

**IN THE MATTER OF A COMPLAINT TO THE JUDICIAL COUNCIL
FOR TERRITORIAL JUDGES REGARDING
TERRITORIAL JUDGE DONOVAN MOLLOY, PURSUANT TO THE
*TERRITORIAL COURT ACT, RSNWT 1988, c. T-2***

REASONS FOR DECISION ON JURISDICTION

Date of Decision: November 3, 2023

Judicial Council Panel Members:

Justice Karan Shaner (Panel Chair)	Designate of the Chief Justice of the Supreme Court of the Northwest Territories
Justice Jack Watson	Designate of the Chief Justice of the Northwest Territories Court of Appeal
Sheldon Toner	Designate of the Law Society of the Northwest Territories
Colin Baile	Designate of the Commissioner of the Northwest Territories
Dr. Patrick Scott	Designate of the Commissioner of the Northwest Territories

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INTRODUCTION

[1] On July 23, 2023, Judge Donovan Molloy (“Molloy”) of the Territorial Court of the Northwest Territories resigned from his position. The resignation became effective the following morning when it was accepted by the Commissioner in Executive Council.

[2] At the time he resigned, Molloy was the subject of a conduct complaint before the Judicial Council for Territorial Court Judges (the “Judicial Council”), established under the *Territorial Court Act*, RSNWT 1988 c. T-2 (the “TCA”). The hearing into the complaint was scheduled to proceed on July 24, 2023, the day Molloy’s resignation became effective. This led to the question, whether the resignation extinguished the Judicial Council’s ability to exercise jurisdiction over Molloy to continue the hearing.

[3] For the following reasons, we have concluded the Judicial Council does not have jurisdiction to hear, or continue to hear, complaints about former territorial court judges.

HISTORY OF THE COMPLAINT

[4] On June 11, 2021, Martha Chertkow, a Crown Prosecutor with the Public Prosecution Service of Canada (the “PPSC”), filed a complaint with the Judicial Council about Molloy’s conduct while presiding over various court proceedings between December 2019 and May 2021. The complaint was reviewed by the

Designated Chair of the Judicial Council in accordance with s 31.31 of the *TCA* and deemed serious enough on its face to warrant referral to investigation by a subcommittee. In a written report dated April 12, 2022, the subcommittee recommended the complaint be referred to a hearing. The Judicial Council accepted the recommendation.

[5] A panel of five members of the Judicial Council (the “Panel”) was struck to hear the merits of the complaint, as well as any preliminary applications: Justice Karan Shaner, designated by the Chief Justice of the Supreme Court of the Northwest Territories, Justice Jack Watson, designated by the Chief Justice of the Northwest Territories Court of Appeal, Sheldon Toner, designated by the Law Society of the Northwest Territories, and Colin Baile and Dr. Patrick Scott, both designated by the Commissioner of the Northwest Territories.

[6] The Panel appointed Mr. Simon Renouf, KC, as Presenting Counsel to bring the case forward, pursuant to its power to do so under s 31.6(1)(b) of the *TCA*. The Panel also granted the Complainant limited standing.

[7] On August 23, 2022, Presenting Counsel provided the Panel and Molloy with 13 citations outlining the particulars of the alleged misconduct. These are appended.

[8] The Panel scheduled dates in October and November 2022 for preliminary motions and the hearing itself. There were a number of adjournments, all at Molloy’s request. Ultimately, the hearing was set to take place on July 24, 2023.

[9] Among the materials Molloy filed in advance of the hearing were reports and affidavits from three psychiatrists and his family physician, all of whom had examined him. They each concluded Molloy was physically and mentally ill to such an extent that he was no longer capable of carrying out his judicial duties.

[10] On July 23, 2023, the Panel received a letter from Molloy’s counsel advising he had submitted his resignation to the Minister of Justice. The letter was accompanied by a Notice of Intention to Raise a Jurisdictional Issue asking the Panel to find Molloy’s resignation effectively brought the proceedings to an end for lack of jurisdiction.

[11] On July 24, 2023, at the commencement of the hearing, Molloy’s counsel advised the Panel his resignation had been accepted by the Commissioner in

Executive Council, effective July 24, 2023, in accordance with s 10 of the *TCA*. At that point, Molloy ceased to be a territorial judge.

[12] The Panel heard oral submissions on jurisdiction from Molloy's counsel, Presenting Counsel, and the Complainant's counsel. Molloy's counsel also tendered limited written submissions. The Panel then heard applications on behalf of the Attorney General for the Northwest Territories (the "Attorney General") and the PPSC, seeking standing to file written submissions relating to jurisdiction. Those applications were granted. The Panel adjourned the hearing, with a direction that written submissions from the parties, as well as counsel for the PPSC and the Attorney General be received on the sole issue of the Panel's jurisdiction to hear the complaint given Molloy's resignation.

[13] Molloy discharged his legal counsel shortly after the hearing was adjourned.

