SCC Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

JOEY TOUTSAINT

Applicant
(Appellant)

- and -

INVESTIGATION COMMITTEE OF THE SASKATCHEWAN REGISTERED NURSES ASSOCIATION

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT ON BEHALF OF THE APPLICANT
Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. People in prison are uniquely vulnerable to the power of the state[1], including when they receive health care. Incarcerated people have greater medical needs than the general population.[2] Further, people in federal prisons are excluded from the *Canada Health Act*[3] and do not receive insurance coverage through Health Canada or provincial health care systems. Instead, their health care is provided by Correctional Service Canada ("CSC"), the same agency that incarcerates, disciplines, and exercises physical force against them. Health care staff in prisons are employed by CSC, which can significantly compromise clinical independence and professional autonomy.[4] People in prison face a unique and serious risk of receiving unethical health care.

2. Joey Toutsaint is an Indigenous person with mental disabilities incarcerated in a federal prison. In January 2020, Mr. Toutsaint filed a complaint with the Saskatchewan Registered Nurses' Association ("SRNA") against a registered nurse employed by CSC. The nurse had initiated a disciplinary charge against Mr. Toutsaint, which could have resulted in up to thirty days of solitary confinement as a penalty. Mr. Toutsaint argued that the nurse had breached her ethical obligations by initiating and participating in his discipline. As of the date of his complaint, Mr. Toutsaint had spent a total of 2,180 days (nearly six years) in solitary confinement.

3. The SRNA's Investigation Committee dismissed Mr. Toutsaint's complaint with a conclusory report that failed to engage with his core concerns, including significant legal questions regarding the dual loyalties of health care professionals in the prison context and the role of international law in health ethics.

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[1] See ex: *Hamm v Canada (Attorney General)*, 2019 ABCA 389 at para. 26; *Drennan v. Canada (Attorney General)*, 2008 FC 10 at para. 41.
[2] Adelina Iftene and Allan Manson, "Recent crime legislation and the challenge for prison health care" (2013) 185(10) CMAJ 886.
[3] RSC 1985, c C-6, s. 2, "insured person".
[4] Office of the Correctional Investigator, *2017-2018 Annual Report* at 18; *Smith v John Doe*, 2020 ABQB 59 at para. 15.

4. This appeal arises from a judicial review of the Investigation Committee's decision. It raises issues of public and national importance regarding the ability of people in prison to hold health care professionals accountable for misconduct. But this appeal also raises legal questions of national importance that transcend the prison context and impact all areas of administrative law. These questions have divided courts across the country and are as follows.

5. First, is the mere existence of reasons sufficient to satisfy the duty of procedural fairness? The Court of Appeal held that, because Mr. Toutsaint was entitled only to procedural fairness review, they could not consider the sufficiency of the reasons given by the SRNA. The result of this approach is that reasons of a professional regulatory body that patently fail to address the subject of a complaint can be immune from review. Such an approach is out of step with *Vavilov*'s focus on a strengthened culture of justification and on the importance of responsive reasons in promoting the legitimacy of public institutions. Mr. Toutsaint submits that, following *Vavilov*, the mere *existence* of reasons should not suffice for procedural fairness purposes. Rather, reasons must demonstrate some consideration of the core concerns raised by the parties to meet the duty of fairness.

6. Second, what standing does a complainant have to seek judicial review when their complaint is dismissed by a professional body? While appellate courts in some provinces have held that standing should be limited to questions of procedural fairness, others have concluded that complainants have standing to challenge the merits of these decisions. This issue is of public importance because standing is a critical mechanism to ensure that professional regulators protect the public interest and are held accountable for their decisions. Mr. Toutsaint submits that, if complainants only have standing to challenge these decisions on procedural grounds, applications for public interest standing to challenge the merits of these decisions must be taken seriously.

B. Summary of Facts

7. Mr. Toutsaint is an Indigenous person serving an indeterminate sentence in federal prison. He has been diagnosed with Post-Traumatic Stress Disorder and Major Depressive Disorder and has spent prolonged periods in solitary confinement. He exhibits many of the recognized symptoms of long-term isolation, including frequent and serious self-harm and suicide attempts.

