Docket: A-269-18

FEDERAL COURT OF APPEAL

BETWEEN: THE HONOURABLE MICHEL GIROUARD

Applicant
(Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

and

THE CANADIAN JUDICIAL COUNCIL

Moving Party
(Appellant)

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party
(Respondent)

APPELLANT'S MEMORANDUM OF FACT AND LAW

November 23, 2018

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Overview

1. The Canadian Judicial Council (the "Council") exercises powers with regard to judicial ethics, including powers of inquiry into the conduct of federally appointed judges. In doing so, is the Council a "*federal board, commission or other tribunal*" within the meaning of the *Federal Courts Act*? That is the core issue of this appeal.

***Federal Courts Act*, s. 2**

2. The Federal Court has no jurisdiction over judicial ethics, since Chief Justices and Associate Chief Justices who sit on the Council ("senior judges with administrative duties"):

    a. exercise powers that are of constitutional origin and, therefore, are not set out in a "federal statute";

***Windsor (City) v. Canadian Transit Co.*, [2016] 2 S.C.R. 617, at para. 61**

    b. exercise powers that are judicial in nature and are inherent to their functions.

***Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 58**

3. For those two reasons alone, the Federal Court has no jurisdiction over the Council when it acts in matters of judicial ethics.

4. When it created the Council, Parliament established a learned assembly of Chief Justices and Associate Chief Justices ("senior judges with administrative duties").

5. Senior judges with administrative duties individually represent all Canadian superior courts on the Council. As such, they oversee Canada's judicial branch by ensuring, among other things, uniformity in the administration of justice throughout the country.

6. Administration of justice includes judicial professional discipline as well as judicial ethics. In such matters, the Council's mandate is to recommend to Parliament whether or not a judge should be removed from office on the basis of the outcome of a judicial inquiry.

7. The judicial disciplinary process conducted by senior judges with administrative duties is meant to be an effective means of ensuring that, should Parliament need to remove a judge from office, such a removal is

based on constitutionally valid grounds, namely grounds related to the conduct of the judge subject to inquiry.

***Constitution Act, 1867*, s. 99**

8. In order to exercise their powers and jurisdiction with regard to judicial ethics, senior judges with administrative duties who sit on the Council and its inquiry committees must benefit from a) judicial immunity, and b) judicial independence, which are attributes of a superior court.

9. This is the context in which the Council and its inquiry committees are "*deemed to be a superior court*", as provided by the deeming provision at subsection 63(4) of the *Judges Act*, as well as the context in which this provision must be interpreted to give it full effect in light of the constitutional role played by the Council.

***Judges Act*, R.S.C., 1985, c. J-1, s. 63(4)**

I. Concise statement of facts

10. The Honourable Justice Michel Girouard (the "Respondent") was appointed to the Superior Court of Quebec in 2010.

11. In September 2010, a few weeks before his appointment to the judiciary, the Respondent was allegedly captured on video in the process of purchasing an illicit substance, which led to a complaint being submitted to the Council.

12. In February 2014, the Council constituted an inquiry committee (the "First Inquiry Committee"), in accordance with subsection 63(4) of the *Judges Act*, to conduct an inquiry into the complaint received, on the basis that, in the opinion of the Judicial Conduct Review Panel, the matter might be serious enough to warrant the removal of the Respondent.

***Judges Act, supra*, s. 63(4)**

13. Subsequent to its analysis, the First Inquiry Committee was unable to conclude that the exchange captured and recorded on video showed a transaction involving an illicit substance. As a result, the First Inquiry Committee rejected all of the allegations against the Respondent.

14. However, a majority of members of the First Inquiry Committee considered it appropriate to comment on the reliability and credibility of the version of the facts related by the Respondent, having identified several contradictions, inconsistencies and implausibilities in the evidence regarding the transaction captured on video.

15. The Council accepted the conclusion of the First Inquiry Committee regarding the exchange captured and recorded on video. The Council recommended that the Respondent not be removed from office on that basis.

16. The Council refrained from making a recommendation on the basis of the majority's findings regarding the Respondent's credibility and reliability on grounds of procedural fairness:

> *The Council takes this approach because the judge was not informed that the specific concerns of the majority were a distinct allegation of misconduct to which he must reply in order to avoid a recommendation for removal.*
>
> ***Matter of Justice Girouard 1, Report of the Canadian Judicial Council to the Minister of Justice,* at para. 42**

17. In June 2016, the Ministers of Justice of Quebec and Canada filed a joint complaint with the Council regarding the Respondent's conduct in the course of the disciplinary process described above. This complaint triggered a mandatory inquiry pursuant to subsection 63(1) of the *Judges Act*, and, as a result, a new inquiry committee was constituted (the "Second Inquiry Committee").

***Judges Act, supra,* s. 63(1)**

18. In its report dated November 6, 2017, the Second Inquiry Committee found, among other things, that the Respondent had become incapacitated or disabled from the due execution of the office of judge by reason of the misconduct of which he had been found guilty following the inquiry held by the First Inquiry Committee.

