

# **ONTARIO JUDICIAL COUNCIL**

**IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the  
*COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C. 43, as amended**

**Concerning a Complaint about the Conduct of  
the Honourable Justice Donald McLeod**

## **Before:**

Justice Janet Simmons, Chair  
Court of Appeal for Ontario

Justice Michael J. Epstein  
Ontario Court of Justice

Mr. Malcolm M. Mercer  
Lawyer Member

Mr. Victor Royce  
Community Member

**Hearing Panel of the Ontario Judicial Council**

## **REASONS FOR DECISION**

## **Counsel:**

Borden Ladner Gervais LLP: Guy J. Pratte, Nadia Effendi, Christine Muir, Veronica Sjolín, Mannu Chowdhury  
Presenting Counsel

Torys LLP: Sheila R. Block, Irfan Kara, R. Craig Gilchrist, Rebecca Amoah;  
Addario Law Group LLP: Frank Addario, Wes Dutcher-Walls; Mirza Kwok |  
Criminal Defence Lawyers: Faisal Mirza; Gates Criminal Law: Kelly Gates  
Counsel for The Honourable Justice Donald McLeod

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## REASONS FOR DECISION

### I. Overview

[1] This proceeding arises out of a March 27, 2019 complaint (the “Current Complaint”) to the Ontario Judicial Council (the “OJC”) against Justice Donald McLeod.

[2] The Current Complaint followed on the heels of a December 20, 2018 OJC decision (the “First Decision”) dismissing a February 2018 complaint against Justice McLeod (the “First Complaint”). The issues at the hearing into the First Complaint (the “First Hearing”) related to Justice McLeod’s conduct in his capacity as Chair of the Interim Steering Committee (or “Steering Committee”) of the Federation of Black Canadians (the “FBC”), a Black community organization Justice McLeod helped found.

[3] At the request of the OJC Registrar, Justice McLeod confirmed that he had resigned as Chair of the FBC Interim Steering Committee while the First Complaint was under investigation. In early January 2019, following the First Decision, Justice McLeod formally resumed a role with the FBC.

[4] The First Hearing and surrounding events provide the backdrop for two sets of issues arising at this proceeding:

- whether Justice McLeod perjured himself at the First Hearing or misled the panel that heard the First Complaint (the “First Panel”); and

- whether Justice McLeod's more recent activities on behalf of the FBC or related to FBC events amount to judicial misconduct.

[5] To better introduce the issues, we will more fully describe events surrounding the First Hearing and elaborate on the issues at this proceeding.

## **II. Introduction**

[6] Justice McLeod helped found the FBC in 2017 and, prior to the First Complaint, had been one of its leading voices. However, to avoid being suspended from sitting as a judge pending determination of the First Complaint, Justice McLeod confirmed to the OJC Registrar on June 11, 2018 that he had resigned as Chair of the FBC Steering Committee and disengaged from any activities on behalf of the FBC.

[7] In its decision, the First Panel observed that the FBC has the laudable goal of promoting greater equality and inclusion for persons of African descent in Canada. However, the First Panel found Justice McLeod's activities on behalf of the FBC crossed the line into conduct that is incompatible with judicial office. That was because, on behalf of the FBC, Justice McLeod initiated meetings with politicians – not just to educate them about issues confronting Black Canadians – but also to advocate for specific policy changes in relation to those issues and for the allocation of resources to achieve such changes.

[8] Justice McLeod's position at the First Hearing was that his activities were permissible. He asserted they constituted important community engagement,

bringing to public attention issues that affect a vulnerable and disadvantaged group, and that his activities did nothing to undermine public confidence in the administration of justice or impair his capacity to carry out the functions of his judicial office.

[9] The First Panel disagreed. No matter how worthy the cause, engagement with politicians and government officials that a judge initiates outside the courtroom to achieve policy changes not directly tied to the administration of justice amounts to political activity and lobbying. Such activity violates the principle of separation of powers and puts at risk judicial independence and impartiality.

[10] Nonetheless, the First Panel concluded, for several reasons, that Justice McLeod's conduct was not so seriously contrary to the impartiality, integrity and independence of the judiciary that it undermined the public's confidence in his ability to perform the duties of his office or the public's confidence in the administration of justice generally. His conduct did not therefore rise to the level of judicial misconduct warranting a disposition under s. 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA").

[11] Among the First Panel's reasons for this latter conclusion were the following, which are particularly relevant to this proceeding:

- a finding, at para. 97, that Justice McLeod attempted to respect the limits of his judicial role in his discussions with politicians, including by refraining from expressing any opinion on a case or issue that was likely

to come before the courts and expressly distancing himself from the FBC's advocacy efforts on behalf of Abdoukader Abdi, a Somalian refugee who was the subject of pending deportation proceedings;

- findings, at para. 100, that Justice McLeod took the precaution of consulting with the Judicial Ethics Committee (the "Ethics Committee") of the Ontario Court of Justice (the "OCJ") concerning his activities, that Justice McLeod had always made it clear that he did not intend to serve on the later-to-be-elected FBC Board of Directors, and that he had terminated his role as Chair of the Interim Steering Committee; and
- the observation, at para. 107, that the First Decision provided the OJC with an opportunity to clarify for Justice McLeod and his colleagues on the OCJ that there are limits that govern judicial participation in civic and charitable activities and interactions with politicians and government officials and that, in the past, there may have been a lack of clarity about when a judge crosses the line into impermissible advocacy and political activity.

[12] Following the First Decision, on January 9, 2019, the FBC Interim Steering Committee approved a motion appointing Justice McLeod as Leadership Advisor to its Interim Steering Committee and Executive Team. Under the terms of that motion, Justice McLeod was to "manage meetings of both committees". However,



he was not permitted to vote “with respect to any matters”. Nor was he permitted to interface with the government on behalf of the FBC.

[13] A few months later, in May 2019, the FBC Interim Steering Committee transitioned to an appointed Board of Directors. At a meeting on June 23, 2019, Justice McLeod was approved as the non-voting Chair of that Board.

[14] Prior to the transition, Justice McLeod attended, and gave a speech at, the 2019 National Black Canadians Summit (the “2019 Summit”) organized by the FBC and others. Following the transition, he attended a July 23, 2019 meeting hosted by Employment and Social Development Canada (“ESDC”), a federal government agency, on behalf of the FBC. The meeting related to the federal government’s “*Supporting Black Canadian Communities Initiative*”, which was announced as part of the March 2019 federal budget.

[15] Justice McLeod resigned from the FBC in September 2019. As of that date, the FBC had not yet transitioned to an elected Board of Directors, a goal Justice McLeod had hoped to achieve in establishing the FBC.

[16] The Current Complaint<sup>1</sup> is premised on a blog published by Desmond Cole in late February 2019. Among other things, the blog referred to Justice McLeod resuming his involvement with the FBC; the FBC’s continuing involvement in coordinating meetings with and presenting “asks” to the government; Justice

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<sup>1</sup> The Current Complaint is attached to the Notice of Hearing for this proceeding, which is dated February 20, 2020. However, the complainant is not identified.

McLeod's attendance at a meeting on January 13, 2018 with Ahmed Hussen, then-Minister of Citizenship, Immigration and Refugees ("Minister Hussen"<sup>2</sup>), allegedly to discuss the Abdi case; and Justice McLeod counselling youth delegates about whether to speak about a racial profiling incident that occurred at the 2019 Summit.

[17] Following an investigation under s. 51.4 of the CJA by a two-person complaint subcommittee (one OCJ judge, one community member),<sup>3</sup> and a review under s. 49(14) of the CJA by a four-person Review Panel (two OCJ judges, one lawyer, one community member), this hearing was ordered under s. 51.4 of the CJA. Subsequently, a Notice of Hearing dated February 20, 2020 (the "2020 Notice of Hearing") was issued,<sup>4</sup> particularizing four allegations of misconduct against Justice McLeod. Those allegations may be summarized as follows:

- i) he committed perjury and/or misled the First Panel regarding his involvement in the Abdi case (the "First Allegation");
- ii) he misled the First Panel regarding his disengagement from any activities on behalf of the FBC (the "Second Allegation");
- iii) he engaged in behaviour that was or could be perceived as being "impermissible advocacy and lobbying" relating to his attendance and

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<sup>2</sup> Minister Hussen is now Minister of Families, Children and Social Development.

<sup>3</sup> We were informed that, in this case, the complaint subcommittee retained outside counsel to assist it as permitted under s. 51.4(5) of the CJA.

<sup>4</sup> Rule 18.1 of the OJC *Procedures Document* provides:

A hearing shall be commenced by a Notice of Hearing, which Presenting Counsel shall prepare for the approval of the review panel that referred the complaint for a hearing.

speech at the 2019 Summit, as well as his attendance and comments at the July 23, 2019 meeting hosted by the ESDC (the “Third Allegation”); and

iv) he engaged in behaviour that was or could be perceived as being “impermissible advocacy and lobbying”, providing legal advice, or improperly influencing individuals in relation to advice he gave to two youth delegates to the 2019 Summit (the “Fourth Allegation”).

[18] As permitted under rule 22.1 of the *OJC Procedures Document*, Justice McLeod delivered a written response dated March 11, 2020 to the 2020 Notice of Hearing (the “Response”) in which he specifically denied each allegation of judicial misconduct.

### **III. Conclusion in Brief**

[19] For the reasons that follow, we find that the First and Second Allegations are not made out. Further, although we find that aspects of Justice McLeod’s conduct involved in the Third and Fourth Allegations were incompatible with judicial office, we conclude that such conduct did not rise to the level of undermining the public’s confidence in his ability to perform the duties of his office or the administration of justice generally. Accordingly, such conduct does not amount to judicial misconduct. We therefore dismiss the Current Complaint.

[20] That said, we wish to make it clear that the issues before us concerning the First Allegation, namely, whether Justice McLeod perjured himself and/or misled

the First Panel concerning his involvement in the Abdi case, did not include the question whether Justice McLeod's specific actions underlying the First Allegation, for example, his conduct in arranging the January 2018 meeting with Minister Hussen, amount to conduct incompatible with judicial office. Those actions occurred well before the First Hearing. The only issues raised before us under the First Allegation were whether Justice McLeod perjured himself and/or misled the First Panel concerning his involvement in the Abdi case.

[21] Similarly, our reasons should not be read as addressing the broad issue of the propriety of a judge belonging to an advocacy organization. As we will discuss below, the First Decision clarified that, no matter who initiates the interaction, engagement by a judge with government officials to achieve policy goals unrelated to the administration of justice constitutes impermissible advocacy and lobbying and is incompatible with judicial office. However, apart from the prohibition against such advocacy and lobbying (or engaging in activities that create the perception of advocacy and lobbying), the First Panel did not address, and was not required to address, the propriety of a judge belonging to an advocacy organization or, if membership is permitted, any further limits on a judge's participation in such an organization. Although the Second and Third Allegations in this proceeding approached the periphery of those issues, those issues were not squarely before us, we did not receive submissions directly addressing them and we have not decided them.

[22] We will discuss each allegation in turn. However, before turning to the specific allegations, we will review the procedure followed at this proceeding and provide some brief background information, including a summary of the First Decision. We will then discuss some general principles relating to judicial conduct and the test for judicial misconduct that was applied by the First Panel, as well as the standard of proof, the approach to credibility assessment, and the character evidence filed at this hearing.

#### **IV. The Procedure Followed at this Proceeding**

[23] As required under rule 16.1 of the OJC *Procedures Document*, this proceeding has been conducted by Presenting Counsel, who have investigated the allegations through document summonses and witness interviews, made disclosure to counsel for Justice McLeod, and presented evidence and submissions at the hearing. Under rule 16.3 of the OJC *Procedures Document*, Presenting Counsel are not instructed by the Panel or the OJC Registrar, but rather operate independently.

[24] Under rule 16.5 of the *Procedures Document*, the duty of Presenting Counsel “is not to seek a particular disposition but is 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.”

[25] The evidence in this matter consists of the oral testimony of 13 witnesses and 22 numbered exhibits. Exhibit 3 is an Agreed Statement of Facts (the “2020

ASF”), to which 74 exhibits are attached, and which addresses the Second, Third and Fourth Allegations. The 2020 ASF exhibits include the Agreed Statement of Facts from the First Hearing (the “2018 ASF”) and transcripts of the First Hearing. Exhibit 4 is a Joint Document Brief to which 133 documents are attached. Some of our factual narrative is drawn from the First Decision, the 2020 ASF as well as the written submissions. Overall, we heard 15 days of evidence in December 2020 and February 2021. Following the evidence, we heard two days of oral submissions in March 2021. We subsequently received written submissions totaling over 400 pages in April 2021.

[26] Although we were provided with summaries of witness interviews conducted by both Presenting Counsel and counsel for Justice McLeod,<sup>5</sup> those summaries were not admitted as evidence, but rather were filed as representing the anticipated evidence of such witnesses.

[27] In accordance with their obligations under the CJA, Presenting Counsel have made submissions summarizing the evidence and relevant law. They have also presented alternative findings of fact and conclusions concerning judicial misconduct. They have not, however, advocated for or against any particular finding of misconduct.

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<sup>5</sup> Counsel for Justice McLeod arranged for the witness interviews they conducted to be verified by affidavit. However, as the witnesses were to provide oral evidence at the hearing, the affidavits were not admitted as evidence.

## **V. Background**

[28] The First Panel fully reviewed Justice McLeod's background, the events leading up to the formation of the FBC and Justice McLeod's subsequent activities with the FBC and interactions with the Ethics Committee prior to the First Hearing. For ease of reference, we will briefly reprise that review as those matters provide context for understanding what was at issue at the First Hearing, whether Justice McLeod perjured himself or misled the First Panel, and the propriety of his activities after he rejoined the FBC.

### **1. Justice McLeod's Background**

[29] Justice McLeod was appointed as an OCJ judge on September 18, 2013. Since his appointment, he has presided in Brampton in the Central West region. Currently, he is the only Black OCJ judge in Brampton, which has long been known for the diversity of its population.

[30] Justice McLeod lived in poverty for the first half of his life. From the age of four, he was raised by a single mother. The two of them and his sister lived in subsidized housing. He was a poor student but with his mother's encouragement and persistence and help from mentors, Justice McLeod was accepted into and graduated from university and ultimately, law school.

[31] Before being appointed to the bench, Justice McLeod had a successful career, practising criminal and administrative law. He was also active in the community, focusing in large measure on organizations that mentor Black youth.

Having overcome the barriers created by poverty and racism, Justice McLeod feels a strong obligation to “pay it forward”.

## **2. The Genesis of the FBC and Justice McLeod’s Activities with the FBC Prior to the First Hearing**

[32] Following the tragic shooting death in May 2016 of a young woman he knew, on Father’s Day 2016, Justice McLeod organized a meeting of what has come to be known as the “Toronto 37”. The Toronto 37 included Justice McLeod and other individuals who had backgrounds in mental health, corrections, education and criminal justice. They identified 13 areas of concern to the Black community and ultimately tasked a group of 15 volunteers to prepare a “White Paper” to examine three specific issues: education, mental health and corrections.

[33] As he describes it, Justice McLeod and others then began knocking on doors. They initiated meetings with various politicians and government officials to discuss the issues that had been identified, where those issues were coming from, and means they had identified to remedy the problems. Among the people Justice McLeod encountered, and a person who became interested in the group’s work, was then-Member of Parliament Ahmed Hussen.<sup>6</sup>

[34] Over time, the idea to form a national organization took hold. Justice McLeod became the chair of an Interim Steering Committee tasked with creating a regional coalition infrastructure and governance model for later ratification by a national

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<sup>6</sup> Justice McLeod testified Minister Hussen was a lawyer before entering politics and that he had previously seen him around the courthouse from time to time.



elected Board of Directors, on which Justice McLeod indicated he would not serve. Through the formation of the Interim Steering Committee and related committees and subcommittees (Executive Team, Governance, Finance, Communications and Stakeholder Relations) the FBC was born. Its initial mandate from the Toronto 37 was to address the three areas that had been identified as well as the United Nations International Decade for People of African Descent (the “UN Decade”), a United Nations initiative encouraging member states to “take concrete and practical steps to [adopt and implement] national and international legal frameworks, policies and programs to combat racism, racial discrimination, xenophobia and related intolerance faced by people of African descent”.

[35] The activities of Justice McLeod and others eventually led to a May 2017 meeting at Ryerson University with Gerald Butts, then-Principal Secretary to the Prime Minister, Minister Hussen, and members of the Black Caucus (Black Members of Parliament and Members of Parliament who represent ridings with significant Black populations). The May 2017 meeting, in turn, led to a June 2017 meeting with the Prime Minister and others at which, among other things, a PowerPoint presentation titled “Closing the Gap”, was given identifying four areas of concern (mental health, corrections, education and the UN Decade) and specific steps (“asks”) that the government should take to address these issues.

[36] The Federation of Black Canadians/La Federation des Canadiens Noir (“FBC FCN”) was formally incorporated on November 28, 2017. Its purpose as

described in its Certificate of Incorporation is “to support and advance the social, economic and cultural interests of Canadians of African descent by providing public forums to foster the economic growth of Canadians of African descent.” The Interim Steering Committee was the group tasked with creating the structure for the national organization that would transition to an appointed Board of Directors and ultimately be headed by an elected Board of Directors.

[37] To articulate the vision of what the FBC was intended to become and to educate Black communities about its mandate, the Interim Steering Committee launched an FBC website. The launch took place on December 3, 2017 to coincide with the 2017 National Black Canadians Summit (the “2017 Summit”), an event the FBC helped organize along with the Michaëlle Jean Foundation (the “MJF”) and the Toronto Public Library.

[38] The website described the FBC as a national, non-profit organization that advances the social, economic political and cultural interests of Canadians of African descent. Further, the website stated that the FBC is “politically non-partisan” but that it partners with community organizations across Canada and “advocates with them to governments, parliaments, multilateral organizations, businesses and faith-driven organizations” (emphasis added).

[39] The 2017 Summit was held in Toronto from December 4-6, 2017. It featured a number of speakers including Justice McLeod, Prime Minister Trudeau, Minister Hussen and other politicians and community members.

[40] FBC members also attended a Lobby Day in 2017, an event organized by a political consultant and the Black Caucus. Lobby Day is described on the FBC website as an event “when lay members meet politicians and public servants at various levels to advocate on a variety of relevant issues” (emphasis added). Justice McLeod attended the event to speak to Black community members about the FBC. He did not otherwise participate in the Lobby Day discussions or events.

[41] On January 30, 2018, Prime Minister Trudeau endorsed the UN Decade, which had been supported in the Closing the Gap presentation, referred to above, but which had not previously been recognized in Canada. Following the endorsement, the FBC issued a press release in which Justice McLeod was quoted as praising the Prime Minister’s action.

[42] The First Panel observed, at para. 37, that the FBC “publicly advocated” against Mr. Abdi’s deportation. However, it stated that, “as this involved a matter that was before the courts, Justice McLeod removed himself from any involvement.” Further, “[m]embers 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.”

[43] As noted by the First Panel, Justice McLeod was frequently described and quoted in news articles as both a leader of the FBC and as a sitting judge. In late February 2018, several media articles were published raising questions about the

FBC, the propriety of an OCJ judge playing a role in an advocacy organization and the FBC's connections with the Liberal Party of Canada.

### **3. Justice McLeod's Interactions with the Ethics Committee Prior to the First Hearing**

[44] In September 2017, Associate Chief Justice Faith M. Finnestad asked Justice McLeod to stop having meetings with political figures in his capacity as Chair of the FBC Interim Steering Committee. In her view, such interactions were inappropriate. As Justice McLeod did not share that view, she suggested he seek advice from the Ethics Committee.

[45] Justice McLeod emailed the Ethics Committee Chair on two occasions in November 2017 and on three further occasions in early March 2018, seeking advice as to whether he should be involved in the FBC. The March emails followed the February 2018 media articles, which were critical of the FBC.

[46] In his first November 2017 email, Justice McLeod described the work of the FBC and said it was not a lobby group or partisan to any political party. Further, he explained that his role with the FBC was "as the founder, chair of the steering committee and an honorary chair of the official Federation of Black Canadians." His "duties [would] be to ensure proper governance and adherence to parliamentary procedure ... during board meetings." As described by the First Panel, the Ethics Committee's initial response was to give him a "green light".

[47] In his second November 2017 email, Justice McLeod advised “that there may be instances where the government (any party) requests an audience with the Federation for the purposes of being educated regarding concerns in the black community (in light of the National scope of the organization).” As described by the First Panel, in response, the Ethics Committee light “turned to yellow”, citing concerns about the potential for a perception of lobbying.

[48] Following Justice McLeod’s March emails, which followed the February 2018 media articles and which will be discussed further below, the Ethics Committee light turned “red”. The Ethics Committee advised Justice McLeod that, although it was his decision, “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”. The concerns expressed by the Ethics Committee included the fact that the work of the FBC appeared to include lobbying; it had been successful in obtaining financial and other commitments from the government to address initiatives it had promoted; and Justice McLeod appeared to have become “unwittingly embroiled in a very public dispute ... with others who purport to serve the same community interests.”

[49] Ultimately, Associate Chief Justice Finnestad filed a complaint with the OJC on February 23, 2018, describing the issue as whether Justice McLeod’s activities with the FBC “cross the line into advocacy and political activity, and thereby transgress principles of judicial ethics.”

## **VI. The First Decision**

[50] The First Hearing was held on November 30 and December 4, 2018. In its decision, the First Panel reviewed evidence relating to various aspects of the FBC's and Justice McLeod's activities, including the following, many of which have been described above:

- the origins of the FBC prior to its incorporation in November 2017;
- the meetings the FBC Interim Steering Committee held with government officials, politicians and others in May and June 2017;
- the contents of the FBC website, launched in December 2017 to coincide with the 2017 Summit;
- Justice McLeod's attendance and speech at the 2017 Summit;
- the participation of other FBC representatives in Lobby Day 2017;
- the FBC's support for the UN Decade during the June 2017 meeting with the Prime Minister, the Prime Minister's eventual recognition of the UN Decade, and the related press coverage in January 2018;
- the FBC's public advocacy relating to Mr. Abdi;
- the February 2018 media coverage of the FBC; and
- Justice McLeod's interactions with Associate Chief Justice Finnestad and communications with the Ethics Committee.

[51] During the First Hearing, Presenting Counsel expressed the view that the evidence did not support the allegations of partisan political activity and fundraising set out in the August 13, 2018 Notice of Hearing, which led to the First Hearing. Rather, Presenting Counsel suggested that Justice McLeod's actions, through the FBC, of engaging directly with politicians for identified policy outcomes and the allocation of government resources to meet those outcomes, crossed the line into impermissible judicial conduct.

[52] Following a review of the OJC *Principles of Judicial Office* and the Canadian Judicial Council's ("CJC") *Ethical Principles for Judges* and *Commentaries* relating to community, charitable and political activities by judges, the First Panel turned to the question whether Justice McLeod's conduct was incompatible with judicial office.

[53] The First Panel focused, in particular, on the "fundamental constitutional principles of judicial independence, judicial impartiality and ... 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": at para. 83. Although the First Panel recognized that judges "do engage with government officials outside the courtroom in a variety of ways that are acceptable" (including serving on government-initiated working tables, acting as an inquiry Commissioner or testifying before a legislative committee), it concluded Justice McLeod's activities had crossed the line and were incompatible with judicial office.

[54] Referencing Professor Peter Russell's warning in "Judicial Free Speech: Justifiable Limits" (1996) 45 U.N.B.L.J. 155, at pp. 157-58, the First Panel noted, "judges would lose credibility as independent adjudicators if they 'were free off the bench to push for or against changes in public policy'": at para. 89.

[55] The First Panel distinguished the acceptable activities it had identified from the type of advocacy in which Justice McLeod had been involved on several bases. Those bases included situations where it is the government that identifies the issues to be explored and invites a judicial perspective to assist in the formulation of public policy as well as the fact that the judge is not involved as the advocate of a specific cause: at para. 81. The First Panel also rejected Justice McLeod's submission that the FBC's activities did not amount to lobbying because the FBC was not promising anything in exchange for what they were asking. The First Panel concluded that no "*quid pro quo*" is required to constitute lobbying – communicating with a public office holder to attempt to influence the development or amendment of any government policy or program meets the definition. The First Panel therefore stated that the activities of Justice McLeod and the FBC thus amounted to lobbying: at para. 78.

[56] The First Panel emphasized that "Justice McLeod would not likely have crossed a boundary had he restricted his efforts to educating member of the public about [issues relating to the history of discrimination and exclusion Black people have faced and how that history has translated into socio-economic challenges]":



at paras. 87-88. However, the First Panel concluded that, “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 [OCJ]”: at para. 86.

[57] As we have said, despite its finding that aspects of Justice McLeod’s conduct were incompatible with judicial office, the First Panel concluded, for several reasons, that such conduct did not rise to the level of judicial misconduct. In addition to the reasons we referred to in the Introduction, the First Panel also relied on the following reasons:

- an absence of evidence of partisan political activity or fundraising;
- a finding that Justice McLeod was motivated by laudable goals entirely consistent with the public interest; and
- a conclusion that Justice McLeod was genuinely motivated to promote public confidence in the justice system through his work as a judge and his efforts to educate justice system participants and members of the public about the experiences of the Black community.

[58] Nevertheless, at para. 108, the First Panel concluded its reasons with the following caution:

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.

## **VII. General Principles Relating to Judicial Conduct**

[59] In addition to the principles relating to judicial conduct on which the First Panel focused, Presenting Counsel also identified the following principles as being significant to this proceeding.

[60] As noted by the First Panel at para. 54 of its decision, maintaining confidence in the judiciary is essential to our democratic form of government. Canadian judges are therefore held to high standards of conduct. As explained by the Supreme Court of Canada in *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paras. 110-11, the personal qualities, conduct and image that a judge projects affects that of the judicial system as a whole and, therefore, the confidence the public places in it. Maintaining public confidence in the justice system is essential to its effectiveness and proper function. The public will therefore demand virtually irreproachable conduct from those performing judicial functions.

[61] Importantly, judges are accountable for both their judicial and extrajudicial conduct: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 44, citing M. L. Friedland, *A Place Apart: Judicial*

*Independence and Accountability in Canada* (1995), report prepared for the Canadian Judicial Council, at p. 129.

[62] However, as was also noted by the First Panel, judges 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.

[63] OCJ judges are guided by that court's *Principles of Judicial Office*, which explain the essential ethical duties expected of judges of the court. As explained by the First Panel, the CJC's *Ethical Principles for Judges* provide more detailed guidance. Both the *Principles of Judicial Office* and the *Ethical Principles for Judges* are advisory in nature and are not to be "used as a code or a list of prohibited behaviours": at p. 3. The OJC has long accepted that the CJC's *Ethical Principles* form part of the ethical standards for judges of the OCJ.

[64] In addition to the general recognition of the requirement for high standards of personal conduct and professionalism set out in the preamble, Presenting Counsel identified the following excerpts from the *Principles of Judicial Office* as being particularly relevant to this proceeding:

- 1.2 Judges have a duty to follow the law.
- 3.1 Judges should maintain their personal conduct at a level which will ensure the public's trust and confidence.
- 3.3 Judges must not abuse the power of their judicial office or use it inappropriately.

- 3.3 Judges are encouraged to be involved in community activities provided such involvement is not incompatible with their judicial office.  
[Emphasis added.]

### **VIII. The Test for Judicial Misconduct**

[65] The First Panel articulated the following two-part inquiry as the appropriate test for judicial misconduct:

- i) whether the judge's conduct was incompatible with judicial office; and
- ii) if so, whether the conduct was so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the judge's ability to perform the duties of office or in the administration of justice generally so as to require a finding of judicial misconduct: at paras. 70-71.

[66] Given that Justice McLeod is a judge and was identified as such in his work with the FBC, the First Panel confirmed that, however well motivated, "his actions must be considered against the objective standard of the conduct that is expected of judges": at para. 53, citing *Re Zabel* (OJC, September 11, 2017), at para. 34.

[67] Importantly, the First Panel also confirmed at para. 70 of the First Decision that "the purpose of judicial misconduct proceedings is 'essentially remedial'." The purpose is not to punish the judge, but rather to ensure that public confidence of reasonable people in the judge, the judiciary and the administration of justice is maintained. As noted by the First Panel, such reasonable people are, however,

aware of the history of racism and exclusion that affects the Black community in Canada, and the racial dynamics of the jurisdiction in which Justice McLeod presides: at paras. 88, 102, citing *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

[68] In Closing Submissions, all counsel identified the need for us to bear in mind the evidence of Professor Wendell Adjetey, an expert witness called by Justice McLeod, to provide necessary context for assessing the evidence and applying the test for judicial misconduct in this case.

[69] Professor Adjetey teaches at McGill University and specializes in a variety of topics related to the African Diaspora, including the African-Canadian experience. Among other things, he testified about:

- the Canadian history and legacy of anti-Black racism, which continues to exist in Canadian institutions;
- the persistent absence of Black people from positions of power and influence in these institutions;
- the importance of Black organizations to dismantling structural inequalities in Canadian society and allowing marginalized groups to engage with society and build their communities;
- the complex challenges Black organizations face as they attempt to establish themselves and gain support;

- the need for Black leaders, well versed in the challenges the Black community faces, with intimate connections to Black communities, in addressing issues faced by Black communities and organizations;
- the developing recognition of the importance of diversity; and
- the importance of Black role models and leaders to interrupting continued stigmatization and oppression and building bridges to offer historically excluded communities access to and inclusion in Canadian institutions.

[70] No one suggests this context means the rules of judicial conduct are or should be different for racialized judges. Nonetheless, the context Professor Adjetey described may inform our findings of fact and assessment of whether particular conduct “crossed the line”.

[71] Presenting Counsel cautioned however that this context does not change the test for judicial misconduct, the applicable law on perjury or misleading a decision-maker, or the evidence concerning Justice McLeod’s conduct on specific occasions.

## **IX. The Standard of Proof**

[72] As this is an administrative law proceeding, the civil standard of proof applies to all the allegations, *i.e.*, proof on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 49.

## **X. Credibility Assessment**

[73] In their written Closing Submissions, Presenting Counsel highlighted for our benefit the standard factors to be considered when assessing credibility. We will not review them here. We will however reiterate that we were alive to the issue of leading questions during the hearing and have borne that factor in mind when assessing the evidence.

[74] Presenting Counsel also submitted that some of the witnesses they called appeared “friendly” to Justice McLeod, which led to what they referred to as “sweetheart cross-examinations”. Counsel for Justice McLeod took exception to this characterization, particularly in the context of a proceeding such as this, where Presenting Counsel had a duty to call all witnesses with relevant evidence to give, whether they might have associations with Justice McLeod or not.

[75] We are, of course, aware of the nature of this proceeding and the special duties of Presenting Counsel. We observe that whether a witness had any reason to give evidence that is more favourable to one side is but one of many standard factors to consider when assessing evidence. It is a factor to be given such weight as the trier of fact considers appropriate in all the circumstances. See, for example, The Honourable Justice David Watt, *Watt’s Manual of Criminal Jury Instructions*, 2nd Ed. (Toronto: Carswell, 2015), at pp. 267-68.

[76] Counsel for Justice McLeod submitted that, in assessing the evidence, we should also bear in mind Professor Adjetey's evidence concerning the concepts of the "credibility deficit" and the "provisional status" of Black people.

[77] Professor Adjetey described the credibility deficit as a phenomenon whereby, despite the sterling qualities of a Black person, negative stereotypes associated with being from "the ghetto" will be triggered in that person's encounters with non-Black society. As a result of the credibility deficit, Black people have a provisional status, which is the effective equivalent of being on probation for life. One perceived misstep by a Black person can lead to disproportionate scrutiny by non-Black society.

[78] We have been mindful of this evidence in carrying out our duties.

## **XI. The Character Evidence Filed at this Hearing**

[79] On our count, 22 letters and videos of support for Justice McLeod form part of the record in this proceeding. As is evidenced by these communications, Justice McLeod is regarded as a man of integrity and a role model by many members of both the Black community and the community at large. The regard for Justice McLeod arises not just because of the position he holds or his success, but also because of his ongoing commitment to trying to improve the lot of others.



## **XII. The Allegations**

[80] We turn now to the specific allegations. In doing so, we address initially the first step of the test for judicial misconduct, namely: is the conduct described in each allegation incompatible with judicial office? Only if we find conduct incompatible with judicial office will we turn to the second step of the test and determine whether any of such conduct, considered individually or cumulatively, requires a finding of judicial misconduct.

### **1. The First Allegation: Did Justice McLeod commit perjury and/or mislead the First Panel regarding his involvement in the Abdi case?**

#### **A. Introduction**

[81] Paragraph 6 of the 2020 Notice of Hearing alleges that Justice McLeod committed perjury and/or misled the First Panel regarding his involvement in the Abdi case. Paragraphs 3 to 5 set out the particulars:

- para. 3 asserts that Justice McLeod “gave evidence by way of Agreed Statement of Facts, and during his examination-in-chief, that he had removed himself from any involvement in FBC’s advocacy work relating to the deportation of a Somali refugee named Abdoukader Abdi”;
- para. 4 states that in dismissing the First Complaint, the First Panel relied on Justice McLeod’s evidence to conclude that he had “removed himself from any involvement in FBC’s advocacy against the deportation of [Mr. Abdi]”; and

- para. 5 alleges that contrary to his evidence at the First Hearing, “Justice McLeod was involved in the FBC’s efforts in this regard, including arranging and/or participating in a meeting with [Minister Hussen], on behalf of the FBC.”

[82] At this proceeding, evidence has been led concerning three matters that could suggest that Justice McLeod was involved in the FBC’s advocacy efforts relating to Mr. Abdi.

