

ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF a complaint respecting

The Honourable Justice Donald McLeod

A Judge of the Ontario Court of Justice in the Central West Region

Before:

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

The Honourable Justice Hugh Fraser
Ontario Court of Justice

Mr. David Porter
McCarthy Tétrault
Lawyer Member

Ms. Judith A. LaRocque
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION

Counsel:

Linda Rothstein and Paul Davis
Paliare Roland Rosenberg Rothstein LLP
Presenting Counsel

Mark Sandler and Amanda Ross
Cooper, Sandler, Shime & Bergman LLP
Counsel for the Honourable Justice Donald McLeod

REASONS FOR DECISION

[1] This proceeding concerns the conduct of Justice Donald McLeod, a member of the Ontario Court of Justice, in his capacity as Chair of the Interim Steering Committee of the Federation of Black Canadians ("FBC"). Justice McLeod helped found the FBC and was one of its leading voices. The FBC has the laudable goal of promoting greater equality and inclusion for persons of African descent in Canada. Its activities included the identification of issues confronting Black Canadians and meeting with politicians and government officials with a view to addressing those issues and improving the circumstances of African-Canadians.

[2] Prior decisions of this Council establish that the Panel may only find that Justice McLeod has committed judicial misconduct if two elements are satisfied. First, we must determine whether, despite his laudable goal, Justice McLeod's activities in relation to the FBC was incompatible with judicial office because it constituted impermissible advocacy and political activity. If the answer to that question is yes, we must then determine Justice McLeod's conduct was so seriously contrary to judicial impartiality, integrity and independence that it has have undermined the public's confidence in his ability to perform the duties of office or in the administration of justice generally.

FACTS

[3] The Panel was greatly assisted by the agreed statement of facts prepared by counsel. The following outline of the facts is primarily based upon the agreed statement, supplemented by Justice McLeod's evidence at the hearing and the evidence of an expert

witness, Dr. Wendell Adjetey, on the history of the Black community in the United States, Canada and in the African diaspora.

Justice McLeod's Background

[4] Justice McLeod was born in London, England. His parents had immigrated to England from Jamaica. The family immigrated to Canada in 1970. His parents separated when he was four years old. Justice McLeod's mother raised him and his sister as a single parent in subsidized housing and with very limited resources. They resided in the Regent Park neighbourhood of Toronto and later in Scarborough.

[5] Justice McLeod struggled in school but with the help of mentorship from the Black community, he graduated from McMaster University, taught school for one year and then graduated in law from Queen's University. He was called to the Bar in Ontario in 1998. Following a successful 15 year career in the practice of criminal and administrative law, he was appointed as a judge of the Ontario Court of Justice on September 18, 2013. He presides in the Central West Region in Brampton.

[6] Prior to his appointment, Justice McLeod was actively involved in a variety of community organizations and initiatives. His community work was particularly focused on initiatives that promoted the education and mentorship of Black youth. In his evidence before this Panel, Justice McLeod explained the importance he attaches to his community work, especially the mentorship of young Black males. As a successful Black Canadian who has overcome the obstacles of poverty and racism, Justice McLeod considers it to be his duty to help others overcome similar barriers to lead positive and productive lives.

[7] The Panel was provided with an impressive number of highly positive letters of reference written by lawyers, judges and community members. These letters indicate that Justice McLeod is highly regarded as a lawyer, judge and colleague for his legal, judicial and community work.

The Toronto 37 and the Federation of Black Canadians: Initial Steps

[8] In May 2016, not quite three years after Justice McLeod's appointment to the bench, a young, pregnant Black woman was shot and killed. Her baby was delivered prematurely, but died three weeks later. Justice McLeod knew the young woman's aunt and he was profoundly affected by the tragedy. He decided that something had to be done to stop the cycle of gun violence involving Black youth and to address its roots. He organized a meeting of thirty-seven people, the "Toronto 37", who had backgrounds in mental health, corrections, education, and criminal justice. This group identified 13 specific "areas of concern" for the Black community.

[9] The Toronto 37 tasked a group of 15 volunteers with creating a holistic plan and preparing a "White Paper" examining the issues facing the Black community in the areas of education, mental health and corrections.

[10] At this point, Justice McLeod initiated meetings by the Toronto 37 with a number of politicians from various parties, government officials and political staffers to discuss these issues. These meetings took place between June and September, 2016. He first contacted Marco Mendicino, a Liberal Member of Parliament ("MP") for the riding of Eglinton-Lawrence in Toronto who he knew from his days in practice. That conversation led to a meeting with Ahmed Hussen, another Liberal MP, who was later appointed

Minister of Citizenship and Immigration. Following his discussion with Mr. Hussen, Justice McLeod flew to Ottawa to meet with Ralph Goodale, federal Minister of Public Safety.

[11] As a result of these meetings, it became apparent that if the group was to have an effective voice, a national organization was required. This led Justice McLeod and the other members of his group to plan the formation of the FBC. Justice McLeod contacted leaders in the Black community across Canada. An Interim Steering Committee, with Justice McLeod as its Chair, was established to put in place the structure for the national organization. Justice McLeod indicated that he would not run for the Board of Directors once it was established but he continued in his role as Chair of the Interim Steering Committee, which effectively acted as the FBC in this interim period.

Meetings with Government Officials and Politicians

[12] In May 2017, Justice McLeod chaired a meeting at Ryerson University with Gerald Butts, Principal Secretary to the Prime Minister, and Ahmed Hussen, Minister of Citizenship and Immigration. Members of the Black Caucus (Black MPs and MPs who represent ridings with significant Black populations) were also in attendance.

[13] This led to a meeting chaired by Justice McLeod on June 28, 2017 with Prime Minister Justin Trudeau, experts, Black community leaders, and federal MPs. The purpose of the meeting was to discuss the mental health, corrections and education challenges Black people face in Canada. Justice McLeod testified that he did not “sit there as a bump on the log” and that he was involved in facilitating the conversation.

[14] The content of the presentation made at that meeting is summarized in a PowerPoint presentation entitled “Closing the Gap: Addressing Systemic Issues Faced by Black Canadians”. The presentation described issues faced by Black Canadians that the organizing group identified and grouped under four broad headings: Mental Health, Corrections, Education and the *International Decade for People of African Descent* (the “*International Decade*”). Under several headings labelled “ask”, the presentation identified specific steps that the government should take to address these issues.

[15] Justice McLeod was photographed with Prime Minister Trudeau at the event. In order to ensure transparency so that the Black community did not perceive that secret discussions were taking place behind closed doors, Justice McLeod directed that the minutes of the meeting and any photographs be made available to the public. Justice McLeod was aware that he would be publicly identified as the FBC’s representative.