19. In their report to the Minister of Justice dated February 20, 2018, twenty (20) of twenty-three (23) Council members adopted the findings of the Second Inquiry Committee that the Respondent was guilty of misconduct and, on that basis, they concluded that he had become incapacitated and disabled from the due execution of the office of judge.

20. Three (3) dissenting Council members recommended that the Respondent not be removed from office, on the grounds that his right to a fair hearing had not been respected, since certain unilingual Anglophone members of the Council were unable to understand and assess the entire record, which included documents that were available in French only.

21. The Respondent filed an application for judicial review of the recommendation made by the majority of Council. In addition, in the course of the two (2) inquiries, the Respondent also filed more than twenty other applications for judicial review of various decisions made by the inquiry committees and the attorneys general.

22. The Council filed a motion to strike the applications for judicial review against the Council and its inquiry committees, on the grounds that the Federal Court has no jurisdiction to grant remedies provided for in section 18(1) of the *Federal Courts Act*, since the Council is not a "*federal board, commission or other tribunal*" within the meaning of that statute.

***Federal Courts Act, supra*, s. 18(1)**

II. Issues

a. Are the Council's powers and jurisdiction "*conferred by or under an Act of Parliament*"?
b. Are the Council's powers and jurisdiction of a judicial nature?
c. Are the Council's recommendations final, without appeal and not subject to judicial review?
d. Are the Court's errors of law the result of a reasonable apprehension of bias against the Council?

III. Concise statement of submissions

23. The Federal Court's jurisidiction in matters of judicial review is limited to "federal boards, commissions or other tribunals", as defined in section 2 of the *Federal Courts Act*, which is the substantive provision for determining whether an entity is subject to the jurisdiction of the Federal Court.

***Federal Courts Act, supra*, s. 18(1) and s. 2**

24. In order to establish whether an entity is a "federal board, commission or other tribunal", the Court must determine the nature and the source of the jurisdiction or power which the entity seeks to exercise.

***Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, at para. 29, [2010] FCJ No 221 (QL) [*Anisman*]**

25. The errors of law made by the Court of first instance (the "Court") can be summarized under the following error categories:

    a. Identifying the *Judges Act* as being the source of the powers exercised by senior judges with administrative duties;

    b. Characterizing the powers exercised by senior judges with administrative duties as being "administrative" in nature or purely "inquisitorial";

    c. Characterizing the deeming provision as being "*the most important provision in this case*".

26. The Council's arguments will follow along the same lines. Firstly, the Council will argue that senior judges with administrative duties who sit on the Council exercise powers and jurisdiction with regard to judicial ethics and judicial professional discipline which require no specific statutory grant, since they are of constitutional origin.

27. The Court erred on this point in determining that the Council's powers and jurisdiction in matters of judicial ethics and professional discipline are derived from the *Judges Act*, hence disregarding binding findings of the Supreme Court of Canada.

28. Secondly, the Council will argue that the powers and jurisdiction exercised by senior judges with administrative duties who sit on the Council are judicial in nature. Therefore, the exercise of these powers and jurisdiction cannot be subject to judicial review, particularly by the Federal Court, since "*persons*" appointed under section 96 of the *Constitution Act, 1867* are excluded from the definition of "*federal board, commission or other tribunal*".

29. The Court erred in determining that the Council's powers and jurisdiction are exercised collectively and, therefore, that the exclusion of persons appointed under section 96 does not apply.

30. Thirdly, the Council will argue that, as judges, senior judges with administrative duties who sit on the Council exercise their constitutional role as protectors of the rule of law. Therefore, the judicial review mechanism does not apply in this case.

31. The Court therefore erred in finding that decisions made by the Council and its inquiry committees must be subject to judicial review by the Federal Court to ensure respect for the rule of law.

32. Fourthly, the Council will argue that subsection 63(4) of the *Judges Act*, the "*deeming provision*", must be interpreted as meaning that the Council and its inquiry committees have the attributes of a superior court that are required to fulfill their mandate. These attributes include judicial immunity, but also immunity from judicial review when exercising their powers with regard to judicial ethics.

33. Finally, the Council will underline the reasons given by the Court that would lead a reasonable and informed person, viewing the matter realistically and practically, to conclude that the Court may have approached the Council's arguments with preconceived ideas, which may have led to the errors in law identified above.

A) The source and nature of the Council's jurisdiction and powers

34. In order to establish whether an entity is a "federal board, commission or other tribunal", the Court must determine:

    a. the source of the power which the entity seeks to exercise through the contested decision; and
    b. the nature of the power or jurisdiction in question.

    ***Anisman, supra,* at paras. 29-31**

35. In this section, the Council will argue that, with regard to judicial ethics:

    a. it exercises powers and jurisdiction whose source is constitutional and not statutory;
    b. it exercises powers and jurisdiction that are judicial and not "administrative" in nature.

i. <u>The source of the Council's jurisdiction and powers</u>

36. In order to meet the definition of "federal board, commission or other tribunal", an entity must exercise powers or jurisdiction that are "*conferred by or under an Act of Parliament*".