[83] First, Justice McLeod acknowledges that he attended a January 13, 2018 meeting (the “January 2018 Meeting”) with Minister Hussen and Black community activist, Professor Rinaldo Walcott, at Minister Hussen’s constituency office. The evidence indicates Justice McLeod arranged the January 2018 Meeting after Professor Walcott emailed him to see if the FBC could be of any help with the Abdi case. Justice McLeod did not refer to the January 2018 Meeting in his evidence at the First Hearing.

[84] Second, evidence has been led that, in his capacity as Chair of the Interim Steering Committee, Justice McLeod circulated drafts of a February 28, 2018 Steering Committee letter to Minister Hussen relating to Mr. Abdi (the “February 2018 Steering Committee Letter to Minister Hussen” or the “February 2018 Letter”) among Steering Committee members to obtain their input and, in addition, took other steps that facilitated the February 2018 Letter’s production and delivery. Among other things, the February 2018 Steering Committee Letter to Minister

Hussen requested a meeting with Minister Hussen and criticized Mr. Abdi's deportation:

The Federation of Black Canadians (FBC) is writing you to request a meeting at your earliest convenience....

Having forcibly assumed the responsibility of raising [Mr. Abdi], the Crown should now consider the repercussions of its own negligence in this area, as it continues removal proceedings against [him].

[85] Third, while the February 2018 Steering Committee Letter to Minister Hussen was being prepared, Justice McLeod participated in circulating proposed FAQs for the FBC website (the "website FAQs"), which included a section advocating against Mr. Abdi's deportation. In addition, while the February 2018 Letter was being prepared, Justice McLeod received certain information from a Black community activist, Professor Idil Abdillahi. Professor Abdillahi had obtained information from Mr. Abdi's lawyer concerning ministerial steps that could be taken to stop, or at least pause, the deportation (the "Information"). Justice McLeod later passed the Information on to another member of the Interim Steering Committee. Aspects of the Information were eventually included in a March 6, 2018 FBC Facebook post entitled "Discussion: Issues Relating to current Canadian Immigration Policies". This Facebook post set out a variety of "community asks" (the "March 2018 Community Asks"), and included a section specifically advocating against Mr. Abdi's deportation.

[86] In his evidence at the First Hearing, given both through the 2018 ASF and orally, Justice McLeod asserted that he had “removed himself from any involvement” in the FBC’s public advocacy against Mr. Abdi’s deportation and was not involved in “any representations that were made by the FBC” about his case. This evidence will be set out in detail below. For ease of reference, it is also included as [Appendix ‘A’](#). The February 2018 Steering Committee Letter to Minister Hussen was before the First Panel. The website FAQs relating to Mr. Abdi,<sup>7</sup> the Information, and the March 2018 Community Asks were not.

[87] In his Response, Justice McLeod states, at para. 12, that he did not commit perjury or intentionally mislead the First Panel about his lack of involvement in the Abdi deportation case. Additional details are set out at paras. 12-14 of his Response:

- at para. 12, Justice McLeod states he “did not make public representations about Mr. Abdi. He met with [Minister Hussen] in January 2018, but it was not about Mr. Abdi”; and
- at paras. 13 and 14, Justice McLeod asserts that the statements in the 2018 ASF that he removed himself from any involvement in the Abdi matter and his testimony that he was not involved in the FBC’s

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<sup>7</sup> Although some website FAQs were before the First Panel as part of the 2018 ASF (Exhibit D), the FAQ relating to Mr. Abdi was not. The reason for this was not explored in the evidence at this hearing. We note that para. 31 of the 2018 ASF stated, in part: “Exhibit D is a version of the FBC’s website as it appeared and was publicly accessible on February 26, 2018.” On the record before us, it appears that the FAQ relating to Mr. Abdi may not have been added to the FBC website until at least February 27, 2018. It is not clear how or why the February 26, 2018 version of the FBC website was added to the 2018 ASF.

representations about Mr. Abdi are true. His statements and testimony related to the FBC's public advocacy. He was not involved in the FBC's public representations about Mr. Abdi.

[88] As developed at this hearing, Justice McLeod's position concerning the January 2018 Meeting is that it was not about Mr. Abdi or his case. Rather, it was about putting immigration and deportation policy issues on the table, in particular longstanding problems relating to the inability of immigrant and refugee children in the child welfare system to obtain Canadian citizenship, leaving them at risk of being deported if convicted of a serious criminal offence as an adult. In any event, he attended the January 2018 Meeting in his personal capacity and not on behalf of the FBC. Although Professor Walcott originally asked him if the FBC could help with Mr. Abdi's case, when Justice McLeod arranged the January 2018 Meeting, ministerial staff made it clear to him that Minister Hussen would not discuss individual cases. The January 2018 Meeting was not about Mr. Abdi.

[89] Concerning the February 2018 Steering Committee Letter to Minister Hussen, while Justice McLeod acknowledges that, in his role as Chair of the FBC Interim Steering Committee, he participated in various administrative matters so the February 2018 Letter could be sent, he maintains that the 2018 ASF was accurate and that his oral testimony at the First Hearing was true: as he said, he did not participate in the creation of the February 2018 Letter, did not sign off on its contents, and did not sign it. Similarly, his role in relation to the website FAQs,

the Information and the March 2018 Community Asks was solely administrative. Moreover, the FBC's involvement in the Abdi case was a peripheral issue at the First Hearing and related solely to the FBC's public advocacy concerning Mr. Abdi. Although updated website FAQs and the March 2018 Community Asks were public documents and available at the time of the First Hearing, the February 2018 Steering Committee Letter to Minister Hussen and related press release were the only public documents included in the 2018 ASF that related to Mr. Abdi. As such, the February 2018 Steering Committee Letter to Minister Hussen was the only public document at issue at the First Hearing. Accordingly, when he spoke to the FBC's public advocacy and representations about the Abdi case, he was referring to the February 2018 Letter.

[90] Presenting Counsel submit that while those inferences may be available, other potential inferences are also available.

[91] Concerning the January 2018 Meeting, this Panel must determine what it was about, whether Justice McLeod attended on behalf of the FBC and if he did, whether his attendance amounted to public advocacy. Further, even if we conclude that the January 2018 Meeting was about policy rather than Mr. Abdi specifically, we will have to consider whether Justice McLeod represented to the First Panel, in his oral evidence, that he would not have discussed the policies underlying Mr. Abdi's deportation, and whether his participation at the January 2018 Meeting make that statement untrue.

[92] As for the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs, the Information and the March 2018 Community Asks, Presenting Counsel submit that we will have to consider whether the evidence reveals that Justice McLeod's role was more than simply administrative and whether it also included, for example, initiating the process whereby the February 2018 Letter was sent, adding content to the website FAQs, or prompting the preparation of the March 2018 Community Asks. Further, even if Justice McLeod's role was solely administrative, we must evaluate his evidence at the First Hearing and assess whether it amounted to perjury or misleading the First Panel.

[93] In addition, Presenting Counsel contend that para. 52 of the 2018 ASF could be viewed as misleading because it refers to members of the Interim Steering Committee other than Justice McLeod "facilitat[ing] a meeting between [Minister Hussen] and members of the black community regarding the historical and ongoing deportation of Black individuals, including [Mr. Abdi]." However, it is undisputed that no such meeting between other members of the Steering Committee and Minister Hussen occurred. The only meeting with Minister Hussen was the January 2018 Meeting that Justice McLeod arranged and attended.

[94] To address this allegation, we will begin by providing some brief background concerning the Abdi case. We will then review the First Panel's findings relating to Justice McLeod's involvement in the Abdi case and the evidence and submissions on which those findings were based. We will then set out the relevant law

concerning perjury and misleading a decision-maker and finally turn to the evidence and submissions in this proceeding.

### **B. Brief Background re: the Abdi Case**

[95] By way of background,<sup>8</sup> Mr. Abdi is a Somalian refugee who came to Canada in August 2000 at the age of six. He was placed in care in 2001 and, in total, spent his childhood in 31 different foster homes. The Nova Scotia Department of Community Services was granted permanent custody and care of Mr. Abdi in 2003 but was never able to obtain Canadian citizenship for him. As an adult, Mr. Abdi pleaded guilty to serious criminal offences. Even before his release from prison in early 2018, he was the subject of deportation proceedings, which, if successful, would result in him being returned to a country with which he had little, if any, connection.

[96] Beginning around 2016, various proceedings concerning Mr. Abdi were pending under the *Immigration and Refugees Protection Act*, S.C. 2001, c. 27. Review proceedings subsequently ensued in the Federal Court.

### **C. The Findings of the First Panel**

[97] Concerning the FBC's advocacy relating to Mr. Abdi, the First Panel noted that the FBC publicly advocated against Mr. Abdi's deportation, but that Justice

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<sup>8</sup> We have gleaned some of this background information from *Abdi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 733.



McLeod removed himself from any involvement. At para. 37 of its decision, the First Panel said:

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. [Emphasis added.]

[98] As noted above, in concluding that Justice McLeod's conduct did not warrant a finding of judicial misconduct, the First Panel relied, in part, on the following findings, at para 97:

- 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; and
- Justice McLeod expressly distanced himself from the FBC's advocacy on behalf of Mr. Abdi precisely because that case was before the courts.

#### **D. The Evidence and Submissions at the First Hearing**

[99] We will now turn to the evidence and submissions at the First Hearing on which these findings were based.

[100] The evidence at the First Hearing consisted of the 2018 ASF (which included a 72-paragraph statement of facts and 32 exhibits), Justice McLeod's oral testimony, and the testimony of Professor Adjetej.

[101] The 2018 ASF included the following two statements concerning the Abdi case:

52. The FBC publicly advocated against the deportation of Abdoukader Abdi, a Somalian refugee who was at risk of deportation after he pleaded guilty to charges of aggravated assault and assaulting a police officer. It is anticipated that the evidence presented by Justice McLeod will show that members of the Steering Committee (other than him) facilitated a meeting between Ahmed Hussen and members of the black community regarding the historical and ongoing deportation of Black individuals, including Abdoukader Abdi. A decision by the federal government in respect of Mr. Abdi's deportation was the subject of a judicial review before the Federal Court of Canada.

53. It is anticipated that the evidence presented by Justice McLeod will show that Justice McLeod removed himself from any involvement in this matter. The Steering Committee (excluding Justice McLeod) wrote a letter to the federal Minister of Immigration, Refugees and Citizenship dated February 28, 2018, which cited Mr. Abdi's case and requested a meeting "to discuss current federal deportation and removal policies, particularly as they affect Black children under government care." Justice McLeod did not participate in the creation of the letter and did not sign it. The letter was posted on FBC's Facebook page so that it would be publicly accessible. [Footnote omitted and emphasis added. Letter and Facebook page noted as attached.]

[102] In Opening Submissions at the First Hearing, Justice McLeod's counsel said the following:

The evidence will show that Justice McLeod avoided any involvement and any advocacy in connection either [with] specific cases or in connection with contentious matters that would likely come before the court for determination.

Indeed, you will hear, and you have already read in the Agreed Statement of Facts, that he avoided any involvement in one particular deportation case that raised deep concerns in the Black community and in marginalized communities.

Indeed, you will also see that the organization was criticized for failing to engage in specific cases that were of concern in the Black community, and this was, the evidence will show, part of Justice McLeod's perspective on what this organization was all about, and what it should and should not be involved in. [Emphasis added.]

[103] Justice McLeod gave the following evidence at the First Hearing during his examination-in-chief relating to his involvement in the FBC's advocacy concerning the Abdi case:

Q. So then we go to paragraph 52 to 53 of the Agreed Statement of Facts, and it reflects that the FBC publicly advocated in relation to the deportation of Mr. Abdi, a Somali refugee who was at risk of deportation after he pled guilty to charges of aggravated assault and assaulting a police officer.

Did you have any involvement at all in any representations that were made by the FBC about that specific case?

A. No.

Q. And why not?

A. I felt that because it was a matter that was still before the courts, even if it's a court, it's not my court, I shouldn't be commenting on it.

There was a greater, I think, principle that was at stake. The case was about Abdoul Abdi, but in reality the principle behind this had to do with the fact that there had been many West Indians and Black people alike that were being deported for years and years prior to the Abdoul Abdi case, but irrespective of that, I didn't think it was appropriate, even if it could be couched in the language which I just stated.

I felt that it would be more prudent for me, in the capacity that I was as a judge, that I not comment. So not only did I not comment on it...I mean, when I say...it not be a part of the letter. So the letter was written, and I didn't even sign the letter.

I didn't sign off on the letter. I didn't sign off on the contents of the letter. [Emphasis added.]

[104] Justice McLeod was not cross-examined on this evidence. However, in Closing Submissions, Presenting Counsel at the First Hearing said the following:

We agree, as Presenting Counsel, that it was right and proper for Justice McLeod to remove himself from the involvement in the Abdi matter, as he did, and you'll see paragraph 53 of the Agreed Statement of Facts.

So had he involved himself in a prominent way in that matter, that would run afoul of these ethical principles ... but he made the right choice in relation to that in moving away from that, which was clearly going to be an area of controversy, and potentially one that was going to land in the courts in some fashion. [Emphasis added.]

[105] Justice McLeod's counsel's Closing Submissions included the following statements:

Justice McLeod never expressed an opinion, whether in sessions with politicians or publicly on any cases before the courts, or on any issues likely to be subject of dispute in the courts.

Indeed the evidence shows, and again, as [Presenting Counsel] fairly conceded, that he took active measures to distance himself from any statements about a deportation case that was of concern to the community. [Emphasis added.]

## **E. The Law relating to Perjury and Misleading a Decision-maker**

### **i) Perjury**

[106] Although this is an administrative law proceeding and not a criminal proceeding, the law of perjury remains rooted in ss. 131 and 133 of the *Criminal Code*, R.S.C. 1985, c. C-46. There are four elements of the offence of perjury as defined under s. 131 of the *Criminal Code*:

- i) the witness gave a statement under oath or solemn affirmation before a person authorized by law to permit it;
- ii) the statement given was false in fact;
- iii) the witness knew the statement was false when the witness made it; and
- iv) the witness made the statement with intent to mislead the person or body to whom the statement was made: *Watt's Manual of Criminal Jury Instructions*, at pp. 555-57. See also *Calder v. The Queen*, [1960] S.C.R. 892, at p. 897, which focuses on the last three elements.

[107] "Statement" is defined under s. 118 of the *Criminal Code* to mean "an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not".

[108] Section 133 of the *Criminal Code* creates a requirement for corroboration:

No person shall be convicted of [perjury] on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

[109] Actual knowledge or wilful blindness will suffice to satisfy the third element (the knowledge element) of perjury as set out above; recklessness will not: *Watt's Manual of Criminal Jury Instructions*, at pp. 556, 559.

[110] "Wilful blindness", arises where a person who has become aware of the need for some inquiry declines to make the inquiry because the person does not wish to know the truth. "Recklessness" involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur: *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584.

[111] A trier of fact may draw an inference that the witness gave a false statement with an intent to mislead where the trier concludes that the statement was false in fact and that the witness knew the statement was false when the witness gave it. Whether such an inference should be drawn depends on all the circumstances of the case: *Calder*, at p. 897. Nonetheless, in many cases, a finding of intent to mislead will flow naturally from findings that a statement was false and the witness knew it was false when the statement was made: *R. v. Pammett*, 2017 ONCA 658, at para. 11.

[112] To constitute perjury, it is not necessary that the false statement actually mislead the person or body to whom it is given, but only that the witness intended it to mislead: *R. v. Regnier* (1955), 112 C.C.C. 79 (Ont. C.A.), at p. 79.

[113] A witness may commit perjury even though a statement made in response to a question is literally true if the question asked is understood in a particular way. The statement will amount to perjury where the witness knows the question asked was intended in a different sense; knows the statement was false as a response to the question as intended; and gave the knowingly false statement with an intention to mislead: *R. v. Farris*, [1965] 2 O.R. 39, [1965] 3 C.C.C. 245 (C.A.), at pp. 251, 262.

[114] For reasons that will become apparent, it is unnecessary that we resolve in this case any issues relating to corroboration.

## **ii) Misleading a Decision-Maker**

[115] As noted above, the 2020 Notice of Hearing contains two allegations that Justice McLeod misled the First Panel. The first such allegation asserts that he “committed perjury and/or misled” the First Panel regarding his involvement in the Abdi case. The second such allegation asserts that he “misled” the First Panel in relation to his disengagement from any activities on behalf of the FBC.

[116] Concerning the allegations that Justice McLeod misled the First Panel, counsel do not agree on the elements of misleading a decision-maker and concerning whether the concepts of perjury and misleading a decision-maker are

the same. Perjury has a well-established three-part test. No similar test exists for the concept of misleading a decision-maker.

**a) Presenting Counsel's submissions**

[117] Presenting Counsel submit that a distinction should be made between the two allegations, perjury and misleading a decision-maker. Particularly given the administrative law context, the centrality of integrity to judicial office, the “and/or” language in the First Allegation and the absence of any reference to perjury in the Second Allegation, the concepts of committing perjury and misleading a decision-maker must be interpreted differently. The distinction can be found both in the nature of the statement made and in the mental element required for the differing allegations.

[118] Whereas perjury requires: i) that a statement be false in fact; ii) that the witness knows the statement is false when making it; and iii) that the witness possess an intention to mislead, those requirements should not apply to an allegation of misleading a decision-maker. Instead, Presenting Counsel contend that, in the context of judicial council proceedings, the test should focus on the duty of a judge to be “frank and transparent” in giving evidence. Presenting Counsel propose a test along the following lines:

Based on an objective assessment of the evidence from the perspective of a fair-minded person, does His Honour's impugned testimony amount to “half-truths” and not “frank and transparent” evidence, whether intentional, reckless or negligent?



[119] Presenting Counsel submit that the principles of avoiding “half-truths” and the duty to be forthcoming originate in the CJC’s decision in *Report of the Inquiry Committee Concerning the Honourable Michel Girouard* (6 November 2017). In that case a second Inquiry Committee found that the judge misled it intentionally. However, at paras. 41 and 95, the Inquiry Committee made broader findings about how judges should testify at such hearings:

The judge who testifies at an inquiry must not only refrain from lying, he or she must also eschew half-truths, stonewalling and other forms of subterfuge designed to frustrate a thorough examination of the relevant issues.

...

Considering the stakes, it is hardly surprising that Judge Girouard proved cautious in his testimony.... There is, however, a difference between caution and stonewalling. Judge Girouard was duty bound to testify in a frank and transparent manner. Instead, he proved to be an uncooperative and obstinate witness, who was often disinclined to answer promptly and fully questions put to him. [Emphasis added.]

#### **b) Justice McLeod’s submissions**

[120] Counsel for Justice McLeod make three submissions.

[121] First, the terms “committed perjury” and “and/or misled” in the First Allegation were intended to convey the same meaning. “Committed perjury” asserts a crime. What is alleged is deliberately making a false statement, knowing it is false and intending to mislead. “Misled” is not a defined legal concept. Under

the interpretive principle, *noscitur a sociis*, its meaning must be determined by the words that surround it.

[122] Further, the fact that the Second Allegation does not contain exactly the same language is irrelevant. The import is the same. The Second Allegation asserts conduct of a criminal nature, namely, that Justice McLeod intentionally misled the First Panel. Had the Review Panel intended the First and Second Allegations to also include a lesser form of blameworthy conduct, it should have said so.

[123] Second, counsel for Justice McLeod point out that Presenting Counsel first gave notice that their theory of misleading a decision-maker could include not only deliberate conduct but also conduct stemming from recklessness, negligence or some combination of the three only two days before the start of this hearing on December 6, 2020. Further, Presenting Counsel stated, “final submissions on this point of law will be done at the closing of the proceeding”. Counsel for Justice McLeod say Presenting Counsel’s approach to this issue contravenes the principles of procedural fairness and prejudiced Justice McLeod’s ability to defend his interests. Moreover, because the First and Second Allegations were framed as deliberate conduct, Presenting Counsel’s acknowledgement that the evidence is equally consistent with recklessness or negligent conduct should lead to a dismissal of those allegations.

[124] Third, and in the alternative, the minimum mental element for a finding of misleading a decision-maker should be recklessness. If the terms “committed perjury” and “misled” as set out in the 2020 Notice of Hearing have different meanings, the test concerning whether Justice McLeod misled the First Panel should be formulated as:

- was the evidence Justice McLeod gave at the First Hearing false;
- did he know the evidence was false when he gave it; and
- did he know or was he reckless as to the possibility that the First Panel would have been misled by his evidence?

[125] Counsel for Justice McLeod submit that Presenting Counsel have provided no authorities that support the proposition that the mental element for misleading a decision-maker should be negligence. In any event, if the intended allegations were simply that Justice McLeod was somehow careless or negligent, the hearing procedure under s. 51.6 of the CJA would not have been invoked. Other, more proportionate, procedures would have been adopted: ss. 51.4(13) and 51.4(18) of the CJA.

### **c) Discussion**

[126] For reasons that we will explain, we do not accept either Presenting Counsel’s definition of the elements of misleading a decision-maker or Justice McLeod’s definition. Before explaining our reasons and setting out our definition,

we wish to address the procedural fairness issue raised by Justice McLeod concerning the mental element of misleading a decision-maker.

[127] The allegation of lack of procedural fairness was first made in Justice McLeod's written Closing Submissions. In light of that fact, and also because we have concluded that the allegations of misleading a decision-maker are not made out, we prefer to determine the elements of misleading a decision-maker issue on the merits without addressing the procedural fairness issue. However, our conclusion on the mental element issue is subject to one caveat.

[128] Based on our interpretation of the 2020 Notice of Hearing, we are inclined to accept Justice McLeod's alternate position that the minimum required mental element for misleading a decision-maker, as alleged in this case, is recklessness. That said, we recognize that, subject to questions of procedural fairness, a panel such as this may not be bound by the specifics of a Notice of Hearing. However, in this case, the fact that we may not be bound matters not. We have concluded that the allegations of misleading a decision-maker are not made out without having to conclusively determine the required mental element. In relation to the only issue where the required mental element could make a difference (whether Justice McLeod misled the First Panel concerning his involvement in the Abdi case), three of four panel members have found that Justice McLeod did not make a false statement. The question of the necessary mental element for misleading a decision-maker is therefore irrelevant to the panel's conclusion that the allegations

are not made out. Nonetheless, because one panel member found Justice McLeod made a false statement in relation to one issue, we have addressed the mental element question. However, our conclusion on the mental element question is subject to the caveat, that, had it been necessary, we may have considered whether we were bound by the specifics of the 2020 Notice of Hearing and any related issues of procedural fairness.

[129] We consider it neither desirable nor necessary that we attempt to craft a comprehensive definition of “misleading a decision maker” for the purposes of judicial council proceedings along the lines Presenting Counsel have suggested. In this case the meaning of “misled” or “misleading a decision-maker” is driven by the language of the 2020 Notice of Hearing.

[130] The First Allegation asserts that Justice McLeod “committed perjury and/or misled” the First Panel. We agree that the “and/or” language signifies a distinction between the two concepts. So does the omission of any reference to perjury in the Second Allegation. However, we do not agree that that distinction goes so far as to support the conclusion that, as alleged, misleading a decision-maker could be committed through negligence.

[131] Perjury is a criminal offence. Where, as here, a decision was made to allege a criminal offence “and/or” other misconduct, the other misconduct derives its meaning, to at least some degree, from the allegation of a criminal offence. Had it been intended that the other misconduct could be entirely dissimilar to the criminal

conduct, rather than combining the two forms of conduct into one allegation, a separate allegation should have been made, or particulars of the lesser form of misconduct provided, so the meaning of the lesser form of misconduct would be clear.

[132] Perjury requires knowledge of a false statement and a deliberate intention to mislead. To bear some similarity to perjury, misleading a decision-maker need not include the requirement of an intention to mislead. It must, however, require some level of knowledge of the false statement. Otherwise, the lesser form of misconduct could be entirely dissimilar from perjury. The lesser form of misconduct cannot therefore be committed through simple negligence. For the purposes of this proceeding, we assume, without deciding, that any form of subjective knowledge (actual knowledge, wilful blindness or recklessness) of a false statement will suffice to satisfy the mental element of misleading a decision-maker.

[133] At para. 409 of their written Closing Submissions, Presenting Counsel appeared to invite us to exclude actual knowledge from the mental element of misleading a decision-maker. Moreover, the focus of their submissions in discussing allegations of misleading a decision-maker is on reckless or negligent conduct. However, excluding intentional conduct is not consistent with the test they proposed at para. 410 of their written Closing Submissions as set out above. In any event, it is unnecessary that we determine that question for the purposes of this matter.

[134] At paras. 427-431 of their written Closing Submissions, Presenting Counsel advanced four bases for asserting that recklessness or negligence will suffice to establish “misleading a decision-maker”.

[135] First, they assert that the OJC has previously recognized that intentionality is not required to support judicial misconduct: *Re Zabel*, at paras. 33-35; *Re McLeod*, (OJC, December 20, 2018), at para. 53. We do not disagree, but the issue for us is interpreting the meaning of “misled”, in the sense of misleading a decision-maker, as it is used in the 2020 Notice of Hearing.

[136] Second, Presenting Counsel referred to three law society disciplinary decisions in which they assert recklessness or negligence led to findings of “misleading” statements. Presenting Counsel assert that the focus in these cases was on whether the lawyer was negligent or reckless in the representations that they made, including not taking sufficient care to ensure that their representations were accurate and complete.

[137] We do not accept these decisions as authority for the proposition that negligence could suffice for the mental element of misleading a decision-maker. As a starting point, the decisions were made in a different context. More importantly however, on our reading of these decisions, the findings were not premised on negligence.

[138] In *Liggett (Re)*, 2011 LSBC 22, the hearing panel found recklessness: at para. 28. In *Jackson (Re)*, 2015 LSBC 57, the lawyer stated in an affidavit, “I have

no knowledge that any orders have been made”. However, the hearing panel found the lawyer knew there was uncertainty about whether a particular order had been made. The lawyer’s knowledge in that respect made her statement misleading: at para. 105.

[139] In the third decision, *Vlug (Re)*, 2014 LSBC 9, the hearing panel found the lawyer intentionally made statements when “he knew or ought to have known” the statements were not true: e.g., at para. 55. We acknowledge “ought to have known” denotes negligence: *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at pp. 645-46. Nonetheless, as we read the decision, we have no doubt the hearing panel was satisfied the lawyer knew or was wilfully blind to the fact that his statement was untrue.

[140] Presenting Counsel’s third and fourth reasons for asserting “misled” or “misleading a decision-maker” do not require deliberate intention rests on the principle of Integrity as set out in chapter 3 of the *Ethical Principles for Judges* and the statements in *Therrien (Re)* indicating that public confidence in the judiciary demands both the existence and appearance of integrity.

[141] Principle 3.1 of the *Ethical Principles for Judges* states: “Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.” Further, the CJC’s *Commentaries* advise that assessment of integrity is largely objective and not conditional on a judge’s intentions.



[142] Presenting Counsel submit that the appearance of integrity can only result from judges taking reasonable steps to ensure the evidence they give under oath is complete and accurate.

[143] Again, we do not disagree with the importance of integrity to the judicial function. Nor do we dispute that giving inaccurate testimony through negligence could amount to judicial misconduct. We also take account of the fact that the purpose of this proceeding is remedial.

[144] However, we are not considering the boundaries of judicial misconduct in the abstract. Our function is to determine the meaning of the allegations in the 2020 Notice of Hearing. In the context of discipline proceedings against a lawyer, it has been said that “[c]harges of professional misconduct should, if possible, avoid using the wording of the *Criminal Code*.” Instead, “they should specify that there has been professional misconduct and set out the particulars relied upon to demonstrate such conduct”(emphasis added): *Stevens v. Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 (Div. Ct.).

[145] Here, the foundational premise of the First Allegation is a criminal offence requiring knowledge of the falsity of a statement. We agree that the “and/or” language in the First Allegation contemplates some lesser form of misconduct than perjury – as does the omission of any reference to perjury in the Second Allegation.

[146] However, the 2020 Notice of Hearing contains no language or particulars that suggest that negligent conduct could be sufficient to amount to misleading a

decision-maker. In the absence of such language or particulars, we conclude it would be unreasonable to hold that the phrase “committed perjury and/or misled [the First Panel]” could encompass negligent conduct. We further conclude that the term “misled” must be interpreted consistently throughout the 2020 Notice of Hearing.

[147] As we have said, in their alternative submissions, counsel for Justice McLeod submitted that, if perjury and misleading a decision-maker differ, the mental elements of misleading a decision-maker would have to establish:

- Justice McLeod knew the evidence was false when he gave it; and
- Justice McLeod knew or was reckless whether the First Panel would have been misled by his evidence.

[148] We do not accept this formulation. We are not satisfied intention to mislead is a necessary element of misleading a decision-maker. In any event, as noted above, an inference of an intention to mislead often flows naturally from knowledge that a statement was false. To differentiate the allegations of perjury and misleading a decision-maker, the differing mental element must relate to knowledge of whether the evidence given was false. Otherwise, the allegations of perjury and misleading a decision-maker would be virtually identical.

[149] We would articulate the test for misleading a decision-maker as set out in the 2020 Notice of Hearing as consisting of the following elements:

- i) did the judge give a statement under oath or solemn affirmation before a decision-maker;
- ii) was the statement false in fact or incomplete in a material way;
- iii) at the time the statement was made, did the judge know, or was the judge wilfully blind or reckless concerning whether the statement was false in fact or incomplete in a material way.

**F. The Evidence and Submissions at this Proceeding Concerning the First Allegation**

**i) The January 2018 Meeting**

**a) The evidence**

[150] As we have said, Justice McLeod acknowledges that he arranged and attended the January 2018 Meeting with Minister Hussen and Black community activist, Professor Rinaldo Walcott, at Minister Hussen's constituency office. Also in attendance were two ministerial aides, Tia Tariq and Zubair Patel.

[151] To provide context, in addition to reviewing evidence concerning what happened at the January 2018 Meeting, we will review the evidence concerning events leading up to the January 2018 Meeting and how it was arranged, as well as evidence concerning certain post-January 2018 Meeting events.

**Evidence concerning events leading up to the January 2018 Meeting and how the January 2018 Meeting was arranged**

[152] There is no real dispute about the following facts concerning how the January 2018 Meeting was arranged:

- Justice McLeod and Professor Walcott were acquainted: they met at a meeting hosted by Adam Vaughan concerning poverty in the Black community;
- Professor Walcott became aware of the Abdi issue in late 2017 and had some prior involvement in speaking against Mr. Abdi's deportation: he gave a flyer to Minister Hussen about the issue at the 2017 Summit; he also tweeted on January 7, 2018, advocating against Mr. Abdi's deportation, and in one of his tweets called out various organizations, including the FBC, for their lack of action on the issue;
- an incident occurred at Minister Hussen's home on January 7, 2018: a group opposed to Mr. Abdi's deportation (Showing Up for Racial Justice) attended and put up posters urging Minister Hussen to stop the deportation;
- also on January 7, 2018, Peter Flegel, then-MJF Director of Programs and Development, sent Justice McLeod a draft New Year's message for the Steering Committee to consider sending to 2017 Summit attendees; among other things, the draft New Year's message claimed the FBC had

been “in direct contact with federal government officials to advocate ... for Black children like the Nova Scotian Abdoul Abdi facing immanent [*sic*] deportation” and asserted the FBC’s aim was “to see the deportation stayed”;

- the catalyst for the January 2018 Meeting was a January 8, 2018 email exchange between Professor Walcott and Justice McLeod, set out below, in which Professor Walcott asked for the FBC’s help or advice concerning the Abdi case;
- Professor Walcott was asked to contact Justice McLeod by Professor Idil Abdillahi, another Black community activist who was working with the Abdi family to oppose his deportation and with whom Justice McLeod later had a lengthy telephone conversation on February 19, 2018 (which Professor Abdillahi surreptitiously recorded) about a variety of subjects, including the January 2018 Meeting;
- soon after the January 8, 2018 email exchange, Justice McLeod arranged the January 2018 Meeting by telephoning Ms. Tariq;
- on January 10, 2018, Justice McLeod forwarded the draft New Year’s message he received from Mr. Flegel to Interim Steering Committee members saying it “should go out as soon as possible, and also tweeted and put on our social media”; however, Justice McLeod also welcomed comments from Steering Committee members before it went out;

- there was a “pivot” in the plan for the January 2018 Meeting when Professor Walcott advised Justice McLeod via text message on January 12, 2018, also set out below, that the “go-between” had not provided the names of any attendees for the January 2018 Meeting, and he (Professor Walcott) was not sure how to proceed; and
- via text message reply, Justice McLeod proposed a smaller meeting that would “allow the policy to be canvassed and potentially put on the table for further discussion”, to which Professor Walcott agreed.

The January 8, 2018 e-mail exchange:

On Jan 8, 2018 1:20 PM, Rinaldo Walcott ... wrote:

Dear Donald,

I am not sure if you have heard about the Abdoul Abdi case and his impending deportation. Many in the community are shaken, hurt and angry about his removal to Somalia. I am wondering if the Federation can be of any help here? As a back channel to Minister Goodale and Minister Hussen? Any advice or help from the Federation would be appreciated.

Any thoughts appreciated.

Happy New Year

Best

Rinaldo [Emphasis added.]

On 2018-01-08, 2:37 PM, "McLeod, Donald Justice (OCJ)" [O.C.J. e-mail address] wrote:

Rinaldo,

I tried to call yesterday to see what we could do. I decided to take the back Channel route and contacted the Minister myself.

When can you talk. I want to make sure we can help. [Emphasis added.]

The January 12, 2018 text message exchange

Justice McLeod: Hey Rinaldo, hope your [sic] well. Are you able to discuss or send me your list of attendees?