[14] Counsel for the PPSC subsequently advised he would not be taking a position on jurisdiction.

[15] The Panel subsequently received written submissions on jurisdiction from Molloy, Presenting Counsel, counsel for the Complainant, and from the Attorney General.

ISSUES

[16] There are two related issues. The first is whether the Judicial Council has jurisdiction to review, or continue to review, the conduct of a former judge. If the answer to that question is "yes", the second issue arises, namely, whether the proceedings should be concluded by reason of there being no meaningful disposition available to the Judicial Council.

SUMMARY OF THE PARTIES' POSITIONS

[17] All parties agree the analysis starts with the principles set out in *Re Rizzo & Rizzo Shoes Ltd.*, [1998], 1 SCR 27, 1998 CanLII 837, which calls for words in a statute "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (at para 21); but they disagree on where the application of those principles should lead.

Molloy, Presenting Counsel, and the Attorney General

[18] Molloy, his former counsel, Presenting Counsel, and the Attorney General each presented their own submissions; however, they contain common threads which can be summarized together. They submit the *TCA* does not give the Judicial Council authority to review, or to continue to review, a complaint about a former judge.

[19] These parties point out there is nothing in the *TCA* which expressly gives the Judicial Council authority over a former judge, nor can such authority be implied. The definition of “territorial judge” itself does not refer to former territorial judges; it is used throughout the *TCA* in reference to *active* judges. The term “territorial judge” is what is found in the provisions respecting the regulation of conduct by the Judicial Council. Save for s 6(2), which applies to the appointment of deputy judges, there is no express reference to “retired” judges. Sections 12 and 17(1) contemplate the rights or duties of territorial judges who have left office.

[20] Both Presenting Counsel and the Attorney General provided examples of equivalent legislation from other Canadian jurisdictions which, in contrast to the *TCA*, contain express provisions allowing judicial conduct proceedings to continue in the face of a resignation. They also point to the manner in which the Canadian Judicial Council, which regulates the conduct of federally appointed judges, has historically interpreted the federal *Judges Act*, RSC 1985, c. J-1 as not allowing for inquiries into the conduct of former federal judges.

[21] Interpreting the term “territorial judge” to include former judges within the jurisdiction of the Judicial Council would mean anyone who had ever been appointed a judge of the Territorial Court could be subject to a conduct inquiry. This interpretation is overly broad, would lead to absurd results, and is unsupported by the principles of statutory interpretation. Had the legislature intended to give the Judicial Council authority over former judges, it would have expressly included words to that effect in the *TCA*.

[22] On the question, whether the Judicial Council should continue with the hearing if it determines it has jurisdiction, Molloy and Presenting Counsel submit it should exercise its discretion to decline to do so. The documentary evidence and the resignation definitively ended the issue of Molloy’s fitness to continue sitting. The

Legislative Assembly cannot now remove him from office as he already resigned. The remaining remedies, namely, warning, suspending, or reprimanding a judge who has engaged in misconduct would similarly have no practical effect. The public's interest would not be served by proceeding with an expensive, multi-day process which could lead to no practical remedy.

The Complainant

[23] The Complainant argues the Judicial Council has jurisdiction to continue with its review of the complaint, despite Molloy's resignation. While she agrees the definition of "territorial judge" does not expressly include former judges, she points out there is nothing in the *TCA* explicitly limiting the complaint process to active judges. She argues the failure to expressly include former judges within the definition of "territorial judge" is an innocent omission, not a deliberate choice to exempt former territorial judges from the complaint process.

[24] The Complainant's argument relies heavily on the undisputed fact that judges occupy a unique position in a democracy and play a direct role in preserving confidence in the impartiality and integrity of the justice system. The Judicial Council, in turn, is central in maintaining public confidence in that impartiality and integrity through its role in examining alleged judicial misconduct and, where it is found, taking the appropriate action. The alleged misconduct in this case is particularly egregious and attracted wide-spread publicity. The Judicial Council's responsibilities go beyond Molloy's individual status as a judge and into the overall effect of his conduct on public confidence in the impartiality and integrity of the Territorial Court. This must inform and consequently, expand, the definition of "territorial judge" to include former territorial judges where it appears in the complaint provisions of the *TCA*.

[25] Relatedly, the Complainant's submission suggests that when interpreting these provisions, it is appropriate to consider broader purposes which the provisions could serve as well as the specific purposes that by the terms of the provisions they clearly exist to serve. In this regard, the Complainant submits Molloy's alleged misconduct has had a real and deleterious effect upon her as a professional person, upon her colleagues at the bar, upon other citizens, and upon public confidence in the administration of justice. She submits continuing the proceeding provides the opportunity to rectify that negative impact and argues that the provisions of the *TCA* should be construed with those broader purposes in mind. While a reprimand, the only feasible remedy at the Judicial Council's disposal, might have little effect on Molloy personally, it would nevertheless publicly acknowledge the wrongfulness of

the conduct and thus permit the Judicial Council to discharge its responsibility in restoring and maintaining public confidence in the administration of justice.