    ***Federal Courts Act, supra*, s. 2**

37. The Court erred in determining that the powers and jurisdiction of the Council and its inquiry committees with regard to judicial ethics are conferred by the *Judges Act*.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 84, Appeal record, tab 2, vol. 1

38. The phrase "*Act of Parliament*" means "*federal statutes*", and the Federal Court was created to ensure their better administration. However, the *Constitution Act, 1867* is not an "*Act of Parliament*" within the meaning of the *Federal Courts Act*.

***Constitution Act, 1867*, s. 101**
***Windsor, supra*, at paras. 61-63**
See also *Galati v. Canada (Governor General)* 2015 FC 91, at paras. 51-60, and *Southam v. Canada (Attorney General) (C.A.)*, 1990 CanLII 8042 (FCA), at para. 28

39. Parliament cannot indirectly extend its authority over other government bodies by broadening, through legislative action, the Federal Court's jurisdiction with regard to judicial review.

***Southam, ibid*, at paras. 31-38**
***Windsor, supra*, at para. 40**

40. Yet, that is precisely the outcome of the Court's decision. Indeed, the definition of "*federal board, commission or other tribunal*" must be given a broad interpretation, but this definition must not defeat the principle that the Federal Court's jurisdiction is a limited one.

***Canada (Attorney General) v. TeleZone*, 2010 SCC 62, at para. 3**
***Windsor, supra*, at para. 33**

41. Therefore, it is erroneous to conclude, as the Court did, that the definition of "federal board, commission or other tribunal" includes "*all of the federal institutions and agencies*" not excluded by section 28 of the *Federal Courts Act*, hence conferring a semblance of residual jurisdiction on the Federal Court. To the extent that an institution exercises powers that have their source in the Constitution and not in a federal statute, such an institution is not subject to the Federal Court's jurisdiction to the same extent.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 96, Appeal record, tab 2, vol. 1

42. Senior judges with administrative duties who sit on the Council exercise powers and jurisdiction with regard to judicial ethics that "*are inherent in the exercise of* [their] *functions and need not be conferred by specific statutory provisions*".

***Ruffo, supra*, at paras. 56-59**
Martin L. Friendland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, at pp. 252-253

International Centre for Criminology, Université de Montréal, *Compendium of Information on the Status and Role of the Chief Justice in Canada,* at pp. 234-237; ("Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)", in *Research Papers on the National Commission on Judicial Discipline and Removal* (1993), vol. 1, 713, at p. 756

43. Those findings directly contradict the Court, which concluded that "*chief justices are given their judicial ethics role through provincial and territorial legislation rather than through constitutional texts.*" Those findings also contradict the conclusions reached by the Honourable Justice Mosley on that subject.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 84, Appeal record, tab 2, vol. 1
***Douglas v. Canada (Attorney General)*, 2014 FC 299, at para. 82**

44. In *Ruffo,* the Supreme Court of Canada recognized that the disciplinary functions of chief judges of the Court of Québec are derived from the Constitution, and not from a statute, even though the Court of Québec was established by statute and its Chief Judge is expressly responsible, under the *Courts of Justice Act*, for ensuring that the judicial code of ethics is observed.

***Ruffo, supra,* at paras. 56-59**

45. The disciplinary functions of Chief Justices, including their power to conduct a judicial inquiry, as well as their jurisdiction with respect to judicial ethics, are essential to maintain judicial independence, a constitutional principle stemming from the preamble to the *Constitution Act, 1867*.

***Ell v. Alberta*, [2003] S.C.R. 857, at para. 19**
***Therrien (Re)*, 2001 SCC 35, at para. 39, [2001] 2 S.C.R. 31**

46. In this case, the Court rightly noted that the federal *Judges Act* does not expressly mention that the Council's mandate includes supervising the conduct of judges and judicial ethics. Nevertheless, it is not disputed that the Council is responsible for these functions, notwithstanding that its enabling statute is silent on this point.

47. It must therefore be concluded that, if the powers and jurisdiction of senior judges with administrative duties are not derived from the Council's enabling statute, their powers and jurisdiction stem from the fact that they are senior judges with administrative duties of their respective courts.

48. The Council is therefore an aggregate of senior judges with administrative duties who exercise their powers and jurisdiction, acquired individually as a result of their status within a superior court, and who sit at the same table.

49. In the absence of an express enabling provision, the Council itself developed the content of judicial ethics rules for federally appointed judges. As the Supreme Court of Canada noted in *Ruffo*, these rules were developed "*in the same way as judicial precedents. Many aspects [...] derived from judicial tradition without being transferred to legislation.*"

Ethical Principles for Judges
***Ruffo, supra,* at para. 57**

50. The Council also developed its own rules of procedure, as provided by the *Judges Act*.

***Judges Act, supra,* ss. 61(2), 61(3)**
Inquiries and Investigations By-laws

51. It should be noted that the Council, as the umbrella body for the judiciary, is the only entity established by an Act of Parliament whose By-laws do not require the approval of the Governor in Council.

***Judges Act, supra,* ss. 61(2), 61(3)**
Ethical Principles for Judges

52. Therefore, it is erroneous to describe the Council's functions in matters of judicial ethics as being merely an "*expertise*". These functions are, in fact, the exercise of constitutional powers and jurisdiction.

ii. <u>The Council is excluded from the definition of "*federal board, commission or other tribunal*" because of the judicial nature of its powers and jurisdiction with regard to judicial ethics</u>

53. Even if the Court rules that the powers exercised by the Council are derived from the *Judges Act*, the analysis does not end there.