Professor Walcott: Good morning Donald. So the go between got back to me last night and told me a meeting with Hussen is not as vital for them at this time. They believe with the move to Toronto that their focus is on seeing him and dealing with Goodale. So with that they provided no names. I am not sure how to proceed. Let me know your thoughts. [Emphasis added.]

Justice McLeod: Perhaps a smaller meeting with you myself and the Minister. That would allow the policy to be canvassed and potentially put on the table for further discussion.

Justice McLeod: What do you think?

Professor Walcott: That is fine with me. What time do you think? I have something at 6:30 on Saturday. [Emphasis added.]<sup>9</sup>

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<sup>9</sup> As we have said, the Current Complaint is premised on a February 2019 Desmond Cole blog. We note that the blog quoted Professor Walcott's January 8, 2018 email to Justice McLeod and Justice McLeod's January 8, 2018 response. Professor Walcott's identity was redacted from the quotation. The blog did not refer to the January 12, 2018 text message exchange between Professor Walcott and Justice McLeod that resulted in a "pivot" in the plan for the January 2018 meeting.

[153] Professor Walcott testified that he understood the “we” in Justice McLeod’s January 8, 2018 email, “I want to make sure we can help”, referred to the FBC. As he did not arrange the January 2018 Meeting, he believed it was arranged by the FBC or Justice McLeod acting on the FBC’s behalf. He understood that he, and community activists focused on the Abdi case whose names Professor Abdillahi would provide to him, would attend the January 2018 Meeting, possibly with some FBC members. The purpose of the January 2018 Meeting was to talk about the Abdi case.

[154] Professor Walcott later learned from Professor Abdillahi that Mr. Abdi had been released from detention and that she and the other activists organizing around his detention were more interested in seeing Mr. Abdi and putting pressure on Minister Ralph Goodale (then-Minister of Public Safety and Emergency Preparedness) than meeting Minister Hussen. In the result, Professor Abdillahi did not provide him with the names of any prospective attendees.

[155] Professor Walcott texted Justice McLeod on January 12, 2018 because he did not know whether to proceed with the January 2018 Meeting. He was not sure exactly what Justice McLeod meant in his reply text when Justice McLeod referred to allowing the policy to be canvassed. He assumed it might be the policy around allowing people brought here as children, who did not acquire Canadian citizenship, to be deported as adults. In any event, having a meeting with Minister Hussen was still fine with him.



[156] As far as Professor Walcott was concerned, he would be meeting with Minister Hussen for one purpose only: to talk about Mr. Abdi and ensure he would not be deported from Canada. That was the only reason he contacted Justice McLeod; he saw no need to reiterate it. He would not have gone to the January 2018 Meeting had he been told he could not talk about Mr. Abdi's case.

[157] Justice McLeod testified that when he wrote in his January 8, 2018 email that he tried to call the day before, he was referring to trying to call Minister Hussen. He tried the Minister's cell number but was unable to reach him. He previously knew nothing about the Abdi case. He was not at the 2017 Summit when the subject came up. But he had heard about the incident at the Minister's home, which he understood involved vandalism, and was concerned for the Minister and his family. He assumed Professor Walcott was as well.

[158] Justice McLeod said the FBC prided itself on sharing its connections. He had Ms. Tariq's cell number as well and contacted her to set up a meeting because he was better acquainted with Minister Hussen than Minister Goodale. He told her about Professor Walcott's email asking about the Abdi case and whether they could set up a meeting. She was agreeable to arranging a meeting but clarified that while they could discuss policy, Minister Hussen would not discuss individual cases. Justice McLeod was not concerned about that; he was doing what he could do to help as he had said he would; it was for the Minister and his group to set the parameters of any meeting. However, Justice McLeod did not recall advising

Professor Walcott about this stipulation. Further, because Ms. Tariq provided such an early date, he was not able to bring the matter to the Steering Committee for a vote.

[159] In any event, there was a pivot in the plan on January 12, 2018. Professor Walcott's contact had not supplied him with the names of any attendees. Justice McLeod proposed a smaller meeting to canvass policy and Professor Walcott agreed. Justice McLeod acknowledged that nothing in their communications precluded Professor Walcott from also raising the Abdi issue. However, in Justice McLeod's mind, this was now in keeping with the FBC's way of doing things; they would have an initial meeting to talk about policy and later come back with a white paper addressing what should be done.

[160] Concerning the draft New Year's message, Mr. Flegel had been instrumental in having the FBC partner with the MJF to organize the 2017 Summit. In Mr. Flegel's view, the FBC had positioned itself at the 2017 Summit as a voice for the Black community. However, he was concerned, post 2017 Summit, about their radio silence on important issues. Mr. Flegel testified that since he had communications experience, he told Justice McLeod in a telephone conversation he would be sending him a New Year's letter to consider having the FBC send out. He was not aware of any "direct contact with federal government officials to advocate ... for Black children like ... Abdoul Abdi facing imminent deportation". Rather, in writing this, he was hoping to spur the FBC into action.

[161] Justice McLeod indicated in his evidence that he did not speak to Mr. Flegel about the proposed New Year's message and did not read the email on January 7, 2018. He did not know what the reference in the email to "direct contact with federal government officials" referred to and had no real explanation for why he suggested the message should be sent out. He said he disagreed with some of the content but wanted other Steering Committee members to have a chance to review it. He testified there was opposition among some Interim Steering Committee members to sending the New Year's message. There is no evidence that it was ever sent.

**Evidence concerning what happened at the January 2018 Meeting**

[162] Professor Walcott acknowledged that his memory of the January 2018 Meeting was limited. According to him, he arrived before Justice McLeod and chatted briefly with Minister Hussen's aides. He testified he told the Minister that he was there as an advocate and described how much anger and betrayal the community was feeling over the fact that Mr. Abdi could be deported. He said he and Minister Hussen spoke quite a lot. He did not recall being told Mr. Abdi's case could not be discussed. The Minister was still upset about the incident at his home and also repeated the "boilerplate" that Ministers always say about the process having to play out. But Minister Hussen did say that he was careful when cases like Mr. Abdi's came to him to carry out his due diligence and that he had turned back a number of cases.

[163] Professor Walcott could not recall Justice McLeod speaking much. He could not recall if policy was discussed; he did not go there to talk about other children. Nor did he recall if anything was said about the FBC. He emphasized that he really did not recall much about the January 2018 Meeting. When asked if there was any discussion of next steps or a possible Town Hall, he responded not to his recollection.

[164] Professor Walcott was asked about an email dated February 15, 2018 that he sent to Justice McLeod and another individual, Debbie Douglas, the Executive Director of the Ontario Council of Agencies Serving Immigrants (“OCASI”). The email reads, in part, as follows:

I am following up on the potential meeting around immigration issues with Minister Hussen. I therefore want to introduce you to Debbie Douglas.... Debbie and her colleagues have been working on these issues for sometime now and have a draft document as well.

...

They should be at the table. I leave the rest up to both of you. [Emphasis added.]

Professor Walcott testified he was unsure what meeting he was referring to in the email. He could only infer that he had been privy to some discussion about a potential meeting on immigration issues with Minister Hussen. It must have been a meeting that had already occurred. He only participated in one meeting with Minister Hussen; it was the January 2018 Meeting at the Minister’s office about Mr. Abdi.

[165] Professor Walcott testified that he assumed the January 2018 Meeting was confidential. No one said that but tensions were high. He assumed a sit-down meeting would be confidential. He did not ask that the January 2018 Meeting be kept confidential.

[166] Ms. Tariq and Mr. Patel testified but produced no notes of the January 2018 Meeting and had little precise recollection of the discussion. Both confirmed that Minister Hussen would not have engaged in discussions of a specific case, particularly one that was before the courts. Ms. Tariq recalled discussion about the fact that there were 120 children in care. She agreed that Mr. Abdi was a high-profile version of a problem affecting 120 other people and thus a symbol of a policy issue. Mr. Patel remembered discussion around children in care and children and immigration status. Both Professor Walcott and Justice McLeod would have spoken to the topic. Although he did not recall it, it was possible Mr. Abdi's name came up. However, as far he remembered the details of the Abdi case were not discussed. In cross-examination, Mr. Patel agreed with a suggestion that he did not know in what capacity Justice McLeod attended the January 2018 Meeting. Neither Ms. Tariq nor Mr. Patel understood the January 2018 Meeting was confidential. Rather, they were clear that Ministers do not hold confidential meetings with constituents.

[167] Although summonsed to produce documents and testify, Minister Hussen invoked parliamentary privilege and declined to attend.

[168] Justice McLeod testified that the purpose of the January 2018 Meeting was to discuss policy. Ms. Tariq made it clear when he arranged the January 2018 Meeting that Minister Hussen would not discuss specific cases. Further, Justice McLeod's January 12, 2018 text to Professor Walcott referred only to canvassing policy. Nonetheless, Justice McLeod agreed nothing was said to preclude Professor Walcott from speaking about Mr. Abdi.

[169] Justice McLeod acknowledged that Professor Walcott referred to the Abdi case at the January 2018 Meeting. As he recalls it, he arrived before Professor Walcott, and he (Justice McLeod) and Minister Hussen had a brief discussion about the January 7, 2018 incident at the Minister's home before Professor Walcott arrived. Professor Walcott started talking about the Abdi case just as they were sitting down. However, Minister Hussen immediately made it clear that he could not talk about individual cases. He spoke about the policy around that. The conversation then moved on to other policy issues.

[170] Justice McLeod testified that he made notes during the January 2018 Meeting in a Moleskin notebook. The notes are dated January 12, 2017. However, Justice McLeod testified he was sure they relate to the January 2018 Meeting. Although, even for Justice McLeod, some of the words are difficult to read, the notes read essentially as follows:

- 1) Policy discussion + next steps
- 2) Comment from the Min.

3) CAS, immigration/structural changes

4) Yes to the policy

5) Activism is a blunt tool

→ +3 – who else?

- pub. safety
- child advocate
- advocacy issue

6) Annual immigration meeting

July – prov. “he” leads

Dept of Justice

→ Federation lead

→ 120 urgent cases

→ Some things immediate

7) Commentary

8) Appearance

“statement”

[171] Justice McLeod testified that item 5, “Activism is a blunt tool”, was a comment Professor Walcott made when Justice McLeod brought up the subject of vandalism having occurred at Minister Hussen’s home. The notes were not otherwise intended to be a verbatim account of what happened at the January 2018 Meeting; they were simply reminders for Justice McLeod because he expected he would have to report on what happened.

[172] Item 3, “CAS, immigration/structural changes”, related to a discussion around the Black community’s belief that there needed to be some overhaul where immigration and the CAS are concerned.

[173] Concerning item 6, “Annual immigration meeting”, Justice McLeod explained that, in terms of next steps, Minister Hussen was also willing to have a round table and that Professor Walcott agreed to provide names of stakeholders who could attend. Justice McLeod wrote “Federation lead” because he thought the immigration summit was something the FBC could potentially take the lead on. He later talked to the Steering Committee in-camera about putting an immigration meeting together.

[174] Justice McLeod also referred to the January 2018 Meeting in his February 19, 2018 telephone conversation with Professor Abdillahi. Early in their conversation he said he met with Minister Hussen, there were activists at the January 2018 Meeting and that after the January 2018 Meeting the activists asked him not to reveal that they were there. Later in the conversation, he had this to say about what the January 2018 Meeting was to be about:

Justice McLeod: And I will tell you this. I have spoken -- so, Rinaldo -- I will tell you, when we were trying to set up this meeting for Abdoul --

Professor Abdillahi: Yes

Justice McLeod: Well, not for Abdoul -- sorry -- but in relation to his case --



[175] In cross-examination, Justice McLeod asserted that he was correcting himself at this point in the conversation to clarify that the meeting (*i.e.*, the January 2018 Meeting) being set up was not about Mr. Abdi; rather it was in relation to him in the sense that he was a symbol of children in care. Justice McLeod acknowledged in cross-examination that Professor Walcott initially wanted to talk to Minister Hussen about the Abdi case. However, the reality was they could not. So, the discussion would have to be in relation to him, meaning in relation to immigration policies that impacted children in care.

[176] On the issue of confidentiality, Justice McLeod testified that as they were leaving, Professor Walcott asked that his attendance at the January 2018 Meeting not be revealed. Justice McLeod was surprised. He had never heard of anyone wanting their attendance at such a meeting to remain confidential. Further, transparency was important and, as his notes indicated, they would have wanted to publicize the fact that he been at the January 2018 Meeting. However, Professor Walcott is a respected person in the community and must have had a reason why he did not want anyone to know he was at the January 2018 Meeting. So, Justice McLeod agreed. But it meant he could not publicize the January 2018 Meeting because if he did, people would ask who attended.

### **Evidence concerning events after the January 2018 Meeting**

[177] The evidence is relatively clear that on January 21, 2018 Justice McLeod advised Interim Steering Committee members during an in-camera session of a

Steering Committee meeting that he had recently had a meeting of some sort with Minister Hussen. Item 8 of the minutes of the January 21, 2018 Interim Steering Committee meeting identifies an agenda item: Other Business Ahmed Hussen BLM. The evidence is not entirely clear concerning what Justice McLeod reported.

[178] Four current or former FBC Board members/Interim Steering Committee/Executive Team members testified about this item: Richard Picart, Len Carby, Chris Thompson and Dahabo Ahmed-Omer. Overall, their evidence was vague. Some thought Justice McLeod told them about vandalism at Minister Hussen's house and that he had a meeting at the house to mediate the situation. Mr. Carby thought he simply told them about a meeting with the Minister, that there were people at the meeting who did not want it known they had attended and that the meeting was not about Mr. Abdi. Without exception, these witnesses discounted the possibility that Justice McLeod was representing the FBC when he met Minister Hussen, as that had never been discussed or authorized.

[179] Justice McLeod testified that he advised the Steering Committee during an in-camera session that he had had a meeting with Minister Hussen. He said he let the Steering Committee know about the January 2018 Meeting, that there had been vandalism at the Minister's home, and that there was someone else at the January 2018 Meeting, but he could not tell them who it was. He also told the Steering Committee there was interest in having an immigration summit. At that point, Ms. Ahmed-Omer was tasked with helping him prepare for a summit.

[180] Justice McLeod did not remember whether he had his notes of the January 2018 Meeting with him at the Steering Committee meeting. In any event, he would not have gone through his notes with the Steering Committee on an item-by-item basis. The extent of any additional details he provided the Steering Committee concerning the January 2018 Meeting was not completely clear.

[181] Mr. Patel produced emails he sent to Justice McLeod dated January 25, 2018 and February 1, 2018 pursuant to the summons he received from Presenting Counsel. He had little recollection of the emails but thought the subject, “Language for NR”, probably stands for “Language for News Release”. On their face, the emails appear to relate to a proposed news release concerning a meeting between the Minister and the FBC. Apart from the January 2018 Meeting, Mr. Patel could not identify any other meeting to which the emails might relate. The February 1, 2018 email appears to be a follow-up to the January 25, 2018 email. The January 25, 2018 email reads as follows:

From: Patel.Zubair

Sent: January 25, 2018 3:55 PM

To: McLeod, Donald Justice (OCJ)

Subject: Language for NR

Call me when you have a minute.

Zubair

- The Federation of Black Canadians was pleased to have the opportunity to meet with the Honourable Ahmed Hussen, Minister of

Immigration, Refugees and Citizenship on various issues of mutual interest.

- The Federation also took the opportunity to discuss immigrant children in the child welfare system and specifically children in the care of the state who should have the chance to become a Canadian citizen.
- Minister Hussen explained that Bill C-6, which received Royal Assent in June of last year, included a notable change to allow minors to apply for Citizenship without a Canadian parent, as the age requirement for citizenship has been removed under subsection 5(1).
- The Minister further indicated his intent to raise the issue with provinces and territories to ensure provincial/territorial agencies are aware of the change that came into effect under Bill C-6, and to provide clear instructions on the process in cases where a child is in state care, and where it is appropriate and in the best interests of the child.
- The Minister is deeply concerned by this matter and he will be asking officials to review our own policies to look at what options exist to expedite pathways to Canadian citizenship for individuals who grew up in Canada in state care. [Emphasis added.]

There is no evidence the news release was ever published.

[182] Justice McLeod did not recall receiving the January 25, 2018 and February 1, 2018 emails. However, apart from the first bullet of what appeared to be a draft news release, he agreed that the remaining bullets reflected some of the matters discussed at the January 2018 Meeting.

## **b) Discussion**

### **What was the January 2018 Meeting about?**

[183] We accept that the January 2018 Meeting unfolded essentially in the manner that Justice McLeod described. That is, Professor Walcott began speaking about the Abdi case as soon as the January 2018 Meeting started. However, discussion about that specific case was shut down. The discussion then turned to policy issues underlying Mr. Abdi's case, including the ability of children in care to apply for Canadian citizenship, and also included the possibility of a future meeting or meetings. We reach this conclusion for several reasons.

[184] First, Ms. Tariq and Mr. Patel both articulated a Ministerial policy of not discussing individual cases, particularly cases that are before the courts. That such a policy exists accords with common sense, the separation of powers and Ministerial responsibilities.

[185] Second, in the face of such a policy we consider it unlikely that Minister Hussen would have breached the policy in a brief meeting that included a community activist with whom he was not acquainted.

[186] Third, Ms. Tariq and Mr. Patel were consistent and credible in their insistence that no such breach would have occurred. Ms. Tariq also confirmed that she told Justice McLeod in advance of the January 2018 Meeting that the Minister would not discuss individual cases, a factor that supports his evidence in that respect.

[187] Fourth, Justice McLeod's version of what happened at the January 2018 Meeting is consistent with his notes and Mr. Patel's January 25, 2018 email, which we conclude contains a proposed news release summarizing at least part of what happened at the January 2018 Meeting. We recognize that the absence of any reference to Mr. Abdi in those documents does not exclude the possibility that Mr. Abdi's case was the subject of some discussion. Nonetheless, we find them of some value in assessing what took place at the January 2018 Meeting. They demonstrate that, at least from the perspective of the authors, the essence of the discussion related to policy issues and possible next steps.

[188] Fifth, we accept Justice McLeod's evidence that Professor Walcott asked him not to reveal that Professor Walcott attended the January 2018 Meeting. Justice McLeod testified that, in his view, transparency is important in the Black community. His notes suggest publicizing the January 2018 Meeting was contemplated, as do Mr. Patel's "NR" emails. But the January 2018 Meeting was not publicized, and Justice McLeod gave an apparently vague explanation of it to the Steering Committee. Further, Professor Walcott later tweeted on February 24, 2018, in relation to the FBC, "we cannot have a national organization that goes missing on important issue like #AbdoulAbdi." His view was that Justice McLeod attended the January 2018 Meeting on behalf of the FBC. According to him, he went there for the sole purpose of speaking about Mr. Abdi. We conclude Professor Walcott had his own reasons for not wanting it known that he attended the January

2018 Meeting and that his evidence that he did not ask that the January 2018 Meeting be confidential was not correct.

[189] Sixth, Professor Walcott's reliability and credibility are also undermined by other factors. As we have said, his overall memory of the January 2018 Meeting was limited. Further, his evidence that next steps were not discussed at the January 2018 Meeting is belied by his February 18, 2018 email to Justice McLeod and Debbie Douglas in which he said he was "following up on the potential meeting around immigration issues with Minister Hussen." His evidence that he was referring to a meeting that had already happened is simply not credible – it is inconsistent with the plain meaning of his words.

[190] Seventh, we do not consider Mr. Flegel's New Year's message or Justice McLeod's actions in relation to it of assistance in determining what happened at the January 2018 Meeting. We accept as logical and reasonable that it was the Minister and his staff who set the parameters for the January 2018 Meeting. In any event, we consider it unlikely that Justice McLeod read Mr. Flegel's email before forwarding it to the Steering Committee. He testified about a personal matter that was occupying his attention in early January 2018. Further, there appears to be no dispute that the content of the proposed New Year's message insofar as it related to Mr. Abdi was not accurate. Accordingly, we do not accept Presenting Counsel's submission that Justice McLeod's actions in forwarding the email could

demonstrate enthusiasm on his part for the FBC sending a public communication about Mr. Abdi in early January 2018.

[191] After considering the evidence about what happened at the January 2018 Meeting as a whole, we accept that, with the exception of some preliminary reference to Mr. Abdi at the beginning of the January 2018 Meeting by Professor Walcott and some possible subsequent references to his case as a symbol of a problem, the January 2018 Meeting was not about Mr. Abdi's case. Rather, it was about policies relating to immigrant children in the child welfare system obtaining Canadian citizenship and deporting adult offenders who failed to obtain Canadian citizenship because they were placed in the child welfare system soon after their arrival in Canada as children.

[192] Although Justice McLeod appeared to be grasping for an explanation for his statement to Professor Abdillahi about "trying to set up this meeting for Abdoul" or "in relation to his case" during cross-examination, we reject any suggestion that this evidence supports the allegation that the January 2018 Meeting was about Mr. Abdi. Rather, it is consistent with what happened. Professor Walcott asked Justice McLeod to set up a meeting to talk about Mr. Abdi's case. Justice McLeod arranged a meeting with Minister Hussen but was told they could talk about policy, not the case. In any event, the people for whom the meeting was arranged decided not to come. Justice McLeod suggested proceeding with a meeting so policy could be canvassed. The only evidence that any significant portion of the January 2018



Meeting related to Mr. Abdi's case came from Professor Walcott. Undoubtedly, that was the focus of the January 2018 Meeting for him and therefore dominates his recollection. However, we are satisfied that Minister Hussen declined to discuss the Abdi case and that, following Professor Walcott's preliminary remarks, the conversation moved on to other topics. Despite what may have been its original intended purpose, we conclude that the January 2018 Meeting, as it ultimately took place, was not about Mr. Abdi. Whether Justice McLeod would have attended the meeting as originally conceived is a matter of speculation.

**Was Justice McLeod at the January 2018 Meeting on behalf of the FBC?**

[193] Although Justice McLeod does not now consider that he was representing the FBC at the January 2018 Meeting, we are satisfied that the other participants at the January 2018 Meeting believed he was present on behalf of the FBC and that their belief was objectively reasonable.

[194] In his original January 8, 2018 email to Justice McLeod, Professor Walcott wrote, "I am wondering if the Federation can be of any help here? As a back channel to Minister Goodale and Minister Hussen?" Justice McLeod responded, "I want to make sure we can help" (emphasis added). Understandably, Professor Walcott understood "we" referred to the FBC and that it was the FBC, or Justice McLeod on behalf of the FBC, that arranged the January 2018 Meeting.

[195] Professor Walcott also explained that Professor Abdillahi originally asked him to reach out to Justice McLeod because Professor Walcott and Minister Hussen both spoke at the 2017 Summit. In Professor Walcott's words, the FBC had been announced as "this new organization" at the 2017 Summit and it was apparent the FBC had a relationship with people who might be able to have an impact on Mr. Abdi's situation.

[196] Further, Mr. Patel's January 25, 2018 "NR" email appears to reflect the Minister's office's understanding of what happened at the January 2018 Meeting, namely, a meeting between Minister Hussen and the FBC. Given the passage of time, we consider Mr. Patel's inability to recall this email or comment on the capacity in which Justice McLeod attended the January 2018 Meeting of no moment. The contemporaneous document is a more reliable indicator of the parties' understanding at the time. The fact that the news release was never published does not detract from this. Following the January 2018 Meeting, Justice McLeod acceded to Professor Walcott's request not to reveal his presence. Justice McLeod testified he could not therefore publicize the January 2018 Meeting; people would ask who was present.

[197] Similarly, although Ms. Tariq has no recollection of it, Justice McLeod's evidence that he told her about Professor Walcott's email suggests she likely knew Professor Walcott was asking for help from the FBC.

[198] Justice McLeod's belief that he was not representing the FBC appears to be anchored in the fact that he had not consulted with the Interim Steering Committee about attending the January 2018 Meeting in advance. As well, pursuing immigration issues was not then part of the Interim Steering Committee's mandate. Further, it appears Justice McLeod did not reveal to the Interim Steering Committee members all the details of the January 2018 Meeting, perhaps because of his promise to Professor Walcott.

[199] However, the FBC bylaws did not require Justice McLeod to get permission to attend a meeting on its behalf, nor was there any prohibition at the time on him doing so. Justice McLeod's notes talk about the FBC taking the lead on a future issue.

[200] Overall, we are satisfied that it is likely that the other January 2018 Meeting participants believed Justice McLeod was present on behalf of the FBC. The fact that the other Steering Committee members who testified at this hearing assert that Justice McLeod did not attend the January 2018 Meeting on behalf of the FBC does not affect this assessment. Our finding, in accordance with Presenting Counsel's submissions, relates to the reasonable beliefs of the other January 2018 Meeting participants.

**Was the January 2018 Meeting a form of FBC public advocacy?**

[201] We are satisfied the January 2018 Meeting was not confidential and that other participants understood that Justice McLeod was present on behalf of the FBC. However, we are not satisfied that the January 2018 Meeting was a form of FBC public advocacy let alone FBC public advocacy against Mr. Abdi's deportation.

[202] As we have said, we are satisfied Professor Walcott's efforts to advocate for Mr. Abdi were shut down. We accept that Justice McLeod did not say much at the January 2018 Meeting. He and Professor Walcott both testified to that effect. Although Justice McLeod knew from personal experience that deportation of Black people who had spent most of their lives in Canada had been a longstanding issue, we accept that he had only recently heard of the Abdi case and, at time of the January 2018 Meeting, had little understanding of the legislative and technical issues involved.

[203] In our view, the January 2018 Meeting became an opportunity for the Minister to demonstrate that:

- he was aware of the controversy around deporting people to countries with which they had little or no connection because they had come to Canada as children, been placed in the child welfare system, and had no opportunity to apply for Canadian citizenship;

- some action had been taken to address the problem (Bill C-6 referred to in Mr. Patel's January 25, 2018 email); and
- he was aware further discussion and action may be needed (as referred to in Mr. Patel's email).

[204] We conclude that, from the outset, Justice McLeod's role in relation to the meeting was as a facilitator: he facilitated Professor Walcott having access to Minister Hussen; he facilitated Minister Hussen having a meeting with a community activist allowing him to demonstrate his awareness of and actions on a controversial issue; and he facilitated a conversation around deportation policy issues and about what some next steps in exploring those policy issues might be. Undoubtedly, the fact that the Black community perceived problems with existing policies was raised. However, this was not a meeting at which the FBC came armed with potential solutions to the problems and advocated for particular outcomes. Rather, it was a meeting at which the fact of the problems was raised, and next steps discussed. The Minister was aware of the problem and some action had been taken. Communication with the community was beneficial. Considered in this light, in our view, the January 2018 Meeting was more of an exercise in education and public relations than FBC public advocacy. However, even if others would characterize it as FBC public advocacy, that does not lead to the conclusion that Justice McLeod perjured himself or misled the First Panel. We are satisfied the January 2018 Meeting did not involve FBC public advocacy against Mr. Abdi's

deportation. The January 2018 Meeting was not about Mr. Abdi and Justice McLeod did not speak against his deportation.

**Did Justice McLeod represent to the First Panel through his oral evidence that he would not have spoken to politicians about the policy underlying the Abdi case?**

[205] This issue arises from three aspects of the evidence at the First Hearing. As noted in the subheading, the question is: did Justice McLeod represent to the First Panel through his oral evidence that he would not have spoken to politicians about the policy underlying the Abdi case? Because the questions put to Justice McLeod during his oral evidence were rooted in the 2018 ASF, it is necessary to also consider the 2018 ASF.

[206] For ease of reference, the following are the relevant aspects of the evidence:

- the statements in the 2018 ASF that the “FBC publicly advocated against the deportation of [Mr. Abdi]” and that “Justice McLeod removed himself from any involvement in this matter”;
- the question, during Justice McLeod’s oral evidence: “Did you have any involvement at all in any representations that were made by the FBC about that specific case” and his answer: “No”;
- Justice McLeod’s oral evidence, in response to the question “And why not?”:

I felt that because it was a matter that was still before the courts, even if it's a court, it's not my court, I shouldn't be commenting on it.

There was a greater, I think, principle that was at stake. The case was about Abdoul Abdi, but in reality the principle behind this had to do with the fact that there have been many West Indians and Black people alike that were being deported for years and years prior to the Abdoul Abdi case, but irrespective of that, I didn't think it was appropriate, even if it could be couched in the language which I just stated.

I felt that it would be more prudent for me, in the capacity that I was as a judge, that I not comment. So not only did I not comment on it...I mean, when I say...it not be part of the letter. So the letter was written, and I didn't even sign the letter.

I didn't sign off on the letter. I didn't sign off on the contents of the letter. [Emphasis added.]

[207] Justice McLeod's response to the question, "And why not" is the critical evidence concerning this issue. Justice McLeod referred to the "principle" behind Mr. Abdi's case and testified that "even if it could be couched in the language which I just stated ... I felt that it would be more prudent for me ... that I not comment." The "principle" appears to relate to deportation policies concerning people like Mr. Abdi. Was Justice McLeod testifying that he would not talk about deportation policies while Mr. Abdi's case was before the courts?

[208] We do not read Justice McLeod's answer to the question, "And why not", as an assertion that he would not and did not participate in discussions about policies relating to the deportation of adults who came to Canada as children and who failed to attain Canadian citizenship while in the child welfare system. Rather, we

understand him to be talking about his lack of input into the February 2018 Steering Committee Letter to Minister Hussen. The questions he was being asked related to the FBC's public advocacy concerning Mr. Abdi.

[209] The only FBC public advocacy concerning Mr. Abdi raised at the First Hearing was the February 2018 Steering Committee Letter to Minister Hussen and a press release related to it, which were exhibits to the 2018 ASF. Other communications about the Abdi issue (e.g., FBC tweets about the February 2018 Letter, the website FAQ relating to Mr. Abdi, the March 2018 Community Asks) were available but not made exhibits. We understand Justice McLeod to be saying in his answer to the question, "And why not", that he decided not to contribute content to the February 2018 Steering Committee Letter to Minister Hussen because even if it were couched in general terms, he did not feel he should be part of a communication to the Minister or Ministers related to Mr. Abdi.

**Did Justice McLeod commit perjury and/or mislead the First Panel regarding his involvement in the Abdi case by failing to disclose the January 2018 Meeting in his evidence at the First Hearing?**

[210] We are satisfied that Justice McLeod did not make a false statement or a statement that was incomplete in a material way regarding his involvement in the Abdi case by failing to disclose his attendance at the January 2018 Meeting in his evidence at the First Hearing. For the reasons we have explained, we are satisfied that: i) the January 2018 Meeting was not about Mr. Abdi; ii) although other participants at the January 2018 Meeting undoubtedly believed Justice McLeod



was representing the FBC, the January 2018 Meeting did not involve FBC public advocacy against Mr. Abdi's deportation; and iii) Justice McLeod did not represent to the First Panel that he would not have spoken to politicians about the policies underlying the Abdi case.

[211] At this hearing, Justice McLeod testified that in giving his evidence at the First Hearing, he did not remember the January 2018 Meeting but "if it was something that seemed to have been pertinent, then it would have jogged [his] memory". We accept this evidence and find it objectively reasonable in light of the findings we have made. The January 2018 Meeting was not about Mr. Abdi, and it was not FBC public advocacy concerning Mr. Abdi. Similarly, we consider the fact that the 2018 ASF mentions other meetings that Justice McLeod had with politicians but not the January 2018 Meeting of no moment.<sup>10</sup> The other meetings related to the genesis of the FBC, the FBC meetings with politicians to present "asks" that were impugned at the First Hearing, the 2017 Summit, and Justice McLeod's attendance on behalf of the FBC at the ceremony acknowledging the UN Decade. All constituted or were related to FBC public advocacy. The January 2018 Meeting was not.

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<sup>10</sup> The relevant paragraphs of the 2018 ASF that refer to meetings with other government officials are reproduced in [Appendix 'B'](#).

[212] As Justice McLeod did not make a false or misleading statement by failing to disclose the January 2018 Meeting in his evidence at the First Hearing, he did not commit perjury or mislead the First Panel in that respect.

**ii) The February 2018 Steering Committee Letter to Minister Hussen, the Website FAQs and the March 2018 Community Asks**

[213] We address these issues together because they are factually related.

[214] It is undisputed that the FBC publicly advocated against Mr. Abdi's deportation in each of the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the March 2018 Community Asks.

[215] As we have said, Justice McLeod acknowledges that, in his role as Chair of the FBC Interim Steering Committee he participated in various administrative steps so the February 2018 Steering Committee Letter to Minister Hussen could be sent and so the website FAQs and the March 2018 Community Asks could be posted. However, he maintains that the 2018 ASF was accurate and that his oral testimony at the First Hearing, that he had "removed himself from any involvement" in the FBC's public advocacy against Mr. Abdi's deportation and was not involved in "any representations that were made by the FBC" about his case, was true (the complete evidence is set out in [Appendix 'A'](#)).

[216] Presenting Counsel submit that we must critically examine the evidence and consider whether Justice McLeod's role was more than simply administrative.

[217] The issues for us to determine therefore include the nature of Justice McLeod's participation in relation to each of the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the March 2018 Community Asks and whether, having regard to that participation, he perjured himself or misled the First Panel in either the 2018 ASF or his oral evidence concerning his involvement.

[218] We will begin by listing the participation Justice McLeod acknowledges, then review the evidence we consider relevant and then turn to the issues.

