In the Matter of Complaints Against Judge Gregory Lenehan,
made pursuant to the *Provincial Court Act*, R.S.N.S. 1989, c. 238

DECISION OF THE REVIEW COMMITTEE

March 29, 2018

Members of the Review Committee:

Judge Frank P. Hoskins

R. Daren Baxter, Q.C.

Katherine Fierlbeck, Ph.D., Public Representative

Counsel for the Review Committee:

Marjorie Hickey, Q.C.

McInnes Cooper
Halifax, NS

Counsel for Judge Lenehan:

J. E. Michel Bastarache, C.C.,Q.C.
Peter Gall, Q.C.
Ben Oliphant

Gall Legge Grant Zwack
Vancouver, BC

TABLE OF CONTENTS

I. OVERVIEW

1. The Nova Scotia Judicial Council received 121 written complaints between March and May 2017 respecting the conduct of Judge Gregory Lenehan, a judge of the Provincial Court of Nova Scotia. The complaints were received following Judge Lenehan's oral decision in *R. v Al-Rawi,*[1] rendered on March 1, 2017, in which Judge Lenehan acquitted the accused of sexual assault. The majority of the complaints focused on Judge Lenehan's comments and decision in the *Al-Rawi* case, which were widely reported by the media.

2. Many of the complainants were critical of a particular statement made by Judge Lenehan in *Al-Rawi,* "Clearly, a drunk can consent". This was a phrase used by Judge Lenehan when describing matters involving capacity to consent while intoxicated. A number of complainants however, went beyond the use of this phrase as the focus of their concern, referencing some prior decisions, and referring to what they saw as a pattern of behaviour – a "track record" – reflecting gender bias in his decisions.

3. This Review Committee was constituted under the *Provincial Court Act*[2] to investigate these complaints, following an initial review of the complaints by Associate Chief Judge Alan Tufts[3] of the Provincial Court, and a subsequent review by Chief Justice Michael MacDonald, the Chair of the Judicial Council. It is not the function of the Review Committee to determine whether Judge Lenehan was right or wrong in acquitting Mr. Al-Rawi. That is the function of an appellate court, a function that was exercised when the *Al-Rawi* trial decision was appealed to the Nova Scotia Court of Appeal. By decision dated January 31, 2018, the Court of Appeal concluded that legal errors were made and remitted the matter for a new trial.[4]

4. The role of the Review Committee is distinct from that of the Court of Appeal, where the Committee's role in the broadest sense is to investigate the complaints to determine

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[1] An unreported decision of the Nova Scotia Provincial Court rendered March 1, 2017, a copy of which is attached as Appendix "A" to this Decision and referenced herein as either *Al-Rawi*, or the *Al-Rawi* trial decision

[2] R.S.N.S. 1989, c.238

[3] The *Provincial Court Act* requires the initial review to be conducted by the Chief Judge of the Provincial Court, who in this case referred the matter to Associate Chief Judge Tufts, as permitted by clause 16(2)(c) of the *Act*

[4] *R. v Al-Rawi*, 2018 NSCA 10, referenced herein as *Al-Rawi* appellate decision

whether the allegations could objectively amount to findings of judicial misconduct that warrant a formal hearing.

5. In carrying out this role, the Review Committee was conscious of the need for judges to be free to make the decisions they believe are in accordance with the evidence and the law. Apart from legal errors that are the purview of appellate courts, interference with this freedom must be limited in order to protect the importance of judicial independence. At the same time, public confidence in the judiciary depends on the impartiality and integrity of the individual judges comprising the institution, and that in turn necessitates an appropriate process for review of allegations of judicial misconduct. This inherent tension between judicial independence and judicial accountability is crystallized in the present case where allegations of gender bias were raised by the complainants against Judge Lenehan.

Judicial Independence

6. Judicial independence is "one of the pillars upon which our constitutional democracy rests."[5] As set out in the Canadian Judicial Council's publication, *Ethical Principles for Judges:*

> An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone.[6]

7. The importance of judicial independence was underscored by the Supreme Court of Canada in its decision concerning the Provincial Court Judges' Association of New Brunswick:

> Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell,* at para. 29). Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the

[5] *Ell v Alberta*, [2003] 1 SCR 857, para 19
[6] *Ethical Principles for Judges*, Canadian Judicial Council Catalogue Number JU11-4/2004E, available at www.cjc-ccm.gc.ca, page 4

> rule of law, fundamental justice, equality and preservation of the democratic process.[7]

Judicial Accountability

8. While the judiciary is not accountable to any electorate or government for its decisions, lapses or questionable conduct by judges can erode public confidence.[8] The judicial conduct processes in place in each Canadian jurisdiction are designed to be responsive to concerns about the conduct of judges, while at the same time being acutely sensitive to the requirements of judicial independence.

9. The Supreme Court of Canada articulated this tension in the following passage from *Moreau-Bérubé v New Brunswick* (*Judicial Council*):

> …The Judicial Council has been charged by statute to guard the integrity of the provincial judicial system in New Brunswick. In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.[9]

10. This passage highlights that the ultimate goal of a judicial conduct process is to guard the integrity of the judicial system or, to put it another way, to ensure public confidence in the judiciary.[10]

11. As noted in *Moreau-Bérubé,* the test for determining the maintenance of public confidence is an objective one, and not one determined through the eyes of an individual complainant. The embodiment of the "public" whose confidence must be maintained is the "informed dispassionate public", often referenced as a "reasonably informed person" or a "reasonable member of the public". The Supreme Court of Canada has further defined the reasonable member of the public, albeit in a different context, as follows:

> …Thus, a reasonable member of the public is familiar with the basics of the rule of law in our country and with the fundamental values of our criminal law, including those that are protected by the Charter. Such a person is

[7] *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice*), [2005] 2 SCR 286, para 4
[8] *Ethical Principles*, page 10
[9] [2002] 1 SCR 249, 2002 SCC 11, *Moreau-Bérubé*, para 72, [*Moreau-Bérubé]*
[10] *Judicial Regulation, Beyond Independence and Accountability*, Professors Richard Devlin and Adam Dodek

> undoubtedly aware of the importance of the presumption of innocence and the right to liberty in our society and knows that these are fundamental rights guaranteed by our Constitution.[11]

Disposition of Allegations

12. For Provincial Court Judges in Nova Scotia, judicial accountability is given effect through the processes established by the *Provincial Court Act*. When a Review Committee is appointed under the terms of the *Act*, it has authority under the *Provincial Court Act* to take one of the following actions:

    a. dismiss the complaints;

    b. resolve the complaints with the agreement of the judge; or

    c. refer the complaints to a hearing before the Judicial Council.[12]

13. Following its detailed examination of all material relevant to the investigation of the 121 complaints, the Review Committee concludes that while Judge Lenehan's choice of certain phrases in two of the matters referenced by the complainants may have benefited from more careful and contextual reflection, from the view of a reasonably informed person the conduct and comments that formed the subject of the various complaints could not be found to meet the test for judicial misconduct. As a result, the complaints are dismissed under the authority of subsection 17G (a) of the *Provincial Court Act*.

II. THE COMPLAINTS

14. Judge Lenehan's oral decision in *Al-Rawi* was widely reported by the media. This resulted in the filing of the earlier referenced complaints by 121 individuals and organizations across Nova Scotia and the country. These complaints essentially alleged that Judge Lenehan was out of touch with female victims of sexual assault.

15. There were a series of public protests and the matter was widely reported in social and other media.

16. When the written complaints are analyzed it can be seen that in addition to the many individualized complaints that were filed, four discrete templates for the letters were used

[11] *R. v St. Cloud*, 2015 SCC 27, para 79
[12] *Provincial Court Act*, section 17G

by several complainants. One template was used 22 times; the second 13 times; the third 8 times; and the fourth 3 times. In total, 38% of the complaint letters appear to be based on some form of template.

17. All of the complainants dispute Judge Lenehan's verdict in *Al-Rawi*, complaining that he used improper reasoning, and questioning how he could have arrived at a not guilty verdict based on their understanding of the facts as reported in the media. The majority of complainants referenced the use by Judge Lenehan of the phrase in his oral decision, "Clearly a drunk can consent", as illustrative of their concerns, and many complainants viewed this statement as wrong. In support of their complaints, some complainants referenced a document produced by the Nova Scotia Department of Health and Wellness, which stated that "There can be no legal consent when a person is drunk, drugged, asleep, or passed out."[13]

18. Several complainants indicated that by not appropriately considering all of the circumstantial evidence that was before him regarding capacity to consent, Judge Lenehan exhibited gender bias.

19. Some complainants felt Judge Lenehan used misogynistic reasoning to arrive at his conclusion and complained that he used sexist attitudes and was reinforcing "rape culture" and "social biases".

20. Several complainants referenced matters other than the *Al-Rawi* decision to support the suggestion that Judge Lenehan had a "track record" of gender bias. They made reference to the following additional matters:

    a. An incident in which Judge Lenehan asked a breast-feeding mother to leave his courtroom in October, 2015;[14]

    b. The sentencing in *R. v E.W.* – A decision of Judge Lenehan dated March 20, 2012, concerning a man convicted of sexually assaulting his teenage step-daughter over the course of a year, where Judge Lenehan sentenced the accused to 2 years less a day, to be served as a conditional sentence through a period of house arrest and

[13] https://novascotia.ca/dhw/healthy-development/documents/11032_SexBook_En.pdf
[14] Referred to herein as "the breast-feeding incident"

other conditions. The complainants were concerned about the leniency of the sentence;

c. The sentencing in *R.* v *K.B.*- an oral decision dated January 15, 2015 involving a youth who distributed child pornography, during the well known and tragic case where K.B. posed for a picture without the knowledge of the young woman involved, while engaged in explicit sexual activity with her. Judge Lenehan sentenced the youth to a 12 month period of probation. The complainants were again concerned with the leniency of this sentence; and

d. The sentencing in *R. v C.S*. – an oral decision dated November 13, 2014 related to the K.B. matter above, involving the sentencing of another youth where complainants again were concerned with the leniency of the sentence.

