The Supreme Court of Canada has established that the decisions of an administrative body must not be assessed against a level of perfection: *Vavilov*, para 91. The failure to refer to all of the arguments, statutory provisions, jurisprudence and other details is not a basis to set a decision aside. The screening procedure of the CJC, "a

discretionary administrative winnowing function that did not decide any legal rights, duties or liabilities" further justifies the format and concision of the Executive Director's decisions. Although the Decisions may appear to be boiler-plate, I am satisfied that the Executive Director was attentive to the evidence adduced and arguments made by the Applicant.

[94] For these reasons, the screening out of the Applicant's complaint by the Executive Director on the basis that it does not raise issues of judicial conduct, as per the CJC's mandate, does not raise an issue of procedural fairness.

[95] The Executive Director reviewed the allegations and concluded that they were in essence complaints about judicial decision-making and not judicial conduct. The Executive Director provided logical reasons for this conclusion. This result was consistent with past practice. The Decisions are reasonable.

[96] Finally, in his prayer for relief, the Applicant seeks various remedies, including:

> (a) That the CJC be ordered to convene and instruct an inquiry committee pursuant to the *Judges Act,* the CJC By-Laws and its established procedures and policies to address concerns regarding the breach of the CJC Ethical Code and of professional misconduct by Justice Tochor and Justice McCreary;
>
> (b) That the CJC be ordered to proceed directly to a full Council hearing regarding allegation of professional misconduct rather than a preliminary review by the Chair or Vice-Chair of the Judicial Conduct Committee or by a formal Review Panel or by an inquiry committee regarding allegations against Justice Tochor and Justice McCreary and;
>
> (c) In the alternative, that the Decisions be quashed and the CJC be ordered to convene an inquiry committee or review panel to reconsider its decision according to law

[97] For the sake of completeness, I wish to make clear that if either of the applications had been granted based on a reviewable error, I would not have granted any of the requested remedies. The matter would simply have been referred back to the Executive Directive for redetermination for concluding that the Complaints do not warrant consideration under section 5 of the Review Procedures.

D. *Costs*

[98] I conclude that there are no special circumstances in this case that would warrant a departure from the general rule that costs should follow the event. The relevant considerations under Rule 400(3) of the *Federal Courts Rules* include the extensive record, the significant amount of time necessarily spent by counsel for the Respondent to review the record, the preparation of responding material, and the attendance of counsel at the hearing. The Respondent submits that a lump sum should be awarded in the amount of $1,000 in each case. I agree. The amount requested is quite modest and fully justified.

IX. Conclusion

[99] For the above reasons, the applications for judicial review in T-245-22 and T-246-22 are dismissed.

[100] The Applicant shall pay costs in each case of $1,000, inclusive of disbursements and taxes.

JUDGMENT IN T-245-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. Costs of the application in the amount of $1,000.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Roger R. Lafrenière"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-245-22
STYLE OF CAUSE:	DR. SATYAM PATEL v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 7, 2022
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	JULY 4, 2023

APPEARANCES:

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