[26] With respect to extra-territorial legislation which specifically allows judicial misconduct inquiries to continue after a judge leaves office, the Complainant argues these represent legislative amendments demonstrating an evolving understanding of the unique role of judicial councils and a need to deal with challenges which have simply not yet arisen in the Northwest Territories. Similarly, the Complainant says cases decided under the federal *Judges Act* do not assist in determining the Judicial Council's jurisdiction because of significant differences in available remedies between the federal legislation and the *TCA*.

[27] Finally, the Complainant argues legislation regulating the conduct of other professionals, such as physicians, lawyers, dentists, engineers, and psychologists, does not assist in answering the question whether the Judicial Council has jurisdiction over a former judge. Regulation of other professions is important but serves a narrower purpose. Other professions do not occupy the same position as judges do in our society. A loss of public confidence in a particular profession will doubtless have an effect on that profession and those who use the services they provide, but it is not of the same calibre as a loss of public confidence in the impartiality and integrity of the judiciary.

ANALYSIS

Does the Judicial Council have jurisdiction to continue with the inquiry into the alleged judicial misconduct?

[28] The Judicial Council is an adjudicative body established pursuant to s 31(1) of the *TCA*. Its purpose and object is to adjudicate conduct complaints against territorial judges. It is composed of a judge of the Court of Appeal of the Northwest Territories, designated by the Chief Justice of the Court of Appeal; the Chief Justice of the Supreme Court of the Northwest Territories (or designate), who also Chairs the Judicial Council; the Chief Judge of the Territorial Court (or designate); a lawyer appointed by the Law Society of the Northwest Territories; and two persons appointed by the Commissioner in Executive Council of the Northwest Territories who are neither judges nor lawyers or former lawyers.

[29] When a judge's conduct, whether in or outside the courtroom, is called into question, there is a risk the public's confidence in the judiciary and the administration of justice as a whole will be affected adversely. Individually, judges

occupy a central role in the administration of justice and institutionally, the judiciary is one of three branches of government in a democracy. In *Re Therrien*, 2001 SCC 35, [2001] 2 SCR 3, Gonthier, J stated:

108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard, supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court, supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

109 If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

[30] In the face of alleged misconduct, the Judicial Council bears the important responsibility of preserving public confidence in the integrity and impartiality in the judiciary as an institution and the overall administration of justice. In *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249, Arbour, J described it this way:

46 Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as “responsible for preserving the integrity of the whole of the judiciary” (also see *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where

their conduct may threaten judicial integrity (*Therrien, supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R v Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *Beauregard v Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *Valente, supra*).

[31] These principles must inform the approach the Judicial Council takes in carrying out its responsibilities, including the manner in which it interprets its powers under the *TCA*. This said, it is equally important for the Judicial Council to respect the parameters of its jurisdiction. As with any other adjudicative body created by statute, the Judicial Council's jurisdiction over a former judge must be found within the wording of the enabling legislation. Jurisdiction either exists or it does not. It cannot be read-in, expanded, or created based on policy considerations, nor can it be founded on case-specific facts, regardless of how compelling they are.

[32] Case law bears this out. In *Harris v Law Society of Alberta*, [1936] SCR 88 at 101, 1936 CanLII 18 (SCC), Rinfret, J, found the Law Society of Alberta, which was created by statute, had exceeded its jurisdiction in a disciplinary matter and declared its resulting order void. He noted:

It is important to keep in mind, therefore, that we are not dealing with a body invested with the plenary authority of a common law court, *but a body to which has been given only limited statutory authority*. [emphasis added]

[33] In *Maurice v Priel*, [1989] 1 SCR 1023, 1989 CanLII 89 (SCC), the Supreme Court of Canada held the Law Society of Saskatchewan had no jurisdiction to hold disciplinary proceedings with respect to a former lawyer, who had been appointed to a judge, concerning conduct which occurred before his appointment: it only had jurisdiction to regulate the conduct of active members. In *Pelletier v Law Society of New Brunswick*, 1989 CanLII 5179 (NBCA), Ayles, JA found there was no authority in the enabling legislation for the Law Society of New Brunswick to refuse to accept the resignation of a member while he was subject to disciplinary proceedings. Moreover, in the absence of clear provisions in the enabling legislation, the Law Society had no jurisdiction to *continue* the disciplinary proceedings after the member resigned.

[34] Although there are broader societal interests at play in the regulation of judicial conduct than in other professions, case law interpreting the jurisdiction of other professional disciplinary bodies is consistent in its direction that an

adjudicative body created by statute is limited to the jurisdiction bestowed on it through its enabling legislation. It is thus useful in our analysis.