54. Depending on the nature or the source of the power it exercises, an entity can be a "*federal board, commission or other tribunal*" for certain purposes, but not for others, according to the nature of the power exercised.

***Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347, at para. 52**

55. The powers and jurisdiction of the Council and its inquiry committees with respect to judicial ethics and professional discipline are judicial in nature. That being so, when senior judges with administrative duties exercise these powers, they act as judges and not simply as "members" of some administrative tribunal.

a. The judicial nature of the powers and jurisdiction of the Council and its inquiry committees

56. The Court erred in characterizing the powers and jurisdiction of the Council and its inquiry committees as being "administrative" in nature or purely "inquisitorial".

Order and reasons given by Justice Simon Noël, August 29, 2018, at paras. 84-85, 97, Appeal record, tab 2, vol. 1

57. As stated by the Supreme Court of Canada in *Therrien*, the first of the three essential guarantees of judicial independence is security of tenure. To satisfy this guarantee, the removal of a judge must be for cause, which must be established following a "*judicial inquiry*" process.

***Therrien (Re), supra*, at para. 39, citing *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 696, 52 OR (2d) 779**

58. The definition of "*judicial inquiry*" was explained by the Honourable Justice McDonald of the Court of Queen's Bench of Alberta, and quoted with approval by the Court of Appeal of Québec in *Conseil de la magistrature du Québec c. Commission d'accès à l'information*:

> *By this* [a "judicial inquiry"] *he must have intended an inquiry conducted by persons who themselves enjoy security of tenure as judges, and are therefore clearly independent of influence by the executive government or by extraneous pressures, and are by virtue of their training and experience well suited to the fact-finding process and to making the decision whether to recommend imposition of the ultimate sanction upon the judge who is affected.*

***R. v. Campbell*, [1995] 2 WWR 469, at para. 174, 160 AR 81, quoted in *Conseil de la magistrature du Québec c. Commission d'accès à l'information*, 2000 CanLII 11305 (QCCA), at paras. 96-97**

59. Therefore, even if senior judges with administrative duties do not generally exercise their powers of inquiry on a day-to-day basis, these powers of inquiry are no less judicial in nature.

60. From this it emerges that, even though the ultimate power of removal belongs to Parliament, the removal of a judge is constitutionally valid only if the conduct of the judge subject to inquiry is found to be incompatible with his or her judicial duties, with regard to ethics rules that apply to judges.

***Ruffo, supra,* at para. 30**
***Moreau-Bérubé v. New Brunswick (Judicial Council),* [2002] 1 S.C.R. 249 , at para. 60**

61. That being so, it is erroneous to conclude, as the Court did, that judges who sit on the Council perform a purely administrative function that has nothing to do with their judicial functions. Members of the Council sit as representatives of all Canadian superior courts.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 84, Appeal record, tab 2, vol. 1

b. The application of *Ranville*

62. As the Supreme Court of Canada confirmed in Ranville:

> *Whenever a statutory power is conferred upon a s. 96 judge or officer of a court, the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary.*
>
> ***Minister of Indian Affairs and Northern Development v. Ranville et al.*, [1982] 2 S.C.R. 518, at p. 527 [*Ranville*]**

63. The *Judges Act* contains no express provision stating that senior judges with administrative duties do not exercise functions of a judicial nature within the Council and its inquiry committees.

64. Therefore, the Court erred in concluding that members of the Council do not sit in their capacity as judges without having identified the "*express provision to the contrary*". Without having identified such a provision, it was erroneous to conclude, as the Court did, that senior judges with administrative duties act in a capacity other than as judges.

65. The Court attempted to find an express provision by relying on the use of the term "member" in the *Judges Act*. However, the term "member" does not confer a different status on senior judges with administrative dutites. If that were the case, judges of the Federal Court would not be judges either, since this term is also used in the *Federal Courts Act*.

See, for example, s. 51 of the *Federal Courts Act, supra*

66. The fact that the Chairperson of the Council can appoint a substitute is not determinative either. The Chief Justices of the Federal Court of Appeal and the Federal Court can also request the appointment of deputy judges, including persons who have held office as a judge.

Subsection 59(4) of the *Judges Act, supra*; s. 10 of the *Federal Courts Act*

67. The Court also erred in determining that *Ranville* does not apply because the Council exercises its powers and jurisdiction collectively, in other words, as an entity.

Order and reasons given by Justice Simon Noël, August 29, 2018, at paras. 84-86, Appeal record, tab 2, vol. 1

68. Such a determination disregards the functioning of the Council and its inquiry committees. The *Judges Act* assigns powers to the Council and its inquiry committees collectively, but these powers and jurisdiction are exercised individually by each senior judge with administrative duties.

69. Senior judges with administrative duties each exercise their individual powers and jurisdiction in this regard as representatives of their respective superior courts.

70. That being so, members of the Council, as well as members of its inquiry committees, are free to express dissent, as was done in this case.