His symptoms also include many of those listed by the Ontario Court of Appeal in *Brazeau*, where the court upheld a *Charter* damages award for victims of unconstitutional solitary confinement:

> anxiety, withdrawal, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate, hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour.[5]

8. On March 11, 2019, when the incident which led to the complaint occurred, Mr. Toutsaint had spent 152 continuous days in some form of solitary confinement. He was self-harming regularly, cutting himself with razor blades, punching himself in the face, banging his head against the floor and walls, and tying ligatures around his neck.

9. On the date of the incident, Ms. Maja Grujic, a nurse employed by CSC, delivered Mr. Toutsaint crushed medication through his food slot. Mr. Toutsaint remained locked in his cell and Ms. Grujic remained outside of the cell, escorted by a correctional officer. Concerned about the dosage, Mr. Toutsaint asked to see the empty package of medication. Ms. Grujic refused. Mr. Toutsaint became emotionally distressed and swore at Ms. Grujic, threatening self-harm. Following the incident, he became worried that the Emergency Response Team (correctional officers in riot gear) would come to his cell and assault him. In a state of distress, he threatened to cut his throat with a razor blade if they did.

10. After this incident, Ms. Grujic filed a Statement/Observation Report, a document intended to record the incident and alert the institution's correctional manager to the issue.

11. Ms. Grujic then chose to complete an Inmate Offence Report and Notification of Charge. This document serves the sole purpose of commencing disciplinary action under the *Corrections and Conditional Release Act*.[6] This is not a document used to record incidents, but is rather the charging document commencing proceedings against a person in prison.[7]

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[5] *Brazeau v. Canada (Attorney General),* 2020 ONCA 184 at para. 16.
[6] SC 1992, c 20 [*CCRA*], ss. 38-44.
[7] See s. 42 *CCRA*, s. 25 of *Corrections and Conditional Release Regulations*, SOR/92-620.

12. When Ms. Grujic initiated the charge against Mr. Toutsaint, serious disciplinary charges could result in up to thirty days of segregation as a penalty.[8] The *United Nations Standard Minimum Rules for the Treatment of Prisoners* ("*Mandela Rules*") establish that solitary confinement in excess of fifteen days is torture or cruel treatment and is prohibited.[9] The *Mandela Rules* also prohibit solitary confinement for any length of time for prisoners with mental disabilities that would be exacerbated by its use.[10] In 2019, the BC and Ontario Courts of Appeal ruled that laws authorizing prolonged solitary confinement violated the *Charter*.[11]

13. At the time when Ms. Grujic initiated the charge, she could not have known whether it would be classified as minor or serious, or whether solitary confinement would be imposed as punishment. Ultimately, Mr. Toutsaint was found guilty of being disrespectful towards a staff member in a manner that could undermine their authority[12] and was fined.[13]

14. Mr. Toutsaint filed a 10-page complaint with the SRNA against Ms. Grujic. In his complaint, he argued that, by initiating disciplinary proceedings, Ms. Grujic had: (1) acted in a conflict of interest; (2) participated in proceedings which could result in cruel treatment; (3) failed to act in his best interests as her patient; and (4) unethically disclosed confidential information about a therapeutic interaction for the purpose of discipline. Mr. Toutsaint noted that the *Mandela Rules*, which inform the interpretation of the *Code of Ethics for Registered Nurses*, prohibit health care personnel from having "any role in the imposition of disciplinary sanctions or other restrictive measures"[14] and prohibit health care personnel from engaging actively or passively in acts that may constitute torture or cruel treatment, including prolonged solitary confinement.[15] The ethical obligation of health care personnel is to the patient, despite any employment obligations to CSC.

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[8] *CCRA*, s. 44(f) [Previous version in force between Jun 21, 2019 and Nov 29, 2019].
[9] United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, General Assembly Resolution 70/175, annex, adopted 17 December 2015 [*Mandela Rules*], Rule 43.
[10] *Mandela Rules*, Rule 45.
[11] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Association v. Canada,* 2019 ONCA 243.
[12] See *CCRA*, s. 40(f).
[13] See *CCRA*, s. 44(1)(d).
[14] *Mandela Rules*, Rule 46.1.
[15] *Mandela Rules*, Rules 32(1)(d), 43.