[35] As noted, the analysis is a contextual one. The provisions relating to the Judicial Council's powers must be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]." *Rizzo Shoes*, at para 21. Upon conducting that analysis, it is our view the *TCA* does not grant the Judicial Council jurisdiction to review, nor to continue to review, complaints about former territorial judges. Our reasons, explained below, are these: the definition of "territorial judge" does not expressly, nor by implication, include former judges; the term is used throughout the *TCA* in relation to active territorial judges; importantly, it is used within the legislative provisions governing complaints without modification; the context surrounding those provisions, particularly the remedies the Judicial Council can impose or recommend, cannot be imposed meaningfully on former territorial judges; and finally, interpreting the *TCA* as giving the Judicial Council authority to inquire into the conduct of former territorial judges would lead to unintended consequences.

[36] The term "territorial judge" is defined in s 1(1) of the *TCA*:

"territorial judge" means a judge of the Territorial Court appointed under subsection 4(2) of the Act and, except where expressly stated to the contrary, includes a deputy territorial judge.

[37] The presumption of consistent expression in statutory interpretation directs that "unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act". *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at 400, 1992 CanLII 121. Legislators are presumed to express terms consistently in a statute. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 53, [2016] 2 SCR 555. If anything other than consistent expression is intended by the legislature, the language used should, in context, demonstrate that the presumption of consistent expression is "clearly rebutted": see *R v Steele*, 2014 SCC 61 at paras 51-52, [2014] 3 SCR 138; *HMB Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44 at para 59, 462 DLR (4th) 642.

[38] The provisions relating to the complaint process contained in ss 29.1 to 31.8 of the *TCA* use the term "territorial judge" without modification and there is nothing within those provisions which would rebut the presumption of consistent expression

and allow the definition to be expanded to include former territorial judges. Indeed, the context, particularly the provisions relating to remedy, suggests the opposite.

[39] If the Judicial Council finds, following a hearing, there has been misconduct, it may impose a number of remedies, set out in s 31.6(10)(b). Alternatively, it can make a recommendation to the Minister of Justice that the territorial judge be removed, pursuant to s 31.6(10)(c):

(10) After completing the hearing, the Judicial Council

(. . .)

(b) may, where it finds that there has been misconduct by the territorial judge who is the subject of the complaint,

- (i) warn the territorial judge,
- (ii) reprimand the territorial judge,
- (iii) order that the territorial judge take specified measures, such as receiving education or treatment, *as a condition of continuing to sit as a territorial judge,*
- (iv) *suspend* the territorial judge with pay for any period, or
- (v) *suspend* the territorial judge without pay but with benefits *for a period up to 30 days;* or

(c) may, where it finds that the territorial judge

- (i) has an inability to perform the essential duties of his or her office,
- (ii) has engaged in conduct that is incompatible with the due execution of his or her office, or
- (iii) has failed to perform the duties of his or her office,

recommend that the territorial judge *be removed from office* . . . [emphasis added]

[40] The array of remedies in s 31.6(10)(b) are clearly aimed at correcting inappropriate conduct by a sitting territorial judge who will *continue* to occupy judicial office. There would be little or no point in warning, reprimanding, or suspending a former territorial court judge. Similarly, there would be no point in recommending to the Minister that a former territorial judge be removed from office, the need to do so being obviated by the resignation. This militates against the Judicial Council having jurisdiction over former territorial judges.

[41] We are mindful of the Complainant's submission that the Judicial Council's ability to "reprimand the territorial judge" serves a purpose which extends beyond the other measures clearly applicable only to active territorial judges. The Complainant takes the inclusion of reprimand amongst the suite of remedies in s 31.6(10)(b) of the *TCA* to reveal how a broader purpose of the enactment could be served even for former territorial judges. As a matter of statutory interpretation, however, the need for consistency in using the term "territorial judge", as discussed in these reasons, stands in the way of this argument.

[42] The policy considerations the Complainant cites in support of her argument, while valid and compelling, are insufficient to inject into the *TCA* the form of clear rebuttal of consistent expression contemplated by judicial authorities; nor can the proposed meaning sit harmoniously with the other provisions so as to justifiably augment them. The interpretive exercise seeks to identify the meaning of the text, consistently with its purposes. Most legislation is aimed at more than one purpose and could serve even more; but each such purpose, desirable as they may be, "are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme". *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 174, [2013] 1 SCR 271. Where the legislative language is precise, its underlying purpose does not operate to "supplant" clear language, nor "to create an unexpressed exception to clear language". *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20 at para 23, [2006] 1 SCR 715.

[43] Turning to the broader legislative context, "territorial judge" is used throughout the *TCA* in relation to *active* territorial judges. The numerous examples include s 2(4) which provides "Every sitting of the Territorial Court shall be presided over by a territorial judge"; s 4, which deals with the appointment of territorial judges, including s 4(3), which requires a territorial judge to reside in the Northwest Territories; ss 10 and 11, which address resignation and mandatory retirement age; s 12.5, which addresses salaries and benefits; ss 15 and 16, which specify general and civil jurisdiction; and s 29(3), which authorizes territorial judges to make rules governing practice and procedure in the Territorial Court. It would be entirely illogical for any of these provisions to apply to former territorial judges.