Discussions with Associate Chief Justice Faith M. Finnestad and the Judicial Ethics Committee

[16] Associate Chief Justice Faith M. Finnestad requested a meeting with Justice McLeod to express her concerns regarding his activities with the FBC. They met on September 21, 2017. Finnestad ACJ advised Justice McLeod that she was of the view that it was inappropriate for him to be meeting with political figures in his capacity of Chair of the FBC Interim Steering Committee. She asked him to cease having such meetings. Justice McLeod responded that, in his view, these meetings were consistent with his obligations as a judge. Finnestad ACJ suggested that he seek advice from the Judicial Ethics Committee of the Ontario Court of Justice (the “Ethics Committee”). The Ethics

Committee consists of a senior lawyer, a judge, a justice of the peace and a lay person. It provides judges and justices of the peace with confidential and non-binding advice relating to issues of ethical concern.

[17] Justice McLeod sent an e-mail to Justice Peter Tetley, Chair of the Ethics Committee, on November 7, 2017. In the email, he sought the Ethics Committee's advice as to whether he was entitled to be involved in the FBC and, if so, what limitations (if any) should be placed on that involvement. Justice McLeod asked the Ethics Committee to "assume the following":

- (i) I will not be involved in any fundraising;
- (ii) The organization is not a lobby group or partisan to any political party;
- (iii) My participation will not take away from my judicial duties nor will I receive any remuneration;
- (iv) I will refrain from commenting on matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

My role with respect to the Federation is as the founder, chair of the steering committee and an honorary chair of the official Federation of Black Canadians. My duties will be to ensure proper governance and adherence to parliamentary procedures (Roberts rules mainly) during board meetings.

[18] Justice Tetley responded that, based on the facts presented by Justice McLeod, the Ethics Committee had no concerns about his involvement with the FBC provided that he distanced himself from fundraising.

[19] Shortly after receiving this advice from the Ethics Committee, Justice McLeod wrote to advise Justice Tetley that "The Federation will/may at times interface with the government". Justice McLeod wrote that "[t]his can be seen as lobbying (perhaps not

traditional), in that the Federation is now speaking to the government in order to provide them with counsel and at times lead the discussions with respect to what is taking place nationally.” Justice McLeod asked the Ethics Committee whether there was any problem with him “being affiliated with the Federation if from time to time they are asked to make representations dealing with the Black community which at times may have them interfacing with government.”

[20] On November 20, 2017, Justice Tetley responded that it was the unanimous view of the Ethics Committee that, while its position “remains unchanged”, its opinion was “contingent on certain limiting considerations”. These considerations were that the FBC was not a “lobby group”, but rather a “conduit of important information relating to issues of significance to a defined group of Canadians”. The Ethics Committee cautioned Justice McLeod of the risk that his role with the FBC might be viewed as political in nature “if the Federation attempts to lobby or influence a particular political party or government authority.” The Ethics Committee further advised that it could “reasonably be anticipated that the information provided by the [FBC] may lead to social or legal reforms and that this reform process will of necessity include a political component.” The Committee added that some might regard all the FBC’s activities as lobbying: “Should the focus of the organization change from being that of a source of information, knowledge and perspective, on important social issues affecting Black Canadians, you may have to reconsider your continuing involvement from an ethical perspective.”

[21] On November 29, 2017, Justice McLeod wrote to Finnestad ACJ, with a copy to Regional Senior Justice Sharon M. Nicklas, advising that he had consulted the Ethics Committee and would “govern my interaction with the Federation around the

recommendations [the Ethics Committee] stipulated.” Justice McLeod continued to organize the FBC and to chair the Interim Steering Committee.

The Federation of Black Canadians Website

[22] The FBC website was launched on December 3, 2017 to coincide with the 2017 National Black Summit, which was held in Toronto from December 4-6, 2017. The content of the website did not change materially between its launch on December 3, 2017 and February 26, 2018.

[23] The website described the FBC (also known by its French name, le Fédération des Canadiens Noirs) as a national, non-profit organization that advances the social, economic, political and cultural interests of Canadians of African descent. The website states that the FBC partners with community organizations across Canada and “advocates with them to governments, parliaments, multilateral organizations, businesses and faith driven organizations.” The website described the FBC as “politically non-partisan.”

[24] The “Frequently Asked Questions” page of the FBC website, added in February of 2018, stated that the FBC “considers international, national, regional and local matters that negatively affect Black Canadians and raise[s] matters of concern directly during its meeting with government officials and political parties.” Under the heading “Government Relations,” the website stated that the FBC “has engaged with several political parties at all levels of government, including the municipal level.” This engagement “has included presentations to the Prime Minister as well as to leaders of the federal and Ontario Conservative and New Democratic parties.”

[25] The website invited members of the public to become members of the FBC, join its mailing list, follow the FBC on social media, and participate in FBC events. It also invited members of the public to provide donations to the FBC to support its activities. The header on each of the FBC's web pages contained a "DONATE" link but Justice McLeod testified that the FBC did not activate this link. Justice McLeod explained that the FBC received no government funding and that he had provided most of FBC's funding and had covered his own expenses.

[26] Justice McLeod was listed as "Donald McLeod - Chairperson" on the webpage identifying the members of the Interim Steering Committee. He described himself as a "presiding judge" in a video posted to the FBC's website. Two news releases of the FBC posted to its website, along with the FAQ page, identify him as "Justice Donald McLeod."

[27] The "FAQ" section of the FBC's website, under the heading, "Can a sitting judge actively participate in the FBC FCN?," stated that Justice McLeod "requested and received the appropriate clearances to act as the interim Chair of the FBC FCN from the independent ethics advisory committee of the Ontario Court of Justice."

[28] In a video posted on the FBC's website, Justice McLeod described his discussions with government officials as "educating them on what we have learned, speaking not for the Black community, because we can't, but speaking for a group of individuals that are saying that there is a problem." Justice McLeod made the following statement:

"the Federation of Black Canadians begins now to start liaisoning [sic] with the – with the government, because we're teaching them. We're not lobbying them... We're coming to tell you what's wrong, based on what we've seen."

[29] Justice McLeod indicated in the video that the Interim Steering Committee had met with Prime Minister Trudeau in June and the other government representatives. Justice McLeod stated that he had told them the following:

“[W]e’re not just expecting to talk. We have to have action. So there were many actions that were – requests that were asked of government that encompass mental health, corrections, education and the [*International Decade*].”

[30] Justice McLeod encouraged members of the public to support the FBC and its objectives. He invited supporters to “flood [the FBC] website” in order to build a “critical mass” of support. Justice McLeod added: “When we galvanize ourselves in this way, we give ourselves an opportunity to not only be heard, but to be listened to, [in] such a way that you now have consequences if you do not listen to the things we’re asking.”

The National Black Summit and Lobby Day

[31] Justice McLeod participated in the 2017 National Black Summit, held in Toronto from December 4-6, 2017. The event featured a number of speakers, including Justice McLeod, Prime Minister Trudeau, provincial cabinet ministers and the Mayor of Toronto. Justice McLeod was identified on the list of speakers as “Justice Donald McLeod, Court of Ontario.”