15. The SRNA's Investigation Committee dismissed Mr. Toutsaint's complaint. The committee provided brief, conclusory reasons for its decision that did not engage with any of the issues at the core of the complaint. The relevant portion of their reasons simply states:

> There were conflicting details between the complainant and the member regarding the incident that occurred. Institutional policies were followed, and attempts were made by the member to de-escalate the situation. No evidence was found to indicate that there was any self-harm by the complainant related to this incident.
>
> This matter does not meet the threshold for further investigation. The evidence does not support professional misconduct or professional incompetence. Based on the evidence, the SRNA will not be proceeding with a formal investigation.[16]

C. Decisions of the Courts Below

16. Mr. Toutsaint filed an application for judicial review of the Investigation Committee's decision, arguing that none of the central issues raised in his complaint had been addressed. He submitted that this was a defect in procedural fairness, as reasons displayed no consideration of the key issues. In the alternative, if this question was deemed to involve substantive review, he applied for public interest standing to challenge the merits of the decision.

17. This application was dismissed by the Saskatchewan Court of Queen's Bench.[17] The Chambers Judge held that the Investigation Committee had not breached its duty of procedural fairness, noting that their decision had "little to no effect upon" Mr. Toutsaint.[18] The Chambers Judge further determined that "Mr. Toutsaint's concern is one of prisoners' rights or human rights", and that he should therefore not be granted public interest standing to challenge the merits of the decision.[19] In any event, the decision to dismiss the complaint was correct.[20]

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[16] *Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses' Association*, 2023 SKCA 11 [*Toutsaint SKCA*] at para. 82.
[17] *Toutsaint v Investigation Committee of the Saskatchewan Registered Nurses Association*, 2021 SKQB 315 [*Toutsaint SKQB*].
[18] *Toutsaint SKQB* at para. 20.
[19] *Toutsaint SKQB* at paras. 24-26.
[20] *Toutsaint SKQB* at paras. 27-31.

18. Mr. Toutsaint appealed this decision. A majority of the Court of Appeal dismissed the appeal (Tholl and Leurer J.J.A.), with Jackson J.A. dissenting. The majority noted that the law on complainant standing to challenge the merits of the decisions of professional bodies was mixed. They did not consider whether Mr. Toutsaint should be granted public interest standing to do so.[21]

19. The majority held that Mr. Toutsaint, as a complainant to a professional body, was owed a duty of procedural fairness at the investigation stage.[22] They agreed with the Chambers Judge that the decision had essentially no impact on Mr. Toutsaint and determined that the duty of procedural fairness fell "at the low end of the spectrum."[23] They held that this duty had not been breached.[24] The majority also noted that this Court's decision in *Newfoundland Nurses*'[25] established that "a failure to give adequate reasons is generally not engaged in an assessment of procedural fairness."[26] However, they also remarked that *Newfoundland Nurses'* was decided prior to *Vavilov* and that it was "an open question as to whether *Vavilov* and its progeny have moved the examination of the sufficiency of reasons further away from the concept of procedural fairness."[27]

20. In her dissent, Jackson J.A. held that the Investigation Committee had failed to accord Mr. Toutsaint procedural fairness.[28] She highlighted the vulnerability of people in prison when receiving health care.[29] After reviewing the reasons of the Investigation Committee, Jackson J.A. concluded: "Even at the bare minimum, the Committee was required to consider the nature of the Complaint and to determine whether further action was necessary in relation to each important aspect of it. In my respectful view, the Committee did not fulfill these basic tasks."[30]

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[21] *Toutsaint SKCA* at paras. 18, 23, 25.
[22] *Toutsaint SKCA* at paras. 24-25.
[23] *Toutsaint SKCA* at paras. 33, 38.
[24] *Toutsaint SKCA* at para. 55.
[25] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62.
[26] *Toutsaint SKCA* at para. 46.
[27] *Toutsaint SKCA* at para. 47.
[28] *Toutsaint SKCA* at para. 59.
[29] *Toutsaint SKCA* at para. 62.
[30] *Toutsaint SKCA* at para. 89.