71. In this respect, the Council is similar to certain courts of appeal whose powers are assigned collectively, without specifying that appellate judges have the individual power to render reasons and/or without specifying that appellate judges are individually vested with the same powers.

***Court of Appeal Act,* RSA 2000, c C-30; *Courts of Justice Act,* R.S.O. 1990, c C.43; *Courts of Justice Act,* CQLR, c T-16; *Judicature Act,* RSNB 1973, c J-2; *Judicature Act,* RSPEI 1988, c. J-2.1; *Court of Appeal Act,* RSY 2002, c 47; *Judicature Act,* RSNWT 1988, c J-1; *Judicature Act,* SNWT (Nu) 1998, c 34 s 1**

72. By applying Ranville, the presumption that judges who are members of the Council act as judges reinforces the judicial nature of the inquiry.

c. The exclusion of any person or persons appointed under section 96 of the *Constitution Act, 1867*

73. In addition to the judicial nature of the inquiry, the Court erred in failing to consider the express exclusion from the definition of "federal board, commission or other tribunal" of "*any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867*".

74. The majority of judges who sit on the Council represent provincial superior courts ("section 96 courts" of the *Constitution Act, 1867*). As representatives of section 96 courts, judges who sit on the Council are "*persons appointed under section 96 of the Constitution Act, 1867*". Persons appointed under section 96 are expressly excluded from the definition of "federal board, commission or other tribunal" at section 2 of the *Federal Courts Act*.

***Federal Courts Act, supra*, s. 2**

75. It should be noted that Parliament chose the terms "person" and "persons", instead of "judges" and "court", to designate persons or entities that are excluded from the definition of "federal board, commission or other tribunal". This choice must be given effect. Parliament intended to exclude any person or persons appointed under section 96. Since they are representatives of their respective courts, senior judges with administrative duties from provincial superior courts who sit on the Council are "persons appointed under section 96".

76. Section 2 of the *Federal Courts Act* does not specify that, in order to be excluded from the definition of "federal board, commission or other tribunal", an entity must be comprised solely of persons appointed under section 96.

77. In the Council's opinion, this exclusion applies in this case, and that is the end of the matter.

78. In *Ranville*, the Supreme Court of Canada noted that:

> *From a reading of s. 2(g) of the Act one could readily draw the conclusion that it was the intention of Parliament that no decision of a federally-appointed judge of a provincial court would be subject to the review jurisdiction of the Federal Court of Appeal, nor subject to the jurisdiction of the Trial Division under s. 18, which is similarly restricted to any federal board, commission or other tribunal.*
>
> ***Ranville, supra*, at p. 527 (citing its reasons in *Minister of National Revenue v. Coopers and Lybrand*)**

79. If the Court concludes that the inclusion within the Council of judges appointed under section 101 precludes the direct application of the exclusion, then the Council submits that the exclusion is a strong indicator of Parliament's intention.

80. Therefore, the presumption should be that federally appointed judges are not subject to judicial review. In the absence of an express provision, as in section 28 of the *Federal Courts Act*, the presumption applies, including to the Council.

B) Respect for the rule of law

i. Judicial review of the Council's decisions and actions does not reinforce respect for the rule of law

81. The Court erred in concluding that the decisions and actions of the Council and its inquiry committees must be subject to judicial review to ensure respect for the rule of law. Senior judges with administrative duties perform a clearly judicial function within the Council; they sit on the Council as members of the judiciary, as judges. That being so, they sit on the Council in their constitutional role as protectors of the rule of law.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 162, Appeal record, tab 2, vol. 1
***MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 830**

82. Therefore, their decisions should not be subject to judicial review.

83. Judicial review of the decisions and actions of the Council and its inquiry committes:

a. overburdens the judicial disciplinary process that Parliament intended to be efficient;

b. does not provide any beneficial further guarantee of respect for the rule of law;

c. undermines the individual independence of senior judges with administrative duties;

d. does not reinforce public confidence in the judiciary in any meaningful way.

84. As the Council and its inquiry committees also have a "*duty to act fairly*" toward a judge who is the subject of a complaint, it does not follow that the Federal Court plays a supervisory role in order to ensure compliance with this duty.

***Ruffo, supra*, at para. 77**

ii. Judicial review compromises the efficiency of the disciplinary process

85. In establishing the Council, Parliament intended to create an efficient review process, based on the values of judicial independence and accountability, with the goal of ensuring public confidence in the judicial system.

Canadian Judicial Council, *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at pp. 6-7, Appeal record, tab 13, vol. 2; and Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, at pp. 100-101

86. This mechanism was developed in response to the *Landreville* matter, which had led to parliamentary and judicial procedures that unduly delayed the removal process.