[32] In 2017, a political consultant and the Black Caucus organized a “Lobby Day,” described on the FBC website as an occasion “when lay members meet politicians and public servants at various levels to advocate on a variety of relevant issues”. The website added that FBC “has participated in Lobby Day, which provided face-to-face opportunity to address federal laws, policies and programs that affect Black Canadians and recommend ways to remove racial barriers and improve quality of life of Canadians of

African descent”. FBC representatives involved in Lobby Day met with representatives of the federal Liberal, Conservative, NDP and Green parties. Justice McLeod attended the 2017 Lobby Day but only met with members of the Black community about the planned formation of the FBC. He did not speak with any politicians and did not participate in the Lobby Day discussions and activities.

Further Discussion with Finnestad ACJ

[33] On December 21, 2017, Finnestad ACJ spoke with Justice McLeod about his involvement with the FBC following a media inquiry. Finnestad ACJ again explained her concerns about Justice McLeod’s activities. She confirmed these concerns by email dated December 21, 2017, in which she stated:

You’ve indicated that you feel that somewhere down the road as the federation develops, your role with it may become inconsistent with the judicial role and you have cautioned people that at that point you will give up those responsibilities. I am cautioning you as I did a few months ago, that I believe you are already at that point and that you should leave this Influential [*sic*] position...

The FBC’s support for the *International Decade for People of African Descent*

[34] The “Closing the Gap” presentation, discussed above, supported the *International Decade*, an initiative coordinated by the United Nations High Commissioner for Human Rights that encourages Member States of the United Nations, including Canada, to “take concrete and practical steps through the adoption and effective implementation of national and international legal frameworks, policies and programs to combat racism, racial discrimination, xenophobia and related intolerance faced by people of African descent.”

[35] On January 30, 2018, after Prime Minister Trudeau endorsed the United Nations' *International Decade*, the FBC issued a press release in which Justice McLeod was quoted as praising the Prime Minister's action. Justice McLeod read this press release before the FBC issued it, though he did not draft it.

[36] On January 30, 2018, Justice McLeod attended a ceremony at which the Prime Minister announced the Canadian government's commitment to upholding the principles enshrined in the *International Decade*. At this ceremony, the questions posed to the Prime Minister focused on issues other than the *International Decade*. Justice McLeod was quoted by the Huffington Post as expressing disappointment with the focus of the media's attention.

The FBC's Advocacy related to Abdoukader Abdi

[37] The FBC publicly advocated against the deportation of Abdoukader Abdi, a Somali refugee who was at risk of deportation after he pleaded guilty to charges of aggravated assault and assaulting a police officer. As this involved a matter that was before the courts, Justice McLeod removed himself from any involvement. Members of the Interim Steering Committee (other than Justice McLeod) facilitated a meeting with Minister Ahmed Hussen and members of the Black community regarding the historical and ongoing deportation of Black individuals.

Media Coverage of the FBC

[38] Justice McLeod was frequently described and quoted in news articles as both a leader of the FBC and as a sitting judge. On February 27, 2018, Desmond Cole published

on his blog an article titled “Black Tea – the truth about the Federation of Black Canadians”. The article suggested that Justice McLeod’s role with the FBC and his position as a judge of the Ontario Court of Justice “raises serious questions about ethics and conflicts of interest.” Mr. Cole alleged that the FBC was a “thinly-veiled front for partisan Liberals.” On February 28, 2018, the Toronto Star published an opinion article by Mr. Cole titled “Black advocates must put cause ahead of career.” This article criticized Justice McLeod’s role with the FBC as creating “the strong appearance of conflict of interest and partisanship.”

[39] On February 27, 2018, an article was published on the website of CBC News entitled “Activists question Federation of Black Canadians’ leadership, ties to Liberals”. The article quoted several individuals who questioned whether it was appropriate for Justice McLeod to lead the FBC while presiding as a judge. Sandy Hudson, described as co-founder of Black Lives Matter Toronto, was quoted as saying: “I have a hard time understanding how someone whose job it is to remain neutral can be the head of an advocacy organization.” Similarly, the article quoted Duff Conacher, the co-founder of Democracy Watch and adjunct professor of law and political studies at the University of Ottawa, as follows: “It would be reasonable for people to have the perception that the judge has a bias that aligns with the organization.”

Further Correspondence Between Justice McLeod and the Ethics Committee

[40] Following this media attention, on March 2, 2018, Justice McLeod emailed the Ethics Committee expressing his disagreement with Mr. Cole’s characterization of his involvement with the FBC. On March 6 and 7, 2018, Justice McLeod sent further emails

to Justice Tetley, stating that “in order for the [the FBC] to run and be effective it should not be headed by a judge.” Justice McLeod indicated that his participation in the FBC would not stop immediately, but rather would cease “within the next 8 to 9 months.” Justice McLeod also informed the Ethics Committee that his role “no longer requires my interfacing with any government body and allows me to speak to the community face to face.” Justice McLeod explained that his reason for staying on with the FBC was “to maintain the credibility of the Federation.” In his March 7 email, Justice McLeod advised Justice Tetley that there had been a typographical error in his earlier email: it should have read “after the next 8-9 months.”

[41] Justice Tetley responded on March 8, 2018 to advise that the Ethics Committee had concluded that “the most prudent course of action from an ethical perspective, is for you to resign from any form of further active participation in this organization now rather than at the end of the year as proposed.” Justice Tetley noted that the conclusions of the Ethics Committee were “not predicated solely on the fact your role in the organization has recently come under public scrutiny and comment.”

[42] The Ethics Committee cited several concerns in support of its conclusions, including the fact that the work of the FBC appeared to include lobbying, that the FBC had been successful in obtaining significant financial and other commitments from the Government of Canada to address initiatives promoted by the FBC, and the fact that Justice McLeod appeared to have become “unwittingly embroiled in a very public dispute or political battle with others who purport to serve the same community interests.”

Ontario Judicial Council Complaint Proceedings

[43] Finnestad ACJ wrote to the Ontario Judicial Council on February 23, 2018 to inform the Council of Justice McLeod's involvement with the FBC. She pointed out that while the goals of the FBC are positive, the issue was whether the FBC's activities and those of Justice McLeod "cross the line into advocacy and political activity, and thereby transgress principles of judicial ethics."

[44] On March 12, 2018, the Registrar of the Ontario Judicial Council advised Justice McLeod that the Council had a complaint relating to his role in the FBC and had assigned that complaint to a complaint subcommittee. Justice McLeod provided a detailed response to the complaint with an 18 page letter dated May 10, 2018. He denied any impropriety and stated that he:

- (a) had taken steps to correct the FBC's website to "eliminate potentially misleading references to my judicial role or clearances obtained by the Ethics Committee";
- (b) recognized that the limitations on his role within the FBC "were not easily understood by the public or adequately communicated on the FBC's website";
- (c) did not engage in any misconduct, and had "attempted throughout to accurately advise the Ethics Committee what was transpiring"; and,
- (d) expected to resign as Chair of the FBC's Interim Steering Committee by the end of 2018, once the organization had transitioned to a Board of Directors.