21. In addition to the written complaints, there were various letters, emails and phone messages received at the Chief Judge's office with respect to Judge Lenehan’s decision in *Al-Rawi,* where no contact information was provided by the authors. These matters are not counted among the 121 complaints.

III. PROCEDURAL HISTORY OF THE COMPLAINTS

22. The complaints arising from Judge Lenehan's decision in *Al-Rawi* and other matters were initially referred to Associate Chief Judge Alan Tufts. Under the *Provincial Court Act*, ACJ Tufts acted as a reviewing authority where he had a mandate to do one of the following:

a. dismiss the complaints and provide written reasons to the complainants if:

i. the complaints are not within the jurisdiction of the Judicial Council;

ii. the Chief Judge considers the complaints to be frivolous or vexatious; or

iii. there is no evidence to support the complaints;

b. attempt to resolve the complaints;

c. refer the complaints to the Chair of the Judicial Council together with a recommendation that the complaints:

i. be dismissed;

ii. be resolved with the agreement of the judge, or

iii. be referred to a Review Committee for further investigation.[15]

23. Pursuant to section 17B of the *Provincial Court Act*, the role of ACJ Tufts was not to evaluate the merits of the complaints. Rather the role was more akin to a screening function to determine if there were reasonable grounds to believe that the complaints should proceed to a Review Committee.

24. ACJ Tufts conducted a detailed review of all relevant material and concluded that given the voluminous number of complaints it was not possible to attempt a resolution of the complaints under section 17B. He further concluded following the completion of his review and his interview with Judge Lenehan that there was no evidence to support the complaints. While the *Provincial Court Act* permitted dismissal at this early stage where there was no evidence to support the complaint, ACJ Tufts determined that the public confidence in the judicial conduct process would be better served if the matter was referred to the Chair of the Judicial Council for his determination.

25. Accordingly, ACJ Tufts referred the matter to Chief Justice MacDonald with a recommendation that the complaints be dismissed, concluding there was no merit to the assertion that Judge Lenehan had a “track record", based on his review of the prior cases.

26. Chief Justice MacDonald received and reviewed ACJ Tufts’ report. Under section 17C of the *Provincial Court Act* the Chief Justice has authority to either accept the recommendation of ACJ Tufts or to empanel a Review Committee.

27. Chief Justice MacDonald concluded that unlike the federal judicial conduct system where a reviewing Chief Justice can in appropriate circumstances consider a complaint on its merits, the structure is different in Nova Scotia where the task to review the merit of complaints is left to a Review Committee if the matter is not earlier dismissed. Chief Justice MacDonald conducted a detailed review of *Ethical Principles for Judges* issued by the Canadian Judicial Council and considered the important concepts of judicial accountability, judicial independence, and the importance of the public confidence in the administration of justice served by the judicial conduct process. In the end he forwarded

[15] Section 17B, *Provincial Court Act*

matters to the Review Committee for investigation and decision under its statutory authority.

28. In doing so, Chief Justice MacDonald indicated that referral to a Review Committee was necessary to maintain public confidence in Nova Scotia's judiciary. He further noted that the legislation provides no procedural rules for the Review Committee, as the Judicial Council has not to date developed any such rules. As a result, Chief Justice MacDonald left it to the Review Committee to follow its own process.

29. The Review Committee was constituted in accordance with section 17F of the *Provincial Court Act,* and consists of the following members of the Judicial Council:

> Judge Frank P. Hoskins, a Nova Scotia Provincial Judges' Association appointee to the Nova Scotia Judicial Council;
>
> R. Daren Baxter, Q.C., Past President of the Nova Scotia Barristers' Society, appointed to the Nova Scotia Judicial Council by the Council of the Society; and
>
> Katherine Fierlbeck, Ph.D., a Professor of Political Science at Dalhousie University, appointed by the Attorney-General of Nova Scotia.

IV. SCOPE OF INVESTIGATION

30. In the absence of explicit guidance as to its role, the Review Committee took a number of steps. First, it determined that Judge Lenehan had no conflict with the participation of any member of the Review Committee, including his judicial colleague, Judge Hoskins. It then looked at retaining legal counsel to provide procedural assistance to the Committee throughout the process. Because the legal counsel under consideration was from the same firm as a member of the Review Committee, the Committee consulted with Chief Justice MacDonald and with Judge Lenehan's counsel. The Review Committee then retained Marjorie Hickey, QC as legal counsel.

31. The Committee next identified the information it needed to conduct a full investigation and proceeded to gather this information. Because some of the complaints suggested a "track record" of bias, the Committee attempted to review sexual assault decisions of Judge Lenehan rendered both before and after the *Al-Rawi* decision. Given the busy nature of Provincial Court, the majority of Judge Lenehan's decisions were oral decisions and not

readily available for review. The Committee reviewed the decisions in the three cases identified in the complaints in addition to *Al-Rawi*, and also reviewed two subsequent decisions noted below that were rendered after *Al-Rawi*. In total, the Committee reviewed the following:

a. The 121 complaints filed with the Provincial Court;

b. The reports of Associate Chief Judge Tufts and Chief Justice MacDonald;

c. The written transcripts in the following cases:

   i. *R. v Al-Rawi* - Transcript of trial and oral decision;

   ii. *R. v E.W.* - Decision of March 20, 2012;

   iii. *R. v K.B.* - Decision of January 15, 2015;

d. Transcript of the "breast-feeding incident" – October 14, 2015;

e. Audio recordings in:

   i. the breast-feeding incident; and

   ii. *R. v C.S.* - November 13, 2014

f. Facta filed by the Appellant, Respondent and Intervenors in the Nova Scotia Court of Appeal in the appeal of *R v Al-Rawi;*

g. A summary of the audio recording of the appeal proceeding in *R v Al-Rawi,* prepared by legal counsel for the Committee*;*

h. Decision of the Nova Scotia Court of Appeal in *R v Al-Rawi,* 2018 NSCA 10;

i. Two decisions of Judge Lenehan given shortly after *Al-Rawi* which also involve sexual assault charges:

   i. *R. v McRae*, 2017 NSPC 28; and

   ii. *R. v Milad,* an oral decision of Judge Lenehan dated October 31, 2017. (The Committee also reviewed the facta filed with respect to the appeal of that decision to the Nova Scotia Supreme Court and the result of the oral decision of Justice Wood dismissing the appeal);

j. Various cases involving judicial misconduct with respect to both federally and provincially appointed judges;

k. Material provided by Chief Justice MacDonald containing redacted and anonymized versions of all judicial conduct decisions of the Nova Scotia Judicial Council issued prior to the introduction of the current legislation in 2000;

l. *Ethical Principles for Judges*, published by the Canadian Judicial Council;

m. Various online media releases concerning *R v. Al-Rawi,* including commentary on press releases from Nova Scotia Criminal Lawyers Association and the Canadian Bar Association, Nova Scotia Branch;

n. Various academic articles concerning the subject matter;

o. Various correspondence exchanged with counsel for Judge Lenehan;

p. Written submissions to the Review Committee from counsel for Judge Lenehan.

32. The Review Committee met with Judge Lenehan and his legal counsel over the course of several hours in a recorded interview which was transcribed for the Review Committee. Prior to the meeting the Committee provided full disclosure to Judge Lenehan of all materials it had reviewed, and also reviewed with Judge Lenehan the scope of permissible questions, given the limitations arising from judicial reasoning immunity.

33. When considering the number and nature of the complaints, the Review Committee was mindful of the following:

a. The media attention given to the decision in *R. v Al-Rawi*, the number of complaints, and the level of media coverage constituted evidence of the intense public concern provoked by Judge Lenehan's comments. This level of concern must be taken into account when considering the public's confidence in the judiciary;[16]

b. However, as set out in the Canadian Judicial Council's decision in matters involving Justice Camp (quoting counsel for Justice Camp):

> … "public outrage is not a reliable barometer of the legal concept of public confidence." In assessing the impact of a judge's conduct on public confidence, we must act "as watchdogs against mob justice" (per Wagner J. in *R. v St.-Cloud*, 2015 SCC 27, at paragraph 83, in another context)[17]

c. Finally, when considering public confidence, as earlier noted it must always be remembered that the "public" must be a reasonable person, properly informed, dispassionate and familiar with the basics of the rule of law in our country and with the fundamental values of our criminal law[18]

[16] See eg. Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council, November 29, 2016 re the Hon. Justice Robin Camp, para 279 (*Camp,* Inquiry Committee Decision)
[17] Report of the Canadian Judicial Council to the Minister of Justice re Justice Camp, 8 March, 2017, para 44 (*Camp*, CJC decision)
[18] *R. v St.-Cloud*, para 79 and *Moreau-Bérubé*, para 72

V. THE ROLE OF THE REVIEW COMMITTEE

34. As earlier noted, this Review Committee derives its authority from the *Provincial Court Act* which, through section 17G, authorizes it to dismiss a complaint, resolve a complaint with the agreement of the judge, or refer the complaint to a hearing before the Judicial Council. The fundamental role of the Committee is to investigate the complaints and to make an assessment of the merits of the complaints in order to know which of these options should be exercised.

35. There are no reported decisions in Nova Scotia that provide guidance on the factors to apply in decisions to be made by a Review Committee, nor is there any test for judicial misconduct set out in any precedent under the *Provincial Court Act*.

36. The current judicial conduct regime in Nova Scotia has been in place only since 2000. Prior to that, each Judicial Council acted under the mandate of a separate order-in-council, resulting from requests from either the Attorney General or the Chief Judge. Since the inception of the current regime in 2000, no cases have been advanced to a Review Committee and as a result, there is no guidance regarding the test to be applied by this Committee or the factors it should consider in reaching its decision.