William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville*, Toronto, University of Toronto Press, 1996;
***Landreville v. The Queen (No. 2)*, [1977] 2 FC 726 (FC, Trial Div.); *Landreville v. The Queen (No. 3)*, [1981] 1 FC 15 (FC Trial Div.).**
See also Friedland, *A place Apart, supra*, at pp. 98-100

87. It goes without saying that the complaint review process concerning the Respondent has gone on for several years. Even though it was not the only cause of the delays, it should nevertheless be noted, as the Court did, that the Respondent filed no fewer than twenty-four (24) applications for judicial review in the course of the process.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 18, Appeal record, tab 2, vol. 1

88. If it was envisaged to grant a right of appeal to a judge subject to inquiry, such a right was not included in the version of the *Judges Act* that was finally adopted by Parliament, which suggests that Parliament intended that the disciplinary process conducted by the Council be as efficient as possible:

> *I realize the problems. For example, a supreme court judge could become enmeshed in a problem. He would not want to take the whole bloody business to the Supreme Court of Canada by way of appeal because other judges would be sitting in judgment on him. There has to be some sort of appeal, even if it involves setting up some procedure in Parliament. This is important to protect the integrity and the independence of judges. ...*
> *I realize that the procedure used is undoubtedly better than what we had to to in the Landreville case. ... But has any consideration been given to whether there should not be some appeal from even the finding of something as august as, no doubt, the Canadian Judicial Council would be? This bothers me a bit.*

89. In response to this concern expressed by the member of Parliament, the Parliamentary Secretary specified that the judge's recourse against the Council's report rests with the Cabinet, and then with Parliament:

> *I did have a discussion with the Minister, and he satisfied me in this regard. All the Council does [is] after they have examined [the complaint or allegation against the judge] in the light of the terms and conditions of the Act, they make recommendations to the Cabinet, and the Cabinet if they approve the Council's decision – then you still have to have a resolution to both Houses before you could fire a*

superior judge, in light of the constitution, the British North America Act. So what we are really doing is setting up a council of judges and expertise rather than put it before a committee like we did here [in the Landreville case], and have it dragged out. So once they find, on the terms and conditions of this Act, that the judge may have done (a), (b) and (c), then the government has to bring in the resolution to Parliament or the Senate. ... if the House of Commons and the Senate did not approve it, then of course that recommendation of the Council would not be carried out. ...

Debates of the House of Commons, June 14, 1971, quoted in *Douglas, supra*, at para. 114

90. Judicial review also raises the possibility that the Council would not be the only branch of government that could rule on the removal of a judge. Judicial review before the Federal Court includes the possibility of seeking declaratory relief. Therefore, the Federal Court could be asked not only to reverse a recommendation made by the Council, but also to issue a declaration on whether the judge subject to inquiry should be removed.

***Federal Courts Act, supra*, s. 18(1)**

91. Given the principle that the Crown or Parliament must comply with the Court's declarations, such a declaration would have a more binding effect than the Council's recommendations, which do not compel Parliament to act, according to section 71 of the *Judges Act* which confirms Parliament's rights under section 99 of the *Constitution Act, 1867*.

***Assiniboine v. Meeches*, 2013 FCA 114, at paras. 12-13**
Judges Act, supra

92. Parliament did not intend for the Federal Court to have the last word in determining whether there are valid constitutional grounds to warrant the removal of a judge.

iii. <u>The definitive nature of the Council's actions and decisions do not undermine the rule of law, since such actions and decisions are taken by judges</u>

93. Unlike administrative tribunals, the Council's actions and decisions are taken by judges. The actions and decisions of inquiry committees are, ultimately, endorsed or not by judges. Judges play a constitutional role as protectors of the rule of law. Contrary to what the Court concluded, they do not lose this faculty when they sit at the Council table; in fact, they have a mandate to continue to play this constitutional role with respect judicial professional discipline.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 90, Appeal record, tab 2, vol. 1

94. Judicial decisions or actions are not subject to review by a judge or other tribunal. This established fact stems from the specific constitutional status of judges, who are responsible for enforcing the rule of law.

***R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 23, 135 DLR (4th) 402**

95. The Council does not entirely subscribe to the views of the Honourable Justice Stratas, as the Court did:

> *In our system of governance, all holders of public power, even the most powerful of them – the Governor General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on – must obey the law. ... From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed.* [Emphasis added]
>
> **Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 6, Appeal record, tab 2, vol. 1, citing *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, at para. 23; see also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at para. 78**

96. With respect, this statement of principle is inaccurate in the case of decisions made by Chief Justices and puisne judges. Their decisions can be subject to review, to ensure compliance with the rule of law, only if a right of appeal exists. The absence of a right of appeal does not imply a right to judicial review.

97. The Court also erred in stating that "*In our judicial order, in which the rule of law plays a fundamental role, a lack of judicial review or of a right of appeal constitutes a breach of procedural fairness.*"

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 160, Appeal record, tab 2, vol. 1

98. The right to correct errors, either by way of appeal or judicial review, is not included in the set of rights encompassed in the so-called right to procedural fairness. The right to appeal is statutory. In the absence of a statutory right of appeal, there is no right of appeal under common law.

***Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at paras. 69-70**
***Molson v. Barnard*, (1891) 18 S.C.R. 622, at p. 625**

99. Many judicial decisions and actions are not subject to a right of appeal, including applications for leave to appeal, certain arbitration decisions, or interlocutory judgments related to the revocation of citizenship or inadmissibility. Such decisions can have serious and irreversible consequences for litigants.

***Citizenship Act*, R.S.C., 1985, c. C-29, s. 10.6**

100. To err is human, certainly. However, the functioning of our judicial system requires accepting the finality of actions that are part of the constitutional role of judges, when Parliament a) does not grant a right of appeal from these actions, and b) does not expressly specify that judges are not acting in this role.