[44] Notably, the *TCA* draws a distinction between active and former territorial judges in ss 12 and 17. Section 12 sets out a territorial judges' powers and the timeline to complete outstanding matters after that judge ceases to hold office:

12. Where a territorial judge ceases to hold office and a cause, action, suit, matter or proceeding that has been fully heard by the territorial judge stands for judgment, the territorial judge may, within six weeks after ceasing to hold office,

give judgment in respect of that cause, action, suit, matter or proceeding and the judgment has the same force and validity *as if he or she were still a territorial court judge*. [emphasis added]

[45] Section 17(1)(a) protects an active territorial judge who acts for a former territorial judge from liability for damages for any decision the former territorial judge made while carrying out judicial duties:

17. (1) No action for the recovery of damages lies in respect of an order or warrant made or sentence imposed

(a) by a territorial judge acting in the place of any other territorial judge or justice *who has then ceased for any reason to act as such*

[. . .]

if the order, warrant or sentence could lawfully have been made or imposed by the territorial judge or justice by whom the conviction was made.

[46] These provisions demonstrate the legislators put their minds to when there must be distinctions between active and former territorial judges and how those distinctions are expressed. They did not make this distinction in relation to complaint proceedings. This, too, supports the conclusion the legislature did not intend the Judicial Council would have authority over former territorial judges.

[47] We agree that to interpret the *TCA* as granting the Judicial Council jurisdiction over former territorial judges would lead to unintended consequences. This was the conclusion reached in *Maurice v Priel*, at 1032. As noted, that case concerned whether the Law Society of Saskatchewan had jurisdiction to adjudicate a complaint about a former member who had become a judge. It was argued a former member of the Law Society should be subject to disciplinary proceedings for conduct that occurred while that person was practicing law. Justice Cory noted the obvious practical problem with such an interpretation, specifically that it would lead to complaints being brought against former lawyers long retired and possibly deceased. In our view, the same issue arises in respect to the interpretation urged by the Complainant in this case.

[48] The Attorney General and Presenting Counsel drew attention to provisions in legislation governing provincial judicial councils in British Columbia, Prince Edward Island, and Manitoba, which expressly allow judicial conduct proceedings to continue if the judge resigns after proceedings have started but before they are

completed. We were also provided with Saskatchewan's legislation, which allows complaints to be commenced within a certain period *after* a judge has left office.

[49] Comparing the *TCA* to other legislative schemes is illuminating as much by the distinctions as by any similarities. We recognize in undertaking this exercise, care must be taken to avoid importing a different express or implicit policy from another jurisdiction's legislation or from judicial or *quasi-judicial* pronouncements on such legislation. Ultimately, we must discern the extent of the Judicial Council's jurisdiction from the *TCA* itself. *Michel v Graydon*, 2020 SCC 24 at para 16, [2020] 2 SCR 763. It nevertheless remains a useful exercise to consider extra-territorial comparators. It permits examination of the words used by other legislatures to bestow and limit powers on judicial councils.

[50] Under s 27(5) of British Columbia's *Provincial Court Act*, RSBC 1996 c. 379, where a judge resigns after an investigation or an inquiry has commenced, the process must be completed unless otherwise directed by the attorney general. Prince Edward Island's *Provincial Court Act*, RSPEI 1988 c. P-25.1 contains a substantially similar provision in s 39.5.

[51] Manitoba's enabling legislation permits its judicial council to exercise its discretion to continue an inquiry into a conduct complaint where the judge resigns or retires after it is started but before it is completed; however, the judicial council may not make findings of misconduct or incapacity. It is limited to making recommendations to the minister which could aid in the administration of justice. *Provincial Court Act*, CCSM c. C275, s 39(3).

[52] Finally, Saskatchewan's *Provincial Court Act, 1998*, SS 1988 c. P-30.11 was amended in 2009 to include s 52.1, which allows judicial conduct proceedings to be commenced against a former judge, within two years of the day the judge became a former judge.