37. For federally appointed judges the leading case that is often referenced as setting out the test for issues of judicial misconduct is the *Marshall* case, where it is formulated as follows:

> Is the conduct so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[19]

38. In another case dealing with a federally appointed judge, *Re Matlow*,[20] the importance of the prospective nature of the test is highlighted. Implicit in the test for removal from office is the concept that public confidence in the judge would be sufficiently undermined to

[19] Report of the Inquiry Committee concerning the Honourable Justice Ian M. MacKeigan, the Honourable Gordon L.S. Hart, and Honourable Malachi C. Jones, the Honourable Angus L. MacDonald and the Honourable Leonard L. Pace (August, 1990) [*Marshall*], page 29

[20] Report of the Canadian Judicial Council Concerning the Hon. Justice Theodore P. Matlow (December 3, 2008) [*Matlow*]

render him or her incapable of executing judicial office in the future, in light of his or her conduct to date.[21]

39. However, an important distinction must be made between cases such as *Marshall* and *Matlow* involving the federal *Judges Act,* and cases under Nova Scotia's *Provincial Court Act*. Under the federal *Judges Act* there is only one option open to the Canadian Judicial Council if a finding of misconduct is made: removal from the bench. In Nova Scotia under the *Provincial Court Act*, and in similar statutes across the country for provincially appointed judges, there is a broader range of dispositions ultimately available to the provincial Judicial Councils which may adjudicate the merits of a complaint. As a result, the portion of the *Marshall* test that requires the conduct to be sufficient "to render the judge incapable of executing the judicial office" is not directly applicable in a provincial court setting, where options other than removal are available.

40. While not a decision of a Review Committee, helpful guidance can be obtained from the decision of the Ontario Judicial Council in the matter of the Honorable Madam Justice Justice Lesley Baldwin, (*Baldwin*), a case frequently referenced in other Ontario Judicial Council decisions. In *Baldwin,* the Ontario Judicial Council outlined the test for misconduct in the context of a provincial judicial conduct regime as follows:

> …whether the impugned conduct is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined public confidence in the ability of the judge to perform the duties of office or in the administration of justice generally, and that it is necessary for the Judicial Council to make one of the dispositions referred to (in the governing Act) in order to restore that confidence.[22]

41. The distinction between the *Baldwin* test and the *Marshall* test is an important one. The test in *Baldwin* recognizes that there can be degrees of misconduct that in some instances may undermine public confidence in the administration of justice generally, without having to reach the conclusion that an individual judge is incapable of performing the duties of his or her office. It is also important to note that the test in *Baldwin* requires not only a finding of an undermining of public confidence in the judge or the administration of justice

[21] *Matlow*, para 166

[22] In the matter of a complaint respecting the Honorable Madam Justice Lesley M. Baldwin, http://www.ontraiocourts.ca/oc/ojc/ojc/public-hearings-decisions/ds002/baldwin/ at page 7

generally, but an additional conclusion that an outcome other than dismissal of the complaint is necessary in order to restore that confidence.

42. The test set out in *Baldwin* is the test to be applied at the hearing stage before a provincial Judicial Council. This Review Committee appointed to investigate the complaints against Judge Lenehan is an investigative committee and not a hearing committee, and that distinction must be borne in mind when determining the threshold test it must apply in considering the options at its disposal.

43. In this regard, reference can be made to the Ontario Judicial Council's Procedures Document, found on the OJC's website.[23] While the statutory provisions and process differ in some respects between Nova Scotia and Ontario, under the Ontario process, there is guidance given to their investigative committee (called a Complaint Subcommittee) that it may dismiss a complaint if, after its investigation, it concludes the evidence could not support of finding of judicial misconduct.

44. The investigative committee in Ontario may recommend a hearing where there has been an allegation of judicial misconduct that the committee believes has a basis in fact and which, if believed by the finder of fact, could result in a finding of judicial misconduct.

45. As a result, using the test in *Marshall*, modified for a provincial regime as in *Baldwin*, and adapted to the statutory framework of the *Provincial Court Act*, the Review Committee has determined that its role is to answer the question:

> **Whether the impugned conduct, if proven or admitted, could support a finding of judicial misconduct. That is, from the point of view of a reasonable, dispassionate, and informed public could it be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore that confidence?**

46. In considering this, the Review Committee must be mindful of the distinction between legal errors and judicial misconduct, as earlier referenced. Appellate courts exist to deal with the former; Judicial Council regimes exist to deal with the latter. While there are some

[23] www.ontariocourts.ca/ojc/ojc/

cases where judicial error and judicial misconduct can co-exist, legal errors, without more, do not amount to judicial misconduct.[24]

47. In assessing public confidence, the Review Committee must determine such public confidence on a prospective basis, based on how a reasonably informed person would view the actions of the judge. The guidance from *Moreau-Bérubé* and *R. v St.-Cloud*, earlier referenced, should be borne in mind in conducting this analysis.

48. In assessing whether the conduct is seriously contrary to the impartiality, integrity, and independence of the judiciary, the Review Committee must consider the presumption of judicial integrity and impartiality that underlies the concept of judicial independence. As explained by the Supreme Court, albeit in a different context:

> The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.[25]

49. Based on this analysis, when considering the complaints against Judge Lenehan the Review Committee recognizes that the threshold for determining when impugned conduct can constitute judicial misconduct is appropriately and necessarily a high one.

VI. JUDGE LENEHAN

50. Judge Lenehan graduated from law school in 1985, completed a period of articles, and was admitted to the bar in 1986. He worked in private industry for approximately a three-year period and was then hired to work as a Crown Attorney. He worked for a period of 21 years as a Crown Attorney in Halifax, Bedford and Dartmouth before his appointment as a judge in 2010. After initially practicing as a Crown Attorney in Halifax, he was assigned to Bedford for a period of nine years, during which he prosecuted many sexual assault cases in the Bedford Court, in addition to hearing cases involving various other offences.

51. For a two-and-a-half year period when he was a Crown Attorney, Judge Lenehan worked with a program known as Operation Hope, which was the RCMP review of complaints

[24] See, eg, *Camp*, Inquiry Committee Decision, para 4
[25] *Cojocaru* v *British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, para 20

involving the Shelburne and Truro Schools for Girls and three other institutions where children were housed under the *Juvenile Delinquents Act* and the *Young Offenders Act.*

52. Judge Lenehan cannot recall the total number of sexual assault cases he prosecuted over the course of the total of his twenty-one years as a Crown Attorney, but of those that went to trial, he states he can remember only six cases that did not lead to a conviction.

53. When Judge Lenehan was appointed to the bench he was initially appointed to the Bridgewater Provincial Court. He sat in that court for three and a half years, although moved around the province when needed to fill in for other judges. While he cannot recall with precision the specific number of sexual assault trials he conducted, he believes there was at least one sexual assault matter in front of him each month while working out of the Bridgewater Court. After moving to Halifax Provincial Court, he had regular involvement in sexual assault matters.

54. Judge Lenehan described for the Review Committee the busy nature of Halifax Provincial Court. He controls his own docket, meaning he schedules cases within his courtroom to ensure they are addressed in a timely way. His typical daily docket is anywhere from two to six pages of case numbers, where each page has 33 case numbers. While several of these matters may involve the same accused, the fact remains that his courtroom is a busy place.

55. Judge Lenehan sits five days each week, and does not have scheduled time out of court to prepare decisions. When he needs the time he must arrange for another judge to cover his court, so that there will be no unnecessary delays in other matters. At the time of the decision in *R. v Al-Rawi*, and prior to that decision, Judge Lenehan indicated that he often prepared his oral decisions by writing notes and referring to them, rather than by writing out the decision in full.

56. Judge Lenehan described the various forms of continuing education that was provided to Provincial Court judges during his time on the bench. He referenced two formal educational conferences each year that cover a range of topics, including sexual assault. Judge Lenehan also described a variety of courses offered through the National Judicial Institute and the National Criminal Law Program. He noted his attendance at a conference approximately three years ago which was specifically focused on matters of sexual

assault, with guest speakers brought in from Ontario for the conference. Judge Lenehan intends to continue to participate in continuing education programs available to judges.

57. Judge Lenehan noted that he consistently reads the cases that are coming down from other courts around the province and around the country and maintains currency in his knowledge through this means. He also noted that he frequently discusses matters with his colleagues to stay abreast of recent developments.

58. Judge Lenehan has had no prior disciplinary findings made against him by the Nova Scotia Judicial Council.

59. During his meeting with the Review Committee, Judge Lenehan both on his own and through his counsel advised of the personal impact of the various complaints and protests. As a result of receiving many concerning phone calls he had to change his telephone number. Protesters attended outside the courthouse, some with signs containing entirely inappropriate personal messages. Family members were subjected to a number of difficult comments. Through it all, given his position as a judge, he was unable to publicly respond in any way to the concerns levied against him. He found the situation particularly upsetting in light of what he describes as his approach in every case of treating alleged victims with respect and dignity. He spoke of the folder he had while acting as a Crown Attorney for 21 years, which contained numerous thank you notes from various complainants and victims of sexual assault for the approach he had taken to their cases. He prides himself in his sense of fairness.

60. Since rendering the decision in *R. v Al-Rawi*, Judge Lenehan has continued to hear cases of sexual assault. He has not been asked by any party to recuse himself from such cases.

61. When asked what changes, if any, he has made since the complaints were filed, Judge Lenehan replied that he no longer relies on notes when rendering oral decisions. Instead, he writes out his decisions in full.

VII. THE COMMITTEE'S REVIEW OF DECISIONS OF JUDGE LENEHAN OTHER THAN *AL-RAWI*:

a. *R. v E.W.*, March 20, 2012

62. A number of complainants made reference to the case of *R. v E.W.*, a sentencing decision of Judge Lenehan issued on March 20, 2012, as evidence of Judge Lenehan's "prejudice against women".

63. E.W. was convicted of sexual assault charges involving his teenage step-daughter, where the assaults occurred over a period of approximately one year. The Crown and defence counsel offered a joint recommendation for sentencing in this case, where the recommendation was a custodial sentence of two years less one day to be served in the community under a conditional sentence order. Judge Lenehan accepted this joint recommendation.