> ***Doucet-Boudreau v. Nova Scotia (Minister of Education),*** **[2003] 3 S.C.R. 3, at paras. 113-115**

101. In any event, it should be noted that the Council's recommendations do not carry the same degree of finality as, for example, a decision of the Supreme Court of Canada, in that the Council's recommendations have no binding effect. Section 71 of the *Judges Act* confirms the supremacy of section 99 of the *Constitution Act, 1867*, which gives Parliament the final decision to remove a judge from office.

102. The Court erred in not recognizing that removal by Parliament constitutes the highest possible form of protection of judicial independence. Judicial review adds nothing to security of tenure, nor does it reinforce public confidence in the judicial system.

> **Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 105, Appeal record, tab 2, vol. 1**
> ***Valente, supra,*** **at para. 26**
> ***Taylor v. Canada (Attorney General),*** **[2002] 3 FC 91, at para. 24**

iii. Judicial review is incompatible with the independence of senior judges with administrative duties

103. Judicial independence demands that judges be directed only by the law. As professor Peter H. Russell stated:

> *In performing their adjudicative functions judges must not be directed as to how they should decide by any authority other than the law. They should not even be subject to direction by other judges, including the judges of higher courts, except to the extent that the decisions of such judges serve as authoritative precedents.* [Emphasis added]
>
> **Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government,* Toronto, McGraw-Hill Ryerson Ltd, 1987, at p. 76**

104. Judicial independence generally refers to the independence of the judiciary from the executive and legislative branches. However, judicial independence also refers to the independence of judges in relation to the public, corporations and other judges.

> ***R. v. Moran,*** **1987 CanLII 124 (ON CA), at p. 14;** ***Re Clendenning and Board of Police Commissioners for City of Belleville,*** **15 O.R. (2d) 97, 75 DLR (3d) 33;** ***Valente, supra,*** **at paras. 17-18**

105. Judicial review involves a loss of independence for judges who are subject to supervision, among other things because their deliberative process could be subject to review by the supervising court.

106. Judicial review implies the right of a superior court to order the production of documents, and even evidence, from Chief Justices and Assistant Chief Justices who were involved in the disciplinary process. Administrative tribunals can rely on deliberative secrecy only to a limited extent.

> ***Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, at p. 965**
> ***Federal Courts Rules*, s. 318**

107. However, issuing such orders "*would be to strike at the most sacrosanct core of judicial independence.*"

> ***MacKeigan, supra*, at p. 831**

108. Therefore, the Court erred in finding that subjecting the Council to judicial review would reinforce judicial independence, confusing judicial independence with security of tenure. If judicial review supposedly provides a judge subject to inquiry with a better guarantee of his right to a fair disciplinary process, it could potentially result in undermining the individual independence of judges who are involved in the disciplinary process.

C) Interpretation of the deeming provision

109. The deeming provision is not determinative of the Court's jurisdiction over the Council and its inquiry committees.

110. The Court erred in not taking into account the Council's central submission – namely that its exclusion from the definition of "federal board, commission or other tribunal", on the basis of the test established in *Anisman*, completely disregards the deeming provision at subsection 63(4) of the *Judges Act*, which states that the Council and its inquiry committees are "*deemed to be a superior court*".

> **Brief, at para. 55, Appeal record, tab 8, vol. 1**
> **Transcript, at p. 47, l. 28, p. 48, l. 1, Appeal record, tab 23, vol. 3**

111. Even in its absence, the Council and its inquiry committees would not be subject to review by the Federal Court. Contrary to what the Court concluded, "*the most important provision in this case*" is not

the deeming provision, but section 2 of the *Federal Courts Act*, which definitively delineates the Federal Court's jurisdiction.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 56, Appeal record, tab 2, vol. 1

112. The deeming provision remains important to the extent that the Court must give it effect by presuming a harmony, coherence, and consistency between statutes dealing with the same subject matter, that being the Council's and the Federal Court's respective jurisdictions.

***R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), at para. 52**

113. On their face, neither the French nor the English versions of subsection 63(4) of the *Judges Act* rule out the possibility that the Council and its inquiry committees are excluded from the definition of "federal board, commission or other tribunal" or that they have no special constitutional status.

114. The Court erred in that its reasons are grounded simply on refuting a position that the Council and its inquiry committees are a superior court. With respect, this position is a red herring, because it was not the Council's position.

Reply, at paras. 7-33, Appeal record, tab 15, vol. 2

115. The Council argued instead that the deeming provision must be given effect in accordance with standard principles of interpretation governing such provisions:

> *When 'deems' is used to create a legal fiction, the fiction cannot be contradicted. The facts as declared by the legislature govern, even in the face of irrefutable evidence to the contrary.*
>
> **Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., Canada, LexisNexis Canada Inc, 2008, at p. 86 [Sullivan]**

116. The Council and its inquiry committees are deemed to be a superior court because they are deemed to have all the attributes of a superior court that are required to fufill their mandate.

117. What attributes are required? The parties agree that the power to summon witnesses and the power to enforce their attendance are required, especially for the work of inquiry committees.