[53] We note the Complainant's position that these express provisions from these other jurisdictions may represent legislative amendments made in response to issues not yet encountered in proceedings in the Northwest Territories. In other words, they may have been intended to clarify, rather than add to, each judicial councils' jurisdiction. The specific policy considerations behind each provision are not before us, however. Moreover, it cannot be assumed they were enacted merely to clarify the parameters of existing jurisdiction. Indeed, the opposite may be true. This point was illustrated by Esson, JA in *Ross v British Columbia Psychological Association*,

(1987) 19 BCLR (2d) 145 (CA), 1987 CanLII 2481 (commenting on amendments to legislation governing lawyers in British Columbia):

[35] The amendment of the Barristers and Solicitors Act to add "former members" was made in 1971 [1971, c. 31, s. 16] at the request of the benchers who had become concerned at a developing pattern on the part of those accused of serious misbehaviour of resigning before a hearing could be held. *The submission is, in effect, that this piece of legislative history implies that the legislature did not intend, without express powers being given, that the disciplinary power would extend to former members.*

[36] I find some merit in that submission. *From the fact that an express power has been granted to the governing body of one profession, it may reasonably be inferred that the legislature did not intend without such a grant that there be such a power. . . [emphasis added]*

[54] Decisions related to judicial regulation were tendered with the submissions. The parties each referred to *In the Matter of a Complaint Against the Honourable Judge John Joy by the Director of Public Prosecutions*, August 4, 2020, and *In the Matter of a Complaint Against the Honourable Judge John Joy by the Newfoundland and Labrador Legal Aid Commission*, August 14, 2020, both decided by the Adjudication Tribunal established under the Newfoundland and Labrador *Provincial Court Act, 1991*, SNL 1991, c. 15. These two cases are helpful insofar as the Adjudication Tribunal articulated the remedial nature of judicial conduct proceedings, particularly, such proceedings are not meant to punish the individual judge, but rather to repair damage to public confidence in the administration of justice. The issue of jurisdiction over a former judge did not arise in either case, however. Judge Joy remained an active, albeit part-time, judge throughout both proceedings and he participated fully in the hearings. Accordingly, these cases do not assist in, nor inform, our analysis of the Judicial Council's jurisdiction over former territorial judges in the Northwest Territories.

[55] We have also considered cases Presented Counsel and the Attorney General submitted which were decided under the federal *Judges Act* and in which the Canadian Judicial Council expressed it would not pursue complaints about judges who resigned before the proceedings concluded. We agree with the Complainant that these cases are largely unhelpful in the analysis. They arose prior to the amendments to the *Judges Act* set out in Bill C-9, which received Royal Assent on June 22, 2023. Until then, the only remedy available to the Canadian Judicial Council under the *Judges Act* following a finding of misconduct was to recommend the removal of the judge. In those circumstances it would not make sense to advance

a complaint against a judge who was no longer in office. In contrast to the federal *Judges Act*, the *TCA* allows the Judicial Council to impose sanctions short of removal, including issuing a warning or a reprimand.

[56] Finally, we considered *The Matter Concerning a Complaint About The Conduct Of The Honourable Justice Dianne M. Nicholas, Decision of the Panel Following Notice of the Pending Retirement of Justice Nicholas* (December 18, 2014), which definitively supports the conclusion we have reached. In that case, a hearing panel established under the Ontario *Courts of Justice Act*, RSO 1990 c. C43 considered whether it had jurisdiction to continue proceedings against a judge who resigned after a complaint was made, but before the hearing commenced. The legislation in question was substantially similar to the complaint provisions in the *TCA* and importantly, made no reference to a former judge. The hearing panel determined it did not have jurisdiction over Justice Nicholas, stating:

Once a judge retires, he or she is no longer a “judge” or “provincial judge” and the Council no longer has jurisdiction to hold a hearing or impose a disposition. Though not made explicit by the legislation, this limit on the Council’s jurisdiction is implicit in the statutory language.

[57] We return to the Complainant’s policy argument. We agree a key purpose of a transparent judicial disciplinary process is to vindicate publicly the norms of the rule of law. Doing so is designed to restore public faith in the integrity of the administration of justice. It may also restore the dignity and confidence of those affected. This said, the legislature chose not to provide for a public process that would be merely educative or declaratory about such norms in the case of a *former* judge. Appeals taken from some of Molloy’s decisions forming part of the complaint addressed in part the ramifications for individuals affected, see: *R v Burles*, 2022 NWTCA 3; *R v Fabien et al*, 2021 NWTCA 9; and *R v Norn*, 2021 NWTSC 35; however, the *TCA* does not grant the Judicial Council similar jurisdiction.

If the Judicial Council has jurisdiction, should it exercise its discretion to discontinue the proceedings?

[58] While the foregoing is dispositive, we will briefly address the secondary question of discretion.

[59] If the Judicial Council did have jurisdiction to continue hearing the complaint against Molloy, we would nevertheless decline to do so for two reasons. First, there

is no reasonable possibility a hearing could be carried out. Second, and relatedly, this would not be an appropriate case to issue relief which is declaratory only. These are addressed in turn.