[219] Justice McLeod acknowledges taking the following steps:

- February 20, 2018, 9:35 a.m., Justice McLeod sent an email to Ms. Ahmed-Omer and Mr. Flegel memorializing the mandate of the Interim Steering Committee, including setting out criteria under which the Interim Steering Committee would be entitled to comment, take action or intervene in relation to national issues, which criteria, among other things, permitted the February 2018 Steering Committee Letter to Minister Hussen to be sent;
- February 20, 2018, Justice McLeod received a text message from Professor Abdillahi forwarding the Information, at least part of which was subsequently included in the March 2018 Community Asks;

- February 20, 2018, Justice McLeod contacted Ms. Ahmed-Omer to tell her he did not feel comfortable writing a letter he had been working on and asked if she would be okay doing it, to which she agreed;<sup>11</sup>
- February 20-28, 2018, Justice McLeod circulated drafts of the February 2018 Steering Committee Letter to Minister Hussen through emails soliciting or receiving input from Interim Steering Committee members or Mr. Flegel concerning its contents;
- February 26-28, 2018, Justice McLeod participated in an email/text message discussion about whether the February 2018 Steering Committee Letter to Minister Hussen would be signed and getting it sent;
- February 26, 2018, Justice McLeod emailed Interim Steering Committee Members Larry Henry, Paul Bailey and Mr. Thompson enclosing a draft of the website FAQs - the draft included a response to the question “Why has FBC FCN been silent on the Abdoul Abdi case?”:
- February 27, 2018, Justice McLeod (and other members of the Steering Committee) received an email from Ms. Ahmed-Omer attaching draft website FAQs, similar to the draft website FAQs included in Justice McLeod’s February 26, 2018 email, which she stated were “reflective of

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<sup>11</sup> Regarding this step and the previous step, it is unclear which came first.

our discussions from our FBC Steering Committee meeting and discussions from today”;

- February 28, 2018 10:27 p.m., Justice McLeod sent a message to the Interim Steering Committee WhatsApp Chat Group after the February 2018 Steering Committee Letter to Minister Hussen was sent:

I do think we should send out a tweet about speaking to stakeholders since January 8, 2018;

- March 1, 2018, Justice McLeod forwarded the Information to Ms. Ahmed-Omer.

#### **a) The evidence**

##### **Background to the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the March 2018 Community Asks**

[220] The evidence reveals that in early 2018 pressure began to build on the FBC Interim Steering Committee to take a stand on the Abdi case and that, over time, differing views emerged on the Steering Committee concerning what to do about it. To be clear, the Interim Steering Committee was not the FBC. Rather, it was the group tasked with building an organization and infrastructure ultimately to be led by an elected Board of Directors. However, social media and other pressure, both external and internal, was mounting on the Interim Steering Committee to say or do something regarding Mr. Abdi.

[221] For example, on January 7, 2018, Professor Walcott tweeted in part:

Where is ... the newly founded Federation of Black Canadians? Where are you? What do you have to say now? #AbdoulAbdi contact your man at @AhmedDHussen and tell him do the right thing. [Emphasis added.]

[222] That same day, Mr. Flegel sent Justice McLeod the draft New Year's message, which stated, in part, that the FBC's aim was "to see [Mr. Abdi's] deportation stayed".

[223] On January 30, 2018, the same day as Prime Minister Trudeau endorsed the UN Decade, a Huffington Post reporter emailed the FBC to ask questions about the announcement. Later that day, Mr. Flegel sent an email to Justice McLeod, Ms. Ahmed-Omer, Mr. Picart and Mr. Thompson proposing answers to the questions, which included the following:

What are the Federation's thoughts on the announcement?

...

We are also pleased to hear that the announcement is but a first step in the federal government establishing a new relationship with Black communities to remove racial barriers and improve social and economic outcomes. The Federation will continue to work with Black organizations to advocate on important issues, including the recent cas[e] of Nova Scotian Abdoul Abdi ... who ... face[s] the prospect of deportation... [Emphasis added.].

[224] Justice McLeod subsequently gave an interview to the reporter but did not mention Mr. Abdi in his interview.

[225] On February 18, 2018, the FBC hosted its National Capital Region Black Communities Town Hall to “allow [it] to pursue [its] conversation about the ways in which [it] can best serve and collaborate with Black communities across the country, particularly in the Capital Region.” As demonstrated by Mr. Thompson’s February 6, 2018 post in the FBC WhatsApp Chat Group,<sup>12</sup> at least some members of the Steering Committee seemed to think the Town Hall related to Mr. Abdi:

Hi everyone, has there been any update on lobby day?  
Or the townhall for Abdi’s case? [Emphasis added.]

[226] Justice McLeod attended the Town Hall but testified that he did not know if the Abdi case was raised. He indicated a series of topics were being discussed in different rooms or areas at the Town Hall. He was not part of any discussions concerning Mr. Abdi.

[227] A February 18, 2018 email from Mr. Bailey illustrates the mounting frustration of some members to the lack of response on the Abdi case. In the email addressed to fellow Interim Steering Committee members, Mr. Bailey asks:

What are the things ... preventing us from releasing a statement on the Abdoul Abdi deportation case...? Can we work around those things and put out a statement that in no uncertain terms calls for the deportation proceedings against him to end, and for policy change in how the citizenship is handled for wards of the state?

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<sup>12</sup> Justice McLeod created the FBC WhatsApp Chat Group on January 29, 2018. The members were Justice McLeod, Ms. Ahmed-Omer, Mr. Picart, Mr. Thompson, and Mr. Flegel.

[228] Later that day, at 11:36 p.m., Ms. Ahmed-Omer posted the following in the FBC WhatsApp Chat Group:

There's a few things we need to address in our COMMS strategy

1. Abdoul abdi [sic] and immigration policies
2. Our next steps and governance structure
3. Our funding and our strategy for seeking funding
4. Our stakeholders and how organizations can engage with the Federation
5. How to join the coalition with the regional person contact information
6. The FBC's chronological history

It's important that this information gets out there ASAP. It answers to all the doubts and some of the online pushback we are getting. [Emphasis added.]

[229] Mr. Carby testified that following the 2017 Summit, there was mounting pressure, from both outside and inside, for the Steering Committee to say something about the Abdi case. However, it did not fit within their mandate of building the capacity of the FBC as an organization. Finally, toward the end of February 2018, the Steering Committee decided to request a meeting with Minister Hussien.

[230] On February 19, 2018, the day after the Bailey email was sent, Justice McLeod had a lengthy telephone conversation with Black community activist Professor Abdillahi, which she recorded, and allowed another, or others, to listen



to,<sup>13</sup> without Justice McLeod's knowledge. A copy of the recording made by Professor Abdillahi (the "surreptitious recording") was admitted into evidence at this proceeding. In reasons released on December 30, 2020, we explained why we admitted the surreptitious recording in the context of this judicial council proceeding. Nothing in our reasons should be taken as condoning the practice of surreptitiously recording telephone conversations or endorsing the admissibility of such recordings in other contexts.

[231] The surreptitious recording reveals that while many topics were discussed, the Abdi case came up early in the conversation. Moreover, near the end of the lengthy February 19, 2018 telephone conversation, Professor Abdillahi agreed to contact Mr. Abdi's lawyer, Benjamin Perryman, to obtain information concerning the status of the case and interventions that could be made and forward it to Justice McLeod by text message (defined above as the "Information"). Justice McLeod agreed to receive the Information but stipulated he should not be copied on the email to Mr. Perryman. He testified that he assumed Professor Abdillahi would only send him policy-related information. During the telephone conversation, he also referred to the fact that on his understanding of the legislation there was a point at which the Minister could step in and stop the deportation. He also agreed that the

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<sup>13</sup> Professor Abdillahi added El Jones, another Black community activist, to the call at some point without Justice McLeod's knowledge. Mr. Cole was with Ms. Jones at some point. It is not clear whether he listened to any portion of the call.

FBC could send a letter to Minister Hussen about the Abdi case and copy the letter to Minister Goodale, the Prime Minister and all leaders of the opposition.

[232] Justice McLeod explained that he had a change of heart during his conversation with Professor Abdillahi. Whereas he had been opposed to the Interim Steering Committee becoming involved in specific cases (because he could not be involved and it was not part of the Interim Steering Committee's mandate), the mounting pressure to comment together with Professor Abdillahi's insistence that Mr. Abdi was the community's child made him realize that he may be wrong. He began to believe he was standing in the way of the FBC publicly advocating for Mr. Abdi. However, he had concerns about his own involvement. Those concerns increased the next day when he saw the second paragraph of Mr. Perryman's response to Professor Abdillahi's inquiry:

As I mentioned on the phone, I have serious reservations about an advocacy organization, chaired by a sitting judge, writing an open letter to Ministers about an existing case. [Emphasis added.]

[233] During the course of his conversation with Professor Abdillahi, Justice McLeod referred to a response or letter he had written or was writing on two occasions. Those references are as follows:

First Reference

So, yes, we actually had a response that was already ready on January the 8<sup>th</sup>. The problem came in that we couldn't send it out as a federation if Nova Scotia doesn't say anything, if Quebec doesn't say anything, if PEI – all

of the people that are saying they are partners in principle.

...

So, I can tell you, our response was – I'm looking at it here, over the past several decades I've been very serious about reaching problems about deportation in our country. Those are matters before the Immigration Review Board. Many Canadians (inaudible) – so, we had that response already there but we had to wait... [Emphasis added.]

#### Second Reference

[S]o, you see in the letter that we said the Federation of Black Canadians has been consulted with several groups and individuals across the country who have faced deportation, been deported, or who have serious concerns with government response to these real issues in our community. In light of these concerns, we have engaged the Minister of Citizenship and Immigration for a meeting with stakeholders and continued support community organizers [sic]. The impact of these policies on the Black community are national in scope and disproportionate in effect. [Emphasis added.]

[234] In his evidence at this hearing, Justice McLeod explained that during his conversation with Professor Abdillahi he was referring to a letter to stakeholders that he was working on because the FBC was then engaged in trying to organize a summit.

[235] Soon after his conversation with Professor Abdillahi, on February 19, 2018 at 6:32 p.m. Justice McLeod sent the following message to the Interim Steering Committee WhatsApp Chat Group:

I think it's REALLY necessary that we discuss next steps.  
If we can meet before the actual steering committee

meeting next week this will prove invaluable. I have just finished a 3 hour discussion with BLM and think we need strategies. [Emphasis in the original.]

[236] Justice McLeod explained in his evidence that Professor Abdillahi had raised multiple issues of concern about the FBC in their telephone conversation (for example, its affiliation with political parties, its partnerships or affiliations with government-related or policing-related individuals or organizations, governance, the fact that the organization was led by a “damn judge”) and said, “you can’t call yourself a Federation and Canadian and Black and have all these questions not answered”.

[237] Later that evening, starting at 9:12 p.m., Mr. Picart posted the following three messages in the FBC WhatsApp Chat:

I think any further steering committee meeting should only be about strategy and definition of self identity for FBC.

I also think we need a governance strategy.

I’m not interested in anything else or we are hurting ourselves.

**The February 2018 Steering Committee Letter to Minister Hussen**

[238] Mr. Flegel testified that he created the first draft of the February 2018 Steering Committee Letter to Minister Hussen and that it was a response to mounting community criticism of the FBC for failing to take a stand on the Abdi case. However, the first draft that appears in the record is dated February 20, 2018

and is contained in an email sent from Ms. Ahmed-Omer to Mr. Flegel on February 20, 2018 at 4:27 p.m. Twenty minutes later, at 4:47 p.m. on February 20, 2018, Ms. Ahmed-Omer sent a revised draft of the February 2018 Letter to Mr. Flegel and Justice McLeod saying, “Your turn!”

[239] Later the same day, at 11:09 p.m., Justice McLeod sent an email to Ms. Ahmed-Omer requesting an amendment to the February 2018 Steering Committee Letter to Minister Hussen clarifying his lack of input and that he would not participate at the Summit or Town Hall (the “Disclaimer request”):

I think in order to ensure that I am kosher with respect to this it should be noted in the letter at the bottom it should read.

As you are aware Justice D. McLeod is the chair of the steering committee for the Federation of Black Canadians as well as a current sitting member of the Ontario Court of Justice. As such this matter and its potential impact to the Black community will be discussed without soliciting his input, advice or presence. This is done out of an abundance of caution to maintain his judicial function as well as to ensure the proper administration of justice while the matter it [sic] is currently before the courts. [Emphasis added.]

[240] More than 20 drafts of the February 2018 Steering Committee Letter to Minister Hussen were produced at the hearing, most of which were circulated to or by Justice McLeod concerning input from Steering Committee members or Mr. Flegel.

[241] Justice McLeod and Interim Steering Committee members who testified to the issue at this hearing denied Justice McLeod had any input into the content of

the February 2018 Steering Committee Letter to Minister Hussen, claiming it was his role as chair to circulate documents and follow-up to ensure decisions made were implemented. The still fledgling organization was made up of volunteers; it had no staff. Interim Steering Committee Members explained Justice McLeod's Disclaimer request was not included in the February 2018 Letter because Steering Committee members overseeing its preparation did not believe it was appropriate content. The February 2018 Steering Committee Letter to Minister Hussen was not about Justice McLeod; he had not had any input into it, and they had never used that kind of language before.

[242] The record also includes various emails, text messages and chats indicating that Justice McLeod may have participated in deciding whether and by whom the February 2018 Steering Committee Letter to Minister Hussen would be signed and that he participated in ensuring it was sent out and that references to it were posted on social media. All of the messages are included in [Appendix 'C'](#). Some examples are set out below:

February 28, 2018 3:50 PM text message from Justice McLeod to Mr. Picart

Hey Richard. We were to have had the letter out about Abdi since Monday. We really need to get that out. What is the holdup?

Mr. Picart's text message response

I didn't get a final final. [Ms. Ahmed-Omer] has the ball. I am ready to move. Who is signing it?

Justice McLeod's text message responses

It's not going to be signed

That was decided prior. We just need to send it out.

She said she gave you final. I will ask her now.

[243] Ultimately, Mr. Picart volunteered to sign the February 2018 Steering Committee Letter to Minister Hussen. It was sent to Minister Hussen on February 28, 2018, with copies to Prime Minister Trudeau, Minister Goodale, Andrew Scheer and Jagmeet Singh and signed by "Richard Picart" as "Communications Lead (Toronto) obo – Steering Committee of the Federation of Black Canadians". It is undisputed that "obo" means "on behalf of".

[244] As we have said, the February 2018 Steering Committee Letter to Minister Hussen, as sent, requested a meeting with Minister Hussen and stated, in part:

Having forcibly assumed the responsibility of raising him, the Crown should now consider the repercussions of its own potential negligence in this area, as it continues removal proceedings against Mr. Abdi.

[245] On February 28, 2018, at 10:27 p.m., Justice McLeod posted the following message on the FBC WhatsApp Chat Group:

I do think we should send out a tweet about speaking to stake holders since January 8, 2018.

[246] In his evidence at this hearing, Justice McLeod explained that this message was meant to reflect the conversations he had had with various stakeholders related to the issues of immigration, deportation and children in care, including Osborne Barnwell (an immigration lawyer Justice McLeod said he invited to the

January 2018 Meeting), and Margaret Parsons, who had been part of the Toronto 37.

### **The website FAQs**

[247] On February 25, 2018, Mr. Thompson emailed Justice McLeod, Ms. Ahmed-Omer, and Mr. Picart with an attachment entitled “Misconceptions needed to be answered - FBC”. The document included two headings. The first heading read:

These are the questions people are asking which I believe are valid/important and need transparency:

Ten questions were listed under the first heading. The seventh question read:

Why have we not made a statement [sic] Abdoul Abdi case? What is our stance?

[248] Later the same day, Mr. Picart emailed the Steering Committee attaching an “FBC FAQ” spreadsheet, which he asked that members complete with their recommendations. He described the attachment as “a draft of the FAQ section that will launch on the FBC site this week.” The spreadsheet included FAQ questions, but the answer fields were blank.

[249] On February 26, 2018, Justice McLeod emailed Mr. Henry, Mr. Bailey and Mr. Thompson, enclosing a draft of the FAQs, with the question relating to Mr. Abdi filled out as follows:

As explained in past FBC FNC [sic] listserve communication and Town Halls, the Federation has raised concerns about Canadian immigration policy and law to relevant federal authorities. This has included the



cases of Abdoul Abdi.... We plan to continue raising concern on these issues.

On February 27, 2018, Ms. Ahmed-Omer emailed the FBC Steering Committee attaching an “FAQ Final” document. She thanked everyone for their input and said: “The attached FAQ is reflective of our discussions from our FBC steering committee meeting and discussions from today.” The question relating to Mr. Abdi was changed slightly but the answer remained as set out above.

[250] Mr. Thompson testified he was unsure who drafted the FAQ relating to Mr. Abdi. Justice McLeod sent the email to him, because they were all looking into what should go into the website FAQs at the time. When asked if he had discussed the content of the website FAQs with Justice McLeod, Mr. Thompson said he did not know if Justice McLeod drafted “this”, but that Justice McLeod was on the email thread.

[251] Ms. Ahmed-Omer testified that she “authored the entire document with Richard Picart”. She clarified that they would have used content from the summit, from town halls and content from members of the Steering Committee. When asked who drafted the answer to the question about Mr. Abdi, Mr. Picart testified that he did not know who originally drafted it but “this version” was coming from Ms. Ahmed-Omer.

[252] Part of the website FAQs was before the First Panel. The FAQ addressing Mr. Abdi was not. See footnote 7 above.

### **The March 2018 Community Asks**

[253] The following matters are undisputed:

- on March 1, 2018 Justice McLeod forwarded the Information to Ms. Ahmed-Omer;
- some or all of the Information was subsequently included in at least one publicly posted FBC document, namely, the March 2018 Community Asks;
- the March 2018 Community Asks included a section on preventing the deportation of Mr. Abdoul Abdi, which was comprised, in substance, of at least part of the Information;
- on March 5, 2018, Ms. Ahmed-Omer emailed a draft of the March 2018 Community Asks to Mr. Henry requesting that he review it and stated:

Donald and I have both looked at this and reviewed it.  
We are good with the document going up online.  
[Emphasis added.]

[254] During cross-examination at this hearing, Justice McLeod said Ms. Ahmed-Omer's statement concerning him reviewing the draft document was "accurate if that's what she says here, yes." However, he clarified that although he "could have looked at ... and reviewed" the draft document, he did not edit it, did not add to it, did not change anything in it and did not create it.

[255] It also appears that shortly before forwarding Ms. Ahmed-Omer the Information on March 1, 2018, Justice McLeod had forwarded to her a text message he had received from Professor Abdillahi criticizing the February 2018 Steering Committee Letter to Minister Hussen and asking, “[W]hat happened to the list of detailed asks I sent?”

[256] Justice McLeod subsequently responded to the text message in which Professor Abdillahi criticized the February 2018 Steering Committee Letter to Minister Hussen on March 3, 2018. Among other things, he said:

Also, your recommendations have been included with a series of other asks for the government. I would never have you do all that work and not honour it. I [*sic*] was a lot and I have been relying quite heavily on it.

[257] Professor Abdillahi testified that she understood “your recommendations” referred to the Information. Finally, we note that on March 3, 2018, Professor Abdillahi tweeted various criticisms of the FBC’s response to the Abdi situation.

**b) Discussion re: Justice McLeod’s participation in the February 2018 Steering Committee Letter to Minister Hussen, website FAQs and March 2018 Community Asks**

[258] As we have said, Presenting Counsel submit that we must critically examine the evidence and consider whether Justice McLeod’s role in relation to any of the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the March 2018 Community Asks was more than simply administrative. For example, does the evidence reveal that he initiated the process whereby the February 2018 Steering Committee Letter to Minister Hussen was sent and

effectively cheer-leaded it; or that he contributed content to the website FAQs; or that he prompted the preparation of the March 2018 Community Asks?

[259] Presenting Counsel point to multiple pieces of evidence, which they say could support such inferences:

- Justice McLeod attended the February 18, 2018 Town Hall where the Abdi case may have been discussed;
- Justice McLeod received an email from Mr. Bailey on February 18, 2018 urging the FBC to support Mr. Abdi;
- the very next day, on February 19, 2018, Justice McLeod was involved in a lengthy telephone conversation with Professor Abdillahi in which they discussed, among other things, the Abdi case and what the FBC could do to help, including sending a letter to various Ministers;
- Justice McLeod did his own legal research in relation to the Abdi matter, which he referred to on his call with Professor Abdillahi;
- Justice McLeod acknowledged in his telephone conversation with Professor Abdillahi that he was working on a letter relating to immigration and deportation issues;
- in his telephone conversation with Professor Abdillahi, Justice McLeod agreed to receive the Information, which, ultimately, he passed on to Ms. Ahmed-Omer, and which was used in the March 2018 Community Asks;

- in his telephone conversation with Professor Abdillahi, Justice McLeod agreed that the FBC could send a letter to Ministers supporting Mr. Abdi and at no time intimated that he had concerns about writing such a letter;
- Justice McLeod prepared a document to amend the FBC mandate to permit the February 2018 Steering Committee Letter to Minister Hussen to be sent;
- Justice McLeod received drafts of the February 2018 Steering Committee Letter to Minister Hussen from Ms. Ahmed-Omer and Mr. Flegel before making the Disclaimer request;
- Justice McLeod circulated drafts of the February 2018 Steering Committee Letter to Minister Hussen facilitating input from Steering Committee members;
- Justice McLeod did not ask anyone to take over the secretarial role in relation to the February 2018 Steering Committee Letter to Minister Hussen or the website FAQs;
- although Justice McLeod made the Disclaimer request, he did not insist on it;
- Justice McLeod pressed Steering Committee members to get the February 2018 Steering Committee Letter to Minister Hussen sent;

- as the Disclaimer request was not included in the February 2018 Steering Committee Letter to Minister Hussen, members of the public and the Ministers to whom the February 2018 Steering Committee Letter to Minister Hussen was sent would not have been aware that Justice McLeod made the Disclaimer request and had no “involvement” in the February 2018 Steering Committee Letter to Minister Hussen;
- Justice McLeod remained the public face of the FBC when the February 2018 Steering Committee Letter to Minister Hussen, which was signed “obo” (on behalf of) the Steering Committee, was delivered;
- Justice McLeod was involved in arranging for FBC tweets claiming interaction with stakeholders about the Abdi case since January 8, 2018;
- Justice McLeod circulated and received drafts of the website FAQs; and
- Justice McLeod advised Professor Abdillahi that he had been relying on the Information and that it would be included in a set of asks.

[260] Presenting Counsel further submit that, among other things, we will have to consider the following issues:

- para. 52 of the 2018 ASF stated that members of the Steering Committee (other than Justice McLeod) “facilitated” a meeting with Minister Hussen – the meeting requested in the February 2018 Steering Committee Letter

to Minister Hussen never took place. What does paragraph 52 mean?  
What was it intended to reflect?

- What did Justice McLeod intend in his February 19, 2018 FBC WhatsApp Chat Group post when he said: “I think it’s REALLY necessary that we discuss next steps.”

[261] As is required when considering the inferences to be drawn from circumstantial evidence, we have not weighed each piece of the evidence individually but rather have considered the evidence as a whole.

[262] We acknowledge that members of the public who viewed the February 2018 Steering Committee Letter to Minister Hussen in an FBC Facebook post, as well as the Ministers who received the February 2018 Letter, would undoubtedly have assumed that Justice McLeod was involved in it. No doubt it is concerning that Justice McLeod would thus have been associated in the public domain with the FBC’s public advocacy concerning Mr. Abdi. However, while that reality may be relevant to determining Justice McLeod’s state of mind in giving evidence at the First Proceeding, it is less helpful to assessing whether Justice McLeod played more than an administrative role in the February 2018 Steering Committee Letter to Minister Hussen, contributed content to the website FAQs or prompted preparation of the March 2018 Community Asks.

[263] After considering the evidence as a whole, we are not satisfied that Justice McLeod’s role in relation to the February 2018 Steering Committee Letter to

Minister Hussen, the website FAQs or the March 2018 Community Asks was anything more than administrative.

[264] In particular, we are not satisfied that Justice McLeod initiated the February 2018 Steering Committee Letter to Minister Hussen or, in effect, cheer-leaded it. Yes, his conversation with Professor Abdillahi demonstrates that the Abdi situation had been on his mind, that he had done some form of research and that he was working on a letter of some sort. And yes, he agreed with Professor Abdillahi that the FBC would send a letter to support Mr. Abdi. But Justice McLeod also testified he had a change of heart while talking to Professor Abdillahi concerning whether the FBC should take a stand on the Abdi case. At the same time, he said he had misgivings even while speaking to Professor Abdillahi about being personally involved with a letter for Mr. Abdi, but also had concerns about getting in the way of the FBC. He said he considered the matter overnight and became even more concerned when he saw Mr. Perryman's letter, such that his concerns crystalized.

[265] Considerable momentum already existed within the Steering Committee to speak out on the Abdi matter. We do not consider it surprising that Justice McLeod would not have discussed any internal struggles he was experiencing with Professor Abdillahi. Further, we cannot discount Justice McLeod's evidence that the letter he told Professor Abdillahi he was working on was a letter to stakeholders about the summit as discussed with Minister Hussen, and that Justice McLeod told Ms. Ahmed-Omer that he was no longer comfortable writing it. Similarly, although



the first draft of the February 2018 Steering Committee Letter to Minister Hussen that Mr. Flegel said he had prepared does not appear to form part of the record, we cannot discount Mr. Flegel's evidence that he prepared the first draft in response to mounting community criticism of the FBC for not speaking out about Mr. Abdi's case. That would be consistent with Mr. Flegel's conduct in preparing the New Year's message. It would also mean that the draft of the February 2018 Steering Committee Letter to Minister Hussen enclosed in Ms. Ahmed-Omer's February 20, 2018 4:27 p.m. email was not the first draft . Overall, we are not satisfied that Justice McLeod initiated the February 2018 Steering Committee Letter to Minister Hussen.

[266] Although we do not endorse Justice McLeod's actions in persisting in carrying out the administrative tasks necessary to get the February 2018 Steering Committee Letter to Minister Hussen finalized and have it sent, we accept that such tasks, including preparing a document whereby the Steering Committee could amend its mandate, were perceived by him and the other members of the Steering Committee as part of his role as Steering Committee Chair. The Steering Committee members who testified on the point all confirmed Justice McLeod's evidence that he did not contribute content to the February 2018 Steering Committee Letter to Minister Hussen. Given that he was not contributing content, it was not for him to press his Disclaimer request.

[267] Based on our consideration of the evidence as a whole, we are not satisfied that Justice McLeod's role with respect to the February 2018 Steering Committee Letter to Minister Hussen is properly characterized as anything more than administrative.

[268] We reach the same conclusion concerning the website FAQ relating to Mr. Abdi. We are not satisfied the evidence supports a conclusion that Justice McLeod contributed content to that FAQ or that he did anything more than circulate a draft of the website FAQs the Steering Committee was anxious to get up on the FBC website.

[269] We have taken note of the fact that before forwarding the Information to Ms. Ahmed-Omer, Justice McLeod apparently sent her Professor Abdillahi's text querying what happened to her list of asks, *i.e.*, the Information. We have also noted that Justice McLeod's text message to Professor Abdillahi in which he advised her that her recommendations, *i.e.*, the Information, would be included with some government asks and that the Information was, in fact, included in the March 2018 Community Asks. We have taken particular note of Justice McLeod's statements to Professor Abdillahi that he "would never have [her] do all that work and not honour it" and that he had "been relying quite heavily on it."

[270] In the end, however, we are not satisfied that Justice McLeod did anything more than pass on the Information. We conclude that the document preparation and content control of the March 2018 Community Asks was in the hands of others.

Justice McLeod was obviously aware of the impending use of the Information before he emailed Professor Abdillahi. However, given the separation of roles in the organization, the independence of the Steering Committee members and the reticence Justice McLeod had developed concerning substantive involvement in the Abdi matter, we are not satisfied that in forwarding the Information he intended to prompt or prompted any particular response on the part of the FBC, as opposed to acting simply as a conduit.

**c) Did Justice McLeod perjure himself or mislead the First Panel concerning his involvement with the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs or the March 2018 Community Asks**

[271] The starting point for our discussion about whether Justice McLeod perjured himself or misled the First Panel concerning his involvement with the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the March 2018 Community Asks is his answer “No” to the following question asked by his counsel at the First Hearing.

Q. So then we go to paragraph 52 to 53 of the Agreed Statement of Facts, and it reflects that the FBC publicly advocated in relation to the deportation of Mr. Abdi, a Somali refugee who was at risk of deportation after he pled guilty to charges of aggravated assault and assaulting a police officer. Did you have any involvement at all in any representations that were made by the FBC about that specific case? [Emphasis added.]

[272] For ease of reference, paras. 52 and 53 of the 2018 ASF referred to in this question posed by Justice McLeod’s counsel provide:

52. 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. It is anticipated that the evidence presented by Justice McLeod will show that members of the Steering Committee (other than him) facilitated a meeting between Ahmed Hussen and members of the black community regarding the historical and ongoing deportation of Black individuals, including Abdoukader Abdi. A decision by the federal government in respect of Mr. Abdi's deportation was the subject of a judicial review before the Federal Court of Canada.

53. It is anticipated that the evidence presented by Justice McLeod will show that Justice McLeod removed himself from any involvement in this matter. The Steering Committee (excluding Justice McLeod) wrote a letter to the federal Minister of Immigration, Refugees and Citizenship dated February 28, 2018, which cited Mr. Abdi's case and requested a meeting "to discuss current federal deportation and removal policies, particularly as they affect Black children under government care." Justice McLeod did not participate in the creation of the letter and did not sign it. The letter was posted on FBC's Facebook page so that it would be publicly accessible. [Emphasis added.]

As previously indicated, paras. 52-53 of the 2018 ASF and Justice McLeod's oral testimony on this issue are reproduced in full in [Appendix 'A'](#).

[273] The panel holds differing views on the issue whether the answer "No" was false in fact or at least incomplete in a material way. Three members consider that the question asked was reasonably capable of two meanings and was therefore ambiguous.

[274] The question was asked in relation to paras. 52 and 53 of the 2018 ASF. Paragraph 53 recited that Justice McLeod did not participate in the creation of the February 2018 Steering Committee Letter to Minister Hussen and did not sign it. On the one hand, when the question is read contextually, “any involvement” could reasonably refer to substantive involvement of the kind referred to in para. 53. On the other hand, read literally, the phrase “any involvement at all” is not restricted to substantive involvement.

[275] Given the ambiguous nature of the question, the answer “No” is not false in fact or incomplete in a material way. Justice McLeod had no substantive involvement in the February 2018 Steering Committee Letter to Minister Hussen. As he subsequently elaborated, the February 2018 Letter was written, he did not sign it, or sign off on its contents.

[276] Similarly, concerning the website FAQs and the Information, Justice McLeod was a conduit. He did no more than distribute and receive drafts of the website FAQs and pass the Information along. He added no content and played no role in determining what use, if any, would be made of them.

[277] In any event, Justice McLeod understood the question related to the February 2018 Steering Committee Letter to Minister Hussen. Although the website FAQs relating to Mr. Abdi and the March 2018 Community Asks were publicly available, no reference was made to them at the First Hearing.

[278] Considered in the context of the evidence at the First Hearing, Justice McLeod's understanding that the question he was asked related solely to substantive involvement in the February 2018 Steering Committee Letter to Minister Hussen was entirely reasonable.

[279] One panel member concludes the answer "No" was false in fact or, at least incomplete in a material way. Justice McLeod was asked whether he had "any involvement at all in any representations" (emphasis added) made by the FBC about the Abdi case. The fact that para. 53 of the 2018 ASF states Justice McLeod did not participate in the creation of the February 2018 Steering Committee Letter to Minister Hussen or sign it, did not, in this panel member's view, restrict the scope of the question he was asked to substantive involvement.

[280] This panel member notes that Justice McLeod arranged for the FBC mandate to be changed so the February 2018 Steering Committee Letter to Minister Hussen could be sent, facilitated the input of all other Interim Steering Committee members, set deadlines for them to meet and also circulated the draft website FAQs and forwarded the Information to Ms. Ahmed-Omer. This panel member concludes these steps fall within the scope of "any involvement at all" and that Justice McLeod's answer "No" was not accurate.

[281] However, this panel member is not satisfied that Justice McLeod knew his answer "No" was incomplete in a material way or that he was wilfully blind or reckless in giving that answer.

[282] This panel member accepts that Justice McLeod took active steps to remove himself from substantive involvement with the February 2018 Steering Committee Letter to Minister Hussen when he recognized such involvement would be improper. He asked Ms. Ahmed-Omer to assume carriage of writing any letter the Steering Committee might choose to send, refrained from substantive input and asked that his Disclaimer request be added. He did not pass on to Ms. Ahmed-Omer content from the partially written letter he referred to when speaking to Professor Abdillahi. He testified he had been working on that letter to advance the Town Hall or roundtable discussed with Minister Hussen in January.

[283] This panel member concludes that Justice McLeod viewed the steps he took in relation to the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs and the Information as being administrative only and part of his duties as Interim Steering Committee chair. In his mind, they did not constitute “involvement” in the February 2018 Letter, the website FAQs or the March 2018 Community Asks. Rather, they were steps taken to assist a fledgling organization that did not have funds for administrative staff and did not have the person power to have someone else properly attend to necessary administrative actions. The steps were taken for the organization. Moreover, because these steps were things done away from the public view and for the benefit of the FBC as an organization they did not and could not reflect on or impact his role as a judge. This panel member concludes that Justice McLeod simply did not appreciate that the steps

he took could be considered as involvement in the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs, or the March 2018 Community Asks or in any way improper.

[284] To conclude that Justice McLeod was wilfully blind or reckless, this panel member would have to be satisfied Justice McLeod suspected, or recognized a risk that, his answer “No” was false or incomplete. This panel member is not satisfied of either proposition.

[285] Based on the foregoing reasons, we are not satisfied Justice McLeod perjured himself or misled the First Panel concerning his involvement with the February 2018 Steering Committee Letter to Minister Hussen, the website FAQs or the March 2018 Community Asks.