[45] On May 24, 2018, the Registrar of the Ontario Judicial Council advised Justice McLeod that the complaint subcommittee was considering making an interim recommendation to the Regional Senior Justice under section 51.4(8) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, that he be suspended with pay until final disposition of the complaint. Justice McLeod responded by letter dated June 4, 2018 to advise that he had resigned as Chair of the Interim Steering Committee of the FBC. Following a further inquiry from the Registrar, Justice McLeod confirmed that he had resigned as Chair of the Interim Steering Committee and had disengaged from any activities on behalf of the FBC. The Registrar then advised Justice McLeod that the complaint subcommittee had decided not to make a recommendation that he be suspended pending final disposition of the complaint.

[46] Following the report of the complaint subcommittee, a review panel, comprised of two judges, a lawyer and a community member, ordered this hearing pursuant to ss. 51.4(18) and 51.6 of the *Courts of Justice Act*.

[47] The Notice of Hearing alleged that Justice McLeod's actions were contrary to the standard of conduct expected of a judge, including the duties to avoid conflicts of interest, participation in partisan political activity, using the powers of judicial office inappropriately, involvement in community activities incompatible with judicial office, and lending the prestige of judicial office to fundraising activities.

[48] This Panel was assisted by the submissions of Presenting Counsel who, under Ontario Judicial Council *Procedures Document*, s. 16.5, has the duty "not to seek a particular disposition" but "rather to ensure that the complaint against the judge is

evaluated fairly and dispassionately so as to achieve a just result and preserve or restore confidence in the judiciary.”

ISSUE

[49] During the course of the hearing, Presenting Counsel indicated that in her view, the evidence did not support the allegations of partisan political activity and fundraising. Presenting Counsel suggests that Justice McLeod’s actions, through the FBC, of engaging directly with politicians to advocate for identified policy outcomes and the allocation of government resources to meet those outcomes, crossed the line into impermissible judicial conduct.

[50] Justice McLeod’s position is that he was engaged in important community activity, bringing to public attention issues that affect a vulnerable and disadvantaged community. He submits that nothing he did undermines public confidence in the administration of justice or impairs his capacity to carry out the functions of his judicial office with independence and impartiality.

ANALYSIS

[51] We begin our analysis by stating that we are entirely satisfied that Justice McLeod was at all times motivated by a highly laudable goal. He has a profound desire to help the members of the Black community to overcome the historic barriers of racism and poverty. He was motivated by a belief that if people of good faith pull together, issues can be identified and changes can be achieved that will remove racial barriers and enhance the

quality of life for Black Canadians. He did not seek personal fortune or fame. He genuinely sought to fulfill what he sees as his personal duty to help his community.

[52] We also recognize the serious moral obligation felt by Black Canadians who, like Justice McLeod, have achieved positions of prominence, to serve as leaders and role models in the community. Dr. Adjetey's evidence illustrated how important role models like Justice McLeod are for Black youth to help them pursue education and careers in fields from which they have been historically excluded. We accept that Justice McLeod was endeavouring to meet that obligation and, in the words of Dr. Adjetey, "pay it forward" in his work with the FBC.

[53] On the other hand, we agree with Presenting Counsel that we cannot decide the issue before us solely on the basis of Justice McLeod's intentions or good faith. Justice McLeod is a judge and he was identified as such in his work with the FBC. This means that however well-motivated, his actions must be considered against the objective standard of the conduct that is expected of judges: *Re Zabel* (OJC, September 11, 2017), at para. 34.

[54] Canadian judges are held to a high standard and maintaining confidence in the judiciary is essential to our democratic form of government. The Supreme Court of Canada has described the judicial function as "absolutely unique" with the judge as "the pillar of our entire justice system": *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paras. 108 and 109. The public "demand[s] virtually irreproachable conduct from anyone performing a judicial function" and judges "must give the appearance of being an example of impartiality, independence and integrity": *Therrien (Re)*, at para. 111. This high

standard necessarily involves “a certain loss of freedom” on the part of judges to pursue goals and objectives that are open to persons who are not judges: *Therrien (Re)*, at para. 111.

[55] Judges, however, are not guided or bound by a crystal clear set of rules. They must look to more general principles of judicial ethics that have evolved over time. The Ontario Court of Justice has its own *Principles of Judicial Office* that explain in brief and general terms the core ethical duties expected of judges. The Canadian Judicial Council’s *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004) (the “CJC Principles”) are more detailed, but they are not a code of conduct. Their purpose “is to provide ethical guidance for federally appointed judges”. They are “advisory” in nature and they are not to be “used as a code or a list of prohibited behaviours”: p. 3. As the Supreme Court has stated, the ethical principles for judges “aim for perfection” and attempt to provide “general guidance” to judges rather than stating that specific conduct is impermissible: *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 110.

[56] This means that we cannot decide this case in a mechanical fashion by simply pointing to a rule that clearly allows or prohibits what Justice McLeod did. Our task is more difficult. We must examine the pertinent ethical principles, consider the nature of the judicial role in Canadian society and take account of the institutional arrangements essential to maintain judicial integrity and independence and ultimately, the public’s confidence in the judiciary in general and in the administration of justice.

Standards of Judicial Conduct

[57] The *Principles of Judicial Office* address community involvement by judges. Principle 3.4 provides: “Judges are encouraged to be involved in community activities provided such involvement is not incompatible with their judicial office.” As the Supreme Court of Canada recognized in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 61, “Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise.” The former attitude that judges were expected to withdraw and refrain from any form of community involvement has given way to a more liberal approach. This approach recognizes the important contribution judges can bring to their communities provided that judges respect certain limits.

[58] Participation in any partisan political activity or making a financial contribution to any political party are forbidden (Commentaries to Principle 3.2). As we have noted, there is no evidence that Justice McLeod was involved in partisan politics.

[59] When engaged in community activities, judges are expected to “maintain their personal conduct at a level which will ensure the public’s trust and confidence” (Principle 3.1). They “must avoid the appearance of any conflict of interest” (Principle 3.2) and they “must not abuse the power of their judicial office or use it inappropriately” (Principle 3.3).

[60] The issue is whether Justice McLeod’s actions with the FBC were “incompatible with [his] judicial office” and whether those actions would impair the public’s “trust and confidence” or amount to an “abuse” of the power of his judicial office.

