Docket: _____
(From the Federal Court of Appeal: A-269-18)

SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDEAL COURT OF APPEAL)

BETWEEN:

THE CANADIAN JUDICIAL COUNCIL

Appelant (Appelant)

and

THE HONOURABLE MICHEL GIROUARD
THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF QUEBEC

Respondent (Respondent)

CANADIAN JUDICIAL COUNCIL'S
APPLICATION FOR LEAVE TO APPEAL
Volume I of I

August 15, 2019

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(From the Federal Court of Appeal: A-269-18)

SUPREME COURT OF CANADA
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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Canadian Judicial Council (Council) is seeking Leave to Appeal before this Court from a judgment of the Federal Court of Appeal, no. A-269-18, issued on 16 May 2019, pursuant to s., 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*, or any other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that the Application for Leave is made on the following grounds:

1. The questions of law that would be put before the Court in this appeal, if leave is granted, raise new points of law and involve important judicial principles deserving to be examined by this Court in light of their nature as well as for the important consequences resulting to the public on a national level.

2. Granting this Application for Leave to appeal would allow the Court to decide on the following issues:

    a) In order to remove a federally-appointed judge from office pursuant to s. 99 of the *Constitution Act*, 1867, does the unwritten constitutionnal principle of judicial independence require that a ground for removal be established prior by a body of the judicial branch?
    b) What are the consequences flowing from the judicial and constitutional nature of the decisions of the Council, especially in regards to the review of their legality?

3. Those issues raise new points of law as well as judicial considerations that are of fundamental importance for the constitutional institution of our country, notably the respect of the unwritten constitutional principle, which justify that this Court be seized by it. The new points of law are:

    a) A judicial inquiry before the removal of a federally appointed judge is a constitutional imperative to the exercice of the power of removal of Parliament pursuant to s. 99 of the *Constitution Act*, 1867;
    b) The constitutional function of the Council;
    c) Judicial discipline as exclusive constitutional responsibility of the judicial branch;
    d) The *sui generis* chracter of the decisions of the Council in matters of judicial discpline and the consequences of their judicial nature for :
        i. Review of their legality; and
        ii. The definition of "federal board" within the meaning of the *Federal Courts Act*, L.R.C. 1985, c F-7

4. Without a decision from this Court on these issues, the judgment of the Federal Court of Appeal would create the following prejudicial consequences:

    a) Parliament could remove a federally appointed judge without respecting the constitutional right of the judge to have a judicial inquiry before hand;
    b) The Council could be abolished, or its composition modified, by Parliament even without a new entity, or a reformed entity, without satisfying the norms required by the unwritten constitutional principle of judicial independence;
    c) The review of the legality of the decisions of the Council could be done in a manner contrary to what the legislator intended, therefore compromising the balance between the principle of judicial finality and the respect for the rule of law, including the respect for procedural fairness;
    d) The jurisdiction of the Federal Court could be expanded to include a body whose powers were granted by the Constitution, contrary to the intention of the legislator.

(From the Federal Court of Appeal: A-269-18)

SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDEAL COURT OF APPEAL)

BETWEEN:

THE CANADIAN JUDICIAL COUNCIL

Appelant (Respondent)

and

THE HONOURABLE MICHEL GIROUARD
THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

CANADIAN JUDICIAL COUNCIL'S MEMORANDUM

August 15, 2019

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I. PART I: STATEMENT OF THE CANADIAN JUDICIAL COUNCIL'S POSITION ON ISSUES OF PUBLIC IMPORTANCE AND CONCISE STATEMENT OF FACTS

1. This matter is about the fundamental principle of judicial independence and, more specifically, the constitutional guarantee of security of tenure of judges and its application to federally appointed juges.

2. The Supreme Court of Canada has never had the opportunity to adjudicate on the process leading to the removal from office of a federally appointed judge under section 99 of the *Constitution Act, 1867*. At issue here is determining the nature and scope of the Canadian Judicial Council's (the "Council") role in this regard.

3. The issues involved in this matter are at the core of Canada's constitutional framework and are of national importance to the public.