### **iii) Discussion re: Paragraph 52 of the 2018 ASF**

[286] Presenting Counsel submitted that para. 52 of the 2018 ASF could be viewed as misleading because it says members of the Interim Steering Committee other than Justice McLeod “facilitated a meeting between [Minister Hussen] and members of the black community regarding the historical and ongoing deportation of Black individuals, including [Mr. Abdi]” when it is undisputed that no such meeting took place. Further, they say it was not other members of the Steering Committee who facilitated a meeting with Minister Hussen; rather, it was Justice McLeod. Presenting Counsel submit that Justice McLeod’s testimony that “facilitated a meeting” in para. 52 refers to a meeting that did not take place is



difficult to grasp and raises an issue of credibility. The only meeting that took place with Minister Hussen was the January 2018 Meeting, which Justice McLeod arranged and attended.

[287] We acknowledge that the phrase “facilitated a meeting” suggests that a meeting between members of the Steering Committee other than Justice McLeod and Minister Hussen actually took place. Nonetheless, when para. 52 is read with para. 53, we conclude that “facilitated a meeting” was intended to refer to the fact that other members of the Steering Committee wrote the February 2018 Steering Committee Letter to Minister Hussen seeking a meeting with Minister Hussen. Paragraphs 52 and 53 of the 2018 ASF are interrelated on their face. The only meeting para. 53 describes is the meeting with Minister Hussen requested in the February 2018 Letter.

[288] We acknowledge that it may be difficult to understand how the phrase “facilitated a meeting” could refer to a meeting that did not take place. Use of the word “facilitated” is inapt and renders the meaning of the sentence in which it is used in para. 52 opaque.

[289] We also acknowledge that in para. 37 of the First Decision, the First Panel adopted the language of para. 52 of the 2018 ASF that members of the Steering Committee other than Justice McLeod “facilitated a meeting with [Minister Hussen]”. The First Panel may have understood that such a meeting took place. The evidence led at this hearing demonstrates that was not the case. However, as

we have said, use of the word “facilitated” was inapt. No evidence was led concerning how or why the word “facilitated” was used. We are unable to draw any inferences from its use. As we have said, considering paras. 52 and 53 of the 2018 ASF together, we conclude that the phrase “facilitated a meeting [with Minister Hussen]” was intended to refer to the meeting requested in the February 2018 Steering Committee Letter to Minister Hussen.

**2. The Second Allegation: Did Justice McLeod mislead the First Panel in relation to his disengagement from any activities on behalf of the FBC?**

**A. Introduction**

[290] Paragraph 10 of the 2020 Notice of Hearing alleges Justice McLeod “misled the [First Panel] in relation to his disengagement from any activities on behalf of the FBC.” The particulars relied on in support of that allegation are set out at paras. 7-9:

- para. 7 asserts that Justice McLeod gave evidence at the First Hearing by way of the 2018 ASF that he was “considering stepping down as leader of the FBC in or around March 2018, and that, by June 2018, he had resigned as Chair of the Steering Committee and ‘disengaged from any activities on behalf of the federation’”;
- para. 8 asserts that, “[t]he [First Panel], in dismissing the [2018 Complaint], relied on the [2018 ASF] to conclude that Justice McLeod had ceased all activity with the FBC, that he did not intend to serve on its

Board of Directors, and that he had terminated his role as Chair of its Interim Steering Committee”;

- para. 9 asserts that “[c]ontrary to his evidence at the [First Hearing], and following the [First Decision], Justice McLeod resumed a leadership role in the FBC, including chairing and/or voting at Steering Committee meetings”; and
- para. 9 further asserts that “the FBC made at least two funding applications to the federal government in the time that Justice McLeod had resumed his leadership role in the FBC.”

[291] At para. 15 of his Response, Justice McLeod denies that his return to the FBC was judicial misconduct. He states that the First Panel “clarified the law regarding political activity by judges” and that he returned to the FBC in a limited capacity in January 2019. He also states, “[h]is reduced role conformed to the clarified legal rules contained in the [First Decision].”

[292] Paragraph 16 of his Response states that following his return to the FBC, Justice McLeod did not engage in advocacy and was not involved in fundraising or applying for government grants. Paragraph 17 reads as follows:

Justice McLeod did not mislead the [First Panel] about his intention to return to the FBC. Justice McLeod’s choice to return to the FBC after a change in the law cannot retroactively make his testimony at the [First Hearing] false or intentionally misleading.

[293] Presenting Counsel has divided the evidence and submissions relating to this allegation into two timeframes: pre-First Decision activity and post-First Decision activity.

[294] The pre-First Decision evidence and submissions address whether Justice McLeod failed to disengage “from any activities on behalf of the FBC” and thereby misled the First Panel.

[295] The post-First Decision evidence and submissions address whether Justice McLeod’s evidence at the First Hearing misled the First Panel in one of two ways:

- i) it amounted to an undertaking that he would not play any role in respect of the FBC on a go-forward basis, regardless of the outcome of the First Decision; or
- ii) it amounted to a representation that he would not play a leadership role with the FBC on a go-forward basis.

[296] In their written Closing Submissions, counsel for Justice McLeod submit that the pre-First Decision activity is not the proper subject matter of this hearing for the following reasons:

- the 2020 Notice of Hearing is entirely focused on Justice McLeod’s conduct upon his return to the FBC;
- there is no evidence that the allegations concerning the pre-First Decision activity were investigated by a subcommittee as required under

ss. 51.4(1) and (4) of the CJA, in particular, the allegations were not discussed in an August 6, 2019 letter from the OJC Registrar to the OCJ Central West Region Regional Senior Judge setting out the particulars relied on by the subcommittee to recommend Justice McLeod's suspension; and

- there is no evidence that these allegations were reviewed by a Review Panel as required under ss. 51.4(17) of the CJA and rules 12 and 13 of the OJC's *Procedures Document*.

[297] Counsel for Justice McLeod accordingly submit that advancing the allegations concerning the pre-First Decision activity is procedurally unfair and further that such allegations were not properly referred to this panel such that we have no jurisdiction to address them: *Hryciuk v. Ontario (Lieutenant Governor)* (1996), 32 O.R. (3d) 1, 139 D.L.R. 4th 77 (C.A.).

[298] Presenting Counsel disputes these submissions.

[299] As we find that the allegations concerning the pre-First Decision activity are not made out, we prefer to address them and assume, without deciding, that we have jurisdiction and that the allegations concerning the pre-First Decision activity are properly before us.

[300] We will accordingly address the allegations concerning each timeframe in turn.

## **B. Pre-First Decision Evidence and Submissions**

[301] Presenting Counsel have led evidence concerning Justice McLeod's conduct in June and December 2018 that may amount to engaging in activities on behalf of the FBC. The June conduct relates to his correspondence with the OJC Registrar concerning disengaging from the FBC and his attendance at an intervening Steering Committee meeting. The December conduct relates to a series of communications he received from FBC Executive Team members seeking his input on FBC governance issues.

### **i) June 2018: Correspondence with the OJC Registrar**

[302] Justice McLeod sent two letters to the OJC Registrar in June 2018 concerning his status with the FBC. In the interval between those letters, he chaired an FBC Interim Steering Committee meeting. The letters were disclosed to the First Panel; the fact that he chaired the Interim Steering Committee was not.

#### **a) Relevant evidence**

[303] That the following events occurred is undisputed:

- May 24, 2018, the OJC Registrar advised Justice McLeod that the First Complaint subcommittee was considering making an interim recommendation under s. 51.4(8) of the CJA that he be suspended with pay until the final disposition of the First Complaint. The OJC Registrar advised that although Justice McLeod was not required to respond, under

the OJC *Procedures Document*, any response he wished to make should be submitted no later than June 4, 2018;

- June 4, 2018, the OJC received a letter from Justice McLeod advising, among other things, that he had “resigned as the Honourary Chair of the FBC effective immediately”, and that the website would reflect that he had resigned in the coming days;
- June 7, 2018, the OJC Registrar wrote Justice McLeod on behalf of the First Complaint subcommittee requesting clarification by no later than June 11, 2018, concerning whether Justice McLeod had resigned as Chair of the Steering Committee and “as to whether [he was] in fact disengaged from all activities of the Federation”;
- June 10, 2018, Justice McLeod attended and chaired an Interim Steering Committee meeting;
- June 11, 2018, Justice McLeod confirmed to the OJC Registrar that he had “resigned as the Chair of the Steering Committee of the Federation of Black Canadians and [had] disengaged from any activities on behalf of the Federation”; and
- June 19, 2018, the OJC Registrar advised Justice McLeod that, based on its understanding that Justice McLeod had resigned as Chair of the Steering Committee and had “fully disengaged from all activities of the Federation”, the First Complaint subcommittee had decided it would not

make an interim recommendation that he should be “non-assigned” pending a final decision on the First Complaint.

[304] The June 10, 2018 Interim Steering Committee meeting minutes do not reflect Justice McLeod’s resignation. However, the August 27, 2018 Interim Steering Committee meeting minutes reflect his departure through the statement under item 1, “[S]ince Donald stepped down from FBC ... meetings would be chaired on a rotation basis”. Further, item 7 of the September 19, 2018 Interim Steering Committee meeting minutes reads as follows:

**Business from previous meeting**

-Donald discussion and acceptance of formal resignation

**Motion:** Be it resolved that the Steering Committee accept the formal resignation of Donald first presented in June 2018 in camera.

**Motion Status: TABLED** [Emphasis in the original.]

[305] During cross-examination at this proceeding, Justice McLeod initially testified that, although he still wanted to tell people, he was fairly certain he had disengaged from any activities on behalf of the FBC as of June 4, 2018. However, when taken to the minutes of the June 10, 2018 Interim Steering Committee meeting, he acknowledged that he chaired the meeting and voted on a motion. In addition, he said:

[T]his is the meeting where I wanted to tell them I won’t be coming back. I had actually written a letter and given it to Ms. Ahmed-Omer to let her know that I had, in fact, resigned. And I wanted to be able to address it at this



meeting at the end. I had been with these people such a long time and they had given their blood, sweat and tears, and so although I'm here and I'm doing this, I know at the end of the meeting I'm going to be telling them that I'm not going to be coming back. And then I write a subsequent letter dated June 11th saying that I have now disengaged from all activities. ... So in effect I had resigned. Ms. Ahmed-Omer had the letter. I wanted to at least tell the people I couldn't be coming back, and so as opposed to telling them at the beginning of the meeting, I wanted to tell them at the end. [Emphasis added.]

[306] Justice McLeod also acknowledged in cross-examination that, while he had disengaged from any activities on behalf of the FBC, people would sometimes call him and ask for information that he had that they did not have or ask for advice. He said he did not have to give advice on a lot of things. When asked if there was any doubt in his mind that he could not be involved at all with the FBC, Justice McLeod responded:

I disengaged. I didn't have any activities with them. But there were times when they were going to call. I didn't think that what it meant was that if Ms. Ahmed-Omer asks me for advice ... I don't think that would be something that I couldn't, like, help her with.

[307] Justice McLeod acknowledged that he had not checked with the OJC to confirm whether such contact was acceptable.

[308] Paragraphs 67 through 71 of the 2018 ASF summarized the May-June correspondence between Justice McLeod and the OJC Registrar. However, the 2018 ASF did not refer to Justice McLeod chairing the June 10, 2018 Interim Steering Committee meeting; the minutes of that meeting were not attached as an

exhibit to the 2018 ASF; and Justice McLeod did not testify about chairing the June meeting at the First Hearing.

**b) Discussion**

[309] Presenting Counsel submit that on the one hand, Justice McLeod's attendance at the June 10, 2018 Steering Committee meeting underscores his commitment to the FBC and could be related to transitioning out of the organization to effect his resignation. On the other hand, it would be open to us to conclude that Justice McLeod misled the First Panel by failing to provide a complete picture of his relationship with the FBC and failing to disclose that he chaired the June 10, 2018 meeting.

[310] We accept that Justice McLeod tendered his resignation from the FBC Interim Steering Committee on June 10, 2018 and, subject to what we will say in the next section concerning communications with FBC members, thereafter, disengaged from all activities on behalf of the FBC pending the First Decision.

[311] We are satisfied that Justice McLeod attended and chaired the June 10, 2018 FBC Steering Committee meeting as a means of transitioning out of the organization. He testified that he had delivered a letter of resignation to Ms. Ahmed-Omer. We have no reason to reject his evidence in that respect. We note that counsel for Justice McLeod did not ask Ms. Ahmed-Omer about the letter of resignation he says he gave her. However, as far as we are aware, the issue of chairing the June 2018 meeting was first raised during Justice McLeod's evidence,

after Ms. Ahmed-Omer testified. Presenting Counsel did not refer to the issue in their Opening Submissions.

[312] We conclude that, as far as Justice McLeod was concerned, in delivering the letter of resignation to Ms. Ahmed-Omer, he had resigned in accordance with his June 7, 2018 letter. Chairing the June 10, 2018 meeting and advising Steering Committee members of his resignation in-camera at the conclusion of the meeting was, in effect, a form of courtesy to people who worked with him to help launch the FBC, an organization he founded and which the First Panel acknowledged had laudable goals. As of June 11, 2018, he had withdrawn from activities on behalf of the FBC, as he confirmed in his letter of the same date.

[313] The allegation here is that Justice McLeod misled the First Panel. He was not asked, when testifying at this hearing, whether he remembered when he signed the 2018 ASF or testified at the First Hearing that he had chaired the June 10, 2018 Interim Steering Committee meeting. We have no basis to conclude that he knew, or was wilfully blind or reckless concerning, whether he recalled having done so at any relevant time. Nor do we have any basis for concluding that, immediately prior to the First Hearing, he had access to Steering Committee meeting minutes or believed there might be a reason to check them.

[314] In any event, we view the precise steps Justice McLeod took to effect his resignation and withdraw from activities on behalf of the FBC in June 2018 as inconsequential. In his June 4, 2018 letter to the OJC Registrar, Justice McLeod

explained how he had attempted to respond to concerns the Ethics Committee had expressed in March 2018. It is apparent that he was surprised and disappointed by the First Complaint subcommittee's position. Nonetheless his "role as a member of the judiciary, and the contributions [he could] continue to make as a member of the Court, [were] so important to [him]" that he acceded to the request to resign from the FBC Steering Committee and disengage from further activities on behalf of the FBC. The important point is that he did what he was asked to do even though he believed the request disproportionate.

**ii) December 2018: Communications from FBC Executive Team Members**

[315] Presenting Counsel led evidence of a series of emails sent to Justice McLeod by FBC Executive Team members in early December 2018. Most of the emails were from Mr. Thompson, then-Chair of the FBC Governance Committee. Primarily, the emails provided updates and sought input about ongoing FBC governance issues. Some involved scheduling a Governance Committee meeting.

[316] It is undisputed that Justice McLeod provided input in relation to a particular governance document and also discussed governance with Mr. Thompson and Ms. Ahmed-Omer from time to time. The issues to be determined are when the document input was provided; whether Justice McLeod attended an FBC Governance Committee meeting prior to the release of the First Decision; and whether any input or conversations Justice McLeod had amounted to engaging with the FBC.

**a) Relevant evidence**

[317] During his examination-in-chief at this hearing, Justice McLeod testified about why FBC Executive Team members were corresponding with him in early December 2018. He said it appeared they were attempting to make substantial mandate changes and they wanted information or input from him because he was the only one with experience with the organization from the beginning.

[318] The first email is dated December 2, 2018 and is from Mr. Carby to Mr. Thompson, Mr. Picart, Ms. Ahmed-Omer and Justice McLeod with a copy to a Mr. Eldon Holder Sr. (Mr. Holder Sr. had previously been on an Interchange placement from the federal government to the FBC and was acting in an advisory role to the Interim Steering Committee at the time.)

[319] In this email, Mr. Carby referred to an Executive Team call that he, Mr. Thompson, Mr. Picart and Mr. Holder Sr. had attended. Mr. Carby confirmed that he had prepared “the motions” for discussion at an upcoming December 5, 2018 Interim Steering Committee meeting and invited Justice McLeod and Ms. Ahmed-Omer to comment “through whatever medium [they] prefer[ed] prior to the meeting so that [their] input [could] be noted.”

[320] The first motion related to the FBC appointing a “Governance Board consistent with [the] principle of regional representation from across Canada.” The second motion related to an internal personnel matter. Mr. Carby testified that, although Justice McLeod was no longer part of the FBC, Mr. Carby nonetheless

thought it appropriate to inform him of planned changes since Justice McLeod was a founding member. He said that did not mean Justice McLeod was part of the decision-making or that his input was required.

[321] Justice McLeod testified that appointing a Governance Board was a fundamental change from what had been articulated about the FBC since the beginning. He said the FBC would need to get his historical knowledge to see whether or not this could actually be done. However, in cross-examination, he testified he did not respond to the email or speak to anyone about it.

[322] The second email is dated December 9, 2018 from Mr. Thompson to Mr. Holder Sr. and Justice McLeod about the Governance Committee of the FBC. The substance of the email suggests Justice McLeod is a member of the Governance Committee and reads as follows:

Hi Eldon,

I think you forgot to add Donald here so I have cc'd him.

Right now the governance committee consists of myself you and Donald. If you are proposing to add others to our call I am fine with that. We can also see what Donald also thinks.

I encourage you both to add updates directly to the document so it makes it easier to track updates and changes as we go in one central place. [Emphasis added.]

[323] Justice McLeod testified that he was not part of the Governance Committee and attributed Mr. Thompson's statement to his (Mr. Thompsons') particular way

of thinking, *i.e.*, membership in the Steering Committee was not a prerequisite to membership in the Governance Committee. He said he would have been inclined to respond but did not believe that he did. In response to a suggestion from his counsel that there is a responsibility not to leave an organization hanging if someone requests information, Justice McLeod responded that the organization was still in its infancy and much, if not all, of the information relating to governance “would have been coming out of [his] head.” When asked during cross-examination if he asked Mr. Thompson to stop sending him emails and particularly not to make inaccurate statements in emails, Justice McLeod responded that he was not sure if he even read the email.

[324] Mr. Thompson testified that he felt it necessary that they hear from Justice McLeod because Justice McLeod had been dealing with governance before he took it over and, unlike Mr. Holder Sr., he did not think they could move forward without knowing the history.

[325] The document referred to in Mr. Thompson’s December 9, 2018 email is a Google document, titled *Board Development of FBC*, setting out four options for the FBC’s governance structure. On an unknown date, Justice McLeod provided input under the heading, “Donald – Suggestions”.

[326] Justice McLeod initially testified that he thought he would have made those suggestions after he returned to the FBC. But, after considering the issue overnight, he volunteered that he could not be sure when those suggestions were

made. He agreed it was possible the suggestions were made before his return to the FBC. Justice McLeod explained that Mr. Thompson and other members of the Steering Committee reached out to him for help from time to time, especially Mr. Thompson. He said Mr. Thompson was the youngest member of the group, had a lot on his shoulders in relation to governance, and both he and Ms. Ahmed-Omer sought out Justice McLeod from time to time.

[327] Mr. Thompson's evidence about when Justice McLeod submitted his suggestions to the Google document was unclear. What is clear is that Mr. Holder Sr. commented on the Google document on December 9, 2018. Justice McLeod's comments, under the heading "Donald - Suggestions", are set out below:

#### Donald - Suggestions

I am in agreement with the proposed options being 1 and 4 (they are both very similar in my estimation). I would further suggest that we then recommend these issues back to governance to iron out the capacity behind the suggestion.

- The appropriate paperwork necessary for each province which should be uniform in nature
- Include in the conversation community engagement committee or persons that have been involved with creating town halls or those who wish to be involved in this type of engagement
- Select a point person or confirm ([Ms. Ahmed-Omar] who has been involved to this point)
- Complete the onboarding process and begin to take on new members to SC - I believe there are proposed names from Vancouver, Alberta, Montreal and Ottawa that should be vetted



- Governance to review and recommend the onboarding paperwork as well as process for community hubs to choose representatives as well as chair. (should also vet any potential conflicts between persons who wish to sit or run as representatives from provinces and the SC)
- Should determine particular provinces where a personal touch would be better required to build capacity such as Ontario.

[328] The third email is a December 10, 2018 email from Mr. Thompson to Mr. Holder Sr., with a copy to Justice McLeod, apparently about scheduling a Governance Committee meeting. The subject line reads: “Re: Board Development of FBC – Invitation to edit.” The body of the email reads as follows:

Just an update I shared Wednesday, Thursday or this weekend Saturday or Sunday as options. Both of you have confirmed receipt of the documents which hopefully help for discussion. Eldon thank you for your additional comments.

Elden [sic] you shared Wednesday could work for you. Since that Donald text [sic] me referencing Thursday as a better day for him after 9:30 pm.

Eldon please let me know if that works for you?

Let's try and use this email thread to confirm the date and time so everyone is in the loop. Also, Donald, Eldon has suggested adding Len to the call meeting. Is that ok once we have a date and time I will let him know? [Emphasis in the original.]

[329] In his evidence, Justice McLeod did not dispute that he likely sent a text to Mr. Thompson specifying his availability along the lines set out in the email. However, he was firm in asserting that while he may have agreed to speak to Mr. Thompson, he would not have attended a Governance Committee meeting. Mr.

Thompson testified the call he was setting up at 9:30 p.m. was “most likely [about] the governance items” but he did not recall whether the call took place.

[330] In the fourth email, dated December 11, 2018, Mr. Thompson emailed Mr. Holder Sr. with a copy to Justice McLeod to confirm the date and time for a call. The subject line reads: “Re: Board Development of FBC – Invitation to edit.” The body of the email reads as follows:

Hey Eldon and Donald,

This is to confirm our call for:

**This Thursday 9:30pm – 10:30pm** [Emphasis in the original.]

[331] There is no evidence of any response from Justice McLeod to this email.

[332] Mr. Thompson also sent a calendar invite to Justice McLeod, Mr. Carby and Mr. Holder Sr. for Thursday at 9:30 p.m., with the subject line “Governance call FBC - conference line”.

[333] There is no evidence of any response from Justice McLeod to this invite.

[334] Later the same day, Mr. Thompson sent the fifth email to Justice McLeod, Ms. Ahmed-Omer, Mr. Carby, Mr. Holder Sr. and Mr. Picart concerning “ET call check-in: Do we need a call this week?” He asks “everyone” whether a call is needed “tomorrow” and confirms that the governance committee is meeting “this Thursday to continue to discuss structure, leadership, and the board conversation.”

[335] Mr. Thompson clarified in his evidence that Justice McLeod was not part of the Executive Team at the time. There is no evidence of any response from Justice McLeod to this email.

[336] The sixth email is a December 17, 2018 email from Mr. Thompson to Mr. Picart, Ms. Ahmed-Omer, Justice McLeod, Mr. Carby and Mr. Holder Sr. checking in for “this Wednesdays ET call”. In his email, Mr. Thompson states:

Governance met - some updates could be given but we have a few more calls which will happen shortly before presenting back to the SC. Basically developing plans for future decision making as a group and Board development.

...

Same as before – let me know if you are confirming for the call....

[337] Justice McLeod was originally firm in his evidence that he did not attend any Governance Committee meetings prior to the First Decision being released. However, after seeing the December 11 and 17, 2018 emails, he said he could not recall being at a meeting and that “in [his] mind” he did not believe that he was at the meeting. Justice McLeod also acknowledged that he never asked Mr. Thompson to stop sending him emails.

[338] In the seventh email, dated December 19, 2018, Mr. Thompson forwarded his December 17, 2018 email to Justice McLeod, Ms. Ahmed-Omer, Mr. Carby, Mr. Holder Sr. and Mr. Picart and stated:

Hey,

So far we have only heard from Eldon and Len, and they are in favour of the call. I can also be on the 7pm ET call.

Donald, Richard, Dahabo if any of you plan to be please let us know.

Thank you.

[339] There is no evidence Justice McLeod responded to this email.

### **b) Discussion**

[340] Perhaps not surprisingly, in the absence of meeting minutes, the witnesses' memories concerning exactly when meetings happened in December 2018 and who was present at any such meetings were not clear.

[341] That said, the document trail demonstrates the following matters:

- a Governance Committee meeting was scheduled for Thursday December 12, 2018 at 9:30 p.m. to suit Justice McLeod's convenience;
- the purpose of the meeting was to continue to discuss structure, leadership and the board;
- a Google document relating to governance was circulated for comment in advance of that meeting;
- Justice McLeod commented on the Google document on a date he acknowledges could have been prior to his formal return to the FBC; and

- Mr. Thompson advised the Executive Team on Tuesday, December 17, 2018 that Governance met and was “[b]asically developing plans for future decision making as a group and Board development.”

[342] Having considered the whole of the evidence relating to this issue, we are not satisfied that Justice McLeod was a member of the FBC Governance Committee as of December 2018 or that he attended any Governance Committee meetings in December 2018.

[343] The only evidence of Justice McLeod being a member of the FBC Governance Committee in December 2018 are the statements to that effect in Mr. Thompson’s emails. We accept it as likely that Mr. Thompson simply made that assumption. Although the paper trail establishes that Mr. Thompson arranged a Governance Committee meeting to suit Justice McLeod’s schedule, we cannot discount the likelihood that Justice McLeod agreed to speak to Mr. Thompson about issues, but not attend a meeting.

[344] Overall, given that Justice McLeod chose to resign from the FBC Steering Committee and disengage from FBC activities to retain his position as a sitting judge, we think it unlikely that he would have risked jeopardizing that position by attending a formal committee meeting.

[345] That said, we are satisfied Justice McLeod submitted his suggestions on the Google document prior to the December 13, 2018 Governance Committee meeting and that he talked to Mr. Thompson and Ms. Ahmed-Omer from time to time about

governance issues. The governance issue started percolating on December 2, 2018; the Google document was circulated on December 9, 2018; and was presumably the basis for at least part of the December 13, 2018 proposed meeting. We consider it likely that Justice McLeod submitted his input to meet that timing.

[346] We are also satisfied that Justice McLeod's suggestions on the Google document – and undoubtedly his conversations with Mr. Thompson, in particular, and perhaps Ms. Ahmed-Omer – went beyond providing information on matters of historical institutional knowledge. His suggestions indicate he provided his opinion, and some substantive input on the go-forward governance model he thought the FBC should adopt.

[347] Presenting Counsel submit that, on the one hand, it is open to us to conclude that Justice McLeod was merely responding to inquiries from the FBC based on his long-standing knowledge of the organization and that his conduct was *de minimis* in nature, such that it was not negligent or lacking in care for him to not inform the First Panel about these communications.

[348] On the other hand, Presenting Counsel submit that it is open to us to conclude that when Justice McLeod advised the OJC Registrar that he had “disengaged from any activities on behalf of” the FBC this meant, as stated in para. 8 of the 2020 Notice of Hearing, that he had “ceased all activity”. In other words, he ceased having contact with FBC members concerning FBC matters, including providing no input into governance decisions being made by the organization. In

that case, it would be open to us to conclude that Justice McLeod's obligation to provide full and complete testimony required him to disclose communications with the FBC members prior to the release of the First Decision to ensure that the First Panel had an accurate picture of his relationship with the FBC at the time it was weighing the evidence.

[349] We are not satisfied that Justice McLeod's December 2018 communications with the FBC members as set out above breached his undertaking to disengage from all activities on behalf of the FBC pending completion of the First Hearing or that he misled the First Panel by failing to disclose them. Justice McLeod was instrumental in founding the FBC and, unlike the Executive Team members with whom he communicated, possessed historical knowledge about how the organization was intended to evolve. From that perspective, he provided an opinion and input to the FBC concerning how it should move forward as an organization. In our view, he did so in the capacity of a respected former member, whose advice the Steering Committee could accept – or choose to ignore. He had a vision that the Steering Committee was interested in, but he was no longer part of the organization.

[350] Justice McLeod's June 2018 obligation to disengage from the FBC was expressed slightly differently in each of the three documents in which it was stated:

- June 7, 2018 letter from the OJC Registrar to Justice McLeod:

The subcommittee seeks confirmation from your Honour as to whether you have resigned as the Chair of the Steering Committee and as to whether you are in fact disengaged from all activities of the Federation. [Emphasis added.]

- June 11, 2018 letter from Justice McLeod to the OJC Registrar:

I confirm that I have resigned as the Chair of the Steering Committee of the Federation of Black Canadians and have disengaged from any activities on behalf of the Federation. [Emphasis added.]

- June 19, 2018 letter from the OJC registrar to Justice McLeod:

The subcommittee has decided that it will not make an interim recommendation ... that you should be non-assigned pending the final decision, based upon its understanding ... that you are fully disengaged from all activities of the Federation, including no longer appearing on the Federation's website for promotional purposes by way of video or having any reference to your judicial office or title on the website or in any Federation materials or events. [Emphasis added.]

[351] However the obligation is expressed, we are not satisfied that by responding to requests for his opinion and input concerning how the FBC should move forward from a governance perspective Justice McLeod engaged in “activities on behalf of the Federation” or “activities of the Federation”. He was not participating as a member or participating in the decision-making. He simply provided input and advice Executive Team members requested. They were free to take it or leave it.

[352] The OJC Registrar's March 12, 2018 and May 24, 2018 letters to Justice McLeod demonstrate that the First Complaint subcommittee was concerned that Justice McLeod's judicial title and identity had become intricately and publicly



connected with an organization that interacted with politicians and that Justice McLeod had done so himself. Thus, the request to resign and disengage. The fact remains that the FBC is an organization with laudable goals that Justice McLeod helped found. Had the First Complaint subcommittee intended Justice McLeod should refrain from assisting the FBC by providing his historical knowledge and perspective on governance issues, it could have made that clear.

### **C. Post-First Decision Activity**

[353] In their written Closing Submissions, Presenting Counsel clarified that the allegations relating to the post-First Decision timeframe address whether Justice McLeod's evidence at the First Hearing misled the First Panel in one of two ways:

- i) his evidence amounted to an undertaking that he would not play any role in respect of the FBC on a go-forward basis, regardless of the outcome of the First Decision; or
- ii) his evidence amounted to a representation that he would not play a leadership role with the FBC on a go-forward basis.

[354] The issues therefore turn on Justice McLeod's evidence at the First Hearing concerning his future with the FBC; the First Panel's treatment of that evidence; and, if we are satisfied Justice McLeod made the noted representation, the evidence concerning the nature of his role following the First Decision.

[355] Before turning to Justice McLeod's evidence concerning his future with the FBC, to provide context, we set out the following undisputed facts concerning Justice McLeod's post-First Decision activities with the FBC:

- on January 9, 2019, the FBC Interim Steering Committee voted to appoint Justice McLeod as Leadership Advisor to its Executive Team and the Interim Steering Committee;
- in his role as Leadership Advisor, Justice McLeod was to manage meetings of both committees, but was prohibited from voting and interfacing with the government on behalf of the FBC;
- following his return to the FBC, Justice McLeod also sat on the Governance and Nomination committees of the FBC;
- the record reveals that Justice McLeod voted accidentally on one occasion at an FBC Steering Committee meeting, however, his vote was not recorded;
- at the 2019 Summit, Justice McLeod gave a keynote address, attended an FBC workshop and assisted with logistics at the event referred to as Black Voices on the Hill;
- as of March 2019, the FBC website described Justice McLeod as "one of several spokespeople at FBC";

- in May 2019, the FBC Interim Steering Committee transitioned to an appointed Board of Directors;
- the appointed Board of Directors approved Justice McLeod as its non-voting Chair on June 23, 2019;
- at the end of May 2019, the FBC submitted a funding application to Heritage Canada for \$430,000, however, Justice McLeod played no role in drafting or submitting the application and the funds were not received until after he had resigned from the FBC in September 2019;
- Justice McLeod attended a July 23, 2019 meeting hosted by ESDC on behalf of the FBC;
- Justice McLeod resigned from the FBC in September 2019; and
- as of September 2019, a “final” FBC Board of Directors had not yet been elected.

**i) Justice McLeod’s Evidence at the First Hearing Concerning his Future with the FBC**

[356] Justice McLeod’s evidence at the First Hearing concerning his future with the FBC consists largely of statements in the 2018 ASF incorporating excerpts from Justice McLeod’s correspondence to the Ethics Committee and to the OJC Registrar, and related correspondence, attached as exhibits to the 2018 ASF.

[357] As we have said, Justice McLeod sent emails to the chair of the Ethics Committee seeking advice concerning his participation in the FBC in November 2017 and March 2018.

[358] Paragraphs 56-58 of the 2018 ASF described the February 2018 media coverage questioning the propriety of a judge holding a leadership role with the FBC. Because of the media coverage, Justice McLeod wrote to the Ethics Committee on March 2, 6, and 7, 2018. Paragraphs 59 through 62 of the 2018 ASF described this correspondence and the Ethics Committee's response. The emails were attached as exhibits W and X to the 2018 ASF. Relevant excerpts from Justice McLeod's March emails to the Ethics Committee read as follows:

Email dated March 2, 2018

[Excerpt from FBC website]

Is the chair of the steering committee also the chair of the FBC FCN Board of Directors?

The interim Chair of the Steering Committee is Justice Donald McLeod. He will be replaced when Black community members elect the Board of Directors, before the end of 2018.<sup>14</sup>

Email dated March 6, 2018

I wish to make it abundantly clear that within the next 8-9 months I will no longer be involved with the Federation.

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<sup>14</sup> The March 2, 2018 email was described in para. 59 of the 2018 ASF. Paragraph 59 reads in part as follows:

Given the media attention, on March 2, 2018, Justice McLeod wrote to the Ethics Committee, stating that he did not agree with Mr. Cole's views, his representation of the FBC, or his criticism of Justice McLeod's role within it. Justice McLeod did not, at that time, indicate that he would withdraw from his role with the FBC.

... I believe that in order for the organization to run and be effective it should not be headed by a judge.