[61] While the Canadian Judicial Council's *Ethical Principles for Judges* are written for federally appointed judges, both counsel referred to them in argument and they provide additional helpful guidance. The Supreme Court has repeatedly referred to these principles as an authority in judicial misconduct proceedings and when the impartiality of a judge is challenged: see *Therrien (Re)*, at para. 109; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 59; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59.

[62] The *Commentaries* to the *CJC Principles* (the “*Commentaries*”) stress the importance of judicial independence, which they describe as “the foundation of judicial impartiality” (2.1, p. 8). The *CJC Principles* make it the duty of all judges to “encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary” (Principle 2.3, p. 7).

[63] The *CJC Principles* deal with civic, charitable and political activities under the heading “Impartiality”. Judges are free to engage in civic, charitable and religious activities subject to several considerations. They should “avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties” (Principle 6.C.1(a), p. 28). Judges are not to solicit funds or lend the prestige of their office to such solicitations (Principle 6.C.1(b), p. 28). They must avoid involvement in causes or organizations likely to be engaged in litigation (Principle 6.C.1(c), p. 28).

[64] The *CJC Principles* strongly discourage almost all forms of political activity. There is no place for partisan political activity (Principle 6.D.2, p. 28). Judges are directed to refrain from membership in a political party, political fundraising, attendance at political

gatherings, contributing to political parties or campaigns or signing petitions to influence a political decision (Principle 6.D.3, pp. 28-29). More generally, judges are to refrain from memberships or public discussions “which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge’s impartiality with respect to issues that could come before the courts”: (Principle 6.D.1, p. 28). Judges are also directed to refrain from participating publicly “in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice”: (Principle 6.D.3(d), pp. 28-29).

[65] The *Commentaries* advise that while community activity can be beneficial for the community and the judge, it “carries certain risks” (Commentary 6.C.1, p. 33). The *Commentaries* acknowledge that this is a controversial area, both inside and outside the judiciary. The benefits of judicial involvement in community activities must be balanced against the risk of jeopardizing the perception of judicial impartiality.

[66] The *Commentaries* advise that “[p]artisan political activity or out of court statements concerning issues of public controversy by a judge undermine impartiality” and “lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other”. The *Commentaries* caution that a judge who uses “the privileged platform of judicial office to enter the political arena puts at risk public confidence in the impartiality and independence of the judiciary”: (Commentary 6.D.2, p. 39).

[67] On the other hand, the *Commentaries* acknowledge that participation in controversial political discussions “is more open to debate and problems of application” than other principles. While judges do not surrender all their rights to freedom of expression upon appointment, they must accept the restraints necessary to ensure public confidence in judicial impartiality and independence. The *Commentaries* identify two fundamental considerations: (1) whether involvement could undermine confidence in the judge’s impartiality, and (2) whether involvement could unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. In either case, involvement is to be avoided (6.D.5, p. 41).

[68] The *Commentaries* address the engagement of judges in the improvement of the law and the administration of justice. Judges are permitted to be involved “in law reform or other scholarly or educational activities of a nonpartisan nature directed to the improvement of the law and the administration of justice.” Judges are also allowed to discuss the law for educational purposes or point out “weaknesses in the law in appropriate settings”. On the other hand, “the judge must not be seen as ‘lobbying’ government” (6.D.7, pp. 42-43).

[69] The *Commentaries* also address the issue of direct interaction between judges having administrative responsibilities, particularly Chief Justices, and government officials. The *Commentaries* thus contemplate these judges interacting with the attorney general, the deputy attorney general, and court services officials. Such interactions are “necessary and appropriate” provided they are “not partisan in nature and the subjects discussed relate to the administration of justice and the courts and not to individual cases.” The *Commentaries* further counsel that judges should avoid being “perceived as

being advisors to those holding political office or to members of the executive”: (6.D.9, p. 43).

The Test for Judicial Misconduct

[70] Before turning to the application of these principles to the conduct of Justice McLeod, it is appropriate to set out the test that must be satisfied for a finding of judicial misconduct. Both counsel agreed that the applicable test is to be found in *Re Baldwin*, (OJC, May 10, 2002) as applied in *Re Douglas*, (OJC, March 6, 2006). Those decisions establish that the purpose of judicial misconduct proceedings is “essentially remedial”. The Hearing Panel is to focus on what is “necessary in order to restore a loss of public confidence arising from the judicial conduct in issue.” The object is not to punish the judge but rather to repair any damage to the integrity and reputation of the administration of justice. As explained in *Baldwin*, at p. 7, it is only where the conduct at issue “crosses [the] threshold” of being “so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public’s confidence in the ability of the judge to perform the duties of office or in the administration of justice generally” that the Hearing Panel may make a finding of judicial misconduct and impose one of the sanctions provided for by s. 51.6(11) of the *Courts of Justice Act*. If the Hearing Panel does not find judicial misconduct, it must dismiss the complaint: *Courts of Justice Act*, s. 51.6(11).

[71] We accept Presenting Counsel’s submission that this means we should ask two questions. The first is whether Justice McLeod’s conduct was incompatible with judicial office. If the answer to that question is yes, the second question is whether Justice McLeod’s conduct was so seriously contrary to the impartiality, integrity and

independence of the judiciary that it has undermined the public's confidence in his ability to perform the duties of office or in the administration of justice generally so as to require a finding of judicial misconduct. Only if such a finding is made would we proceed to the third stage to determine the appropriate sanction for the misconduct.

Application of the Test of Judicial Misconduct to the Present Case

1) Was Justice McLeod's conduct incompatible with judicial office?

[72] In our view, properly interpreted and understood, the principles of judicial conduct provide generous scope for a community-minded judge like Justice McLeod to work for the betterment of his community. For instance, Justice McLeod is the founder and co-chair of 100 Strong, a non-profit organization that aims to foster learning, embraces community and inspires excellence in young boys largely although not exclusively drawn from the Black community. We view his work with 100 Strong as highly laudable and entirely consistent with any constraints imposed by his judicial office. Equally laudable is Justice McLeod's long list of speaking engagements at award ceremonies, law schools, high schools and celebrations by police and others of Black history and culture.

[73] Justice McLeod is rightly seen as a leader in his community. As a racialized judge, he has a moral obligation as a leader and role model in the Black community. As he noted in his response to the complaint, his community involvement was an important factor when he was appointed. There is no reason why it should have entirely ended when he assumed judicial office. He is to be commended for leaving his court room and judicial chambers from time to time in order to present to the public a positive and inspiring vision of what young Black Canadians can aspire to.

[74] That said, our task is to focus on the conduct identified by Presenting Counsel as being problematic, namely, the suggestion that he advocated, or could be perceived to be advocating, to politicians for particular policy outcomes and resource commitments on issues not tied to the administration of justice. On the basis of the agreed statement of facts and the evidence we have heard, we make the following factual findings.