PART II: QUESTIONS IN ISSUE

21. The prospective appeal raises the following questions of public importance:

a. Post-*Vavilov*, is the mere provision of reasons, whatever their form, sufficient to satisfy procedural fairness?

b. What standing does a complainant before a professional body have to seek judicial review when their complaint is dismissed?

22. More broadly, the proposed appeal raises issues of public importance because it concerns the ability of people in prison to access ethical health care. As noted above, people in prison face a unique and significant risk of receiving unethical medical treatment. They cannot choose their health care providers[31] and have no avenue other than professional complaints to address unethical conduct. If the reasoning of the courts below is permitted to stand, even this sole avenue of recourse would be illusory: professional bodies could issue terse reasons that do not engage with the issues raised, and judicial review would be limited to determining whether or not reasons were given. Further, health care personnel in prisons experience dual loyalties, given that they are employed by CSC.[32] It is therefore critical to ensure that complaints by people in prison about health care are adequately addressed. The ethical treatment of incarcerated people, including by health care practitioners, impacts the administration of justice and public perceptions of the criminal legal system, and is of public importance.

PART III: STATEMENT OF ARGUMENT

A. *The Duty of Procedural Fairness Includes Responsive Reasons*

23. This appeal raises a pressing question in administrative law: is the mere provision of reasons, whatever their form, sufficient to satisfy procedural fairness? In other words, can terse reasons that do not address the essence of a complaint nonetheless be deemed fair?

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[31] See *Smith v John Doe*, 2020 ABQB 59 at para. 15.
[32] Office of the Correctional Investigator, *2017-2018 Annual Report* at 18.

24. This question is put squarely to the Court in Mr. Toutsaint's case because the majority of the Court of Appeal ruled that it would *only* consider whether the decision under review was procedurally fair, and not whether it was substantively reasonable. The majority took this position because it is unclear whether complainants to professional bodies have standing to challenge the merits of these decisions.[33] The majority also took the view that Mr. Toutsaint was not actually seeking to challenge the substance of the underlying decision.[34] However, at the Court of Appeal, Mr. Toutsaint had in fact argued that the failure of the Investigation Committee to engage with the key issues raised by his complaint was a procedural defect, but that if the court disagreed, it should grant him public interest standing to challenge this failure on substantive grounds.

25. Mr. Toutsaint submits that *Vavilov* aimed to reinforce "a culture of justification"[35] in administrative decision-making and emphasized the importance of cogent reasons that respond to key issues raised by the parties.[36] It is his position that *Vavilov*'s emphasis on responsive reasons has implications beyond substantive review. To meet the duty of procedural fairness, reasons must respond to the central issues before the decision-maker.

26. This Court has long recognized the critical role that reasons play in promoting fair and accountable decision-making. In *Baker*, this Court emphasized the significance of reasons, writing:

> Reasons … foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.[37]

27. *Baker* established that the failure to provide reasons may constitute a breach of the duty of procedural fairness.[38] However, the line between procedural fairness review of reasons (attracting a correctness standard of review) and substantive review (often attracting a reasonableness

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[33] *Toutsaint SKCA* at para. 23.
[34] *Toutsaint SKCA* at para. 21.
[35] *Vavilov* at para. 2.
[36] *Vavilov* at paras. 127-128.
[37] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 39 [Citations omitted].
[38] *Baker* at para. 43.

standard of review) was blurry. Lawyers could therefore undermine deference by framing issues with reasons as procedural rather than substantive and seeking correctness review.[39]

28. In *Newfoundland Nurses*', this Court revisited how courts should examine reasons provided by an administrative actor. *Newfoundland Nurses*' drew a bright line between procedural review for failure to provide reasons and substantive review of the reasonableness of a decision. The Court explained that the duty of fairness simply requires the *existence* of reasons, a question that is reviewable on the correctness standard: "Where there are no reasons in circumstances where they are required, there is nothing to review. But where … there are reasons, there is no such breach."[40] In contrast, where the substantive reasonableness of a decision is challenged, the Court can look at the *quality* of the reasons provided and must assess whether "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes."[41] The Court found that inadequate reasons should be addressed as a substantive defect, rather than a procedural one. *Newfoundland Nurses*' also directed courts to show "a respectful attention to the reasons offered or which could be offered in support of a decision"[42] in conducting substantive review.