...

My role for the next 8 - 9 months will be to visit communities across the country, provide them with the narrative, answer questions and ensure that the province establishes a Provincial hub. These hubs will then elect a chair and those chairs will elect the chairperson of the Federation. ... I felt it necessary to reiterate this to the committee to ensure that the committee was under no illusion as to my role, function and eventual end date. My reason for continuing to stay on at this point is to maintain the credibility of the Federation. In light of the fact that the organization was started by me it would not bode well if I was not present to answer questions with respect to its origins, the purpose for its mandate and the utility such an organization would have for us as Black Canadians (especially since something like this has not been attempted for decades and to this point we have made very significant inroads which could erode if I am viewed as stepping away). [Emphasis added.]

Email dated March 7, 2018

[I]n reading it over there is a typo... That being said I wish to make it abundantly clear that after the next 8 - 9 months I will no longer be involved with the Federation... [Emphasis in the original.]

[359] In a March 8, 2018 letter, the Ethics Committee chair advised Justice McLeod of the Committee's view:

Obviously, 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.

[360] Paragraphs 63 and 66 of the 2018 ASF referred to Justice McLeod's May 10, 2018 letter responding to the First Complaint, which was attached as exhibit B

to the 2018 ASF. In addition to quoting from his correspondence to the Ethics Committee, Justice McLeod wrote the following:

As reflected below, I am phasing out my involvement as Chair of the Steering Committee of the [FBC], which had always been the plan....

...

### **My Involvement in the FBC**

...

I intended to start the organization and attempt to ensure its sustainability, never to lead the organization.

...

I confirmed for the Ethics Committee that:

...

I was the interim Chair of the Steering Committee. I anticipated being replaced when Black community members elected a Board of Directors, before the end of 2018;

...

The key issue for me was whether I resign as the Chair of the Steering Committee immediately or do so within the next six months, once the infrastructure and governance model is in place across the country to enable the FBC to carry on, and serve the community through a new Board of Directors.

...

Please allow me to explain why I have chosen to “phase out” my role as chair of the Steering Committee.

First, I have taken active steps to correct the FBC’s website to eliminate potentially misleading references to

my judicial role or clearances obtained by the Ethics Committee.

...

Second ... [m]y focus is now on the creation of infrastructure and governance models described earlier, and behind-the-scene involvement, rather than public interface with government.

Third, I fully expect the transition to a Board of Directors will take place by the end of 2018, if not sooner. I will resign as Chair of the Steering Committee by the end of this year.

...

I recognize that the easier course would be for me to resign immediately. ... Too many people have expressed concern that my departure right now will be interpreted (despite my expressed motivation for doing so) as an abandonment of the organization and as a signal that it is doomed to failure. [Emphasis added.]

[361] Paragraphs 67 to 71 of the 2018 ASF described the correspondence between the OJC Registrar and Justice McLeod in May and June 2018. The correspondence was appended as exhibits AA-EE to the 2018 ASF. As indicated in the last section, in response to advice that the First Complaint subcommittee was considering recommending that he be suspended with pay pending determination of the First Complaint, Justice McLeod advised the OJC Registrar on June 4, 2018 that he had “resigned as the Honorary Chair of the FBC effective immediately.”<sup>15</sup>

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<sup>15</sup> Paragraph 68 of the 2018 ASF erroneously states:

[362] Following a request for clarification, on June 11, 2018, Justice McLeod confirmed to the OJC Registrar that he had “resigned as the Chair of the Steering Committee of the Federation of Black Canadians and [had] disengaged from any activities on behalf of the Federation.”

[363] Justice McLeod was not asked during his testimony at the First Hearing whether he intended to return to the FBC and if so, in what capacity.

## **ii) The First Panel’s Findings**

[364] At paras. 17, 40, 41, 44, and 45 of the “FACTS” section of the First Decision, the First Panel reviewed the above-noted correspondence. When considering whether Justice McLeod’s conduct rose to the level of judicial misconduct, the First Panel said the following, at para. 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 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,

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On June 4, 2018, the Ontario Judicial Council received a letter from Justice McLeod advising, among other things, that he had resigned as Chair of the Steering Committee of the FBC.



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.  
[Emphasis added.]

### **iii) Discussion**

[365] Presenting Counsel submit that it is open to us to conclude that Justice McLeod's evidence at the First Hearing confirmed that:

- he intended to “phase out” his role with the FBC and expected his role as Chair of the FBC to finish by the end of 2018 as the organization transitioned to a Board of Directors; and
- in any event, he had resigned from his position as Chair, and had “disengaged from any activities on behalf of the FBC” prior to the hearing of the First Complaint.

[366] Accordingly, it would be open to us to conclude that his evidence was in the nature of an “undertaking” that he would not play any role in respect of the FBC going forward, regardless of the outcome of the First Hearing.

[367] Alternatively, if we determine that Justice McLeod did not make a commitment at the First Hearing to never return to the FBC, Presenting Counsel submit that we must determine whether Justice McLeod's evidence at the First Hearing was that he would not play a leadership role with the FBC on a go-forward basis, and relatedly whether his return to the FBC was in a “leadership” role and was therefore contrary to his evidence. In this respect, whether Justice McLeod

adhered to the parameters set out in the First Decision is relevant to this assessment.

[368] We are not satisfied that Justice McLeod's evidence at the First Hearing amounted to any form of undertaking or representation concerning his relationship with the FBC on a go-forward basis.

[369] Justice McLeod's March 2018 statements to the Ethics Committee and May 2018 statements to the OJC Registrar related to his expectations concerning what would happen if he continued in his role and accomplished transitioning the FBC to an elected Board of Directors. That did not happen. He subsequently resigned at the request of the First Complaint subcommittee to avoid being suspended from sitting. His resignation and confirmation that he had disengaged from activities on behalf of the FBC were not voluntary and did not include any representation concerning his future intentions. They reflected his current intentions only when faced with a choice between being suspended from sitting as a judge and resigning his position and disengaging from the FBC.

[370] Justice McLeod interpreted the First Decision as permitting him to continue in a role with the FBC so long as he, personally, did not initiate interactions with politicians or government officials to achieve policy objectives not directly tied to the administration of justice. Had the Review Panel intended to allege that he breached the First Decision or otherwise engaged in judicial misconduct by

rejoining the FBC in a leadership role or otherwise, it could have required that the Second Allegation be framed to say so.

[371] Instead, the allegation is that Justice McLeod misled the First Panel through his evidence. For the reasons we have expressed, we do not accept that is the case. He did not undertake in his evidence never to return to the FBC. Nor did he make any representations about his future involvement with the FBC.

**3. The Third Allegation: Did Justice McLeod engage in behaviour that could be perceived as impermissible advocacy and lobbying by his speech at the 2019 Summit and his attendance at the July 23, 2019 Meeting?**

**A. Introduction**

[372] Paragraph 13 of the 2020 Notice of Hearing alleges that Justice McLeod engaged in behaviour that was or could be perceived as being “impermissible advocacy and lobbying”.

[373] The particulars are set out in paras. 11 and 12 of the 2020 Notice of Hearing.

[374] Paragraph 11 asserts that on or about February 4, 2019, Justice McLeod attended and gave a speech at the National Black Canadians Summit in Ottawa (defined above as the “2019 Summit”), an event attended by government Ministers.

[375] Paragraph 12 asserts that, on July 23, 2019, Justice McLeod attended and spoke at a meeting on behalf of the FBC. The meeting was between federal government officials and Black community organizations. It related to a proposed

funding distribution model for the Supporting Black Communities Initiative. Under that model, three to six agencies, including the FBC, would receive federal funding and be responsible for distributing funding to other agencies.

[376] At para. 8 of his Response, Justice McLeod asserts that he did not engage in impermissible advocacy or lobbying at the 2019 Summit or the Supporting Black Communities Initiative meeting.

[377] Paragraph 9 of his Response states that Justice McLeod attended and spoke at the 2019 Summit in his capacity as a judge and a member of the Black community, not as a representative of the FBC. His speech was autobiographical and personal, not political.

[378] Paragraph 10 of Justice McLeod's Response states that he attended a July 23, 2019 meeting hosted by Employment and Social Development Canada (defined above as the "ESDC") as the FBC's representative. However, his attendance was not advocacy or lobbying.

[379] We will deal with each event in turn. Before doing so, we will review certain principles of law which Presenting Counsel submit are specifically relevant to allegations of impermissible advocacy and lobbying.

## **B. Judicial Misconduct: Impermissible Advocacy and Lobbying**

[380] Presenting Counsel emphasize three points:

- judges are generally not prohibited from being involved in the community;

- a judge's community involvement is subject to limitations; and
- racialized judges have a unique and vital role to play in both their own communities and in the community at large.

[381] The principle that judges are free to participate in community activities is recognized in both the OJC's *Principles of Judicial Office* and the CJC's *Ethical Principles for Judges*. However, both sets of guidelines make it clear that this basic principle is subject to limitations.

[382] Principle 3.4 of the *Principles of Judicial Office* states: "Judges are encouraged to be involved in community activities provided such involvement is not incompatible with their judicial office" (emphasis added).

[383] Under heading 6, "Impartiality", section C.1 of *Ethical Principles for Judges* provides: "Judges are free to participate in civic, charitable and religious activities" but cautions that they "should avoid any activity or association that could reflect adversely on their impartiality" (emphasis added).

[384] In relation to volunteer service in community, charitable, religious or educational organizations, *Commentary* C.8 to Principle 6.C.1 warns against involvement on boards of directors because, among other things, of the potential that the board may be involved in disputes and litigation, breach government regulations, or "otherwise be implicated in matters of public controversy." Any of these situations could "give rise to reasonable apprehension of a lack of impartiality". The same *Commentary* also states:

Many institutions solicit and/or receive money from government. Except for funds required for the proper administration of justice, it is not appropriate for the judge to be directly involved in soliciting funds from government. [Emphasis added.]

[385] The general principles concerning community involvement and its limitations are confirmed in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at paras. 33, 59 and 61. Paragraph 61 also highlights the importance of diversity on the bench and the fact that being appointed as a judge does not mean an end to a racialized judge's involvement in organizations related to their community. Nonetheless, affiliation with an advocacy organization may be a different matter:

Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues.

...

While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest.

...

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. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a

judge does or joins predetermines how he or she will judge the case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind. [Emphasis added]

[386] In addition to the extracts from *Principles of Judicial Office* and *Ethical Principles for Judges* previously mentioned, principles 6.D.1, 6.D.2 and 6.D.3(d) of *Ethical Principles for Judges* are also relevant to the questions of impermissible advocacy and lobbying:

Principle 6.D Political Activity

1. Judges should refrain from conduct such as membership in ... organizations or participation in public discussion which, in the mind of reasonable, fair-minded and informed person, would undermine confidence in the judge's impartiality with respect to issues that could come before the courts.

2. All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair-minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

3. Judges should refrain from:

...

(d) taking part 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. [Emphasis added.]

[387] Commentary D.9 to Principle 6.D. cautions that judges should avoid being “perceived as being advisors to those holding political office or to members of the executive.”

[388] While there are undoubtedly limits on community involvement by judges, the First Panel recognized the particular importance of permissible community involvement by racialized judges, at paras. 73 and 88:

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. ... He is to be commended for leaving his courtroom 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.

...

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 [for example, the history of racism and discrimination against black people in the community]. [Emphasis added.]

### **C. Justice McLeod's Attendance and Speech at the 2019 Summit**

[389] It is undisputed that Justice McLeod was invited to give a plenary address (the "February 2019 Speech" or the "Speech") at the 2019 Summit in his role as a public figure in the Black community. The title of the February 2019 Speech was, "Bringing the Canadian Judiciary into the 21<sup>st</sup> Century". Black community empowerment through unity was a central theme of the Speech.

[390] Justice McLeod confirmed in his evidence that he used a basketball phrase, "We got Next", as an anchor in the February 2019 Speech. He explained that "We got Next" refers to what a team coming to your neighbourhood to play basketball



will say to signal they intend to play after whichever of the teams then playing loses.

[391] Justice McLeod testified that he was trying to convey several messages in the February 2019 Speech. He touched on issues such as racism, colonialism, and the need and ability to believe in yourself. The Speech also addressed the intersection between equity and equality, and the specific idea that giving individuals from different backgrounds with different needs the same thing cannot be expected to produce the same outcomes. The terminology in the Speech changed in places from “We got Next” to “We demand Next”.

[392] Presenting Counsel submit that on the one hand it is open to us to characterize the February 2019 Speech as being in the nature of a rallying cry to the Canadian Black community to come together and support each other. Considered in that way, in itself, it could not be considered impermissible advocacy or lobbying.

[393] On the other hand, Presenting Counsel submit that, when viewed in the context in which it was made, the February 2019 Speech could be viewed as impermissible advocacy or lobbying. That context includes the fact that the Speech was given on the day before an event called Black Voices on the Hill (“BVOTH”), which in reality was Lobby Day 2019. At least some members of the audience were likely to attend BVOTH to present “asks” to government ministers or officials. Moreover, if they did not know it already, the audience could learn at the 2019

Summit that Justice McLeod was the Leadership Advisor to the FBC, an organization known to advocate for policy changes to government.

[394] Justice McLeod testified that he did not have BVOTH in mind when he prepared the February 2019 Speech. Moreover, he contends that the Speech does not contain an identifiable policy “ask” and cannot properly be characterized as impermissible advocacy or lobbying.

[395] We will review the evidence relating to the context of the February 2019 Speech and the Speech itself and then turn to the submissions.

### **i) Relevant Evidence**

#### **a) The 2019 Summit and BVOTH**

[396] The 2019 Summit was held in Ottawa from February 1-3, 2019.<sup>16</sup> On February 4, 2019, a related event, called Black Voices on the Hill, was held on Parliament Hill. The MJF, with the help of the FBC and the Somali Centre for Family Services (the “Somali Centre”), organized the 2019 Summit and BVOTH. Two FBC Interim Steering Committee members, Ms. Ahmed-Omer and Mr. Carby, were part of the working group that planned the 2019 Summit. Justice McLeod was not a member of the working group.

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<sup>16</sup> BVOTH is described in the 2020 ASF as a related event to the 2019 Summit. We note however that the 2019 Summit agenda describes the 2019 Summit as running from February 1-4, 2019. BVOTH was scheduled for February 4, 2019. However, the 2019 Summit agenda included a reference to “closing remarks” in relation to a plenary scheduled for 4:40 p.m. to 6:00 p.m. on February 3, 2019. We have treated BVOTH as a related event to the 2019 Summit.

[397] The agenda for the 2019 Summit was titled “Mapping Our Future – Face To Face with Our Lawmakers”. The February 2019 Speech was scheduled for Sunday, February 3, 2019 under the main heading “Plenary Address and Panel”. As part of the agenda item, Justice McLeod was described as, “Justice Donald McLeod, Judge, Ontario Court of Justice”. According to the agenda, the Speech was to be followed by a panel discussion titled “Leveraging Advocacy for Systems Change: a Cross-Cultural Conversation”.

[398] Justice McLeod testified that the panel discussion ended up preceding the February 2019 Speech. Other agenda topics at the 2019 Summit included: Democratic Participation; Affordable Housing and Shelter; Community Safety; and Accessing Justice.

[399] It is undisputed that Justice McLeod did not meet with any politicians at the 2019 Summit. However, he did interact with one member of parliament at BVOTH in relation to the racial profiling incident that is related to the Fourth Allegation discussed below.

[400] The 2019 Summit agenda also described the BVOTH event saying, in part, the following:

[BVOTH] provides a unique opportunity for federal lawmakers to meet with African Canadian community leaders representing a variety of key sectors. ... [T]he event will ignite much needed conversation between community and political leaders. Conversation will focus on issues of concern to Black Canadians and on enhancing collaborative work with different federal

departments, agencies and corporations and political parties.

[401] BVOTH attendees received a document titled “*Black Voices on the Hill, Official Asks Document (Parliament Hill, February 4, 2019)*” (the “Official Asks Document”). The Official Asks Document contains a set of “asks” specific to the federal ministries taking part in BVOTH. The “Overview” to the Official Asks Document states in part the following:

On February 4, 2019 Black community organizations from across Canada took part in the Black Voices on the Hill (BVOH). Led by the Somali Centre for Family Services in partnership with the Federation of Black Canadians and various organizations from across Canada, the day was a follow-up to the 2018 Lobby Day that provided an opportunity for federal lawmakers to meet with African Canadian community leaders representing a variety of key sectors.

Conversations focused on issues of concern to Black Canadians and provided ministers from federal departments and agencies with key asks intended to help develop more collaborative and results-oriented strategies to improve the quality of life for Black Canadians.... [Emphasis added.]

[402] BVOTH attendees broke off into separate rooms during the event.

[403] Justice McLeod attended BVOTH, but only to provide logistical support.

#### **b) The February 2019 Speech**

[404] Mr. Flegel testified that the MJF asked Justice McLeod to deliver a plenary address at the 2019 Summit because of his experience at the First Hearing. Mr. Flegel described the First Decision as a ground-breaking decision, which he felt

could be of interest as part of the broader conversation of advancing the rights of Black Canadians across the country. He described the audience for the February 2019 Speech as being representatives from the Black community across the country including “lots of mainstream Black Canadian organizations”, as well as many young people who had been invited to attend. There is no evidence that there were politicians or government officials in the audience.

[405] Justice McLeod confirmed in his evidence that he drafted the February 2019 Speech. Prior to doing so, he reviewed the decision of the First Panel as well as speeches of other judges, including former Chief Justice Beverley McLachlin and Justice Rosalie Abella, who had also touched on issues of equity and equality in speeches given by them.

[406] Mr. Flegel introduced Justice McLeod prior to the Speech. He described Justice McLeod as a member of the judiciary and said Justice McLeod would be telling the audience about the FBC.

[407] Early in the Speech, Justice McLeod spoke briefly to the First Hearing. He described the support he received from members of the Black community across the country but turned quickly to the theme of unity:

Then, just under a year ago, in March 2018, the wind of change took a detour and waged a personal storm against myself. It found me the subject of a complaint that eventually led to a hearing before the Ontario judicial Council....

However, let me be clear, my fight is no greater than anyone else's....

...

But I think what people didn't realize was that I had a unique advantage ... I had some people that were rallying around me that nobody knew I had....

...

So, we came together ... What we rallied around was something that people did not see. What we rallied around was the fact that we are Black and that we have a Blackness that is unifying all of us.

...

So, we said that we're Black and we're proud.

The community spoke and what happened when we spoke is that the community shifted. We began to change. We began to move. And so the idea that the community came together to help a brother out is something that I can only say thank you for.

...

But I believe that when this community speaks the system shifts, but we must speak as one in purpose. Our message can be and should be different ... but we must believe we have the same purpose. We must be unified or else we will be conquered.

You see, I stand here not as a judge. I stand here as a man, as a Black man. I was not born Justice McLeod but I was born Black.

So, I'm saying: please do not define me by my black robe but rather identify me by my lived experience... It is time to also believe in each other. It is time for us to believe in ourselves. [Emphasis added.]

[408] In his evidence, Justice McLeod explained that the February 2019 Speech spoke to many things: the fact that you cannot have next unless you are ready; the intersection between race, colonialism, and the ability to believe in yourself; merging those concepts into an understanding that to have next, you must be able to appreciate that you can have next; and that to do so, you must be able to stay on. The Speech also spoke to the intersection between equity and equality: the fact that, for example, just because everyone gets the same baby bonus, that does not mean they will be able to achieve the same outcomes.

[409] Relevant excerpts from the February 2019 Speech are set out below:

So, yes although I was supposed to talk about some things I feel that the shift that I was seeing in the environment here needed to be different.

...

It is time now for us to look with the collective lens. We need to speak the language of inclusion. We need to understand that in order for us to ensure that we give ourselves a fighting chance we have to get it right and we need to get it right now.

...

But we must move from the “I” to the “We”.

...

We must begin to learn from those who have defined us.

...

But when the outside world looks at us they group us all together. When there is a struggle, it's us. It's we. It's black people. But yet, for some reason we're talking amongst ourselves we prefer to call ourselves “I”.

...

I am suggesting that we should stand together at all times. If they put us together in bad then let's stay together in good.

...

There is something that changed my actual interaction with this community, from when I was young. ... One of the things that they taught me when I was young is that my Blackness is my strength.

...

So if we are grouped together because of our Blackness, if we are judged because of our colour, if our story begins with our condition as a result of our Blackness, then I suggest that as a community we let this country know that if we are bound then let that perceived weakness become our strength. If it wasn't it was a weakness before. I'm saying let's rally around the fact that they are wrong and we are right, and we are strong.

...

I say that we need to advise the powers that be, the systems that we are engaged in, the entities that make decisions on our behalf, that we, in fact, as a community, have next. In fact, we will not rest until we got next.

...

So, when the question is posed by the team that is coming to meet who got next, when the politicians ask who got next? I'm telling you that we got next. I'm not asking.

In this room full of those desperate for advancement and patience for change, we got next. For every voice that cannot be heard, every person living in assisted housing and suffering from mental health issues, we have next. For every Black young person who is streamed to applied courses, every young man who was ripped from the grips of this life as he is running through the hallways and



narrow alleyways, just trying to make sure that he doesn't get shot, we have next.

I actually -- someone actually told me that what they have done for the Black community is that they have given us a child benefit cheque and that's good enough. That should make you mad. Because it doesn't mean that because we make babies we should be happy that you gave us \$200 for the year, or whatever the amount is. The reality is that our babies still can't get into university. The reality is that our babies are still not finishing high school.

So, the reality is that unless somebody understands that what this community requires is that you will give it to us or we will walk away. We will not be there anymore like we have been before. Then, there will be an understanding that we're legit.

...

So, I suggest the following, for those who are here from the media, those who represent from within and without our community: Hear me and hear me clearly; you can write this down. We will not be answering the call with: we are not sure who has next. ... We demand next! We think that our lived experience has shown it. We believe that the difficulties that we have had have shown it. The fact that we are marginalized the fact that we are being impacted by systemic discrimination -- if we didn't have it before, we have it now. [Emphasis added.]

[410] In cross-examination, Justice McLeod disagreed with the suggestion that when he was talking about “the powers that be”, that was a call to those entities to say “we are next, we need to be properly dealt with”, that’s why they were organizing and that’s what the BVOTH official asks would be for. He explained that he was speaking to the fact that the Black community needed to come together and that colonial populations sometimes thought they could never have next, never be in charge of themselves. He also explained that there is an evolving recognition

of who the Black community is and why they are the way they are. Justice McLeod described “we demand next” as demanding next from everywhere: from schools who have failed to set Black children on a path for achieving their fullest potential; to businesses that have failed to employ Black individuals in the higher echelons of their businesses; and every system that has discriminated systematically.

[411] Justice McLeod also maintained that the February 2019 Speech “had nothing to do with Black Voices on the Hill”. While he acknowledged that some attendees at the Speech may have attended BVOTH the following day, that was not within his contemplation as he was writing the Speech. Justice McLeod testified that the Speech was not related to “asks” and that it was not a political speech. Rather, it was about recognizing the Black community and the fact that if:

[W]e’ve got next, then you have to be prepared yourself to be able to win that game. So when I’m talking about systems, when I’m talking about entities, I’m talking about people that are making decisions for us, as a community we have to understand that in order for us to have next, we first have to be able to make sure that we manage it ourselves.

### **c) The FBC workshop and other events**

[412] In addition to giving the February 2019 Speech at the 2019 Summit, Justice McLeod attended an FBC hosted workshop titled, “*The Federation of Black Canadians: One Year Later*”, which followed immediately after the Speech. The workshop related to the FBC and its activities since its creation. Ms. Ahmed-Omer,

Mr. Carby, Mr. Picart and Mr. Thompson gave a PowerPoint presentation on behalf of the FBC.

[413] The PowerPoint described the FBC as a “national organization that partners with Black communities, organizations and people in 13 provinces and territories across Canada. We advocate on their behalf with governments, parliaments, international organizations, business, faith driven organizations. The FBC is politically nonpartisan” (emphasis added).

[414] The PowerPoint included a “MEET THE TEAM” section, which included Justice McLeod’s name and photograph and described him as Founder & Leadership Advisor and his role as including “provid[ing] advice to the Steering Committee”.

[415] Justice McLeod attended the workshop but did not participate in giving the PowerPoint presentation. He did, however, answer a question posed by an attendee.

[416] During cross-examination at this hearing, Justice McLeod agreed that a reasonable person reading the PowerPoint presentation would conclude that the FBC claims to be an advocacy organization and that Donald McLeod provided advice to its Steering Committee as Leadership Advisor. He also agreed that it was possible that someone could draw a “reasonable conclusion” with respect to the Official Asks Document, that he was “providing advice to an organization that’s pushing” the policies and changes contained therein.

[417] On the evening of Sunday, February 3, 2019, an event was held at the 2019 Summit called “Dinner + Politics”. Justice McLeod did not attend this event.

**ii) Discussion**

[418] On our review of the February 2019 Speech, it contains no identifiable policy asks. Nonetheless, we find that the context in which the Speech was made brings it close to the line of impermissible advocacy or lobbying.

[419] As a starting point, the Speech was made at the 2019 Summit by the Leadership Advisor to the FBC, one of the organizers of the event. Although not itself a type of lobby day, the 2019 Summit was related to advocacy, as exemplified by the panel that preceded the Speech, titled “Leveraging Advocacy”.

[420] Moreover, the FBC described itself in the workshop PowerPoint as a national organization that “advocates” to government on behalf of Black people. Further, Justice McLeod was described in the PowerPoint as a person who provides advice to the FBC Steering Committee.

[421] Secondly, the 2019 Summit culminated in BVOTH, which was a lobbying event, at which, among others, nine federal government ministers received policy asks from community delegates, some of which could result in the allocation of resources. As but one example, the Overview to the Official Asks Document lists the “Minister of Department of Justice” as one of the Ministers available to meet with delegates. Among the Justice asks was a request to “[c]omplete a holistic

review of the justice system, using an anti-Black racism lens”. Undoubtedly a laudable goal, but also one which would require the allocation of resources.

[422] The FBC was among the organizers of BVOTH. The Official Asks Document was printed on FBC letterhead. As we have said, Justice McLeod was noted in the FBC’s PowerPoint as a person who gives advice to the FBC Steering Committee.

[423] The February 2019 Speech undoubtedly addressed matters of importance to the Black Canadian community. However, read in the context in which it was made, aspects of the Speech could be viewed as encouraging – or even inciting – any members of the audience attending BVOTH to advocate forcefully to the Minister with whom they were meeting for their assigned asks and not to take no for an answer.

[424] Thus, while not amounting directly to lobbying, aspects of the Speech could be read as advocating to others to do so. We do not doubt Justice McLeod’s evidence that he did not have BVOTH in mind when he wrote the Speech. Nonetheless, his actions must be considered against the objective standard of the conduct that is expected of judges: *Re McLeod* (OJC, December 20, 2018), at para. 53. Read in the context in which it was made, aspects of the Speech come perilously close to impermissible political advocacy.

[425] That said, we are satisfied that Justice McLeod was not invited to speak, and did not purport to speak, in his capacity as an FBC member. Nor did he

represent himself as someone involved with BVOTH. A reasonable observer could make that distinction.

[426] Moreover, we endorse and adopt the First Panel's statements about the important role Justice McLeod can play as a racialized judge in the justice system, in the Black community and in Canadian society at large, in educating about historical injustices and serving as a role model and bridge to combat racism and eliminate barriers to equality.

[427] Had the February 2019 Speech been given in a different context, one not related to a lobbying event, it would not raise the concerns we have identified. It could then be read solely as a more general rallying cry to the Black community and could properly be likened to the speeches of the other judges Justice McLeod testified he researched.

[428] However, context matters. In the context in which it was given, we conclude that the potential connotations of the February 2019 Speech were problematic. But considering this was a one-time event, and that a reasonable observer could discern that Justice McLeod was not purporting to speak as an FBC representative or as being associated with BVOTH, we are not prepared to hold that the Speech amounted to conduct incompatible with judicial office. We would caution however that repetition of this type of speech in a similar context could lead to a different conclusion. Repetition could lead the reasonable observer to conclude the speaker was associated with the lobbying event.

[429] Justice McLeod also argued that because he was invited to speak at the 2019 Summit, the February 2019 Speech could not amount to impermissible advocacy or lobbying as defined by the First Panel. It is unnecessary that we address that argument in relation to the Speech. However, we will address it in relation to the next issue.

#### **D. The July 23, 2019 Meeting Hosted by ESDC**

##### **i) Introduction**

[430] On July 23, 2019, the ESDC hosted a meeting of Black Canadian community organizations and federal government officials (the “July 23, 2019 meeting”). The July 23, 2019 meeting related to the federal government’s “Supporting Black Canadian Communities Initiative”, which was a \$25 million funding program announced as part of the March 2019 federal budget. Among other things, meeting topics included an “intermediary funding model”, which will be discussed further below, and allocation of funds as between different projects. The ESDC extended invitations to attend the July 23, 2019 meeting to various organizations and specified that only one senior representative of each organization should attend.

[431] It is undisputed that Justice McLeod was invited to attend, and attended, the July 23, 2019 meeting on behalf of the FBC. However, he absented himself from parts of the discussion because of his position as a judge. It is also undisputed that he was invited to and attended a June 20, 2019 telephone meeting, which also

involved federal government officials and similar topics, leading up to the July 23, 2019 meeting.

[432] Presenting Counsel submit that it is open to this Panel to conclude that Justice McLeod's participation in these meetings amounted to, or could be perceived to have amounted to, impermissible advocacy or lobbying because Justice McLeod interacted with government officials concerning the allocation of government resources in relation to issues that had nothing to do with the administration of justice.

[433] Justice McLeod asserts that the First Panel clarified that impermissible advocacy or lobbying involves engagement with politicians that is initiated by a judge. As the ESDC invited him to attend the July 23, 2019 meeting, his participation could not amount to impermissible advocacy or lobbying. In any event, he took reasonable steps to limit his role at the July 23, 2019 meeting and did not participate to achieve any policy objectives.

[434] We will review the background and lead-up to the June 20, 2019 telephone meeting and July 23, 2019 meeting before turning to a discussion of the issues.

## **ii) Relevant Evidence**

[435] It is undisputed that, in recognition of the UN Decade, the federal government included a program called the "Supporting Black Canadian Communities Initiative" (the "Initiative") in its March 2019 budget. Under the Initiative, the federal government committed \$25 million over five years for projects



and capital assistance to, among other things, build capacity in Black Canadian communities (the “Budget Commitment”).

[436] The ESDC, and specifically the Social Development Partnerships Program with ESDC (the “SDPP”), was charged with administering the funds.

[437] The funds were not earmarked for any particular social issue or program. Following the Budget Commitment, the ESDC engaged in outreach with various Black Canadian organizations to assess their needs and inform the government about how the Budget Commitment should be allocated. Two primary “pillars” emerged from this outreach:

- i) capacity building within Black Canadian community organizations, and
- ii) the development of an institute for policy analysis known as the “Canadian Institute for Peoples of African Descent” (“CIPAD”).

[438] The ESDC proposed an intermediary funding model for distributing funds allocated to the first pillar. Under an intermediary funding model, an “intermediary” enters into an agreement to receive and distribute government monies to appropriate recipients and typically receives a portion of the funds to cover administrative costs.

[439] The ESDC’s initial outreach was assisted by the UNDPAD (or UN Decade) Push Coalition (the “Push Coalition”), an organization founded by Richard Sharpe

and others in response to the 2019 Budget and for the purpose of encouraging the federal government to take action in support of the UN Decade.

[440] Mr. Sharpe was, at the time, a federal government employee on Interchange with the FBC. He was also cofounder and leader of a community organization known as 613/819 Black Hub.

[441] On April 2, 2019, Mr. Sharpe emailed members of the Interim Steering Committee, including Justice McLeod, to update them on a conference call he participated in as a member of the 613/819 Black Hub. Among other things, he advised that the ESDC hoped to have the call for proposals for the \$25 Million capacity building funding available by the end of June 2019 and that what was required was “a national Black organization to drive this work across the country.” He said the FBC “could be a major player” if it “establishe[d] its capacity sooner rather than later”.

[442] Ms. Ahmed-Omer testified that she understood Mr. Sharpe was suggesting that the FBC build capacity to be part of the process. She understood there were discussions around this and the possibility of the FBC participating as an intermediary and that Justice McLeod participated in some of the discussions. Justice McLeod testified that he did not read the email, he would not have known about it, and it would not have been of any consequence to him.

[443] On June 4, 2019, Mr. Sharpe emailed ESDC members to propose a meeting to discuss the Budget Commitment. On June 19, 2019, he forwarded the email to

Justice McLeod and other Push Coalition members who were expected to attend a June 20, 2019 telephone meeting with ESDC officials. He also set out talking points for each participant. For Justice McLeod, he said:

Donald – Focus on FBC national efforts to bring voice to the issues of Black Canadians. Bringing together Black voices through National Black Canadians Summit, Black Voices on the Hill and other initiatives to synthesize the issues and asks of Black Canadians. Black Canadians have an expectation that government will respond to those asks in real time.

[444] In cross-examination, Justice McLeod indicated he did not read this email as he was on vacation with his family. Mr. Sharpe telephoned him directly on June 20, 2019 to get him on the call. Justice McLeod testified he was invited to the call with ESDC because he had “a unique perspective on the country.” He had been around the country as part of the FBC and they wanted his input to speak about organizations across the country. They also wanted to know about the FBC’s national efforts and BVOTH.

[445] ESDC representatives who participated in the June 20, 2019 telephone meeting were Janet Goulding, Assistant Deputy Minister for Income Security and Social Development; Catherine Scott, Director General for Social Innovation and Community Development; and Heather Meek, Senior Policy Analyst, SDPP, Social Programs Division.