[75] As the founder and chair of the Interim Steering Committee of the FBC, Justice McLeod actively participated in a process that aimed to identify policy issues that needed to be addressed to improve the lot of Black Canadians. Once the issues and desired policy outcomes had been identified, Justice McLeod initiated a series of meetings with senior government officials and politicians including MPs, Ministers of the Crown, and elected municipal officials. At those meetings, Justice McLeod was actively involved in presentations that not only provided information but also advocated specific policy changes and the allocation of government resources to achieve those policy changes. Throughout this process, Justice McLeod was publicly identified as a sitting judge of the Ontario Court of Justice.

[76] We do not accept Justice McLeod's position that these activities can be fairly characterized as being merely educative or intended to inform politicians of the difficulties facing Black Canadians. We acknowledge that many of Justice McLeod's community activities, including some of his work with the FBC, were focused on education. We also accept that in his own mind, Justice McLeod saw his work as being primarily focused on education. However, we are satisfied that the line between education and advocacy was crossed. As we have noted, the PowerPoint presentation the FBC delivered to the Prime Minister and other politicians at the June 28, 2017 meeting included "asks" for policy

change and resource allocation in each of the areas of mental health, corrections and education. For example, under the heading Mental Health, the FBC asked for the government to take the following actions:

- 1) the creation and funding of a National Multidisciplinary Agency;
- 2) a transitional housing program;
- 3) policy changes and funding for research into issues confronting Black Canadians;
and
- 4) new legislation to promote race relations and services; and sustained investment in innovation, evidence and capacity building.

[77] Justice McLeod's own statements also indicate that his activities with the FBC included more than just education. In his video presentation explaining the work of the FBC, Justice McLeod was clear:

“[W]e're not just expecting to talk. We have to have action. So there were many...requests that were asked of the government that encompass mental health, corrections, education and the [*International Decade*].”

Similarly, in cross-examination, Justice McLeod conceded that the FBC “was looking for the government to commit resources and make some policy changes” and that he was “looking for some significant policy shifts from government”.

[78] Nor do we accept Justice McLeod's position that he was not engaged in “lobbying” as there was no “quid pro quo” exercise whereby the FBC was promising something in exchange for what they were asking. In our view, no “quid pro quo” is required to

constitute lobbying. The *Canadian Oxford Dictionary*, 2nd ed., edited by Katherine Barber (Don Mills: Oxford University Press, 2004), defines the verb “lobby” as to “solicit the support of (an influential person); to “seek to influence (the members of the legislature)”; or to “attempt to persuade a politician to support or oppose changes in the law”: pp. 901-902. This dictionary definition is consistent with the definition of lobbying in the *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.), ss. 5(1) and 7(1), and the *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched., s. 1(1). Both statutes define lobbying as including communicating with a public office holder to attempt to influence the development or amendment of any government policy or program. The fact that both statutes only impose reporting obligations on persons who perform these activities for payment or as an employee of another person, corporation, or organization does not detract from the ordinary meaning of lobbying. The activities of Justice McLeod and the FBC thus amount to lobbying even though they were not required to register under both statutes.

[79] We recognize that judges do engage with government officials outside the courtroom in a variety of ways that are acceptable. In his response to the complaint, Justice McLeod made reference to the involvement of judges with a “working table” that the Ontario Ministry of the Attorney General created to review and discuss current issues and policy concerns on mental health issues in the criminal justice system. As we have noted, the *Ethical Principles for Judges* contemplate judges being involved in law reform initiatives. In Canada, judges frequently serve on commissions of inquiry. Reference was made to the practice in the United Kingdom (UK) where judges have frequently appeared as witnesses before Parliamentary Committees: see Graham Gee et al, *The Politics of*

Judicial Independence in the UK's Changing Constitution (Cambridge: Cambridge University Press, 2015) at pp. 101-102.

[80] However, it is equally clear that judges remain subject to limits in how they engage with government officials in these settings. In the UK, the matters discussed tend to relate to the actual operation of the courts. The UK's Judicial Executive Board has also cautioned that judges should avoid commenting on the merits, meaning or likely effects of prospective legislation or government policy except where the bill or policy affects the independence of the judiciary or relates to the operation of the courts or the administration of justice: Gee et al, at p. 111; Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees* (October 2012). Moreover, in Canada the *Commentaries* make it clear that a judge must carefully consider the implications for judicial independence of serving as an inquiry commissioner: 2.8, p. 12.

[81] In our view, serving on a working table, acting as an inquiry commissioner, or testifying before a legislative committee are distinguishable from the type of advocacy at issue in this case. The government, not the judge, initiates these former activities. It is the government that identifies the issues to be explored and invites a judicial perspective to assist in the formulation of public policy. The judge is not involved as the advocate of a specific cause. The government structures the setting for the interaction. In the case before us, it was the FBC that initiated contact with government officials, identified the issues to be addressed, and advocated the adoption of policy choices that the FBC sought to have implemented in a setting that the FBC itself structured.

[82] Counsel for Justice McLeod argued that we should adopt a narrow definition of what amounts to impermissible engagement by judges with politicians. He submits that judges need to avoid such engagement only where it would directly affect their impartiality or independence in relation to identifiable issues coming before the court. Justice McLeod has never been asked to recuse himself from any case on account of the conduct at issue in this proceeding. As there is no evidence that Justice McLeod's impartiality or independence was actually affected by the conduct, he argues that there was no breach of the principles of judicial ethics.

[83] We cannot accept this submission. We agree with Presenting Counsel that a broader prohibition is implicit, if not explicit, in the principles of judicial ethics that we have discussed. This conclusion is rooted in the fundamental constitutional principles of judicial independence, judicial impartiality and, as the Supreme Court identified in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at para. 125, the consequent need to maintain a separation between the judiciary on the one hand and the executive and legislative branches of government on the other. The separation of the judiciary from the executive and legislative branches is a central feature of the rule of law, the constitutional ideal that the affairs of government are to be conducted according to the law and the constitution as interpreted and applied by an independent judiciary: see *P.E.I. Reference*, at para. 10. As the Supreme Court has held, the separation of powers requires that the relationship of the judiciary to the legislative and executive branches be "depoliticized": *P.E.I. Reference*, at para. 140.

[84] Judicial independence secures the institutional arrangements required to ensure an impartial judiciary, capable of resolving disputes according to law and free from

interference from powerful forces, including the executive and legislative branches of government. Judicial independence requires that judges occupy “a place apart”: see Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995). Judges must stand above the political fray, free from the pushes and pulls of public opinion. It is incompatible with the separation of powers for a judge to enter the fray and ask political actors for policy changes and the allocation of resources, however worthwhile the judge’s motivating cause. A perception could arise that the judge’s rulings will be influenced by whether the government accepts or rejects the policy changes that the judge has advocated for, or that the government will try to influence the judge by accepting or rejecting such changes.