***Judges Act, supra*, paras. 63(4)(*a*) and (*b*)**

118. The Court also agreed, as did Justice Mosley in *Douglas*, that judicial immunity is also required for the Council and its inquiry committees to fulfill their mandate. Therefore, it must be inferred that the

phrase "*deemed to be a superior court*" has a wider scope than simply the power to summon witnesses and the power to enforce their attendance.

Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 142, Appeal record, tab 2, vol. 1
***Douglas, supra*, at para. 103**

119. However, neither the Court nor Justice Mosley justified why the scope of the deeming provision must be limited to immunity from prosecution.

120. Immunity from judicial review is necessary for the Council and its inquiry committees to fulfill their mandate, among other things to ensure the invididual independence of judges who form the Council and its inquiry committees, but also to ensure the efficiency of the judicial disciplinary process.

121. The Court erred in concluding that the Council cannot be a superior court because it is not included in subsection 35(1) of the *Interpretation Act*, which lists the courts that are considered to be superior courts. This is not surprising, since the Council and its inquiry committees are not full-fledged superior courts such as those. However, Parliament intended that the Council and its inquiry committees be treated as such for the purposes of their specific mandate and in accordance with their constitutional status.

***Interpretation Act*, s. 35(1)**
Order and reasons given by Justice Simon Noël, August 29, 2018, at para. 116, Appeal record, tab 2, vol. 1

122. Generally, the Court was mistaken in comparing the attributes of ordinary superior courts with the Council's specific attributes, and then finding that, since the Council does not have the exact same attributes, it cannot be a superior court.

Order and reasons given by Justice Simon Noël, August 29, 2018, at paras. 119-123, Appeal record, tab 2, vol. 1

123. It is clear that the Council and its inquiry committees do not have the same mandate as the courts listed under subsection 35(1) of the *Interpretation Act*. The Council and its inquiry committees do not issue orders that have a binding effect. Neither do they have supervisory powers over lower courts. The Council does not have inherent jurisdiction in all matters. However, such differences do not preclude that the Council and its inquiry committees are deemed to be a superior court for the purposes of their specific mandate. The Court did not consider this nuance in any way.

D) Preconceived ideas regarding the Council's submissions and a reasonable apprehension of bias

124. Many of the errors of law identified above have to do with the Court not having considered, either fully or even partly, the Council's submissions regarding the issues that were before the Court.

125. Generally, the Court simply presumed that the Council's submissions were the same as those that were argued before the Honourable Justice Mosley in *Douglas*. The Court did not in any way analyze how the Council's submissions were different. Many of the errors of law identified above stem from preconceived ideas regarding the Council's submissions.

***Douglas, supra*, at paras. 26, 49**

126. For example, several times in its reasons, the Court refuted a position that the Council is a superior court, despite the fact that the Council did not put forward such a position before the Court. The Court also considered that the deeming provision was central to the Council's submission, which was not the case.

Order and reasons given by Justice Simon Noël, August 29, 2018, at paras. 79, 82, 83, 89, 102, 122, Appeal record, tab 2, vol. 1

127. In fact, the Council unequivocally clarified, both in its Reply Memorandum and its oral submissions, that this was not the position it put forth. The Court made no mention of it.

Reply, at paras. 7-33, Appeal record, tab 15, vol. 2
Transcript, at pp. 27-28, Appeal record, tab 23, vol. 3

128. With all due respect, the general tone of the reasons given, as well as several vexatious and improper remarks made about facts irrelevant to the issues in dispute before the Court, would lead a reasonable and informed person, viewing the matter realistically and practically, to conclude that there is a reasonable apprehension of bias on the part of the judge.

Order and reasons given by Justice Simon Noël, August 29, 2018, at paras. 19, 173-183, Appeal record, tab 2, vol. 1
***Yukon Francophone School Board, Education Area #23* v. *Yukon (Attorney General)*, [2015] 2 S.C.R. 282**

IV. Orders sought

129. The Council respectfully claims the following relief:

a) Allow the appeal;

b) Strike the application for judicial review of the decision of the First Inquiry Committee contained in the notice of application bearing docket number T-733-15 of the Federal Court;

c) Strike the application for judicial review of the decision of the First Inquiry Committee contained in the notice of application bearing docket number T-2110-15 of the Federal Court;

d) Strike the application for judicial review of the decision of the Second Inquiry Committee contained in the notice of application bearing docket number T-423-17 of the Federal Court;

e) Strike the application for judicial review of the decision of the Canadian Judicial Council contained in the notice of application bearing docket number T-409-18 of the Federal Court;

f) Declare that the Canadian Judicial Council is not a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7;

g) Issue any other order that this Honourable Court considers fair and appropriate.

Respectfully submitted on this 23rd day of November, 2018

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6.	*Yukon Francophone School Board, Education Area #23* v. *Yukon (Attorney General)*, [2015] 2 S.C.R. 282	
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16.	*Minister of Indian Affairs and Northern Development v. Ranville et al.*, [1982] 2 S.C.R. 518	p. 527
17.	*Molson v. Barnard, (1891)* 18 S.C.R. 622	p. 625
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