64. It must be noted that while the obligation to arrive at an appropriate sentence is the Court's, which has the right to reject a joint recommendation by counsel, a joint recommendation should not be rejected unless it would be contrary to the public interest or would bring the administration of justice into disrepute. The Courts have held that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty, provided of course, that the sentence is within the acceptable range and the plea is warranted by the admitted facts.[26]

65. The accused in this case had no prior criminal record. The victim impact statement showed very troubling consequences for the victim. Judge Lenehan heard the submissions of the Crown and defence counsel and accepted the joint recommendation.

66. The joint recommendation was within the range of sentences for similar offences.

67. In reviewing the decision of Judge Lenehan and the comments made during the sentencing hearing, the Review Committee found no inappropriate conduct on the part of Judge Lenehan. He responded to a joint recommendation from Crown and defence; the range of sentences was within the range for similar offences; and he took into account the aggravating and mitigating factors of the case.

[26] See, e.g., *R. v Cook*, [2016] 2 SCR 204, 2016 SCC 43 (CanLII)

68. In speaking directly to the accused Judge Lenehan used strong language in condemning the actions of the accused.

69. The Review Committee could find absolutely no support for a suggestion that this decision is an example of gender bias shown by Judge Lenehan or, as one complainant described it, an example of his "long history of dangerous, antiquated rulings". To the contrary, the stern language used by Judge Lenehan in condemning the actions of the accused demonstrates his understanding of the significant impact on the victim in this case, and his abhorrence of the conduct involved in the assault.

70. The Review Committee finds that a reasonably informed person would not conclude that Judge Lenehan's sentencing in this matter could lead to a finding of judicial misconduct, and the Committee accordingly dismisses any complaints arising from it.

b. R. v K.B.

71. Judge Lenehan conducted a sentencing hearing on January 15, 2015 concerning a youth charged with distributing child pornography, in a case well known to the public, where aspects of the Court proceedings and decision are subject to a publication ban. The matter arose out of the photograph taken of a young woman and K.B. while the two were engaged in explicit sexual activity. The photographic image was taken without the knowledge or consent of the young woman. The photographic image was subsequently transmitted by K.B. to others.

72. The offender in this case was being sentenced under the provisions of the *Youth Criminal Justice Act*, which was noted by the Crown to constrain the disposition that the Court may impose and to mandate a very different disposition than that applied to an adult offender involved in similar conduct.

73. The Crown proposed a probation order as the appropriate way of fulfilling the objectives of the *Youth Criminal Justice Act.*

74. Counsel for K.B. noted that he had pled guilty to the charge. Counsel also outlined various other factors that should be borne in mind by the Court, and concluded by joining with the Crown in making the recommendation for probation, which was in the range of sentences for similar offences.

75. In accepting the joint recommendation from Crown and defence counsel, Judge Lenehan minced no words in speaking to the accused. He said the following:

> …at the time, he displayed absolutely no respect for Ms.[X]. He willingly posed for the photo as if such an intimate circumstance was nothing but a lark and really had no meaning for him. Ms.[X] was treated as no more than a prop for his enjoyment. By sharing that image with the two others, he demonstrated utter contempt for Ms. [X], her dignity, her self-respect and her privacy. The image and the distribution of it were, quite frankly, for Ms. [X] sexually degrading.

76. Judge Lenehan then went on to enunciate the principles under the *Youth Criminal Justice Act* that acknowledge that young persons are less morally blameworthy than adults. The statute requires that sanctions have to emphasize rehabilitation and reintegration and to recognize the youth's reduced level of maturity.

77. Judge Lenehan then spoke directly to the accused at the end of his sentencing where he said:

> Mr. K.B., in every case of child pornography, every time the image is viewed, the person who is being degraded, dehumanized and humiliated is victimized again. Every time the image you shared twice was subsequently shared or viewed…and I accept you had no control over that. But every time, Ms. [X] was being victimized again…

78. After reviewing the transcript of the sentencing hearing, this Review Committee is satisfied that the reasoning of Judge Lenehan in ordering probation for K.B. was not reflective of any form of gender bias, or as one complainant put it, “a history of misogynistic actions”. Rather, the Committee is satisfied that Judge Lenehan accepted the joint recommendation of the Crown and defence, in accordance with the commonly accepted practice for joint recommendations. He took the time to thoughtfully address those in the courtroom, including K.B., ensuring that the sexually degrading nature of K.B.'s actions were brought to the forefront of the sentencing hearing.

79. The Review Committee finds that a reasonably informed person would not conclude that Judge Lenehan’s sentencing in this matter could lead to a finding of judicial misconduct, and the Committee accordingly dismisses any complaints arising from it.

c. R. v C.S.

80. Judge Lenehan conducted a sentencing hearing on November 13, 2014 respecting a second youth involved in the same incident giving rise to the charges against K.B., above. C.S. was the photographer who took the picture of the sexual act involving K.B. and the young woman without the young woman's consent, and then provided the photo to K.B.

81. The Judge in giving his reasons for sentencing referred to the case as one involving an "act of sexual degradation" and one of "stark objectification of girls and women". He referred to the young woman who was photographed as being "degraded", "humiliated", and "dehumanized".

82. The appropriate range of sentence as submitted by both the Crown and Defence counsel,, based on case authority, was between a conditional discharge, where the youth's record could be expunged after 3 years, and probation, where the youth's record could be expunged after 5 years.

83. In sentencing the youth to a conditional discharge, Judge Lenehan recommended the youth complete a sexual harassment course to gain a better understanding of interactions with women in the future.

84. After reviewing the transcript of the sentencing hearing, this Review Committee is satisfied that the reasoning of Judge Lenehan was not reflective of any form of gender bias. To the contrary, Judge Lenehan's words to the youth reflected a strong awareness of the objectification of the young woman involved and he conveyed that message to the youth in no uncertain terms. The sentence he imposed was within the range proposed by both Crown and defence counsel, and consistent with the case authorities and the various aggravating and mitigating factors that were carefully delineated by Judge Lenehan.

85. In short, the sentence was consistent with the applicable legislation and case law and sensitively delivered in a thoughtful oral decision that was appropriately reflective of the nature of the crime.

86. The Review Committee finds that a reasonably informed person would not conclude that Judge Lenehan's sentencing in this matter could lead to a finding of judicial misconduct, and the Committee accordingly dismisses any complaints arising from it.

VIII. DISCUSSION OF THE "BREAST-FEEDING INCIDENT"

87. Thirty-three of the complainants referenced an incident whereby Judge Lenehan asked a woman to leave his courtroom while breast-feeding. This incident occurred in Court Room No. 1 in Halifax on October 14, 2015. The Court transcript from that date states the following:

> THE COURT: Excuse me, ma'am. Do you want to take that out of the courtroom, please, okay? If you're going to breast-feed, please do it outside the courtroom, okay?
>
> A. Okay.
>
> THE COURT: I don't have a problem with you breast-feeding, just not in the courtroom, okay.
>
> A. Okay.

88. The Review Committee listened to the audio recording commencing several minutes before the above exchange and continuing after until the court recessed. Judge Lenehan is heard speaking with others in the courtroom and seems to be waiting on someone to arrive to start a proceeding. After awhile a baby is clearly heard fussing nearby for a few minutes before the above exchange. There was nothing unusual with the Judge's tone. He was neither terse nor discourteous. But, at the time no explanation was given by Judge Lenehan for making the request. There was no objection voiced by anyone.

89. During the interview with Judge Lenehan, the Review Committee asked him about the circumstances in the courtroom and why he asked the woman to leave. He explained that Halifax Courtroom No. 1 is a very small courtroom, the second smallest in the building. The breast-feeding mother was sitting in the first row, directly behind the defence counsel table, maybe 12 feet from the Judge's bench. The Court was waiting for the accused to arrive any moment to commence the proceeding, and the Crown and defence counsel were in discussions outside of the courtroom. The Judge was preparing for the next proceeding. When meeting with the Committee, Judge Lenehan expressed concern that the proceeding would start any moment and that the noise from the baby would be a distraction. He then asked the breast-feeding mother to leave the courtroom. The Judge did not want to have to interrupt the proceedings once underway.

90. During his interview, Judge Lenehan stated he does not allow any noise in his courtroom. He noted it is important to clearly hear the witnesses and lawyers. Persons' liberties are

at stake in his courtroom. He does not want any distractions for them, for the lawyers or for others focused on the proceedings. For instance, the Judge said he does not allow whispered conversations in his courtroom. He gave an example of recently asking a person who was rooting through a plastic shopping bag and making noise to leave.

91. Judge Lenehan told the Review Committee that had he been in a larger courtroom with the mother breast-feeding farther from the bench and counsel table, the noise from the baby may not have been a concern. He stated he does not have any objection in principle to mothers breast-feeding in public, or in his court room. His only concern that day was the distraction caused by the noise from the baby.

92. Judge Lenehan offered through the Court's communication office to give an explanation to the mother involved in the matter. She was invited to attend at his courtroom at any time convenient for her. He would then, on the record, explain why he asked her to leave so she would understand his motivation. Judge Lenehan's offer was not acted upon.

93. A judge requesting a woman to leave a courtroom simply because she is breast-feeding would be cause for concern. If, however, the issue for the judge is the control of noise which may distract the parties, and which may be picked up on the court recording, then it is appropriate for the judge to make reasonable requests to control the noise level.

94. The request to a breast-feeding mother "to take that out of the courtroom please" may have been better phrased and explained at the time. However, when taken in the context of the circumstances in this instance Judge Lenehan was entitled, and indeed responsible, to control the noise level in his court. It is unfortunate that he did not make it clear during his comments in the courtroom as to why he was asking the woman to leave the courtroom. Judge Lenehan did try to rectify this shortly after the incident by offering to give an explanation on the record, although the offer was not acted upon.

95. The Review Committee finds that a reasonably informed person would not conclude that Judge Lenehan's comments and actions in this matter could lead to a finding of judicial misconduct, and the Committee accordingly dismisses any complaints arising from it.