[85] These principles are not just vague abstractions. They are, as described by Chief Justice Brian Dickson, “the lifeblood of constitutionalism in democratic societies”: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70. Their maintenance depends not only upon the need for the government to avoid actions that impair judicial independence but also upon the need for judges to conduct themselves at all times in a manner that respects the very independence that defines their unique role.

[86] As our review of the principles of judicial ethics demonstrates, respecting and maintaining judicial independence, judicial impartiality and the separation of judges from political involvement are core animating values. Engagement that a judge initiates outside the courtroom, with politicians to achieve policy changes not directly tied to the administration of justice amounts to political activity that violates the principle of

separation of powers, threatens judicial independence and is inconsistent with the standard expected of a judge of the Ontario Court of Justice.

[87] We accept that the FBC's goal of improving the integration of Black Canadians into Canadian society was praiseworthy and that the issues FBC and Justice McLeod raised were well-documented. The evidence of Dr. Adjetey about the history of discrimination and exclusion Black people have faced in Canadian society and how that history translates into socio-economic challenges today was both powerful and uncontested. In *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), the Court of Appeal for Ontario recognized the existence of racism "within the interstices of our institutions": at p. 338. The court went on to recognize that Black persons are "prime victims" of racism and that courts should acknowledge the perspectives of racialized people that racism erects barriers to their advancement: at p. 341. The Supreme Court has taken judicial notice of the over-representation of Black people in the criminal justice system and of their vulnerability to unjustified police interventions: see *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 154, per Binnie J. As Justice McLeod stated in his May 10, 2018 letter to the Ontario Judicial Council, his life experience and legal career prior to becoming a judge gave him considerable familiarity with these issues.

[88] We also wish to emphasize that Justice McLeod would not likely have crossed a boundary had he restricted his efforts to educating members of the public about these issues. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, McLachlin and L'Heureux-Dubé JJ. emphasized that impartiality must be assessed from the perspective of a reasonable person who supports the principles of equality and is aware of the history of discrimination

that disadvantaged groups in society have faced. This reasonable person is also aware of the history of racism and discrimination against Black people in the community: at paras. 46-47. As a trial judge at one of Ontario's busiest courts that sits in one of Ontario's most diverse regions, Justice McLeod was intimately aware of how the legacy of racism and socio-economic barriers that Black people face brings them into contact with the criminal justice system. As he wrote in his May 10, 2018 letter, "the great obstacle presented by the intersection of race and financial disadvantage was obvious then and now." He was thus well-placed to educate others about these barriers.

[89] However, as the Federal Court of Appeal stated in a different context, initiating contact with government officials to advocate policy changes is no less political "because the cause that is the object of the initiative is popular, or has unanimous support or is endorsed by the existing authorities": *Action by Christians for the Abolition of Torture v. Canada*, 2002 FCA 499, 225 D.L.R. (4th) 99, at para. 67. As Professor Peter Russell warned in "Judicial Free Speech: Justifiable Limits" (1996) 45 U.N.B.L.J. 155, at pp. 157-8, judges would lose credibility as independent adjudicators if they "were free off the bench to push for or against changes in public policy". As Professor Russell recognizes, judges "will have opponents on virtually any of the public issues on which they might take a public stand". The Supreme Court of Canada issued a similar warning in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, where Chief Justice Antonio Lamer stated: "members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice": para. 140.

[90] We also conclude that Justice McLeod should have foreseen that engaging in policy advocacy and interacting with government officials could expose him to political attack and perceptions of a lack of impartiality and conflict of interest by members of the Black community who disagreed with both his goals and the means he used to achieve those goals. There was nothing improper about Justice McLeod's educational efforts to inform others about the issues and challenges facing the Black community. The existence of these issues and challenges are uncontested. However, as the events of February 2018 demonstrated, there are real and reasonable disagreements within the Black community concerning both the goals that members of the community should pursue and the means they should employ to achieve those goals. Indeed, as the Ethics Committee advised Justice McLeod on March 8, 2018, his activities led to a situation in which he was "embroiled in a very public dispute...with others who purport to serve the same community interests." This situation was reasonably foreseeable. As Justice McLeod stated in his own testimony, "we as a community are never always going to agree, nor should we." Accordingly, as the *Commentaries* note, Justice McLeod should have avoided involvement that could have unnecessarily exposed him to political attack: 6.D.5, p. 41.

[91] Justice McLeod's counsel cautioned us not to rule in a way that would undermine worthwhile and important work judges can do in their communities or discourage community-minded individuals, especially from disadvantaged communities, from aspiring to judicial office. In our view, the line we have drawn as to impermissible conduct should not have an undue "chilling effect" on acceptable community activity by judges. Our focus is explicitly on engagement that a judge initiates with politicians and

government officials to achieve identified policy objectives that are not directly tied to the administration of justice. We have explained why we consider that type of engagement to be highly problematic from the perspective of judicial impartiality and independence. Avoiding this type of engagement is one of the “numerous constraints” that the Supreme Court has held that judges must accept to maintain public trust: *Therrien (Re)*, at para. 111. We are satisfied that barring that type of engagement leaves open to judges a wide range of activity whereby judges can work for the betterment of their communities.

[92] We conclude, accordingly, in answer to the first question, that Justice McLeod’s conduct was incompatible with judicial office.

2) Did Justice McLeod’s conduct undermine public confidence in his ability to perform the duties of office or in the administration of justice generally so as to require a finding of judicial misconduct?

[93] We now turn to the second question, namely, whether Justice McLeod’s conduct requires a finding of judicial misconduct. As we have noted, to answer that question, we are to ask whether the conduct “crosses [the] threshold” of being “so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public’s confidence in the ability of the judge to perform the duties of office or in the administration of justice generally.”

[94] Despite our finding that Justice McLeod’s conduct was incompatible with judicial office, there is a long list of features to this case that leads us to conclude that this threshold of undermining public confidence in his ability to perform the duties of office or in the judiciary generally has not been crossed.

[95] There is no evidence of partisan political activity. The issues Justice McLeod identified and addressed were not of a partisan political nature but rather were the product of his good faith effort to improve the lot of a highly disadvantaged community.

[96] There is no evidence that Justice McLeod engaged in fundraising. It was imprudent for him to be associated as a judge on a website with a DONATE button, but that button was inactive. While he did ask the government to allocate resources to meet certain policy objectives, he did not seek any funds for himself or for his organization.

[97] Justice McLeod did exhibit caution and attempted to respect the limits his judicial role placed on him. In his discussions with politicians, Justice McLeod did not express any opinion on a case or issue that was or was likely to come before the courts. He expressly distanced himself from the FBC's advocacy on behalf of Abdoukader Abdi precisely because that case was before the courts. Similarly, Justice McLeod deliberately did not speak with politicians at Lobby Day and did not participate in the Lobby Day discussions or activities out of concern to protect the limits of his judicial office. While he did attend an event on the same day as Lobby Day, his remarks were purely educational.