4. If leave to appeal is granted, the Council intends to argue that:

    a) Given the unwritten constitutional principle of judicial independence, which includes the guarantee of security of tenure, Parliament's power to remove a judge from office can be exercised only if there is cause for removal related to good behaviour;
    b) In order to ensure that the principle of judicial independence is respected and, particularly, that the executive and legislative branches do not intervene beyond the powers provided by section 99, such cause for removal of a judge must be established following an inquiry or investigation conducted by an independent body led by judges;
    c) The Council is the body that has the constitutional responsibility to conduct such judicial inquiries or investigations;
    d) That said, Parliament cannot take this responsibility away from Council, without assigning such a responsibility to another body that satisfies the guarantee of the principle of judicial independence, namely an independent body led by judges;

e) Consequently, the Council's decisions, including a recommendation to Parliament as to whether or not a judge should be removed from office, are judicial decisions that are *sui generis* in nature;

f) Respect for the rule of law and the principle of judicial independence demand that the Council's decisions be subject to judicial supervision, either by way of appeal or judicial review;

g) However, given the constitutional and judicial nature of the Council's decisions, they cannot be subject to review by the Federal Court, contrary to lower court rulings;

h) That said, there is a legislative void regarding the judicial supervision of the Council's decisions, which requires the involvement of this Court in order to frame a supervisory process that ensures respect for the rule of law, while taking into account the origin and nature of the Council's responsabilities.

A) Canadian Judicial Council's position on issues of public importance

5. The Council is the body tasked with making judicial inquiries or investigations into the conduct of federally appointed judges; after an inquiry or investigation, if the Council is of the opinion that a judge has become incapacitated or disabled from the due execution of the office of judge, it may recommend that the judge be removed from office.

***Judges Act*, R.S.C., 1985, c. J-1. s. 63, 65**

6. Although its powers to conduct inquiries or investigations and make recommendations are set out in the *Judges Act*, the Council argues that in exercising such powers, it performs a constitutional function which falls exclusively to the judicial branch, from which the Council emanates.

7. The Council thus argues that its powers to conduct inquiries or investigations and make recommendations are derived from the Constitution and are judicial in nature.

8. Consequently, the Council has argued that the Federal Court does not have jurisdiction to exercise its powers of judicial review over the Council's actions and decisions in this regard. Such actions and decisions do not fall within the scope of administrative law and,

consequently, the Council is not a "*federal board, commission or other tribunal*" within the meaning of the *Federal Courts Act* when exercising its powers to conduct inquiries or investigations and make recommendations.

***Judges Act*, supra, s. 59-65**
***Federal Courts Act*, R.S.C., 1985, c. F-7, s. 2, 18, 18.1**

9. The Federal Court and the Federal Court of Appeal have rejected the Council's arguments.

10. The Council is applying to this Honourable Court for leave to appeal against the decision of the Federal Court of Appeal in *Canadian Judicial Council v. Girouard*, 2019 FCA 148, on the grounds that it raises two issues of public importance.

11. Firstly, the Federal Court of Appeal maintains that the Council's powers are "*strictly statutory*" and that "*the only procedure provided for by the Constitution to remove a superior court judge from office is that set out in subsection 99(1) of the Constitution Act, 1867.*"

***Canadian Judicial Council v. Girouard*, 2019 FCA 148, at para. 46**

12. The Federal Court of Appeal's conclusion in this regard implies that there is no constitutional restriction on the exercise of Parliament's powers of removal under section 99. Such a conclusion limits the scope of principles set out in *Valente* to provincially appointed judges, such that a federally appointed judge could be removed from office without a judicial inquiry being conducted beforehand.

***Valente*, [1985] 2 S.C.R. 673, at para. 30**

13. This conclusion is of public importance because it implies a substantial limitation on the constitutional guarantee of security of tenure of federally appointed judges, which is a primary condition of their independence.

14. Secondly, the Federal Court of Appeal concludes that inquiries or investigations made by the Council are not "judicial" inquiries, in the sense of being conducted by judges acting in their capacity as judges.

***Council v. Girouard*, supra, at paras. 60-68**

15. In the view of the Federal Court of Appeal, even though the Council is comprised of chief justices and associate chief justices from all superior courts in Canada, who collectively perform a constitutional function, the Council's actions and decisions are administrative in nature and are thus subject to ordinary judicial review by the Federal Court.

16. In so concluding, the Federal Court of Appeal denies the judicial and constitutional nature of the Council's decisions, which raises issues of public importance, particularly regarding the review of the legality of the Council's *sui generis* decisions.