[446] At the June 20, 2019 telephone meeting, the attendees discussed, among other things, the Budget Commitment (including how to allocate it), the

intermediary funding model, and organizational capacity in the Black community. Justice McLeod did not put the FBC's name forward as a potential intermediary during the telephone meeting. Rather, he took the opportunity to educate ESDC about the historical context of Black communities in Canada and urged ESDC to apply a "Black lens" to its policy development.

[447] On June 20, 2019, following the telephone meeting, Ms. Scott emailed Mr. Sharpe confirming the ESDC's desire to hold a meeting with community representatives and potential intermediary organizations during the week of July 22, 2019. She enclosed a preliminary list of invitees, which included "Donald McLeod" as the "Key Contact Name" for the FBC. Mr. Sharpe replied on June 26, 2019 adding names to the list.

[448] It is not clear from the record to what extent other FBC Board members may have been supporting the FBC's involvement as a potential intermediary. In a July 4, 2019 email exchange between Ms. Ahmed-Omer, Mr. Sharpe and FBC Board members, Ms. Ahmed-Omer raised questions about the viability of such involvement and the CIPAD proposal. In his response, Mr. Sharpe claimed that he had "received concurrence from FBC Steering Committee members of their interest in the organization to participate." He said the FBC's name had been put forward for consideration to serve as an intermediary.

[449] Ms. Ahmed-Omer testified that the FBC talked about whether to be an intermediary after Mr. Sharpe's email and she assumed Justice McLeod was

present at some of the meetings where the issue was discussed. During cross-examination Justice McLeod said he was not familiar with the email at the time. However, he acknowledged that the FBC's name had been put forward for consideration as an intermediary. He testified that Mr. Carby was interested in pushing the FBC as an intermediary, but the organization was not. Justice McLeod said he made the ESDC aware that the FBC was not interested in serving as an intermediary in a subsequent telephone call on July 18, 2019.

[450] The FBC received email invitations to attend the July 23, 2019 meeting at its general email address on July 4 and 8, 2019. The July 4, 2019 invitation described the purpose of the event:

As you know, in recognition of the [UN Decade], Budget 2019 included \$25 million in grants and contributions over five years, starting in 2019-20, for projects and capital assistance to build capacity in Black Canadian communities. This important initiative will be delivered via the Social Developments Partnerships Program – Children and Families component, a program of Employment and Social Development Canada.

In order to benefit from the advice of key organizations and thought leaders representing Black Canadian communities, ESDC will be hosting a one-day engagement event....

[451] The July 8, 2019 invitation changed the date of the meeting from July 24 to July 23, 2019 and added Justice McLeod to the recipient list in addition to the FBC. The July 4 and 8, 2019 emails both made it clear that the ESDC was seeking one “senior representative” from each invitee organization.

[452] Justice McLeod testified that Mr. Holder Sr., then an ESDC Director, originally asked him to attend the July 23, 2019 meeting because he (Justice McLeod) had unique experience, including “discussion with hundreds of people across the country” and because the FBC was the only national organization at the time. In cross-examination, Justice McLeod said he was not originally going to go, and he did not know how they got his name for the July 8, 2019 invitation.

[453] On July 17, 2019, Susan MacPhee, ESDC Director of Social Programs, sent an email to invitees enclosing the meeting agenda, a PowerPoint titled “Overall Frame of the Supporting Black Canadian Communities Initiative”, and a PowerPoint titled “Overview of the Intermediary Model”.

[454] ESDC prepared the meeting agenda and PowerPoints. Agenda item #5 indicated that the ESDC contemplated inviting three to six organizations to develop proposals to act as intermediaries, detailed how the model worked, and addressed the selection criteria that ESDC would apply. Agenda item #6 included the discussion topic: “Who would you suggest as possible intermediary organizations and why?”

[455] On July 18, 2019, Mr. Sharpe sent Mr. Carby an email with the subject line: “Recommendations on FBC engagement in the July 23rd ESDC session”. Among the recommendations set out in the email were the following:

- FBC should explore ways in which it can better meet the criteria for the intermediary role if it plans to put its name forward to serve in this capacity;

- FBC should support the CIPAD proposal as well as other proposals as part of the Capacity Build fund.

[456] Mr. Sharpe also attached several documents to his email, including a document he had prepared entitled: “Recommendations on FBC engagement in the July 23rd ESDC session on programming around \$25M Capacity Build funding for Black Canadians”. In an early part of the document, it states that “[p]riorities, intermediaries and projects will be discussed at the [July 23, 2019] meeting.” Later it says:

The Federation of Black Canadians (FBC) has been recommended to serve as one of several intermediaries as part of the proposed intermediary stream of the Capacity Build funding program. It should be noted that FBC does not completely qualify as an intermediary based on the proposed criteria. However, given its role as a national organization FBC has remained on the list for consideration and its role and [sic] well as other organizations will be discussed at the July 23 session. There is a desire from the most senior levels of government to support the initiative. [Emphasis added.]

[457] Mr. Carby acknowledged in his evidence that FBC Steering Committee members had reservations about the intermediary role.

[458] In his evidence, Justice McLeod explained that the FBC had misgivings about how the funds would be distributed and believed that the intermediary model may not necessarily be the most appropriate model. He also clarified that it was not just the FBC position that it was against the intermediary model; rather it was the FBC in conjunction with its partners in principle. He testified that he advised

Mr. Holder Sr. of that position in a July 18, 2019 “Meeting of the Minds” (“MOM”)<sup>17</sup> telephone call and suggested that he not attend the July 23, 2019 meeting. Mr. Holder Sr. responded that they wanted him there and that it did not matter if there were differing opinions on the idea of capacity or how things work in the community. Justice McLeod testified that is when he decided to attend the July 23, 2019 meeting. He confirmed that the issue had been canvassed with FBC partners in principle in a telephone call a day or two before the July 18, 2019 MOM call.

[459] On July 18, 2019, Justice McLeod responded to an email dated July 17, 2019 from ESDC team member, Ms. MacPhee, attaching an agenda and PowerPoint presentations for the meeting. He asked if he could speak to the framers of the agenda sometime the next day. He explained:

I make the above request in an attempt to ensure transparency and equity in light of discussions that the Federation has had with several partners in principle and others in our community. I would prefer to have the conversation in an attempt to find common ground if at all possible.

Please let me know if you are willing and or able.

[460] On July 19, 2019, Ms. McPhee responded by email and said the agenda had already been set:

The agenda has been put together based on a variety of conversations with representatives of Black organizations over the last several months. I believe you were involved in one of these discussions with ESDC along with

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<sup>17</sup> Mr. Carby testified that he attended some of these calls, which he described as a “loosely put together collaborative of many organizations from across the country” to “drive agenda and make sure that we were collaborating as a community.”



representatives of the [UN Decade] Push Coalition and Janet Goulding and Catherine Scott of ESDC. The agenda has now been approved and distributed. The intent of the event on Tuesday is to provide a venue for representatives of many Black organizations to share their views, so the agenda is structure [sic] with that in mind.

[461] On July 21, 2019, Justice McLeod emailed Ms. McPhee again and asked if Ms. Ahmed-Omer could accompany him to the meeting. He also clarified that because he is a judge, he would not be able to participate in negotiating funding or making specific “asks” in relation to funding:

It was always our intention to have another individual attend the meeting with me. Ms. Ahmed Omer [sic] a member of the Federation Board and a resident of Ottawa. She would not need any financial accommodations. Could you advise if she would be permitted to attend the days programing [sic].

My apologies for the late request but it was only brought to my attention recently that she was not on the list of attendees.

Lastly, in light of my position as a Justice in the Ontario Court of Justice I wanted to ensure that there was an understanding that it is not my intention to negotiate funding or make any specific “asks” with respect to funding from any political entities. I am aware that this meeting is to speak with the black community about engagement and help the community build appropriate capacity for the various organizations who have been asked to attend the roundtable. In the event discussions deviate from the suggested intention I may have to excuse myself in order to maintain an arms length [sic] distance. I felt it was appropriate to advise you of this unlikely event, to insure [sic] a level of full transparency. [Emphasis added.]

[462] On July 22, 2019, Ms. McPhee replied that Ms. Ahmed-Omer would not be permitted to attend as they were allowing only one representative per organization. She also responded to Justice McLeod's comments about his position as a judge:

Thank you for mentioning your situation as a member of the judiciary. We are aware that you play more than one important role, and it is good of you to note for us the parameters of your participation at the upcoming event. The overall purpose of the event is for us to seek the advice of representatives of Black organizations as to the design of this initiative so most of the discussion will be in general terms. There will be two segments of the day in which participants will have an opportunity to discuss possible roles for particular organizations: the discussion of potential intermediary organizations; and the possible creation of an institute. [Emphasis added.]

[463] Concerning this email, Justice McLeod testified as follows:

[I]t seemed that my ability to be able to go there was fine. They understood the limits that I had, and in understanding the limits, they also knew that if there was discussion in terms of where monies go or how they are doled out, I just have to leave. I assumed that they were fine with that. And as a result of this response, I bought my ticket. [Emphasis added.]

[464] Item #7 on the minutes of the July 21, 2019 FBC Board meeting is "UN Push Coalition". The minutes indicate that two non-FBC members were invited to speak to the Board about, among other things, the UN Push Coalition, the meetings that had occurred so far, what the CIPAD proposal was all about and who had been consulted. The minutes also state:

There was a question as to whether the FBC had actually provided formal support for the proposal since the FBC name was referenced as a part of a proposal document

that was sent to government. In the end ... it was agreed that it is a project the FBC should remain at the table with to discuss, learn, and work through, but most members felt they had insufficient information for formal vote of endorsement. A few comments were also made around the number of Black led groups that were actually aware of this and if a project like this might need to be slowed down to allow for more public consultation especially in various provinces outside of Ontario.

It was also shared that there was going to be a meeting in Ottawa on July 23<sup>rd</sup> around the CIPAD idea in which government officials would be present to learn more, discuss the idea at a conceptual stage. A few [sic] FBC members would also be present. [Emphasis added.]

[465] In addition to Justice McLeod, other members of the FBC attended the July 23, 2019 meeting, albeit not on behalf of the FBC. Ms. Ahmed-Omer attended on behalf of the Somali Centre (having taken the place of the Centre's Executive Director, Abdirizak Karod, at the Centre's request). Rustum Southwell (a member of the FBC Board at the time), attended on behalf of the Black Business Initiative. Ms. Ahmed-Omer and Justice McLeod sat at table #6.

[466] At the July 23, 2019 meeting, Justice McLeod introduced himself and the FBC under Agenda Item #1. He did not refer to himself as a judge. He said:

Hi. I'm Donald McLeod. I'm going to say a lot of things in a very short time.

Also -- so, this -- I am the Chair of the Federation of Black Canadians. We have been in existence since 2016 as a result of a shooting that took place in a neighbourhood that I'm from.

So, what happens is really, it goes from a very grassroots organization to what it is today.

We have been part of -- or integral, with respect to negotiations with the Finance Minister towards the 2018 budget. We have met with Finance, PHAC, Stats Canada, the Premiers, ex-prime ministers, community groups. We have had two summits with Black Voices on the Hill. We have met with every leader from every party, federally, and we have done as best as we can provincially.

We have amassed social science data with respect to mental health, the criminal justice housing, youth initiatives, the creation of hubs. In fact we have met with the creator of Hubs in Saskatchewan, Corrections, education. We carried data from both the summits. We have been working on a Black paper with respect to the (inaudible) bank. We spoke to Scotia Bank last week as well as Tangerine, to see whether or not that could be a reality. And also spoke to -- or did Black Voices on the Hill.

I think what we are the most proud of is the fact that we have been able to overcome growing pains. Growing pains are something that everyone in this room is aware of as community organizations, and I think that we have been able to get past most. We still have some to go.

When I talk about growing pains and not just talking about micro but also macro. This room is an extension of growing pains that are coming together to make things better, and I think as a result we should be proud of ourselves to be able to sit here and be able to have transparent conversations.

And that's it. [Emphasis added.]

[467] When introducing himself at the meeting to Ms. Scott, Justice McLeod informed her that he would not be a very vocal participant during the meeting, given his role as a judge.

[468] The agenda, audio recording and related transcripts of the July 23, 2019 meeting disclose the meeting essentially followed the agenda and that a number of items were discussed as summarized briefly below:

- Agenda Item #1 (Introduction) - among other things participants introduced themselves and their organizations;
- Agenda Item #2 (Update on Initiatives) - representatives from Canadian Heritage, the Public Health Agency of Canada and Statistics Canada provided updates on program initiatives for Black communities. The Heritage Canada representative explained that \$45 million in funding was available over three years to be aimed at countering racism;
- Agenda Item #3 (Overall Frame of the ... Initiative) - Ms. McPhee presented the PowerPoint about the Initiative sent to attendees on July 17, 2019, highlighting that \$25 million was available and how it could address both capital assistance and capacity building projects;
- Agenda Item #4 (Community Capacity Building-Stakeholder Perspectives) - among other things, the participants were asked their views on what percentage of the project funding should go toward capital projects versus capacity building;
- Agenda Item #5 (Overview of the Intermediary Funding Model) - Ms. McPhee presented the PowerPoint sent to attendees on July 17, 2019

relating to the intermediary funding model and requested feedback on how three to six intermediaries could achieve the necessary coverage;

- Agenda Item #6 (Round Table Discussions) - round table discussion seeking input on possible intermediaries (flip-charted at each table);
- Agenda Item #7 (Plenary: Report Of Highlights And Discussion On Intermediary Role, Organizations, Projects) - two tables suggested the FBC as a possible intermediary (table #6 did not); and
- Agenda Item #8 (Canadian Institute for People of African Descent) - the Push Coalition made a presentation concerning CIPAD. The audio recording and transcript disclose that during this session Justice McLeod asked questions relating to whether the allocated funding could be “repurposed” in the event of a change in government. He began his questions with the comment that he thought “the CIPAD as well as the intermediaries are brilliant ideas.”

[469] Justice McLeod explained he was at the meeting to talk about capacity building and “the experiences that [he had] had across the country, if need be.” He testified that he left the meeting when they were talking about “dispensing with the money and picking intermediary groups”. He said he was gone for an extended period of time.

[470] Ms. Ahmed-Omer testified Justice McLeod left the room when an unanticipated “vote” was convened with respect to the funding model.

[471] After the July 23, 2019 meeting, the Push Coalition suggested that the FBC be considered by ESDC as a possible “secondary” intermediary. However, while the ESDC did submit the FBC’s name as a possible intermediary to the Minister’s office, its name was on a “contingency” list of organizations to be considered only after those organizations listed on a primary list were evaluated.

[472] The ESDC did not ultimately conduct a capacity assessment of the FBC or ask it to be an intermediary. Nor did the FBC apply to become an intermediary, either at the July 23, 2019 meeting or thereafter. As at May 2020, the government had announced three organizations to act as intermediaries in respect of the Initiative: Le Groupe 3737, Black Business Initiative and Tropicana Community Services. All were represented at the July 23, 2019 meeting.

### **iii) Discussion**

#### **a) Does the First Decision limit impermissible advocacy and lobbying to situations where the judge initiates engagement with politicians or government officials?**

[473] Justice McLeod submits that the First Panel clarified the type of activity in which judges are prohibited from participating, at para. 86 of the First Decision:

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. [Emphasis added.]

[474] He submits that to be impermissible advocacy or lobbying, the conduct must satisfy the following elements:

- i) Did the judge initiate the engagement at issue?
- ii) Was the engagement with politicians or government officials?
- iii) Was the engagement to achieve specific or identified policy objectives not directly tied to the administration of justice?

[475] We do not accept this narrow reading of the First Decision. While the focus of the First Panel's reasons was "explicitly" on engagement with politicians initiated by a judge, this was in large measure because that was the fact situation in front of them: at para. 91. The First Panel had no reason to consider the propriety of Justice McLeod's future involvement with the FBC or of his future interactions with government on behalf of the FBC. On the evidence before the First Panel, the FBC was to transition to an elected Board of Directors, on which Justice McLeod would not serve, by the end of 2018 and he already had resigned as Chair of the FBC Steering Committee.

[476] Other statements in the First Decision make it clear that the question whether engagement or interaction with politicians is impermissible cannot turn on whether the judge initiates the engagement:



- “maintaining judicial independence, judicial impartiality and the separation of judges from political involvement are core animating values”: at para. 86;
- “[t]he separation of the judiciary from the executive and legislative branches is a central feature of the rule of law”: at para. 83;
- “communicating with a public office holder to attempt to influence the development or amendment of any government policy or program” meets the definition of lobbying: at para. 78;
- “[i]t is incompatible with the separation of powers for a judge to ask political actors for policy changes and the allocation of resources no matter how worthwhile the judge’s motivating cause.” This is because “[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”: at para. 84; and
- the “maintenance [of these principles] 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”: at para. 85.

[477] Given the central importance of the separation of powers to the independence and impartiality of the judiciary, the fact that the government initiates an activity or meeting with a judge cannot be determinative of whether the activity or meeting is permissible. Rather, we accept Presenting Counsel's submission that the determining factor must be whether the activity or meeting is consistent with the judge's ethical obligations and maintaining the independence and impartiality of the judiciary.

[478] The First Panel provided examples of permissible judicial interaction with government officials that provide guidance. The First Panel's examples were the following:

- serving on a government working table;
- acting as an inquiry commissioner;
- testifying before a legislative committee: at para. 81.

[479] Granted, in distinguishing these activities from Justice McLeod's activities that were at issue at the First Hearing, the First Panel noted that "[t]he government, not the judge, initiates these former activities": at para. 81. However, the First Panel also identified the following important features of the examples of permissible interactions with government it provided, each of which examples is tied to the administration of justice:

- the government 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 for a specific cause; and
- the government structures the setting for the interaction: at para. 81.

[480] For the reasons we have explained, we conclude that the propriety of judicial engagement with politicians or government officials does not turn on who initiates the engagement. Rather, as Presenting Counsel have submitted, the question turns on whether the engagement is consistent with the judge's ethical obligations and maintaining the independence and impartiality of the judiciary.

**b) Did Justice McLeod engage in impermissible advocacy or lobbying through his attendance at the June 20, 2019 telephone meeting and the July 23, 2019 meeting?**

[481] Justice McLeod submits his attendance at the June 20, 2019 telephone meeting and the July 23, 2019 meeting (collectively, the "ESDC meetings") did not amount to impermissible advocacy or lobbying because he was invited to attend both meetings and, in any event, did not seek to achieve any specific policy objective at such meetings. Moreover, in advance of the July 23, 2019 meeting, he specifically flagged the limitations on his participation and, once at the meeting, absented himself when there was a discussion related to distribution of government funding.

[482] We conclude that, at a minimum, Justice McLeod's attendance at the ESDC meetings gives rise to a perception of lobbying concerning the allocation of government resources and was therefore incompatible with judicial office.

[483] As we have explained, we do not accept Justice McLeod's position that his attendance at the ESDC meetings should be viewed as permissible because he was invited by the ESDC to attend. In reaching our conclusion that his attendance gives rise to at least a perception of lobbying, we rely, primarily, on the following factors:

- fundamentally, the ESDC meetings were about a government agency (the ESDC) obtaining Black community feedback concerning two issues, both of which involved the allocation of government resources: i) the allocation of the \$25 million Budget Commitment as between the two pillars of capacity building within Black communities and CIPAD; and ii) the adoption, implementation and shape of the intermediary funding model for the capacity building pillar;
- although the FBC did not apply to be an intermediary, either before or after the ESDC meetings, others were interested in having it do so and/or publicly advanced its name as a possible intermediary at the July 23, 2019 meeting;
- prior to the July 23, 2019 meeting, Justice McLeod stated his opposition to the intermediary funding model to an ESDC official (Mr. Holder Sr.)

and thus advocated a position relating to the capacity building funding model;

- in introducing himself and the FBC, Justice McLeod described the FBC as having an “integral” role in the negotiations that led to the \$25 million Budget Commitment;
- during the Push Coalition’s CIPAD presentation, Justice McLeod asked questions about whether the funding was at risk in the event of a change of government and appeared to praise both the CIPAD and the intermediary funding model;
- although we accept that Justice McLeod absented himself for at least some part of the July 23, 2019 meeting, his evidence and Ms. Ahmed-Omer’s evidence are not consistent concerning how long and during what part of the discussions he was absent;
- in any event, Justice McLeod did not publicly declare he was absenting himself from part of the July 23, 2019 meeting; and
- assuming Justice McLeod was not present during any portion of the July 23, 2019 meeting when funding distribution or the identity of intermediaries was discussed, an objective observer would not likely be aware of his absence or the purpose of his absence but would be aware of his comments about the FBC’s role regarding the Budget Commitment, his praise of the CIPAD and the intermediary funding model, his

questions about the security of the funds, and the fact that the FBC had been proposed as an intermediary.

[484] Viewed from the perspective of an objective observer, we fail to see how Justice McLeod's attendance at the July 23, 2019 meeting could be viewed as anything but lobbying in the sense of advocating to government about the allocation of resources in relation to an issue that had nothing to do with the administration of justice or Justice McLeod's perspective as a judge. The letters filed by Justice McLeod's counsel concerning judicial involvement in the Canadian Association of Drug Treatment Court Professionals do not detract from that conclusion. That association's function appears to be directly tied to the administration of justice.

[485] When the Interim Steering Committee voted to appoint Justice McLeod as the FBC's Leadership Advisor on January 9, 2019, it prohibited him from interfacing with government on behalf of the FBC. No exception was made for situations where Justice McLeod might be invited by a government to attend a particular meeting. We are cognizant that by June-July 2019, the FBC had transitioned from an Interim Steering Committee to an appointed Board of Directors. Nonetheless, we fail to see why that change should have affected the prohibition. In the wake of the First Hearing, the problem created by Justice McLeod's attendance at the ESDC meetings is undoubtedly one the Interim

Steering Committee was trying to avoid. Justice McLeod should have abided by the prohibition.

[486] We will address the question of whether Justice McLeod's conduct in this respect rises to the level of judicial misconduct following our discussion of the Fourth Allegation.

**4. The Fourth Allegation: Did Justice McLeod engage in impermissible behaviour in relation to advice he gave to two youth delegates at the 2019 Summit?**

**A. Introduction**

[487] Paragraph 14 of the 2020 Notice of Hearing states that "[o]n or about February 4, 2019, during the course of the [2019 Summit], a security guard approached a group of Black attendees to request that they leave the Parliament Hill cafeteria in which they were gathered." Paragraph 14 alleges that Justice McLeod:

- "subsequently counselled two youth delegates to the [2019 Summit], who were witnesses to the request to leave the cafeteria, not to speak publicly about the allegedly racist incident"; and
- that such counselling "was or could be perceived as providing legal advice, and was part of and meant to further the advocacy of the FBC."

[488] Paragraph 15 alleges that, in light of the above, Justice McLeod "engaged in behaviour that was or could be perceived as being 'impermissible advocacy and

lobbying””. Further, it alleges that Justice McLeod also gave advice to the two youth delegates, “which advice was or could be perceived as legal advice.” In addition, or in the alternative, Justice McLeod “used his position of authority and/or legal background to influence these delegates.”

[489] At para. 18 of his Response, Justice McLeod states that following a racial profiling incident at the 2019 Summit, he had a telephone conversation on February 6, 2019 with two youth delegates who were witnesses to the incident. He states that he “did not pressure or intimidate the youth delegates.”

[490] At para. 19 of his Response Justice McLeod says he “drew upon his own experiences as a Black man in Canada to provide advice to the youth delegates about the potential outcomes of making public allegations of racial profiling against law enforcement. This was personal advice.”

[491] It is undisputed that, during the afternoon of February 4, 2019, several BVOTH attendees were congregated in a cafeteria on Parliament Hill. A security guard approached them and is alleged to have addressed them in a racist way, communicating something about a complaint about “dark-skinned” people in the cafeteria, and asking them to leave (the “Racial Profiling Incident” or “Incident”). The attendees had permission to be in the cafeteria. This conduct was insulting, demeaning and inexplicably reflected racism in a place that is supposed to be a symbol of inclusiveness and democracy for all Canadians. Not surprisingly, all BVOTH attendees were shocked and upset by this treatment.



[492] Following the Racial Profiling Incident, Mr. Flegel and Ms. Ahmed-Omer organized a group of individuals and organizations to form a “Coalition” of individuals impacted by the Racial Profiling Incident to denounce the Incident and ultimately to formulate a response.

[493] Kate MacDonald and Trayvone Clayton are the two youth delegates that Justice McLeod counselled during the February 7, 2019 telephone conversation that is the subject of the Fourth Allegation. Both are from Halifax. They were giving a CPAC interview near the cafeteria when the Incident occurred. They subsequently became part of the Coalition. Justice McLeod did not. Mr. Clayton attended the February 2019 Speech at the 2019 Summit and knew Justice McLeod was a judge. Ms. MacDonald did not attend the Speech but met Justice McLeod briefly as they were both leaving Parliament following the Racial Profiling Incident. Justice McLeod mentioned a Nova Scotia case to her. She was familiar with the case. She testified, “I knew he was a lawyer, I guess, and some sort of senior legal law person but I didn’t know his exact title.”

[494] The Coalition’s response to the Incident included preparing a media release, which was ultimately issued on February 7, 2019, a media advisory, a press conference speech, media lines (speaking lines to respond to questions for the press conference speakers) and organizing coordinated press conferences in several locations across the country for February 8, 2019. Ms. MacDonald and Mr. Clayton were among the speakers scheduled to speak in Halifax.

[495] In its final form, the Coalition media release stated that, as urged by Mr. Clayton, the FBC had requested a meeting with Prime Minister Trudeau to obtain a formal commitment to end racial profiling at the federal level and that the Coalition would ask for “a more comprehensive government-wide approach to eradicate anti-Black racism”.

[496] On February 7, 2019, CTV News published an article regarding the Racial Profiling Incident in which Ms. MacDonald and Mr. Clayton were quoted. Later that day, Ms. Ahmed-Omer asked Ms. MacDonald and Mr. Clayton to call her. Ms. Ahmed-Omer joined Justice McLeod to the telephone call. It is Justice McLeod’s comments during this February 7, 2019 telephone call (the “February 2019 Telephone Call” or the “Call”) that are at issue in the Fourth Allegation.

[497] Ms. MacDonald and Mr. Clayton spoke at the Halifax press conference but did not use the press conference speech or media lines.

[498] Presenting Counsel submit that, based on the evidence, it could be open to us to find that Justice McLeod’s counselling of the two youth delegates amounted to giving legal advice, improper use of judicial office, and/or conduct in furtherance of the FBC’s advocacy concerning the incident.

[499] Justice McLeod asserts that the focus of the allegation against him is that he gave legal advice. He submits that, rather than legal advice, his advice was personal in nature and not otherwise improper.

[500] We will review the evidence we consider relevant to the background of this issue before turning to a discussion of this Fourth Allegation.

## **B. Relevant Evidence**

### **i) The Lead-up to the February 2019 Telephone Call**

[501] BVOTH began on the morning of February 4, 2019. Ms. Ahmed-Omer and Mr. Flegel were both involved in organizing the event. Ms. Ahmed-Omer called Justice McLeod to assist her with logistics after several volunteers failed to attend. Justice McLeod attended and helped with ferrying people around and other similar tasks but did not meet with any Ministers or government officials as part of the event.

[502] Following the Racial Profiling Incident, Mr. Flegel reached out to Ms. Ahmed-Omer for assistance in forming the Coalition. Mr. Flegel wanted to assist the youth who had been the subjects of, or witnessed, the Racial Profiling Incident, to communicate their story and generate an official apology.

[503] On February 5, 2019, Mr. Flegel created a Facebook chat group called “Dealing with What Happened on the Hill” (the “Facebook Coalition Chat Group”). Ms. MacDonald and Mr. Clayton were members of the Facebook Coalition Chat Group.<sup>18</sup> Justice McLeod was not.

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<sup>18</sup> Other members of the Facebook Coalition Chat Group included Mr. Flegel, Ms. Ahmed-Omer, Emmanuel Onah, Marcus James (Mr. Clayton’s father), Laurie Antonin and Stephanie Allen.

[504] The Facebook Coalition Chat Group subsequently messaged about doing a media release and coordinated Coalition press conferences, both of which were ideas initially proposed by Mr. Flegel. Early in the conversation, Mr. Flegel offered to draft proposed speaking notes on which the Coalition could all agree.

[505] Also on February 5, 2019, Mr. Thompson created a WhatsApp chat group called “FBC ET [Executive Team] Group” (the “FBC ET Chat Group”), which also included Ms. Ahmed-Omer, Mr. Carby and Justice McLeod.

[506] On February 5, 2019 at 5:00 p.m., Justice McLeod emailed members of the Interim Steering Committee and others concerning “Post Summit Tasks”. Included in the email was the heading, “New Issue”, under which Justice McLeod described the Racial Profiling Incident. In addition, Justice McLeod wrote, in part:

Senator Wanda Thomas Bernard filed a formal complaint today against the security staff and the individual. Social media has been a buzz about this incident and its beginning to make its rounds. The Senator and I spoke strategy and I believe one is in the making. There will be a press release sent out in due course and a coalition of groups and individuals will be coming together in an attempt to right this wrong. The belief is that we can make a difference here and draw national attention around what took place. Some MP’s and Senators may very well want to join in the advocacy.

I am sending this so that none are alarmed and all recognize that we are all pulling in the same direction on this one. One ask may be to have the PM meet with a small group of young people (who were present), Senator Wanda and FBC. This is being worked out currently. I will share the information with Comms and we can take it from there with respect to the need for a recommendation to the SC. [Emphasis added.]

[507] In his evidence at this hearing, Justice McLeod explained that at the time of sending the email set out above, he likely knew the Coalition was being formed. Concerning the statement, “[t]he belief is that we can make a difference”, he said the “we” refers to Black people forming part of the Coalition, and not specifically the FBC. As for the statement “we are pulling in the same direction on this one”, Justice McLeod said he was referring to Black people and not specifically the FBC. He also explained that he had known Senator Bernard for some time and that she shared her strategy regarding the Racial Profiling Incident with him.

[508] On February 5, 2019 at 7:00 p.m., Mr. Flegel circulated to Justice McLeod and Ms. Ahmed-Omer copies of a proposed media release.<sup>19</sup> Among other things, the proposed media release referred to the FBC, at the urging of Mr. Clayton, sending a formal request for a meeting with the Prime Minister to obtain various commitments, including additional funding to eradicate anti-Black racism and to press conferences being scheduled:

Black Youth organizers from across Canada, the Federation of Black Canadians ... as well as Senators Wanda Thomas-Bernard, Marie-Françoise Mégie and Kim Pate denounce the incident of racial profiling that occurred on Parliament during the Black Voices on the Hill Lobby Day, which took place on Feb 4, 2019.

...

In addition, urged by Halifax-based youth activist Trayvon Clayton, the Federation of Black Canadians has

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<sup>19</sup> This initial document was originally called a media advisory. This term was later changed to media release, and another document called a media advisory was prepared to advise the media about the impending press conferences.

sent a formal request for a meeting with Prime Minister Trudeau to obtain a formal commitment to eradicate racial-profiling within police and security, under federal jurisdiction, as well as more comprehensive, government-wide funding, programming, policy and legislation to eradicate anti-Black racism and improve quality of life for Canadians of African Descent as articulated in the *Canadian Strategic Action Plan for the International Decade for People of African Descent*.

Press Conferences are slated for Thursday, February 7, 2019, in Halifax and Ottawa to address what transpired and make public demands. [Emphasis added.]

[509] Also on February 5, 2019, at 7:29 p.m., Mr. Thompson posted the following in the FBC ET Chat Group: “Hi everyone ... Donald is requesting an emergency important ET call at 9pm tonight to discuss the issue shared”.

[510] On February 6, 2019, at 12:32 a.m., the draft media release regarding the Racial Profiling Incident was sent to Coalition members, including Ms. MacDonald and Mr. Clayton, from an email address controlled by Mr. Flegel and Ms. Ahmed-Omer (the “Coalition email address”). The draft media release was revised to indicate that the FBC’s “formal request” would be for a meeting with the Prime Minister “to obtain a formal commitment to end racial profiling at the federal level.” Further, it stated the coalition would also ask for “more comprehensive funding ... to eradicate anti-Black racism”. An updated version was later circulated at 1:32 a.m. the same day. The quoted language remained the same.

[511] On February 6, 2019, both Ms. MacDonald and Mr. Clayton responded to the email, approving the draft media release.

[512] That same day, namely February 6, 2019 at 12:20 p.m., Mr. Flegel emailed Justice McLeod an up-to-date version of the media release. About 25 minutes later, Justice McLeod emailed Mr. Flegel pointing out a possible error in the draft media release concerning how the complainant had described the people in the cafeteria.

[513] Later, on February 6, 2019, at 5:34 p.m., Justice McLeod emailed the Steering Committee under the subject line: "Urgent matter". The email included a more recent draft of the proposed media release. The email read, in part, as follows:

As you were made aware yesterday an emergency meeting was called with the executive team to consider on an urgent basis a response to an incident that had taken place during BVOH....

The vote yesterday was for FBC to take a lead role and that a media release be sent out (please find below). Further, this Friday has been air marked [sic] for a news conference surrounding the matter, Len [Carby] will be leading that discussion.

The media release is close to completion and it is anticipated that the release will be sent out later today. Please send any comments in response to this message. [Emphasis added.]

The draft media release included in the email omitted specific reference to funding requests,<sup>20</sup> but did indicate that, at the urging of Mr. Clayton, the FBC send a formal

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<sup>20</sup> Sometime on February 6, 2019, Mr. Clayton's father, Marcus James, suggested in the Facebook Coalition Chat Group that mentioning funding in "the letter" as part of the response was taking away from the seriousness of the incident. In addition, he said, "The ask of funding is something that can be apart [sic] of outcomes in farther [sic] discussion." Other Coalition members agreed.

request to the Prime Minister for a meeting to obtain a commitment to end racial profiling at the federal level.