IX. DISCUSSION OF *R. v AL-RAWI*

96. It was Judge Lenehan's decision in the *Al-Rawi* sexual assault trial that is the subject matter of all the 121 complaints, and which generated significant media attention. The

complainants generally focused on Judge Lenehan's use of the phrase "Clearly a drunk can consent" as an example of what they perceived as gender bias. Many of the complainants went beyond this specific example to suggest that the acquittal itself was an example of gender bias, where the complainants could not reconcile the Judge's verdict in the context of the publicly reported evidence. Overall, the theme of the complaints was that on a proper consideration of the evidence Judge Lenehan should have convicted Mr. Al-Rawi, and his failure to do so was due to gender bias and stereotyping.

Procedural history of Al-Rawi

97. Mr. Al-Rawi was charged with a single count of unlawfully committing a sexual assault, contrary to section 271 of the *Criminal Code*. A trial was held on February 9 and 10, 2017, during which a number of witnesses testified. In addition to the police officers involved in the investigation of the matter, the complainant herself testified, along with friends she was with on the night of the matters leading to the charge. A forensic expert was called to testify with respect to the blood alcohol level of the complainant, and the impact of that blood alcohol level on her.

98. During the trial an interpreter was present to interpret between the English and Arabic languages, as English was not Mr. Al-Rawi's first language.

99. Judge Lenehan issued his oral decision in the matter on March 1, 2017.

100. There was no pretrial conference held in this matter, and no written briefs were provided by either the Crown or Defence counsel at any time.

101. Judge Lenehan advised the Committee that he did not write out his decision in its entirety prior to delivering it on March 1. He rendered his oral decision based on various notes he had made.

102. During his interview with the Committee, Judge Lenehan noted that while no particular legal authorities were provided to him by either counsel prior to his decision, and he did not reference any authorities in his decision, he did consider relevant cases at the time he was considering his decision and preparing his notes. While he could not recall the specific cases that he referenced he indicated it was his practice to do so. He referenced searching for cases with similar circumstances. He also indicated that he spoke with some

of his judicial colleagues about the case to bounce matters off them, while maintaining the decision-making role himself.

103. The transcript of Judge Lenehan's oral decision is found at Appendix A to this decision.

Relevant Facts in Al-Rawi

104. The relevant facts and Judge Lenehan's decision are well summarized in the introduction given by the Nova Scotia Court of Appeal in its decision on the *Al-Rawi* matter written by Justice Beveridge:[27]

> [2] The circumstances of the evening of May 22, 2015 combined to lead the complainant to become severely intoxicated. Pressed for time, she had nothing to eat, and, feeling emotionally vulnerable, she drank too much. Descriptions of what and how much alcohol she consumed varied. She testified that between 8:00 p.m. and around midnight, she had five glasses of beer, two shots of tequila and at least one mixed drink of vodka and cranberry juice.
>
> [3] We do know from objective uncontested evidence a number of things: she was denied re-entry to a bar due to her intoxication; she argued vehemently with friends against having something to eat or getting into a taxi to go home; she stormed off from her friends in a distraught and emotional state; and she exchanged text messages with other friends.
>
> [4] Shortly after her last text exchange, she became a fare in a taxi driven by the respondent. Eleven minutes later, the police came across the taxi in the south-end of Halifax, far from the complainant's home or any address she was familiar with.
>
> [5] The complainant was in the rear seat, naked from the waist down, with her breasts exposed. Her legs were propped over the front seats. She was unconscious.
>
> [6] The respondent was seen turned in his seat, between the complainant's open legs. The police saw him trying to hide the complainant's urine-soaked pants between the console and front seat. He then fumbled with the complainant's shoes on the floor of the driver's compartment. The police described the respondent's zipper as part-way down, as were the back of his pants.
>
> [7] The police had to rouse the complainant. She could tell them her name, her address, but not why she was there, nor what had happened.
>
> [8] The respondent was charged with sexual assault. The trial judge accepted the complainant's evidence that she could recall little of the

[27] *Al-Rawi,* appellate decision

> evening's events from the bar and nothing of her entry into and her time in the taxi.
>
> [9] The complainant's first memory was of speaking with a female police officer, but she could not say if this was at the hospital or in the taxi.
>
> [10] The complainant had never met the respondent before and did not recognize him nor his name, except its presence on her subpoena.
>
> [11] The trial judge repeatedly said he had "no evidence" on the issue of lack of consent by the complainant. The judge found as a fact that the respondent had touched the complainant in a sexual manner when he removed her pants and underwear. He acquitted the respondent on the basis that the Crown had not proven beyond a reasonable doubt the absence of the complainant's consent.

105. At trial there was no direct evidence of what transpired in the taxi. The accused, Mr. Al-Rawi, did not testify, as was his constitutionally protected legal right. The complainant had no memory of her time in the taxi, and could give no direct evidence of what transpired while she was in the taxi.

106. One of the elements that must be proven by the Crown in a sexual assault case is the absence of the complainant's consent to the sexual activity. The onus is on the Crown to do so beyond a reasonable doubt. The Crown offered no direct evidence in this regard, but relied upon circumstantial evidence in an attempt to establish that the complainant did not consent, or did not have the capacity to consent to sexual activity. Judge Lenehan accepted the testimony of the complainant and the other witnesses put forward by the Crown. However, none of these witnesses were able to give evidence of what transpired in that taxi during the critical eleven minutes the complainant was alone with Mr. Al-Rawi. They gave evidence as to the circumstances before and after the eleven minutes in question.

Decision of Judge Lenehan

107. Judge Lenehan, based on the circumstantial evidence, found that Mr. Al-Rawi removed the complainant's clothes, but that the Crown provided "absolutely no evidence on the issue of lack of consent".[28] He accepted the testimony of the Crown's expert that with a blood alcohol level of 223 to 244 milligrams of alcohol in one hundred millilitres of blood, the complainant might very well have been able to direct, ask, agree or consent to any

[28] *Al-Rawi* trial decision, page 12

number of different activities. Judge Lenehan concluded that the Crown failed to prove beyond a reasonable doubt the complainant's lack of consent and, accordingly, he had no alternative but to find Mr. Al-Rawi not guilty.

Appeal

108. Whether Judge Lenehan made an error of law is the purview of the Court of Appeal, and as earlier noted, that Court has now issued its decision in the matter.[29] The appeal was allowed and the matter sent back for trial on the basis that Judge Lenehan made an error of law by finding there was no evidence of lack of consent. The Court of Appeal ruled Judge Lenehan did not properly consider all the circumstantial evidence from which he could draw an inference that the complainant either did not consent to sexual activity or did not have the capacity to consent.

109. With respect to the issue of capacity to consent the Nova Scotia Court of Appeal noted that:

> A complainant must have the capacity to consent to the sexual activity in question. The exact test or dividing line to determine capacity and incapacity has not yet been authoritatively settled by the Supreme Court of Canada.[30]

110. After reviewing various cases where the complainants were impaired in some way, the Court stated the following with respect to Judge Lenehan's statement "Clearly a drunk can consent":

> The Crown concedes that the impugned expression is not wrong, but says the judge's choice of words amounted to an unfortunate personalization of the complainant.
>
> The Crown's concession is appropriate. As detailed earlier, it is well established in our jurisprudence that an intoxicated person may still have the capacity to voluntarily agree to engage in sexual activity despite the expectation that if sober or less impaired they would not have done so.[31]

111. The Court of Appeal confined its analysis to errors of law and did not wade into the issue of whether Judge Lenehan's comments or conclusion in any way reflected biased thinking

[29] *R. v Al-Rawi*, appellate decision
[30] *R. v Al-Rawi*, appellate decision at para 32
[31] *R. v Al-Rawi*, appellate decision at paras 112-113

or reliance on myths and stereotypes. It is the role of this Review Committee to consider such allegations in the context of determining whether there is a basis for potential findings of judicial misconduct.

Judicial Misconduct

112. As earlier referenced, the public reaction to the portions of the *Al-Rawi* decision reported in the media was swift and widespread. It appears that much of the substantive public reaction was premised on those portions of the case reported by the media, and that the volume of public reaction was multiplied through the use of social media. The Committee can understand why many members of the public found the reported aspects of the case to be of sufficient concern to file complaints, given the current context of sexual assault awareness.

113. The role of this Review Committee is to investigate the complaints and to determine, based upon our investigation, whether there was conduct on the part of the Judge that could be found to constitute judicial misconduct. In particular, as previously noted, the Review Committee must determine:

> **Whether the impugned conduct, if proven or admitted, <u>could</u> support a finding of judicial misconduct. That is, from the point of view of a reasonable, dispassionate, and informed public could it be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore that confidence?**

114. The guidance articulated in *Moreau-Bérubé* and *St. Cloud* suggests that in the context of the *Al-Rawi* decision, the reasonable, dispassionate and informed member of the public is a person familiar with the basics of the rule of law that mandate the accused is presumed innocent until the Crown proves all elements of the offence beyond a reasonable doubt.[32]

115. In exploring the meaning of judicial misconduct, it is helpful to consider the guidance that can be provided through the document *Ethical Principles for Judges* produced by the Canadian Judicial Council. While not directly written for or approved by the Nova Scotia Judicial Council or other provincial Judicial Councils, *Ethical Principles for Judges* has

[32] *R. v St.-Cloud*, para 79; *Moreau-Bérubé,* para 72

been referenced in numerous cases, not as a code of conduct for judges, but as a guidance document on appropriate and inappropriate conduct, advisory in nature. Some provincial courts, such as Ontario, have adopted their own ethical guidance principles. Other provinces, including Nova Scotia, have not done so. Because the federal document *Ethical Principles for Judges* is written in broad enough terms, it remains appropriate to make reference to this document as a guide when considering issues of potential misconduct.