[98] Justice McLeod was motivated by laudable goals, entirely consistent with the public interest. Many if not all of the challenges facing the Black Canadian community that he presented are well-documented and there is a pressing need that they be addressed.

[99] The approach of the FBC was non-combative and cooperative. A range of experts and constituencies were involved. For example, on the corrections issue, defence counsel, Crown counsel, police and corrections officers were included.

[100] Justice McLeod took the precaution of consulting the Ethics Committee. Based upon the information that he provided to the Committee, the Committee's initial response was to give Justice McLeod a green light. Justice McLeod should have acted more promptly in response to Finnestad ACJ's concerns, especially after the light from the Ethics Committee turned to yellow in the November 20, 2017 email and then red in the March 8, 2018 email. It is significant, however, that his interactions with politicians occurred over a relatively brief period. There appears to have been no engagement with politicians amounting to lobbying after the Ethics Committee expressed concerns about lobbying in its message of November 20, 2017. He advised the Ethics Committee that he had ceased all such activity in March, 2018. At all times, Justice McLeod made it clear that he did not intend to serve on the Board of Directors of the FBC once it was established and he has now terminated his role as Chair of the Interim Steering Committee.

[101] Justice McLeod also responded reasonably and appropriately to the public controversy that erupted in February 2018. He did not respond publicly to serious allegations levelled against him in the press even though he believed them to be inaccurate and unwarranted. He rightly recognized that it would be inappropriate for him to respond publicly given his judicial office. He also proactively brought the media articles that were critical of him to the attention of the Ethics Committee. And, as we have noted, he did cease engaging with politicians, even prior to receiving the Ethics Committee's advice on March 8, 2018.

[102] We also consider it appropriate to evaluate Justice McLeod's conduct in light of the racial dynamics in Ontario and the Central West Region. In *S. (R.D.)*, Justices McLachlin and L'Heureux-Dubé recognized that the reasonable person would be

conscious “of the local population and its racial dynamics”: para. 47. One of these dynamics, as the Court of Appeal noted in *Parks*, is that many Black people mistrust the criminal justice system because actors in that system can and do perpetuate negative stereotypes about Black people: at pp. 341-342. That Black people are overrepresented in the criminal justice system, are likely to be disproportionately arrested and searched by police, and are particularly vulnerable to unjustified police interventions are cases in point: *Golden*, at para. 83; *Grant*, at para. 154. This mistrust can also extend to the judiciary: Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995), at pp. i-ii, 11-39. It would be wrong for courts and justice system participants to dismiss these perceptions: *Parks*, at p. 341. As Justice McLeod stated in his May 10, 2018 letter, his life experiences made him uniquely aware of Black over-representation in the criminal justice system and its roots.

[103] We are satisfied that Justice McLeod was genuinely motivated to promote public confidence in the justice system. That is relevant precisely because the aim of judicial misconduct proceedings is to maintain public confidence in judicial institutions: *Ruffo*, at para. 110. As Cory J. recognized in *S. (R.D.)*, racialized judges bring an important perspective to the task of judging: para. 119. It is clear that Justice McLeod brings a unique perspective to the task of judging and that his presence on the bench promotes the public’s confidence in the administration of justice. Indeed, his perspective and experiences were cited by Justice McLeod and others as explanations for why he was appointed to the bench.

[104] In our view, Justice McLeod's efforts to promote public confidence in the justice system weigh against a finding of judicial misconduct.

[105] The evidence before us illustrates that Justice McLeod's sensitivity to the experiences and backgrounds of the people who appear before him in court and his efforts to educate other justice system participants and members of the public about the experiences of the Black community make the judiciary more responsive to the needs of the public it serves. Justice McLeod's work as a judge and his community activities, including his educational activities, help increase public confidence in the justice system among all Ontarians. This effect is especially significant for Black Ontarians. Justice McLeod serves as a role model for members of the Black community, especially Black youth. His work and community efforts increase public confidence by demonstrating that judges are committed to recognizing and taking seriously the experiences of the Black community and the real problems that have led to mistrust of the justice system among the Black community.

[106] As the *Commentaries* acknowledge, judicial participation in civic and charitable activities and interactions with politicians and government officials is a difficult field of judicial ethics. The "precise constraints...are controversial": 6.C.3, p. 34. The conflict of views between Finnestad ACJ and the Ethics Committee as to whether Justice McLeod's involvement in the FBC was permissible illustrates the ambiguities involved and the differences of opinion among members of the judiciary. Based on the information provided to it, the Ethics Committee ultimately took a considered position that Justice McLeod's involvement with the FBC was permissible provided he adhered to certain limits. We are

satisfied that Justice McLeod relied on the Ethics Committee's advice and did strive, albeit imperfectly, to adhere to those limits.

[107] Finally, we observe that this proceeding has given the Ontario Judicial Council the opportunity to consider and clarify for Justice McLeod and his colleagues on the Ontario Court of Justice that there are limits that govern judicial participation in civic and charitable activities and interaction with politicians and government officials. Prior to this decision, there may have been a lack of clarity about when a judge crosses the line into impermissible advocacy and political activity.

[108] In this decision, we have provided clarity, setting a clear boundary that judges will be expected to respect. We emphasize that it does not follow from our decision that judges who engage in lobbying will not be guilty of misconduct merely because of their good intentions. In the future, if a judge crosses the line that we have delineated, a Hearing Panel may indeed find that public confidence has been undermined and that the judge has engaged in judicial misconduct.

DISPOSITION

[109] We conclude that Justice McLeod's conduct was incompatible with judicial office, but that it was not so seriously contrary to the impartiality, integrity and independence of the judiciary that it rose to the level of undermining the public's confidence in his ability to perform the duties of office or the public's confidence in the judiciary generally. Accordingly, we dismiss the complaint.

[110] Section 51.7(5) of the *Courts of Justice Act* provides as follows:

51.7 (5) If the complaint is dismissed after a hearing, the Judicial Council shall recommend to the Attorney General that the judge be compensated for his or her costs for legal services and shall indicate the amount.

[111] As the complaint has been dismissed, a recommendation of compensation for legal costs is mandatory. The Panel notes that the question of compensation under s. 51.7(5) has been considered by way of written submissions in the past.

[112] The Panel requests that Mr. Sandler submit his submissions on compensation and a costs outline by January 15, 2018. If Presenting Counsel have any written submissions on the matter, they should file their response no later than January 22, 2019.

[113] The Registrar is directed to update the Council's website to reflect the amount of compensation requested and the amount that the Panel ultimately recommends. The submissions, costs outline and our written recommendation to the Attorney General will be considered to be part of the publicly accessible file.

Date: December 20, 2018

Hearing Panel of the Ontario Judicial Council:

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

The Honourable Justice Hugh L. Fraser
Ontario Court of Justice

Mr. David Porter
McCarthy Tétrault
Lawyer Member

Ms. Judith A. LaRocque
Community Member