29. In *Vavilov*, this Court reconsidered the framework for judicial review of administrative action, establishing a presumption of reasonableness in all cases when conducting substantive review.[43] The importance of cogent, responsive reasons is a central theme in *Vavilov*. The Court explained the critical role that reasons play in protecting the legitimacy of public institutions, writing: "Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power."[44]

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[39] Paul Daly, "Process and Substance: What Happens when the Decision-Maker Doesn't Listen?" (October 26, 2014) *CanLii Connects*. Online: https://canliiconnects.org/en/commentaries/30398.
[40] *Newfoundland Nurses* at para. 22.
[41] *Newfoundland Nurses* at para. 16.
[42] *Newfoundland Nurses* at para. 12 [Emphasis added].
[43] *Vavilov* at para. 10.
[44] *Vavilov* at para. 79 [Citations omitted].

30. The Court emphasized that robust reasons are important both from the perspective of substantive reasonableness *and* procedural fairness. It explained that reasons are the "primary mechanism by which administrative decision makers show that their decisions are reasonable", and as a result, the provision of reasons "may have implications for [a decision's] legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable."[45]

31. *Vavilov* overturned the direction in *Newfoundland Nurses'* that courts should look to supplement deficient reasons with reasons that a decision-maker *could have* provided.[46] It also stressed the importance of meaningful engagement by administrative actors with the key questions raised by the parties, a central issue in Mr. Toutsaint's case. Significantly, the Court underscored that responsive reasons are not only important from the perspective of substantive review, but also lie at the heart of the duty of procedural fairness:

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties…a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.[47]

32. Overall, *Vavilov* has significantly changed the lens through which administrative reasons are reviewed. This seminal decision "affirm[s] the need to develop and strengthen a culture of justification in administrative decision making."[48] Whereas *Newfoundland Nurses*' made reasons secondary to the outcome, to be supplemented as long as the outcome was within a reasonable range, *Vavilov* sees reasons as the central avenue for establishing the legitimacy of a decision.

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[45] *Vavilov* at para. 79.
[46] *Vavilov* at para. 96.
[47] *Vavilov* at para 127.
[48] *Vavilov* at para. 2.

33. Mr. Toutsaint submits that the way courts review reasons from a procedural fairness perspective is a question of public and national importance. Post-*Vavilov*, is it still the case that the mere "existence" of any reasons at all is sufficient to discharge the duty of procedural fairness?

34. Given the majority of the Court of Appeal's position that only procedural fairness was at issue in Mr. Toutsaint's case, it held that *Newfoundland Nurses*' precluded consideration of the adequacy of the reasons offered in the Written Report of the Investigation Committee:

> It is important to note at the outset that this portion of the analysis does not involve an examination of the decision of the investigation committee based on sufficiency of reasons principles. Such an assessment for sufficiency would involve a reasonableness review of the substantive decision, which is not being done here. As noted in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*N.L.N.U.*], while the reasons may have some relation to procedural fairness, a failure to give adequate reasons is generally not engaged in an assessment of procedural fairness.[49]

35. The majority queried whether *Newfoundland Nurses'* was still good law on this point in light of *Vavilov*, but left the question for another day:

> That said, *N.L.N.U.* predated *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1. It is an open question as to whether *Vavilov* and its progeny have moved the examination of the sufficiency of reasons further away from the concept of procedural fairness, and it is possible that all aspects of that analysis are now subsumed in a reasonableness review: *Danychuk v University of Regina*, 2022 SKCA 146 at para 48, and *Manitoba Government and General Employees' Union v Manitoba (Finance)*, 2021 MBCA 36 at paras 71–77, [2022] 2 WWR 100.[50]