116. The document sets out a variety of ethical principles, including "Equality". Under that principle, it states:

> Judges should strive to be aware of and understand differences arising from, for example, **gender,** race, religious conviction, culture, ethnic background, sexual orientation or disability.[33] [**Emphasis added**]

117. In the Commentary section of *Ethical Principles for Judges*, the following statements have relevance:

> 2. Equality according to the law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.
>
> 3. Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes. [34]

118. In exploring whether the test for judicial misconduct can be supported in the context of the *Al-Rawi* decision, this Committee closely examined the allegations of gender bias or influence arising from attitudes based on stereotype, myth or prejudice that were raised by the complainants. In doing so, it recognized that bias may be demonstrated by the use of explicit words or phrases that on their face are indicative of bias.[35]

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[33] *Ethical Principles for Judges*, page 23, Principle 2

[34] *Ethical Principles for Judges*, page 24

[35] As demonstrated, for example, in the phrases used by Judge Camp in *R. v Wagar*, as reported in *Camp*, Inquiry Committee Decision, where Judge Camp stated: "Young wom[en] want to have sex, particularly if they are drunk"; and "And when your ankles were held together by your jeans, your skinny jeans, why couldn't you just keep your knees together?".

119. The Committee also recognized that judicial misconduct in the form of bias or stereotyping can be exhibited in less direct ways, sometimes unknown to the judge, and more difficult to detect. This was addressed directly in the *Marshall* Inquiry Report as follows:

> Everyone holds views, but to hold them may, or may not, lead to their biased application. There is, in short, a crucial difference between an empty mind and open one. True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.[36]

120. To maintain that open mind judges must therefore be diligent in staying current with changing laws and social values. Judges must avoid reasoning based on stereotypes and myth. They must also be highly aware of latent values and beliefs they may hold that could have an influence on their reasoning. The failure of a judge to adhere to these standards in the way they approach their duties can undermine the public's confidence in the ability of that judge to perform the duties of office. For instance, regardless of how polite a judge may be, public confidence could be lost if it is evident from the aggregate of a judge's comments, or a judge's general approach to a case, that their impartiality is impaired by biased reasoning.[37]

121. In reviewing the *Al-Rawi* decision for any indication of bias, the Review Committee first examined areas where the Judge made explicit statements that could arguably form the basis of an allegation of bias, and included in this review not only statements specifically raised by complainants but any statements where such allegation may have a foundation. In particular, the Committee reviewed the following three specific comments:

a. "Clearly, a drunk can consent"; [38]
b. "As noted by (the forensic alcohol expert) one of the effects of alcohol on the human body is it tends to reduce inhibitions and increases risk-taking behaviour, and this often leads to people agreeing and to sometimes initiating sexual encounters, only to regret them later when they are sober"; [39] and

[36] *Marshall,* pages 26-27
[37] See for instance, the Report and recommendation of the Inquiry Committee to the Canadian Judicial Council, November 9, 2011, re the Hon Justice Robert Dewar.
[38] *Al-Rawi* trial decision, page 7, lines 3-4
[39] *Al-Rawi* trial decision, page 7, lines 5-10

c. "He knew going along with any flirtation on her part involved him taking advantage of a vulnerable person." [40]

122. Each of these comments is addressed below followed by the Committee's general examination of the entirety of the *Al-Rawi* decision for any suggestion of a more latent form of bias.

"Clearly, a drunk can consent"

123. With respect to this comment, some of the complainants have said that this statement was "categorically untrue" and "irresponsible" and sends the wrong message about our laws. And some have complained that this statement is disrespectful, offensive, or demeaning to the complainant and victims generally.

124. As earlier noted, the statement "Clearly a drunk can consent" is not an incorrect statement of the law. In his concurring reasons in the Court of Appeal decision Justice Saunders states:

> When Judge Lenehan said "Clearly, a drunk can consent" he was simply stating the law… Had he said "a drunken consent is a valid consent" or "intoxicated persons, can nonetheless consent" his words would still have been a proper statement of the law, while, arguably, sounding less personal or harsh. But that is not the reason for reversal in this case, and it is important to say so, just as the Crown has acknowledged in its submissions to this Court.[41]

125. Judges have used somewhat similar language to this phrase in a variety of other cases to make the same point. For example, in *R v Heraldson,*[42] the Alberta Court of Appeal reviewed a number of cases where the issue of capacity to consent was summarized by the respective Courts as follows:

a. "A drunk complainant may retain the capacity to consent";

b. "Mere drunkenness is not the equivalent of incapacity"; and

c. "A drunken consent is still a valid consent".

[40] *Al-Rawi* trial decision, page 11, lines 17-18
[41] *Al-Rawi*, appellate decision, para 131
[42] *R. v Heraldson*, 2012 ABCA 147, para 7

126. In analyzing the phrase “Clearly a drunk can consent” from the bias lens, it is important to put these words in their full context. The passage in its entirety reads:

> Now, on the element of consent, in order for there to be consent, the person giving the consent must have an operating mind, they must be of an age responsible enough to agree to sexual conduct, it can be withdrawn at any time, and it can be limited to certain acts and not others.
>
> A person will be incapable of giving consent if she is unconscious or is so intoxicated by alcohol or drug [sic.] as to be incapable of understanding or perceiving the situation that presents itself.
>
> This does not mean, however, that an intoxicated person cannot give consent to sexual activity. Clearly, a drunk can consent.[43]

127. During his interview with the Committee, Judge Lenehan stated that when using the phrase “Clearly a drunk can consent” he was not referring to the complainant in the case. He was speaking generally about any person in a state of drunkenness. The paragraphs and words before the subject statement provide context and make this clear.

128. Judge Lenehan told the Committee that when he gives his decisions, he is not giving them to the media, but rather directly to the accused whose liberty is at stake. In this case, he wanted Mr. Al-Rawi to understand the decision and his reasons. Mr. Al-Rawi’s first language was not English and he had an Arabic interpreter throughout the trial. When the parties appeared in Court to hear Judge Lenehan’s reserved decision, Mr. Al-Rawi indicated that he wanted to try to listen to the decision without the assistance of an Arabic interpreter. Judge Lenehan chose to deliberately communicate his decision in plain, simple language so that Mr. Al-Rawi could understand it.

129. Judge Lenehan reserved his decision, and when he gave his decision almost three weeks after the trial, it was given orally. It was not a written decision. Judge Lenehan did not prepare the text of his decision in advance, but rather, had some notes from which he was prepared to deliver an oral decision. The Committee observes this is not an uncommon practice in the Provincial Court where judges hear so many cases every day and their heavy schedules do not afford them the time required to prepare written decisions in many of their cases.

[43] *Al-Rawi* trial decision, pages 6-7

130. After hearing Judge Lenehan's explanation for this phrase, reviewing it in its entire context, considering similar language in other cases, understanding the need for clear language for the accused (particularly where his first language was not English), and recognizing that this decision was given orally from notes and was not a decision designed for publication, the Review Committee finds that a reasonably informed person would not conclude that the use of the impugned phrase in this context could lead to a finding of judicial misconduct. It was a correct statement of law, given in the context of describing the law in plain and simple language, not directed to the complainant nor meant to be disrespectful to the complainant.

131. That said, judges must be mindful when delivering decisions, whether oral or written, that their decisions are not just for the accused, but also for the benefit of a wider audience, including other parties to the proceedings, the legal profession, the judiciary, the media and the public generally. To the extent reasonably possible, care must be taken in choosing their message and words to avoid the potential for misinterpretation and misunderstanding. We make further comment on this below.

The effect of alcohol "often leads to people agreeing and to sometimes initiating sexual encounters, only to regret them later when they are sober"

132. While this phrase was not explicitly referenced as an allegation of bias in the complaints, the Committee nonetheless reviewed it in the context of the more general allegations of stereotypical thinking.

133. This phrase immediately followed the previous statement "Clearly, a drunk can consent". In its entirety, the passage reads:

> Now, on the element of consent, in order for there to be consent, the person giving the consent must have an operating mind, they must be of any age responsible enough to agree to sexual conduct, it can be withdrawn at any time, and it can be limited to certain acts and not others.
>
> A person will be incapable of giving consent if she is unconscious or is so intoxicated by alcohol or drug [sic.] as to be incapable of understanding or perceiving the situation that presents itself.
>
> This does not mean, however, that an intoxicated person cannot give consent to sexual activity. Clearly, a drunk can consent.
>
> As noted by Ms. Cherlet, the forensic alcohol specialist, one of the effects of alcohol on the human body is it tends to reduce inhibitions and increase

> risk-taking behaviour, and this often leads to people agreeing and to sometimes initiating sexual encounters, only to regret them later when they are sober.[44]

134. At trial the Crown called the forensic alcohol expert who testified as follows:

> So an individual under the influence of alcohol has the mental ability to make decisions. You know, an impaired driver makes the decision to operate a motor vehicle. However, individuals under the influence of alcohol do have a deterioration in mental function as described earlier. So many of the decisions these individuals make are – are bad decisions. Individuals under the influence of alcohol have a loss of inhibition, which means that they will do things that they normally wouldn't do in the sober state, and they have an increase in self-confidence.
>
> So individuals under the influence of alcohol certainly can make decisions but the alcohol can impair their mental function to such an extent that incorrect or bad decisions are made under the influence of alcohol. [45]

135. Several courts have also made a connection between the consumption of alcohol and a lessening of inhibitions. See, for example, *R v Olotu*, where the Court stated: "(t)he complainant had no memory of the events in issue – she was intoxicated and it is well known that alcohol lowers inhibitions".[46]

136. The Supreme Court of Canada has also noted that even "mild intoxication" causes "alcohol-induced relaxation of both inhibitions and socially acceptable behaviour."[47]

137. The Nova Scotia Court of Appeal in *Al-Rawi* also stated:

> As detailed earlier, it is well established in our jurisprudence that an intoxicated person may still have the capacity to voluntarily agree to engage in sexual activity despite the expectation that if sober or less impaired they would not have done so.[48]

138. During his interview with the Committee, Judge Lenehan indicated that he made the subject comment based on the evidence of the forensic alcohol specialist and his own professional experience in other cases.