[60] Before it could issue any form of declaratory relief, the Judicial Council would have to hold a hearing to determine if there was in fact misconduct. Given the evidence tendered respecting the severity of Molloy's physical and psychiatric conditions and the limitations they place on him, there is no reasonable prospect he could participate meaningfully in a hearing. To hold a hearing in such circumstances would offend a pillar of procedural fairness, namely, the right to be heard, which includes the *opportunity* to be heard. This would not only be unfair to Molloy, but to the Complainant, the public, and the judiciary as an institution. Each has a fundamental interest in knowing any decision made by the Judicial Council is a fair and thorough one, which comes as a result of a process allowing allegations of misconduct, and the events surrounding the allegations, to be placed before the Judicial Council and considered fully. Without a fair hearing, the Judicial Council cannot make a fair decision, nor can it impose any form of sanction.

[61] The Complainant's position, as discussed, is the Judicial Council may make a declaratory and denunciatory statement about the conduct of the former judge in the form of a reprimand under s 31.6(10)(b)(ii) of the *TCA*. This could go some distance in restoring and maintaining public confidence in the institution of the judiciary and the overall administration of justice in the Northwest Territories. Assuming that remedial power extended to this case, however, it remains a declaratory remedy and must be guided by what the Supreme Court of Canada said in *Canada v Daniels*, 2016 SCC 12, at para 11, [2016] 1 SCR 99: "A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties".

[62] The "live controversy" governed by these provisions concerned whether Molloy's conduct would attract a warning, reprimand, or suspension, or a recommendation he be removed from office altogether. That controversy has been resolved by reason of Molloy's resignation. A reprimand would be of no practical effect. We are satisfied the people of the Northwest Territories, informed of the public process of the Judicial Council and of the results of various appeals taken from some of Molloy's cases, would understand that to hold a full hearing for such a contingent outcome would not be practical.

CONCLUSION

[63] For the foregoing reasons, we conclude the Judicial Council does not have jurisdiction to continue hearing the complaint against Molloy. In reaching this conclusion, we are mindful the complaint against Molloy has attracted significant publicity. Moreover, it has been a very long and difficult experience for all involved. The lack of a definitive resolution makes it even more so.

[64] Accordingly, we order the complaint proceedings against Donovan Molloy be discontinued.

DATED November 3, 2023 at Yellowknife, Northwest Territories and signed on behalf of all members of the Panel.



Justice Karan M. Shaner,
Panel Chair

Simon Renouf, KC, Presenting Counsel

Donovan Molloy, on his own behalf

Evan McIntyre, for the Complainant

Karin Taylor, for the Attorney General of the Northwest Territories

APPENDIX

IN THE MATTER OF THE TERRITORIAL COURT ACT, RSNWT 1988, c. T-2 AND IN THE MATTER OF A COMPLAINT REGARDING THE CONDUCT OF THE HONOURABLE JUDGE DONOVAN MOLLOY

CITATIONS

It is alleged that the Honourable Judge Donovan Molloy (Judge Molloy), while a judge of the Territorial Court of the Northwest Territories, engaged in conduct that constituted misconduct under the *Territorial Court Act*, RSNWT 1988 c. T-2. The particulars of such misconduct are set out herein.

1. It is alleged that on or about August 28, 2019, while presiding in the Territorial Court of the Northwest Territories, at Tuktoyaktuk, Judge Molloy on his own initiative and without providing reasons, adjourned sentencing of the Accused, Stacey Cockney-Raddy to Fort Smith, revoked the Accused's Undertaking to Appear, and issued her a Recognizance with conditions, all contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
 - a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
2. It is alleged that on or about October 19, 2019, while presiding in the Territorial Court of the Northwest Territories, at Tuktoyaktuk Judge Molloy on his own initiative issued the Accused, Marilyn Gruben, who was at that time located in Lethbridge, Alberta to undergo a medical procedure, a Recognizance requiring her to appear in person in Tuktoyaktuk on December 4, 2019, with a condition that she was not to operate an motor vehicle, and

revoked her Undertaking to Appear, all contrary to Justice Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

- a. Carry out his duties with respect for the Accused, without discrimination or prejudice.
 - b. Refrain from discriminatory behaviour.
 - c. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
3. On or about December 3, 2019, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife over the sentencing of Sheldon Charney, Judge Molloy improperly pressured Crown Counsel to ignore guidelines issued by the Director of Public Prosecutions. Judge Molloy's conduct on this occasion was contrary to his commitment to perform his role in such a manner to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
 - d. Avoid conduct which could reasonably cause others to question his impartiality.
4. On or about January 7, 2020, and January 15, 2020, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, Judge Molloy in the matter of *R v Jerry Cockney*, accused Crown Counsel of improper

conduct and threatened to report her to the Law Society, contrary to his commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Avoid all forms of harassment and abuse of authority or status.
 - d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
 - e. Avoid conduct which could reasonably cause others to question his impartiality.
5. On or about November 9, 2020, while presiding in the Territorial Court of the Northwest Territories, at Hay River, Judge Molloy refused Crown Counsel permission to appear in Court by telephone, contrary to the COVID-19 Practice Directives dated July 6, 2020, and then dismissed various matters on the Hay River docket for want of prosecution, all contrary to his commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
6. On or about December 2, 2020, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, Judge Molloy referred to the Accused, Alain Grimard, who was unrepresented, as "one of those morons", suggested that the Accused "get a lawyer and not an astrophysicist" and without the election of the Accused recorded the elections and entered pleas, despite