36. Mr. Toutsaint submits that *Vavilov* requires procedural protections that *Newfoundland Nurses*' did not. Following *Vavilov*, the duty of procedural fairness is not satisfied by the mere existence of reasons, even where those reasons ignore or fail to engage with the key issues at stake. The extent of procedural protection, articulated in *Newfoundland Nurses*' as the "existence" of reasons, should require the existence of reasons *on the central points* before the decision-maker. With respect to procedural protections, the culture of justification which *Vavilov* seeks to develop demands more than mere words on the page. The duty of procedural fairness is breached where

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[49] *Toutsaint SKCA* at para. 46.
[50] *Toutsaint SKCA* at para. 47.

the reasons fail to consider and respond to the central issues raised by the parties. Indeed, and as highlighted in *Vavilov*, the right to responsive reasons is intimately tied to the right to be heard — a key tenet of procedural fairness.

37. The approach taken in *Newfoundland Nurses'* has raised similar questions before. To resolve them, some courts have already held that a failure to address important arguments raised is a procedural defect, effectively holding that the "existence of reasons" means the existence of reasons on the central issues before the decision-maker.[51] Others, like Chambers Judge and the majority of the Court of Appeal in this case, have found that the existence of *any* reasons, even reasons that do not address the central issues raised, satisfies procedural fairness. Mr. Toutsaint submits that the latter approach cannot stand in light of *Vavilov*.

38. The responsiveness of reasons is a critical issue in Mr. Toutsaint's case. The Court of Appeal's majority and dissent diverged in their assessment of whether the Investigation Committee had properly responded to Mr. Toutsaint's complaint, and thus whether it had fulfilled its duty of procedural fairness. The majority was satisfied with the Investigation Committee's cursory reasons and took the position that the Committee did not even need to *list* the four issues raised by Mr. Toutsaint in his complaint or "provide some type of substantive analysis" of them.[52] By contrast, the dissent found that, by failing to engage in the "basic tasks" of considering the nature of the complaint and responding to the important aspects of it, the Investigation Committee had denied Mr. Toutsaint procedural fairness.[53] As Mr. Toutsaint's case demonstrates, guidance from this Court is needed on how to assess review reasons on procedural fairness grounds.

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[51] *Turner v. Canada (Attorney General)*, 2012 FCA 159 at paras. 38-45, *Sanderson v. Alberta (Criminal Injuries Review Board)*, 2010 ABCA 167 at paras. 12-13; *Canada (Public Safety and Emergency Preparedness) v. Ramirez*, 2013 FC 387 at para. 22; *Shah v. Canada (Citizenship and Immigration)*, 2015 FC 487 at paras. 26-29; and *Korniyenko v Edmonton (Police Service)*, 2021 ABQB 1022 at paras. 89-98.
[52] *Toutsaint SKCA* at para. 54.
[53] *Toutsaint SKCA* at para. 89.

B. The Law of Standing Should Not Shield Regulators from Accountability

39. This appeal raises a second question of public and national importance: what standing do complainants have to seek judicial review of decisions made by professional regulators?

i. Complainant Standing Promotes Accountability

40. The question of complainant standing has divided courts across the country. In *Cameron*[54], the Saskatchewan Court of Appeal adopted a line of cases from the Alberta Court of Appeal, from *Friends of the Old Man River Society*[55], through to *Mitten*[56], *Warman*[57], *Tran*[58], and *Makis*[59]. The Saskatchewan Court of Appeal limited complainant standing on judicial review of decisions made by professional regulators to questions of procedural fairness. This limitation is based on an analysis of the participatory rights granted to the complainant by the governing legislation. An application for leave to appeal of *Cameron* has been filed with this Court, file no. 40535.

41. However, as the majority acknowledged in Mr. Toutsaint's appeal,[60] courts of appeal in other provinces have not followed this approach, including the Nova Scotia Court of Appeal in *Patient X*[61], the Ontario Court of Appeal in *Wall*[62], and the Newfoundland Court of Appeal in *Aylward*[63]. These courts have either held or presumed that complainants have standing to review both the merits and procedure of such decisions.