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[44] Al-Rawi trial decision, page 7, lines 5-10
[45] *Al-Rawi* trial transcript at pp 261-262
[46] *R v Olotu*, 2016 SKCA 84, para 105
[47] *R. v Daly*, [2007] 3 SCR 5234, 2007 SCC 53, para 41
[48] *R. v Al-Rawi*, appellate decision, para 113

139. The Review Committee has considered the evidence given during the *Al-Rawi* trial by the forensic expert, as well as the comments made by other courts, and finds that a reasonably informed person would not conclude that this comment could constitute judicial misconduct. It was a supportable inference from the evidence that added relevant context to the discussion on capacity to consent.

"He knew going along with any flirtation on her part involved him taking advantage of a vulnerable person".

140. While not specifically referenced in the complaints, the final comment reviewed by the Committee in determining whether there were specific phrases or words used by Judge Lenehan to suggest gender bias or impermissible reasoning arose from his reference to flirtation on the part of the complainant. A reference to flirtation can raise concern about twin myth reasoning; that is, the decision maker uses evidence of other sexual conduct to conclude that the complainant is less credible or more likely to consent to the sexual acts in question. In this case, however, it is important to note the full context of the reference to "flirtation". The reference is made in the latter part of the decision where the Judge discussed in a general way the obligations of all taxi drivers to get their fares safely home. He had earlier made a finding that Mr. Al-Rawi had removed the complainant's pants. He then said:

> If the complainant consented to Mr. Al-Rawi's removal of her clothes, Mr. Al-Rawi was under a moral or ethical obligation to decline the invitation. She was clearly drunk. If she was unable to provide an address, he should have sought police assistance.
>
> Once he saw she had peed her pants, he knew she was quite drunk. He knew going along with any flirtation on her part involved him taking advantage of a vulnerable person. That is not somebody I would want my daughter driving with, nor any other young woman, and it is not somebody I would want to hire to drive for my company. [49]

141. In the last paragraph above when read alone, Judge Lenehan seemingly suggested the complainant had engaged in flirtation. During his interview with the Committee he made it clear that the comment about "flirtation" was made only in the context of the hypothetical scenario posed in the preceding paragraph, i.e.…."**If** the complainant consented to Mr. Al-Rawi's removal of her clothes…", **then** "any flirtation on her part involved him taking

[49] *Al-Rawi* trial decision, page 11, lines 17-18

advantage of a vulnerable person". Judge Lenehan volunteered he made this point to emphasize that even if there had been consent to the removal of her clothes, and there was no evidence of that, Mr. Al-Rawi would still have a moral and ethical obligation not to participate in any sexual activity with her.

142. During the trial, defence counsel had specifically asked the complainant whether she remembered taking her pants off in the back seat and throwing them to the front. The complainant answered "no", and there was no evidence this had occurred.[50]

143. In his closing submissions defence counsel argued that the DNA on Mr. Al-Rawi's face was not as a result of an unlawful sexual assault. Rather he submitted that the complainant, "intoxicated, uninhibited, exercising questionable judgment, did something to Mr. Al-Rawi to get it on his face, maybe a kiss, maybe licking his face, something that deposited her DNA on his face".[51] Defence counsel further argued that the inference to be drawn from the circumstantial evidence concerning the removal of the complainant's clothes was that the complainant "drunkenly removed her own clothing and threw it at Mr. Al-Rawi".[52]

144. The Committee concludes it would have been preferable for Judge Lenehan to have framed the reference to flirtation in the context of these suggestions from defence counsel, so as to avoid this stand-alone and seemingly unnecessary reference. At the same time, the Committee recognizes this was an oral decision rendered in a busy court environment, where individual words were not intended to be parsed and analyzed separately and apart from the flow of the case. The phrase was used by the Judge in an oral decision where the parties had an awareness of all defence and Crown arguments, including the defence suggestion that the complainant had somehow removed her own clothes and thrown them at the accused. Given the context of the comment, the Committee finds that a reasonably informed person would not conclude that this comment could constitute judicial misconduct.

[50] Al-Rawi trial transcript, page 144, lines 9-11
[51] *Al-Rawi* trial transcript, page 285, lines 10-13
[52] *Al-Rawi* trial transcript, page 296, lines 5-7

Was bias exhibited in the overall approach to the decision and in the result?

145. Based on the foregoing the Committee has concluded that none of these three specific comments could be seen on their own, by a reasonably informed person, to constitute judicial misconduct.

146. The broader issue that requires examination with respect to the *Al-Rawi* decision is whether Judge Lenehan, through acquitting the accused with the circumstantial evidence that was before him, and in the context of all the comments he made in his decision, exhibited gender bias.

147. This is the overarching concern of many of the complainants who question how Judge Lenehan could find Mr. Al-Rawi not guilty given the circumstantial evidence that existed. They are concerned that the acquittal is a reflection of an underlying bias that caused the judge to conclude there was *no* evidence of lack of consent.

148. When reviewing the question of any underlying bias, it is important to remember that our judicial system is premised on a number of foundational principles, three of which have application to the matters at hand:

a. The presumption of innocence: Perhaps the single most important aspect of our criminal justice system is that an accused is presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. This presumption of innocence is guaranteed by the *Charter of Rights and Freedoms.*[53]

b. The onus on the Crown to prove an accused's guilt: The accused does not have to testify nor do anything to prove their innocence, but may challenge the evidence and argument presented by the Crown.

c. The standard of proof: The Crown must prove each element of the offence to the standard of proof beyond a reasonable doubt. It is not sufficient for a judge to think an accused is probably guilty. But, rather, the judge must, after reviewing all the evidence, be sure the accused committed the offence in order to make a finding of guilty. This is to limit the risk that innocent persons might be found guilty.[54]

[53] *The Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11,section 11(d)
[54] *R. v Lifchus*, [1997] 3 SCR 320, 1997 CanLII 319 (SCC), paras 13, 36 and 39

149. The reasonable and informed member of the public, through whose eyes the conduct of judges is viewed, is aware of these fundamental legal principles applied by judges in the course of their duties.

150. Sexual assault cases test the tensions between the above fundamental legal principles and emerging social norms. Some argue that what it takes to prove guilt beyond a reasonable doubt in sexual assault cases can be especially punitive to women given the private nature of sexual encounters where direct evidence is often nonexistent. The bar to convict must be high enough to protect the innocent, to align with the fundamental principles of the presumption of innocence. However, many who filed complaints suggest that a bar placed too high will discourage sexual assault victims from coming forward at all.

151. Many of the complaints specifically addressed Judge Lenehan's position on capacity to consent: if it is held that consent can be given despite severe intoxication, some asked, will this not lead to a greater likelihood that highly intoxicated women may be targeted for sexual assault? Again, this concern presents a tension vis-à-vis the requirement for the Crown to prove the elements of an offence beyond a reasonable doubt.

152. When these issues are played out in the context of emerging social norms regarding sexual assault, judges must be continuously attuned to the messages sent by their decisions. Their decisions must be and must be seen to be consistent with contemporary social values with respect to how complainants should be treated in sexual assault cases. At the same time, their decision must ensure adherence to the foundational principles underlying our justice system that provide fundamental rights to an accused.

153. It is clear from our reading of Judge Lenehan's decisions that were available to us, and in his meeting with us, that he takes very seriously, as he should, the presumption of innocence and the burden upon the Crown to prove every element of an offence beyond a reasonable doubt.

154. The Review Committee has had the benefit of hindsight applied through repeated reading and analysis of Judge Lenehan's decision. We recognize that the very busy and pressured everyday life of a Provincial Court Judge does not permit the kind of time and analysis of a decision that this Committee can now retrospectively apply.

155. We know that complicated legal issues arose through the course of the *Al-Rawi* trial. This was a sexual assault trial, where the law is complex, difficult and ever evolving to adapt to the broader norms and values of a responsive democratic society.

156. Although Judge Lenehan has substantial experience with sexual assault law from both his 21 year career as a Crown Attorney and his 7 years as a judge, he did not know what legal issues would arise in the *Al-Rawi* trial until they unfolded live before him. All the Judge knew at the commencement of the trial was the nature of the charge and that an Arabic interpreter was required for the accused. He did not know what legal or evidentiary issues might arise in the course of the trial. He had no pre-trial conferences or briefs to alert him to the complexities of the case, nor reference to case authorities from counsel throughout the trial. It was only with the testimony of the complainant that capacity to consent first became an apparent issue. In the absence of direct evidence of what happened during the crucial eleven minutes in the taxi, Judge Lenehan ultimately had only circumstantial evidence of what happened before and after this timeframe.

157. The *Al-Rawi* case was particularly complex. It involved the unclear issue of capacity to consent by an intoxicated complainant, no direct evidence on the critical issue of consent, a Crown Attorney's case built entirely on circumstantial evidence, no references to relevant case law nor legal briefs from counsel, an accused with limited language comprehension who required an interpreter for the evidentiary portion of the trial, and an oral decision delivered from notes and not a script. It was the perfect storm.

158. Amidst this storm Judge Lenehan wrestled with the issue of capacity to consent and concluded there was no direct evidence on consent. He was left to determine what all the circumstantial evidence meant. In his meeting with the Committee he volunteered that he simply did not know what happened in the taxi; he was unable to conclude that the Crown had proven each and every element of the offence beyond a reasonable doubt; and he used language in his oral decision that was plain and simple and directed toward the accused who had a limited understanding of English.

159. The Committee did not find evidence in the *Al-Rawi* case as a whole to rebut the presumption of impartiality on the part of Judge Lenehan. He accepted the evidence of

the complainant and gave a "reluctant acquittal"[55] where he admonished Mr. Al-Rawi for his actions.

160. It appears to the Committee, based on a holistic reading of the transcript of both the trial and the decision, and based on the interview with Judge Lenehan, that he was focused on the presumption of innocence and the requisite standard of proof. While he committed errors of law as found by the Court of Appeal, and could have more carefully reflected his reasons, the Committee could not find evidence to attribute the Judge's approach to bias.