[514] Concerning the February 6, 2019 email to the Steering Committee, Justice McLeod testified that the Executive Team had voted, and it was now up to the Steering Committee to decide. During cross-examination, he disputed that “lead role” for the FBC in the response to the Incident meant anything more than a role.

[515] Shortly after Justice McLeod’s email, on February 6, 2019, at 5:38 p.m., Mr. Thompson sent an email to Justice McLeod, Ms. Danielle Dowdy, Ms. Ahmed-Omer, Mr. Carby, Mr. Picart, Laurie Antonin (a member of the Steering Committee at the time), Adejisola Atiba (another member of the Steering Committee at the time), and Mr. Holder Sr. The email stated, in part:

Donald would like to schedule a call with the SC tonight at 9:30pm for 45 minutes. Regarding the concerns expressed today ...

**If you have any questions or concerns prior to the call I encourage you to follow-up with Donald directly by email or phone prior to the call:**

4 parts to one topic to cover:

1. Commentary Behind media release
2. Proposed decision from ET regarding media release
3. Current options available to the SC

Option #1 – send out media release as is

Option #2 – amend current media release to meet solely with the Speaker of the house



Option #3 – no media release but letter sent to Speaker cc'd to the PM

Option #4 – Do nothing

4. How to manage community fall out [if] any [Emphasis in the original.]

[516] Justice McLeod testified that he would have called Mr. Thompson and presented the options listed in the email set out above. He confirmed that a Steering Committee meeting took place to discuss the issue. He said no one asked for his opinion as Leadership Advisor and he did not volunteer his opinion.

[517] On the evening of February 6, 2019, at approximately 8:30 p.m., the members of the Facebook Coalition Group Chat held a conference call. Ms. Ahmed-Omer suggested the call in a message on the Facebook Coalition Chat: “We need to strategize and there [*sic*] a few new developments that I’d like to get your feedback and response on.” On the call, a unified response to the Racial Profiling Incident was discussed, including press conferences to be held across Canada on Friday, February 8, 2019. JusticeMcLeod was not on this call.

[518] After the call, Mr. Clayton and Ms. MacDonald posted in the Facebook Coalition Group Chat as follows:

Mr. Clayton: so with my interview tomorrow, I am going to just stick to telling her what happened and what I experienced but I will not mention anything about what we are planning to do for the upcoming future. If anyone thinks different let me know please

Ms. MacDonald: I’m gunna hop on the same train and refrain from commenting outside of what’s already.

[519] On the morning of February 7, 2019, Mr. Clayton emailed Justice McLeod to follow up on their interaction after the February 2019 Speech. His email read in part:

This is Trayvone Clayton from Halifax, Nova Scotia here. We met over the weekend at the National Black Canadian Summit. I am sending you this email to make sure that we stay in touch, it was wonderful to meet you. Your speech was so amazing, everything you said I could relate to, it was crazy. Hopefully I can meet up with you and experience your everyday lifestyle was being a judge, that's something I want to see myself doing in the future. Thank you so much for your Black Excellence!! Enjoy your day and I hope to hear from you soon. [Emphasis added.]

[520] Justice McLeod responded that afternoon:

Hello Trayvone,

It a pleasure to hear from you and yes I remember you!

I think meeting up is a very good idea. As you can tell I am not your normal judge and my background is very different than most people in my profession. That being said if I can do what I am doing anyone can, including you. Feel free to meet up with me anytime and I will let you see not only my court but also let you see how the courthouse operates.

Thank you for giving me a chance to help out, its an honour. You can reach out to me at anytime and we can converse. Do your best and trust me you will get the best...my motto is simple "Excellence without Excuses." That's how we win, please don't forget that.

Stay Well,

[521] Later on February 7, 2019, an email from the Coalition email address requested confirmation that the recipients, including Ms. MacDonald and Mr.

Clayton “officially support the media release”. Also requested was the name and contact information of the media contact in the addressee’s region and the location of their press conference.

[522] Ms. MacDonald emailed the Coalition email address on February 7, 2019 at 12:37 p.m. to confirm her support of the “final draft” of the proposed media release circulated earlier that day at 10:39 a.m.

[523] On February 7, 2019 at 4:22 p.m., CTV News published an article regarding the Racial Profiling Incident that quoted both Ms. MacDonald and Mr. Clayton, including a comment by Mr. Clayton that the Prime Minister should apologize in person. The article noted that “[t]he group is holding press conferences across the country Friday to call attention to the issue.”

[524] On February 7, 2019 at 5:14 p.m., an email was sent from the Coalition email address to an undisclosed recipient list containing the final version of the media release with instructions to “Please Distribute Immediately to all Outlets”.

[525] Ms. MacDonald and Mr. Clayton received this email. The media release reads, in part, as follows:

OTTAWA, February 7, 2019 -- Seventeen organizations, including the Federation of Black Canadians ... denounce an alleged incident of racial profiling, which occurred on Parliament Hill, during the Black Voices on the Hill (BVOH) lobby day, on Monday, February 4, 2019.

...

In addition, urged by Halifax-based youth activist Trayvone Clayton, the Federation of Black Canadians has sent a formal request for a meeting with Prime Minister Trudeau to obtain a formal commitment to end racial profiling at the federal level, including on Parliament Hill, by making the issue a key element in the government anti-racism strategy. A meeting is also being requested with the Speaker of the House to secure an official apology.

For the national coalition of organizations and groups, the incident, which violated the human rights of the victimized, is not isolated but part of a broader systemic problem. It shows how at the highest levels of Canada's public institutions, anti-Black racism can flourish embedded within public institutions, how law enforcement can disproportionately criminalize Black youth, and how there is an urgent need for more robust measures to eliminate all forms of discrimination from society. The coalition will ask for a more comprehensive government-wide approach to eradicate anti-Black racism, support those victimized by the issue and improve quality of life for Canadians of African Descent, as articulated in the Canadian Strategic Action Plan for the Decade. [Emphasis added.]

[526] The FBC issued the media release on its letterhead and posted it on its website. Because they were charitable organizations, neither the MJF nor the Somali Centre could do so.

## **ii) The February 2019 Telephone Call**

[527] On the evening of February 7, 2019, Ms. Ahmed-Omer sent a message to Ms. MacDonald and Mr. Clayton on the Facebook Coalition Chat Group, asking them to call her. It is undisputed that the February 2019 Telephone Call involving Ms. MacDonald, Mr. Clayton, Ms. Ahmed-Omer and Justice McLeod took place.

The evidence differs concerning how it was that Justice McLeod joined the Call and the conversation that unfolded.

[528] Ms. MacDonald testified that she and Mr. Clayton played telephone tag with Ms. Ahmed-Omer initially, but eventually connected. She was not expecting Justice McLeod to be joining the Call. Ms. MacDonald said they were discussing the fact that she and Mr. Clayton wanted to say, “whatever we wanted to say and we didn’t understand why that was such a big deal.” Justice McLeod was eventually patched into the call. Ms. Ahmed-Omer introduced him simply as Donald McLeod.

[529] Ms. MacDonald recalled Justice McLeod speaking about Rocky Jones, an activist from Halifax who had passed away, and the fact that Mr. Jones had said whatever he wanted to say to the media and ended up in a lawsuit that lasted for years. She testified Justice McLeod’s advice was not to speak outside the media release, media lines or media advisory because they could find themselves in a similar situation, “like locked into a lawsuit for years.”

[530] Ms. MacDonald described herself as terrified after the Call ended. She said she did not want to end up in a lawsuit; all she wanted was to say that the treatment they received was inappropriate. She felt these things were being raised because she and Mr. Clayton “were the most rogue and ... seemed to be the ones that didn’t want to follow the rules.” She said that the purpose of the press conference

speech was so that “every press conference had the exact same thing from coast to coast.”

[531] When asked further about her reaction to the February 2019 Telephone Call, Ms. MacDonald said she was scared to be implicated in something legally. Further, when asked about statements she had made on other occasions, she confirmed she had her “own personal capacity to do whatever [she] want[ed] to do.” She did not feel “backed into a corner” or “powerless in the situation”. No one asked her and Mr. Clayton not to tell the truth or lie about what had happened. Further, their safety was not threatened. But Justice McLeod insinuated they could be wrapped up in a long legal battle. Ms. MacDonald did not believe that they were silenced, but rather they were advised to say only certain things or let somebody else speak.

[532] Mr. Clayton remembered receiving the request from Ms. Ahmed-Omer to call her and remembered having the February 2019 Telephone Call with Ms. MacDonald, Ms. Ahmed-Omer and Justice McLeod. He did not recall why Justice McLeod was on the Call. When asked during examination-in-chief what was discussed on the Call, he said:

[B]asically ... we were told whatever you say or do can be used against you. So for example, if we were lying on anything about Parliament Hill, lying about the situation that was going on. I remember Rocky Jones being brought up into that conversation because I believe Rocky Jones went through, like, the same thing that we went through before in his time, where he was brought into this kind of stuff that I’m going through now. So that was -- yeah, basically tips and pointers coming from a

judge about what would possibly happen if we go further.  
[Emphasis added.]

[533] Mr. Clayton testified that after the Call he felt “worried, shocked, scared.” He was confused because he was told by a judge he “could get in trouble if this goes wrong.” When asked what he meant by “if this goes wrong”, he said he did not really know because he did not think there was anything wrong with sharing the truth about what happened on Parliament Hill. He did not understand why a judge was telling him things could go wrong if he was only going to tell the truth.

[534] Mr. Clayton acknowledged that at the time of the Call he felt Justice McLeod was just giving them advice and looking out for them, but at the same time: “it was all a little weird because, you know, why am I getting a phone call from a judge?” When he first met Justice McLeod, he wanted to meet him more. But then this came up. It made him think, “[W]hat’s really going on? Is he against us? Is he standing with us?”

[535] Mr. Clayton did not specifically recall the portion of a subsequent telephone call with Coalition members in which he had said there was no pressure. He testified that he was probably saying there was no pressure on them, they did not feel they were doing anything wrong or pressured because they were doing something wrong.

[536] Ms. Ahmed-Omer testified she wanted to speak with Ms. MacDonald and Mr. Clayton because of the CTV News conference. She did not believe they understood media relations etiquette about not speaking in advance of a press

conference. She said she was already on a call with Justice McLeod when Ms. MacDonald and Mr. Clayton called her. Before joining Justice McLeod to the Call, she asked them if they would be comfortable with her doing so. She knew Justice McLeod had done a lot of media in his lifetime and thought he could share his experience. She viewed the February 2019 Telephone Call as friendly and believed Justice McLeod raised Rocky Jones because it was a case they could learn from.

[537] Justice McLeod's recollection was that he and Ms. Ahmed-Omer were speaking on the telephone when she indicated she needed to speak to Mr. Clayton and Ms. MacDonald. She felt they needed to have a conversation around media. He had media experience so she asked if he could stay on the line while she tried to call them. The Call was not planned, it was impromptu. After Mr. Clayton and Ms. MacDonald came on the line, he could tell they were nervous. So, he tried to speak to them as an elder and someone willing to give them advice. He was speaking "just person to person" and not in any legal capacity.

[538] Justice McLeod testified he told Mr. Clayton and Ms. MacDonald about Rocky Jones because he wanted to use an example they could relate to. They were from Nova Scotia. Rocky Jones was from Nova Scotia. He used Mr. Jones' case to explain how the media can misconstrue what you say. So, he was telling them to be careful and that if it was not something they felt they could do, or if they felt there were issues or repercussions, then they could always let someone else



do it – someone just as charismatic as them. He told them they had to be careful that what they said was not taken out of context. He denied silencing them or threatening them. He maintained it was a relaxed conversation in which he was acting as a mentor.

### **iii) Events Following the February 2019 Telephone Call**

[539] Later during the evening of February 7, 2019, at approximately 9:00 p.m., members of the Facebook Coalition Chat Group held another conference call. Ms. Ahmed-Omer was on the call. Justice McLeod was not on the call.

[540] Following the conference call, an email was sent to Coalition members from the Coalition email address enclosing a media advisory discussed on the conference call and requesting that it be sent to the media that evening. The media advisory was printed on FBC letterhead and described the Racial Profiling Incident. Each group holding a press conference could insert the details and then distribute it to the media.

[541] Shortly before midnight on February 7, 2019, Mr. Flegel emailed Ms. Ahmed-Omer and Justice McLeod a copy of the press conference speech he (Mr. Flegel) had written. The press conference speech was subsequently sent to the Coalition on February 8, 2019 at 7:50 a.m. from the Coalition email address.

[542] On February 8, 2019 at 8:44 a.m., Mr. Flegel emailed Ms. Ahmed-Omer and Justice McLeod a “media lines” document that provided the Coalition members who were participating in the press conferences answers to potential media

questions. The media lines were subsequently sent to Coalition members from the Coalition email address. To the best of his recollection, Mr. Flegel drafted the media lines.

[543] The purpose of providing the press conference speech and the media lines was to ensure a uniform message from the members of the Coalition.

[544] On February 8, 2019, press conferences were held in respect of the Racial Profiling Incident in several Canadian cities: Vancouver, Toronto, Ottawa, Montréal and Halifax.

[545] Ms. MacDonald and Mr. Clayton spoke at the press conference held in Halifax, as did Marcus James, Mr. Clayton's father. Ms. MacDonald testified that up until about five minutes before the press conference they could not figure out what to do. Mr. James was telling them to say whatever they wanted to say. But they had been advised to stick to the media lines and all the text they had been given – and if they strayed from that they could find themselves “in a messy situation ... a years long legal battle.” Then they received a call from Desmond Cole just prior to the press conference. Mr. Cole told them, “You can say whatever you want, it's fine, it really doesn't matter, it's not that serious, you should follow your gut, and whatever your gut tells you to do, do that.”

[546] Ms. McDonald thought the first thing she said at the press conference was, “I know that I'm going to get in a lot of trouble for talking like this, but here goes.” Then she started to cry because she was so stressed out. She had just gotten

back from Ottawa, everything happened so quickly, but she decided just to talk because that was all she knew how to do. She and Mr. Clayton did not read the text they had been given.

[547] On February 13, 2019, Ms. MacDonald circulated a draft letter (the “Draft”) via email to other Halifax-based advocates. She and Mr. Clayton had spoken to Mr. Cole about the February 2019 Telephone Call with Justice McLeod. The evidence was not clear concerning whether Mr. Cole prepared the Draft after their conversation or whether Ms. MacDonald and Mr. Clayton prepared it with his assistance.

[548] In any event, the Draft alleged that Justice McLeod had advised Ms. MacDonald and Mr. Clayton that in his opinion as a judge and a lawyer they should not be speaking at the February 8, 2019 Halifax press conference or be speaking to media at all. Although she circulated the Draft to other advocates, Ms. MacDonald did not ultimately send it out. She felt she had stepped into some sort of personal issue between Mr. Cole and Justice McLeod. She and Mr. Clayton spoke about it and decided it was not the right “move” for them.

[549] Mr. Cole subsequently published the allegation from the Draft in his February 26, 2019 blog that formed the basis for the Current Complaint.

[550] Ms. MacDonald had a telephone conversation with Ms. Ahmed-Omer on February 26, 2019 in which they discussed the Telephone Call. Ms. Ahmed-Omer recorded the February 26, 2019 call without Ms. MacDonald’s knowledge or

consent. The recording and a transcript of the recording are exhibits to the 2020 ASF. Among other things, Ms. MacDonald acknowledged she did not feel backed into a corner or threatened by the February 2019 Telephone Call.

[551] Ms. MacDonald and Mr. Clayton both participated in a telephone conversation with certain Coalition members later in the day on February 26, 2019. Again, Ms. Ahmed-Omer recorded the call, and the recording and transcript of the recording are exhibits to the 2020 ASF. Ms. MacDonald and Mr. Clayton both acknowledged not feeling threatened on the February 2019 Telephone Call.

[552] In a subsequent Facebook chat with Ms. Ahmed-Omer on February 27, 2019, among other things, Ms. MacDonald said the following about the February 2019 Telephone Call:<sup>21</sup>

The conversation with you and Justice McLeod didn't really sit right with us. All of the conversations lead us to speaking the way we felt we needed to. We don't think the ultimate goal was to threaten or silence us. But we definitely felt like we were advised to play ball in a certain way. [Emphasis added.]

### **C. Discussion**

[553] We consider it unnecessary to resolve the question whether Justice McLeod's statements to Ms. MacDonald and Mr. Clayton in the February 2019 Telephone Call amounted to legal advice. We conclude that Justice McLeod used his position of authority and legal background, and in the case of Mr. Clayton, his

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<sup>21</sup> These excerpts are taken from the 2020 ASF.

position as a judge, to attempt to influence Ms. MacDonald and Mr. Clayton to abide by the parameters for media interaction set by the Coalition organizers, including Ms. Ahmed-Omer, and, to that extent, to further the advocacy of the FBC.

[554] We begin by reiterating that the propriety of a judge's conduct must be assessed objectively, from the perspective of a reasonable observer. While relevant, the judge's intentions are not determinative.

[555] Next, we accept the evidence of Ms. MacDonald and Mr. Clayton. Both presented as intelligent, informed, young people, very accomplished in their own right, quite disinterested (in the sense of not wanting to be involved) and certainly with no axe to grind in this proceeding. Both were completely credible. We have no hesitation in accepting their evidence as an accurate portrayal of what transpired on the February 2019 Telephone Call.

[556] Having accepted their evidence, we also accept that, in the context of the upcoming Halifax press conference, scheduled for the next morning, at which Ms. MacDonald and Mr. Clayton were scheduled to speak, Justice McLeod's Rocky Jones story came across as a cautionary tale or warning. It illustrated that the media may misconstrue communications, that advocates must be careful in this regard, and, most importantly, that consequences could flow if the communications were not done properly. In Ms. MacDonald's words, Justice McLeod told them, in effect, not to speak outside the media release, media lines or media advisory.

Otherwise, they could find themselves in a similar situation to Rocky Jones, “like locked into a lawsuit for years.”

[557] Ms. MacDonald said she was terrified following the February 2019 Telephone Call. Mr. Clayton was worried, shocked, scared. Ms. MacDonald said she was terrified because Justice McLeod insinuated they could be wrapped up in a long legal battle.

[558] Once again, we observe that context matters. Mr. Flegel and Ms. Ahmed-Omer formed the Coalition to respond to the Racial Profiling Incident, which was upsetting to all involved, including those who were not in the cafeteria when the Incident happened.

[559] The Coalition’s response was to issue the media release and organize coordinated national press conferences. This was a form of advocacy. The object was not simply to publicize the Incident. Rather, it was to seek a meeting with the Prime Minister to obtain a formal commitment to end racial profiling at the federal level and a formal apology from the Speaker of the House. The Coalition was also asking for “a more comprehensive government-wide approach to eradicate anti-Black racism”. The media release, the press conference speech and media lines were prepared to present a united front and so all speakers would be on the same page.

[560] The FBC was deeply involved in this advocacy. The Steering Committee voted to play a role. It published the media release and media advisory on its

letterhead. It posted the media release on its website. The media release specifically referenced the FBC as one of the organizations denouncing the Racial Profiling Incident.

[561] Justice McLeod was present when the FBC Steering Committee voted. He had reviewed and commented on a version of the media release. He was aware that Senator Bernard had filed a formal complaint. Moreover, he had commented on the substance of the version of the media release in which it was noted that the Parliamentary Protective Services, with whom the complaint had been filed, were taking the complaint seriously.

[562] While we acknowledge that Justice McLeod did not present himself as a judge on the February 2019 Telephone Call, Mr. Clayton knew Justice McLeod is a judge – and Justice McLeod knew Mr. Clayton knew that. Justice McLeod must also have been aware that he had had a brief conversation with Ms. MacDonald in which he described himself as having been involved in a Nova Scotia legal case with which she was familiar. He said he recalled meeting her.

[563] It was in this context that Justice McLeod presented his cautionary tale and effectively told Ms. MacDonald and Mr. Clayton not to deviate from the media release, the media advisory or the media lines. This caution may well have been sound advice from a media relations perspective and well-intentioned in seeking to protect younger people from a bad experience. However, given the advocacy involved in the Coalition's response, including the upcoming press conferences,

the FBC's involvement in the advocacy, and Justice McLeod's role as a judge, it was not for him to give this advice. Undoubtedly, the advocacy was for a laudable purpose, but it was advocacy to government, nonetheless. A reasonable observer could only conclude that the intent of this 11th hour advice was, at least, in part, to have Ms. MacDonald and Mr. Clayton toe the line and rely on the text that had been prepared to further the Coalition's advocacy of which the FBC was a part. Justice McLeod should not have allowed himself to be drawn into this situation. In all the circumstances, his conduct in being involved in the February 2019 Telephone Call was incompatible with his judicial office.

**5. Did Justice McLeod's conduct rise to the level of judicial misconduct?**

[564] We have found two aspects of Justice McLeod's conduct incompatible with judicial office: i) his attendance at the ESDC meetings; and ii) his advice to Ms. MacDonald and Mr. Clayton during the February 2019 Telephone Call.

[565] The remaining issue is whether this 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 [Justice McLeod] to perform the duties of office or in the administration of justice generally.'": *Re McLeod*, (OJC, December 20, 2018), at para. 93.

[566] We have considered the conduct we have found incompatible with judicial office both individually and cumulatively. We conclude that such conduct does not



rise to the level of judicial misconduct. We reach that conclusion for several reasons.

[567] We begin with Justice McLeod's attendance at the July 23, 2019 meeting, which, of the two ESDC meetings, was the most significant. We view Justice McLeod's attendance at the July 23, 2019 meeting as a significant error in judgment. His attendance was not only incompatible with judicial office under the First Decision it also contravened the terms of his renewed involvement with the FBC. Nonetheless, we are satisfied that this error was the result of a mistaken understanding of the First Decision; that Justice McLeod believed his attendance was permissible; and that he attempted to comply with his judicial obligations while at the meeting.

[568] The ESDC invited Justice McLeod to attend the July 23, 2019 meeting. A government official (Mr. Holder Sr.) even encouraged him to attend. Justice McLeod understood they wanted his perspective as a person who had experience in a national organization. In Justice McLeod's mind, the invitation, and the fact that Ms. McPhee appeared to accept the restrictions he placed on his participation, made his attendance permissible under the First Decision. Justice McLeod believed, incorrectly, that because he did not initiate this engagement with government officials, the First Decision did not prohibit it. We accept that while at the July 23, 2019 meeting, Justice McLeod absented himself from various discussions in an effort to comply with his judicial obligations.

[569] We acknowledge that Justice McLeod's decision to attend the July 23, 2019 ESDC meeting was premised on a narrow and incorrect reading of the First Decision, which could likely have been avoided had he taken the precaution of consulting with the Ethics Committee. Nonetheless, we are satisfied that Justice McLeod attempted to comply with his judicial obligations as he understood them and that his failure to comply was not deliberate. He made a mistake.

[570] Second, although Justice McLeod's attendance at the ESDC meetings was incompatible with judicial office, we are satisfied that his purpose in attending was to provide advice that could benefit the Black community. Justice McLeod did not attend these meetings seeking benefits for himself or his organization. Moreover, his attendance did not result in any benefits to him or the FBC or otherwise give rise to any apparent conflicts of interest for him in carrying out his judicial duties. We see no evidence that Justice McLeod engaged in any partisan political activity by attending the ESDC meetings.

[571] Justice McLeod should not have attended the ESDC meetings. That said, given his mistaken understanding of the First Decision, his purpose in attending and the steps he took to attempt to comply with his judicial obligations, we do not believe his attendance is likely to have undermined confidence in his integrity, impartiality and independence or in the administration of justice generally in the minds of reasonable members of the public informed of all the circumstances.

[572] Third, we are satisfied that Justice McLeod's participation in the February 2019 Telephone Call was impromptu and motivated by his ongoing commitment to "paying it forward" and mentoring younger people. His error was in failing to stop and think about the context and in allowing himself and his position of authority to be used to attempt to bring others into line with the Coalition's advocacy strategy.

[573] Fourth, we take account of Justice McLeod's positive contributions to the administration of justice not only through his work in the courtroom but also through his ongoing permissible community activities such as mentoring young people and fulfilling community speaking engagements. Several of the letters and videos of support for Justice McLeod that form part of the record speak to Justice McLeod's commitment to "paying it forward". We note that despite their finding of conduct incompatible with judicial office, overall, the First Panel concluded that Justice McLeod's permissible community contributions have helped increase public confidence in the justice system: at para. 105. We adopt that conclusion.

[574] We hasten to add however, that our findings in this case, as well as the findings of the First Panel, demonstrate that, in the future, Justice McLeod must exercise greater caution in his community activities. In a society that embraces diversity and welcomes positive change, testing unclear boundaries that place limits on otherwise positive activities may not undermine public confidence in a judge's ability to perform their judicial function or in the administration of justice generally. But once the boundaries have been established, they must be

respected. In the future, Justice McLeod should seek advice before engaging in community activities that are not clearly recognized as permissible.

[575] While we consider that both transgressions we have found could and should have been avoided, taking account of all the circumstances under which they occurred and Justice McLeod's positive contributions to the administration of justice, we are not satisfied they were such as to diminish public confidence in Justice McLeod's ability to carry out the duties of his office or the administration of justice generally.

### **XIII. Disposition**

[576] We have concluded that two aspects of Justice McLeod's conduct were incompatible with judicial office but not so seriously contrary to the impartiality, integrity and independence of the judiciary that, whether considered individually or cumulatively, they rose to the level of undermining the public's confidence in his ability to perform the duties of his office or the administration of justice generally. We therefore dismiss the Current Complaint.

[577] Given that the Current Complaint has been dismissed, a recommendation that Justice McLeod be compensated for his costs for legal services is mandatory: CJA, s. 51.7(5). The First Panel noted that this question has been considered by way of written submissions in the past. We therefore ask that Justice McLeod's counsel provide submissions on compensation and a costs outline 14 days

following the release of these reasons. Presenting Counsel may file any response within 14 days thereafter.

[578] The OJC Registrar is directed to update the Council's website to reflect the amount of compensation requested and the amount ultimately recommended. The submissions, costs outline and our written recommendation to the Attorney General shall be part of the publicly accessible file.

[579] The 2020 Notice of Hearing was filed not long before the onslaught of the pandemic. No doubt this created extraordinary challenges for all counsel in preparing and presenting this case. We were impressed by the roles played by "less senior" counsel in not only preparing, but also presenting, it. We are grateful to all counsel for their diligence and professionalism in assisting us.

**Released: this 2 day of June, 2021.**

"Justice Janet Simmons", Chair

"Justice Michael J. Epstein"

"Mr. Malcolm M. Mercer"

"Mr. Victor Royce"

## Appendix 'A'

Paragraphs 52 and 53 of the 2018 ASF:

52. The FBC publicly advocated against the deportation of Abdoukader Abdi, a Somalian refugee who was at risk of deportation after he pleaded guilty to charges of aggravated assault and assaulting a police officer. It is anticipated that the evidence presented by Justice McLeod will show that members of the Steering Committee (other than him) facilitated a meeting between Ahmed Hussen and members of the black community regarding the historical and ongoing deportation of Black individuals, including Abdoukader Abdi. A decision by the federal government in respect of Mr. Abdi's deportation was the subject of a judicial review before the Federal Court of Canada.

53. It is anticipated that the evidence presented by Justice McLeod will show that Justice McLeod removed himself from any involvement in this matter. The Steering Committee (excluding Justice McLeod) wrote a letter to the federal Minister of Immigration, Refugees and Citizenship dated February 28, 2018, which cited Mr. Abdi's case and requested a meeting "to discuss current federal deportation and removal policies, particularly as they affect Black children under government care." Justice McLeod did not participate in the creation of the letter and did not sign it. The letter was posted on FBC's Facebook page so that it would be publicly accessible. [Emphasis added.]

Justice McLeod's oral evidence at the First Hearing relating to his involvement in the FBC's advocacy concerning the Abdi case:

Q. So then we go to paragraph 52 to 53 of the Agreed Statement of Facts, and it reflects that the FBC publicly advocated in relation to the deportation of Mr. Abdi, a Somalian refugee who was at risk of deportation after he pled guilty to charges of aggravated assault and assaulting a police officer.

Did you have any involvement at all in any representations that were made by the FBC about that specific case?

A. No.

Q. And why not?

A. I felt that because it was a matter that was still before the courts, even if it's a court, it's not my court, I shouldn't be commenting on it.

There was a greater, I think, principle that was at stake. The case was about Abdoul Abdi, but in reality the principle behind this had to do with the fact that there had been many West Indians and Black people alike that were being deported for years and years prior to the Abdoul Abdi case, but irrespective of that, I didn't think it was appropriate, even if it could be couched in the language which I just stated.

I felt that it would be more prudent for me, in the capacity that I was as a judge, that I not comment. So not only did I not comment on it...I mean, when I say...it not be a part of the letter. So the letter was written, and I didn't even sign the letter.

I didn't sign off on the letter. I didn't sign off on the contents of the letter. [Emphasis added.]

## **Appendix 'B'**

Paragraphs in the 2018 ASF that refer to other meetings between Justice McLeod or the FBC and government officials:

13. Justice McLeod contacted a number of politicians from various parties (referenced at paragraphs 17 and 18), government officials and political staffers to discuss the issues that had been raised at the meeting. He first contacted Marco Mendicino, Member of Parliament ("MP") from the riding of Eglinton-Lawrence in Toronto. His conversation with Mr. Mendicino led to a further conversation with another MP, Ahmed. Hussen, 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. It is anticipated that the evidence presented by Justice McLeod will show that these meetings took place between approximately June and September of 2016.

...

17. 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 Immigration and Citizenship Members of Parliament and members of the Black Caucus were also in attendance.

18. On June 28, 2017, Justice McLeod chaired a meeting between other representatives of the FBC and Prime Minister Justin Trudeau, national community leaders, experts and Black community leaders, and federal members of parliament to discuss the mental health, corrections and education challenges black people face in Canada. A photocopy of the Facebook page from the Kanisa Fellowship (a local church) describing this event is attached hereto as Exhibit E.

...

20. The presentation described issues identified by the initial organizing group and through their national



community consultations, and identified steps that could be taken to address these issues. Each of these steps was described in the presentation as an “ask”. One such “ask” was for:

Stronger and earlier presence in Court-Diversion settings that assist stakeholders, partners of client’s [sic] in systems and supporting African clients with case management aimed at system navigation. Also, training for court workers, Justices and Duty Counsel in those spaces that inform sensitivity towards African-Canadian, [immigrant, refugee, ethno-cultural and racialized groups] of Anti Black racism and its expressions.

At this meeting, Justice McLeod was photographed with Prime Minister Trudeau. It is anticipated that the evidence presented by Justice McLeod will show that 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. Some of the photos, including one of Justice McLeod with the Prime Minister were later posted on the Facebook page of a local church. Justice McLeod was aware that he would be publicly identified as FBC’s representative.

...

44. As referenced above, the FBC website was officially launched at an event at the 2017. National Black Summit, which was held in Toronto from December 4-6, 2017. The event was organized by the Steering Committee of the FBC, the Michaëlle Jean Foundation and the Toronto Public Library. 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.” The FBC website stated that the event was sponsored by TD Bank Group and Deloitte, with additional support from the National Film Board, Afroglobe TV and the Canadian Labour Congress.

...

51. 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 focussed on issues other than the International Decade. Justice McLeod commented to the Huffington Post that the media was "engaged with other issues to the exclusion of the issue that they were there for... I felt that it was hard to stand there and see, but it was a stark reminder of where we are." The article by Mohamed Omar, entitled "Justin Trudeau Gets No Questions About Black Canadians At Press Conference Focused on Their Experiences", Huffington Post Canada (January 30, 2018), is attached hereto as Exhibit O.

## Appendix 'C'

### February 26, 2018 email from Justice McLeod to Steering Committee members

Below is the letter to Minister Hussen. your [sic] input is reflected.

please [sic] have a last look and provide any last minute comments by 6pm today.

COMMS- please have this letter ready to be sent out tomorrow AM. [Emphasis in the original.]

### February 26, 2018 email from Interim Steering Committee member Richard Picart to Ms. Ahmed Omar with a copy to Justice McLeod

Yes, just tell me who is signing it.

### February 26, 2018 email from Ms. Ahmed Omar to Mr. Picart with a copy to Justice McLeod

OK checking with Donald when he comes out of court

### February 28, 2018 12:45 p.m. email from Mr. Picart to Ms. Ahmed-Omer

D,

See attached.

I believe the letter should be signed.

I am happy to sign it. Larry should sign it as the secretary.

If he is not comfortable with that, I'll sign.

r.

### February 28, 2018 3:50 p.m. text message from Justice McLeod to Mr. Picart

Hey Richard. We were to have had the letter out about Abdi since Monday. We really need to get that out. What is the holdup?

Mr. Picart's text message response

I didn't get a final final. [Ms. Ahmed-Omer] has the ball. I am ready to move. Who is signing it?

Justice McLeod's text message responses

It's not going to be signed

That was decided prior. We just need to send it out.

She said she gave you final. I will ask her now.

Mr. Picart's text message response

In a meeting. Talk to [Ms. Ahmed-Omer]. Out in 1 hour

Justice McLeod's text message response on February 28, 2018 at 5:54 p.m.

Done?

Mr. Picart's text message response

Not yet on the road. Should be within the hour. You will know because you will get an email.

Justice McLeod's FBC WhatsApp chat group post February 28, 2018 10:27 p.m.

I do think we should send out a tweet about speaking to stake holders since January 8, 2018