42. Mr. Toutsaint submits that the central obligation of self-regulated professional bodies is the protection of the public. The importance of this obligation requires the existence of an avenue

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[54] *Cameron v The Association of Professional Engineers and Geoscientists of Saskatchewan*, 2022 SKCA 118.
[55] *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107.
[56] *Mitten v College of Alberta Psychologists*, 2010 ABCA 159.
[57] *Warman v Law Society of Alberta*, 2015 ABCA 368.
[58] *Tran v College of Physicians and Surgeons of Alberta*, 2018 ABCA 95.
[59] *Makis v College of Physicians and Surgeons of Alberta (Complaint Review Committee)*, 2019 ABCA 341.
[60] *Toutsaint SKCA* at para. 23.
[61] *Patient X v College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 41.
[62] *Wall v Ontario (Office of the Independent Police Review Director)*, 2014 ONCA 884.
[63] *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68.

to challenge complaint dismissals on their merits, whether by granting complainants standing for substantive review, or through a robust approach to public interest standing in appropriate cases.

43. The standing of complainants to challenge the merits of complaint dismissals is an issue of significant public importance because standing is a critical mechanism to ensure that regulators are held accountable. Professional regulators play a central role in protecting the public and have an obligation to act in the public interest. As this Court highlighted in *Pharmascience*:

> This court has on many occasions noted the crucial role that professional orders play in protecting the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them…The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public.[64]

44. This Court has recognized the important role that regulators play in protecting the public. In *Pharmascience*, it extended the jurisdiction of professional regulators to make the orders and use the tools necessary to protect the public from unethical professional practice, even where such powers are not explicitly granted in governing legislation.

45. The corollary of this approach is that, when a regulator fails to fulfill its statutory mandate in settings like prisons where vulnerable people are at risk, there must be some mechanism to review its failure to regulate. The importance of its role in protecting the public requires no less.

46. Limiting complainant standing to questions of procedural fairness prevents inappropriate complaint dismissals from being reviewed by the courts. Shielding such decisions from substantive review is dangerous in cases, like Mr. Toutsaint's, where a regulator's review of a complaint is the sole avenue by which a vulnerable person can seek review of a regulated professional's conduct. Courts must have some ability to intervene in cases where vulnerable people have a limited choice of professional services, including health care in provincial prisons, federal prisons, and

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[64] *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para. 36.

psychiatric facilities. Ensuring complainant standing in such cases aligns with the principle of legality, requiring that state action conform with the law and that practical and effective ways exist to challenge state action which does not.[65]

47. *The Registered Nurses Act, 1988*[66] guarantees that an ethical code will be applied to the nursing profession and enforced by a self-governing professional regulator. The authority to self-regulate is granted by statute, but the legitimacy of such schemes depends on regulators' willingness and ability to protect the public through the enforcement of ethical codes. The need to preserve the legitimacy and integrity of professional orders makes the ability of complainants to challenge the substance of these decisions a question of public importance.

48. *The Registered Nurses Act, 1988* grants a monopoly to members of the SRNA over nursing services in Saskatchewan. CSC maintains a monopoly over the provision of health care services in federal penitentiaries. The free market provides no oversight. People in prison cannot select a health care provider or regulator with a greater focus on the ethics of prison health care. As the SRNA is independent of government, cabinet and the legislature can provide limited oversight of their decision-making. Where regulators refuse to regulate, as the SRNA has here by refusing to address critical questions of prison health care ethics, the public is not protected. Only the courts can provide oversight to ensure that the regulator's mandate is respected.

49. This case highlights the difficulty in limiting complainant standing to procedural questions. On one hand, there is a policy interest in limiting the complainant's role on judicial review so that complainants do not overwhelm the relationship between member and regulator, pursuing professionals into the courts where the legislature intended for self-regulation. On the other hand, where the regulator has failed to fulfill its statutory duty and placed vulnerable people at risk, this limitation of standing raises serious concerns and prevents meaningful oversight.