Crown Counsel's assertion that disclosure had not been provided to the Accused, all contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Foster access to all and carry out his duties with appropriate consideration for the Accused, and ensure that the Accused is treated fairly and respectfully.
 - d. Carry out his duties with respect for the Accused, without discrimination or prejudice.
 - e. Refrain from discriminatory behaviour.
 - f. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
7. It is alleged that on or about December 16, 2020, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, Judge Molloy mocked the Accused, Debbie Ailanak, who was unrepresented, as "the epitome of normal", contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Foster access to all and carry out his duties with appropriate consideration for the Accused and ensure that the Accused is treated fairly and respectfully.

- d. Carry out his duties with respect for the Accused, without discrimination or prejudice.
 - e. Refrain from discriminatory behaviour. f. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
8. It is alleged that on or about January 8, 2021 while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, Judge Molloy on his own initiative and without providing reasons, revoked the bail of the Accused, Christopher Yendo, and then refused to expedite the production of a Presentence Report, all contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
9. It is alleged that on or about February 3, 2021 , while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, in the matter of *R v Joshua Clark*, Judge Molloy accused RCMP Constable Gordon Raeside of theft and made inappropriate comments about Cst Raeside's conduct, contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
 - b. Treat everyone with civility and respect in the performance of his judicial duties.
 - c. Avoid all forms of harassment and abuse of authority or status.
 - d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.

- e. Avoid conduct which could reasonably cause others to question his impartiality.

10. It is alleged that on or about February 17, 2021, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, Judge Molloy's demeaning treatment of Crown Counsel during a joint sentencing submission in the matter of *R v Benjamin Nitsiza* was contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
- b. Treat everyone with civility and respect in the performance of his judicial duties.
- c. Avoid all forms of harassment and abuse of authority or status.
- d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
- e. Avoid conduct which could reasonably cause others to question his impartiality.

11. It is alleged that on or about May 7, 2021 and on or about May 28, 2021, while presiding in the Territorial Court of the Northwest Territories, at Yellowknife during the sentencing of Abraham William Paul Bonnetplume, Judge Molloy made allegations against Crown Counsel contrary his commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
- b. Treat everyone with civility and respect in the performance of his judicial duties.
- c. Avoid all forms of harassment and abuse of authority or status.

- d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
- e. Avoid conduct which could reasonably cause others to question his impartiality.

12. It is alleged that on or about May 17th 2021, while presiding in the Territorial Court of the Northwest Territories at Yellowknife, at the opening of Court Judge Molloy, contrary to the NWTTC Practice Directives dated January 18, 2021, ordered Crown Counsel, in the matter of *R v Shawn Beaulieu*, who was present by videolink, to attend Court in person to speak to the Accused's matter, and subsequently indicated he would invite submissions as to whether to dismiss the charges against the Accused for want of prosecution, contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public in the administration of justice, and particularly, contrary to his duty to:

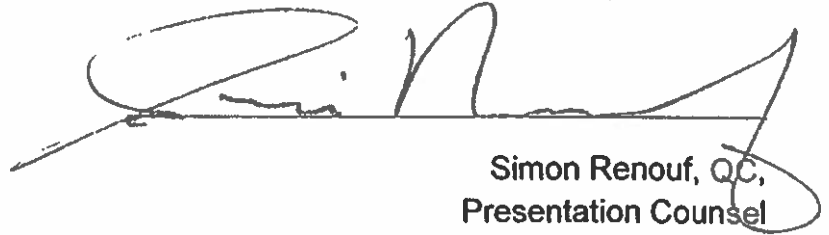
- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
- b. Treat everyone with civility and respect in the performance of his judicial duties.
- c. Avoid all forms of harassment and abuse of authority or status.
- d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
- e. Avoid conduct which could reasonably cause others to question his impartiality.

13. It is alleged that on or about May 27, 2021 while presiding in the Territorial Court of the Northwest Territories, at Yellowknife, in the matter of *R v TP*, Judge Molloy's demeaning treatment of counsel was contrary to Judge Molloy's commitment to perform his role in such a manner so as to maintain the confidence of the public, and particularly, contrary to his duty to:

- a. Conduct himself inside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.

- b. Treat everyone with civility and respect in the performance of his judicial duties.
- c. Avoid all forms of harassment and abuse of authority or status.
- d. Ensure that his conduct at all times maintains and enhances confidence in his impartiality and that of the judiciary.
- e. Avoid conduct which could reasonably cause others to question his impartiality.

DATED at the City of Edmonton, in the Province of
Alberta, this 23rd day of August, 2022.



Simon Renouf, QC,
Presentation Counsel