161. As previously noted, errors of law, without more, do not constitute judicial misconduct.

162. The errors of law have been addressed by the Court of Appeal, and the choice of language is being addressed by Judge Lenehan in his resolve to write out all oral decisions in the future. Public confidence in the judiciary is met by both outcomes, and a disposition other than a dismissal of the complaints is neither warranted nor needed.

163. As a result, the Committee finds that a reasonably informed person would not conclude that Judge Lenehan's conduct in the *Al-Rawi* case could lead to a finding of judicial misconduct, and the Committee accordingly dismisses any complaints respecting this case.

Is there any overall pattern of bias in Judge Lenehan's decisions?

164. The Committee's conclusions in *Al-Rawi* are reinforced by its earlier analysis of Judge Lenehan's decisions in *R.* v *E.W.*, *R.* v *K.B.* and *R. v C.S.* where the Committee found no words or conduct indicative of impermissible reasoning or otherwise suggestive of gender bias. To the contrary, these decisions contained strong condemnation of the actions of the male accused. These prior decisions assist in dispelling any suggestion of an overall pattern of bias or stereotypical thinking, culminating in the *Al-Rawi* decision.

165. Although not the subject matter of any complaints, the Committee decided it would be prudent to examine some sexual assault decisions of Judge Lenehan subsequent to *Al-Rawi* to determine whether any form of judicial misconduct arising from gender bias could be detected in those decisions. Two decisions with relevance to the issues in *Al-Rawi*

[55] *Al-Rawi* appellate decision, para 133

were reviewed, one of which involved the issue of consent, and the second of which involved an allegation of sexual assault against a taxi driver:

a. *R.* v *McRae*, 2017 NSPC 28 (*McRae*); and

b. *R.* v *Milad* (oral decision of Judge Lenehan arising from the trial heard on August 21 and 22, 2017) (*Milad*).

166. *McRae* involved an allegation of sexual assault where the complainant was intoxicated and asleep for portions of the alleged assault. Judge Lenehan conducted the trial in October, 2016 and February 2017 (prior to his decision in *Al-Rawi*). He rendered his written decision on April 11, 2017 (some six weeks after his decision in *Al-Rawi*).

167. The written decision of Judge Lenehan contains a careful analysis of the required elements of sexual assault, the law on capacity to consent, and the defence of honest but mistaken belief in consent. Judge Lenehan found the complainant did not consent to sexual activity as she was asleep. The Judge then considered the defence of honest but mistaken belief and concluded that the accused failed to take reasonable steps to obtain consent.

168. The Review Committee notes that in contrast to the *Al-Rawi* decision, this was a detailed written decision from Judge Lenehan, with references to applicable case authority. It contained a thorough and comprehensive analysis of the law in the context of the evidence. There was nothing in this decision to indicate that Judge Lenehan engaged in gender bias in his reasoning or in his decision.

169. In *Milad*, a young woman was sexually assaulted by a taxi driver providing her a ride home from downtown Halifax. The only issue at trial was identification. The accused denied he was the taxi driver involved in the incident. The Crown advanced evidence to show that the taxi driver involved in the assault had provided a business card with the name of the accused on it to the complainant. The complainant was not asked to identify the accused in the court as the taxi driver who drove her home on the night in question. There was various other evidence introduced respecting taxi company records and GPS printouts of routes taken by Mr. Milad's taxi on the night in question.

170. Judge Lenehan analyzed the circumstantial evidence and determined he was not satisfied beyond a reasonable doubt of the identity of the accused. In making this finding he

determined that the evidence of the complainant was credible. But it did not meet the onus of proof on the question of identity. Judge Lenehan acquitted Mr. Milad. The Crown appealed this decision, which appeal was dismissed on January 29, 2018 by Justice Wood.

171. The Review Committee is satisfied on its review of the *Milad* decision that Judge Lenehan did not engage in any gender bias when considering the evidence of the complainant.

172. Both of these decisions clearly articulated the Judge's reasons for his disposition in a manner that reflected his understanding of the law. There are no words or phrases used that are indicative in any way of impermissible reasoning or gender bias.

173. The Committee has taken into account the totality of Judge Lenehan's decision in *Al-Rawi* and the various cases noted above that were rendered both before and after the *Al-Rawi* decision. There is nothing in the words of Judge Lenehan or his approach to any of these matters to cause the Review Committee any concern that he has or might engage in prohibited reasoning or that could rise to the level of judicial misconduct.

X. THE CHALLENGE OF DELIVERING CLEAR DECISIONS

174. As the Supreme Court of Canada stated in *R. v Sheppard*:

> The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.[56]

175. Judicial reasoning is based upon the careful evaluation of evidence and the logical construction of argument. It is not about appeasing public sentiment. At the same time, judges do not make pronouncements in a vacuum. They understand and appreciate that their words could have serious consequences, and thus are expected to be measured and thoughtful in what they say. Their decisions may be addressed to the accused in the first instance, but they also speak to the complainant, to the legal community, the judiciary, the media and to the wider public. And the public may, and does, respond to these judgments in turn. In this broader sense, decisions rendered become part of a public dialogue over the nature of justice in a democratic society.

[56] *R. v Sheppard*, [2002] 1 SCR 869, 2002 SCC 26 (CANLII), para 55

176. The use of ill-considered words by a judge in a decision can undermine the public's confidence in the judiciary just as much as the reality of proven bias.

177. Given the nature, diversity and expectations of the audience for the decisions rendered by the Provincial Court, it is important that decisions be delivered in a manner that is clearly understood by diverse audiences. In other words, when decisions are well written or clearly articulated orally, the audience understands how the court reached its decision. An informed audience reaffirms transparency and public confidence in the effectiveness of the legal system. Moreover, an informed audience is aware that cases are decided according to law and not to community views. Undoubtedly, a well-reasoned decision that is carefully and thoughtfully explained enhances public confidence in the justice system.

178. In a very busy court such as the Provincial Court, delivering a clear, concise and comprehensible decision is one of the most challenging aspects of being a judge. The concern about a backlog of cases can put pressure on judges to deliver their decisions in a timely and efficient manner. The Supreme Court of Canada recognized this in *Sheppard* when it stated:

> Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.[57]

179. Thus, Provincial Court judges are required to give concise, clear, thoughtful, and well-reasoned decisions within limited time restraints. This can be very challenging because it requires the judge to explain how legal concepts apply to the facts of the case in clear language and with sensitivity, particularly in sexual assault cases. Indeed, in the context of assessing credibility of witnesses, the Supreme Court of Canada addressed this challenge in *R. v G. (L)*, where the Court noted that "it is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after observing and listening to witnesses and to reconcile the various versions of events."[58] The Court also acknowledged that "a trial judge's language must be reviewed not only

[57] *Sheppard*, para 55
[58] *R. v G.(L),* 2006 207 C.C.C.(3d) 353, para 20

with care, but also in context. Most language is amenable to multiple interpretations and characterizations". [59]

180. In the *Al-Rawi* appellate decision Justice Saunders' observations are apposite. He wrote:

> Facing the legal obligation to carefully assess the evidence and then declare one's factual findings in strong, clear prose, is what trial judges in Canada do every day. Fulfilling this responsibility may produce language that seems insensitive to outside observers who know little about the case, or to those who are actually parties to the particular litigation. Maybe, in hindsight, a better choice of words, or a gentler turn of phrase, would have been preferred. But such is the reality of having to judge the conduct of others, whenever that conduct becomes the subject of criminal prosecution.[60]

181. The Review Committee agrees with this passage and notes the test for judicial misconduct requires much more than a failing to have a better choice of words or a gentler turn of phrase.

XI. CONCLUSION

182. This investigation required an examination of the difficult intersection of the rights of an accused facing serious criminal charges, the considerations of a vulnerable complainant, the complex, unclear and evolving law of capacity to consent to sexual activity, a Crown's case built entirely on circumstantial evidence, and the realities of the pressures of judging – all amidst the overarching need to maintain the public's confidence in the judiciary.

183. As expressed in *Therrien (Re)* by the Supreme Court of Canada, the judge is the pillar of the entire justice system and of the rights and freedoms which that system is designed to promote and protect. The Supreme Court quoted from a paper written by the Canadian Judicial Council, as follows:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary….[61]

[59] *R.v G.(L),* para 19
[60] *Al-Rawi,* appellate decision, para 130
[61] *Therrien (Re)*, 2001 SCC 35, paras 109-11

184. Public confidence is maintained by having an impartial, independent judiciary that is nonetheless accountable to the public through processes that permit a review of a judge's actions to determine if the high threshold for judicial misconduct has been met. The test will only be met where in the eyes of a reasonable, dispassionate and informed public the judge's comments or actions could be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that they have undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore that confidence. It is a high test to meet.

185. While the Court of Appeal in its *Al-Rawi* decision has concluded that some of the concerns identified by the complainants constitute errors of law, it would be dangerous and wrong to equate an error of law, without more, with judicial misconduct. Similarly, while this Review Committee has concluded that the choice of certain language by Judge Lenehan in *Al-Rawi* and in the breast-feeding incident may have benefited from more careful and contextual reflection, it would be dangerous and wrong to equate this with judicial misconduct.

186. The threshold for a finding of judicial misconduct is necessarily high to protect the independence of the judiciary that is the cornerstone of the rule of law.

187. Having reviewed the trial transcript and decision in *Al-Rawi*, as well as decisions rendered by Judge Lenehan both before and after this decision, and the incident involving a breast-feeding mother in his courtroom, this Review Committee finds no evidence of impermissible reasoning or bias. The test for judicial misconduct has not been met. No outcome other than dismissal of the complaints is warranted to maintain the confidence of the reasonable, dispassionate and informed public, who are fully appraised of the fundamental legal principles at play in the criminal justice system. Accordingly, the Review Committee dismisses all complaints against Judge Lenehan.

Dated at Halifax, Nova Scotia this 29th day of March, 2018

Judge Frank P. Hoskins, a Judge of the Provincial and Family Courts of Nova Scotia

R. Daren Baxter, Q.C.

Katherine Fierlbeck, Ph.D.,
Public Representative