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[65] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 [*Council of Canadians with Disabilities*] at para. 34.
[66] SS 1988-89, c R-12.2.

ii. Public Interest Standing Plays a Role

50. If complainant standing to challenge decisions made by professional regulators is limited to issues of procedural fairness, courts must take a robust approach to applications for public interest standing for substantive review. It may be appropriate to deny public interest standing where a complaint has only personal, rather than systemic, ramifications. However, where a complaint raises systemic issues that impact marginalized people, public interest standing serves an important role in promoting the accountability of professional regulators.

51. This Court recently reaffirmed the importance of public interest standing in *Council of Canadians with Disabilities*, writing: "Public interest standing … offers one route by which courts can promote access to justice and simultaneously ensure that judicial resources are put to good use."[67] This decision confirms that courts must consider the following factors when deciding whether to grant public interest standing: (i) whether the case raises a serious justiciable issue; (ii) whether the party bringing the action has a genuine interest in the matter; and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court.[68]

52. In this case, the regulator did not engage with the core issues raised by Mr. Toutsaint's complaint, which are the central issues of health care ethics in the prison environment. The complaint raises serious systemic issues around dual loyalties, conflicts of interest, and the role of international law in health care ethics in prisons, issues which affect all individuals incarcerated in federal institutions. By refusing to address these questions, the Investigation Committee effectively refused to regulate the core issues of health care ethics in prisons. These questions transcend Mr. Toutsaint's case and have ramifications for many vulnerable people.

53. In her dissent at the Court of Appeal, Justice Jackson noted the public importance of Mr. Toutsaint's case, writing: "It is axiomatic that prisoners cannot choose their medical caregivers or the timing of any intervention. Prisoners are vulnerable to a system that may choose to treat them or not or to interact with them with compassion or contempt, with little recourse in either instance.

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[67] *Council of Canadians with Disabilities* at para. 2.
[68] *Council of Canadians with Disabilities* at paras. 28-32.

They cannot seek care elsewhere."[69] The majority acknowledged that Mr. Toutsaint's complaint raised the question of how "nurses interact with vulnerable persons who often have little to no choice with regard to medical services"[70], though they minimized the significance of this issue.

54. Both the Court of Queen's Bench and the majority of the Court of Appeal failed to give Mr. Toutsaint's application for public interest standing sufficient consideration. In declining to grant public interest standing, the Court of Queen's Bench failed to recognize the importance of the issues raised by Mr. Toutsaint's complaint, characterizing Mr. Toutsaint's own interest as "minimal" and stating that "[t]he issue was a personal one, not one which raised any serious questions of public interest."[71] The Court did not appreciate that the complaint concerned systemic and critical questions regarding health care ethics in the prison environment.

55. At the Court of Appeal, the majority ruled that Mr. Toutsaint's argument could be disposed of on procedural fairness grounds alone. His alternative argument and ground of appeal, that public interest standing should have been granted to allow him to address the decision's central flaws through substantive review, was not addressed.

56. If a complainant's standing is limited to questions of procedural fairness, there must be means of holding self-regulated professional bodies accountable if they fail to meet their mandate. Public interest standing provides a mechanism to ensure that oversight is available in appropriate cases.

PART IV: SUBMISSIONS ON COSTS

57. Mr. Toutsaint does not seek costs on this application and asks that no costs be awarded against him. Mr. Toutsaint is a long-term federal prisoner with very limited financial means. This litigation is undertaken in the public interest on Mr. Toutsaint's behalf by two non-profit organizations: Prisoners' Legal Services and the John Howard Society of Saskatchewan.

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[69] *Toutsaint SKCA* at para. 62.
[70] *Toutsaint SKCA* at para. 33.
[71] *Toutsaint SKQB* at para. 25.

PART V: ORDER REQUESTED

58. Mr. Toutsaint requests that his application for leave to appeal be granted, and that no costs be awarded against him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Burnaby, British Columbia, this 19th day of March 2023.

Jessica Magonet
Counsel for the Applicant, Joey Toutsaint

Pierre Hawkins
Counsel for the Applicant, Joey Toutsaint