B) Concise statement of facts

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

18. In September 2010, a few weeks before being appointed 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.

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

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

20. Subsequent to its analysis, the 2014 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 2014 Inquiry Committee rejected all of the allegations made against the Respondent.

21. However, a majority of members of the 2014 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 Respondent's testimony regarding the transaction captured on video. The majority of members of the 2014 Inquiry Committee recommended that the Respondent be removed from office on that basis.

22. The Council accepted the conclusion of the 2014 Inquiry Committee regarding the exchange captured and recorded on video. The Council recommended that the Respondent not be removed from office on that basis.

23. The Council did not make a recommendation on the basis of the majority's findings regarding the Respondent's credibility and reliability on grounds of procedural fairness.

24. 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 "2016 Inquiry Committee").

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

25. In its report dated November 6, 2017, the 2016 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 2014 Inquiry Committee.

26. In a report to the Minister of Justice dated February 20, 2018, the Council adopted the findings of the 2016 Inquiry Committee that the Respondent was guilty of misconduct and, on that basis, it concluded that he had become incapacitated and disabled from the due execution of the office of judge.

27. Of the 23 members of Council, three (3) dissenting judges expressed the view that the Respondent should not be removed from office, on the grounds that he was not provided with

a fair hearing, alleging that some members of Council were unable to understand and assess the entire record, parts of which were not available in both official languages.

28. The Respondent filed an application for judicial review of the Council's recommendation, among other things.

29. 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 subsection 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, ss. 18(1)**

II. PART II: CONCISE STATEMENT OF ISSUES

30. The Council intends to submit the following issues to this Honourable Court:

a) In order to remove a federally appointed judge from office under section 99 of the *Constitution Act, 1867*, does the unwritten constitutional principle of judicial independence require that cause for removal related to good conduct be established beforehand by a body emanating from the judicial branch?

b) What consequences flow from the judicial and constitutional nature of the Council's decisions, particularly with regard to the review of their legality?

III. PART III: CONCISE STATEMENT OF SUBMISSIONS

A) Issue 1: In order to remove a federally appointed judge from office under section 99 of the Constitution Act, 1867, does the unwritten constitutional principle of judicial independence require that cause for removal related to good conduct be established beforehand by a body emanating from the judicial branch?

i. *The conduct of a judicial inquiry prior to removing a federally appointed judge from office is a constitutional imperative that is the outcome of the evolution of the principle of judicial independence.*

31. It is of public importance that this Court determine if the removal from office of a federally appointed judge requires that a judicial inquiry be held in order to establish beforehand whether the conduct of a judge who is the subject of an inquiry warrants an address of Parliament under section 99 of the *Constitution Act, 1867*.

32. In the decision that is the subject of this application, the Federal Court of Appeal expresses the view that it does not; it concludes that:

> *In summary, the Council's investigative power is strictly statutory. This means that if the Act were to be repealed, the Council and, certainly, the chief justices would not be empowered to conduct inquiries or investigations, summon witnesses and compel them to give evidence during these investigations or inquiries. The only procedure provided for by the Constitution to remove a superior court judge from office is that set out in subsection 99(1) of the CA 1867.*
>
> ***Canadian Judicial Council v. Girouard*, supra, at para. 46**

33. It follows from this conclusion that the procedure for conducting inquiries and making recommendations established under the *Judges Act* has no constitutional foundation, and that it could be abolished by Parliament just as easily as it was created. Parliament could then proceed to remove a judge from office without a judicial inquiry being conducted beforehand.

34. If leave to appeal is granted, the Council intends to argue that this conclusion goes against the evolution of the principle of judicial independence.

35. The Council intends to argue that the unwritten constitutional principle of judicial independence and the judicial branch's inherent powers, which are derived from the Preamble to the *Constitution Act, 1867*, must be interpreted in light of their history and subsequent evolution, including the period following the entrenchment of paragraph 11*(d)* until today.

36. As was recognized in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, the principle of judicial independence is evolutionary and, in order to interpret this principle, the Court must be called on to fill the gaps in the express terms of the constitutional text. The Council intends to argue that the conduct of a judicial

inquiry is a constitutional restriction on the exercise of the powers of removal under section 99; even though the constitutional text does not expressly provide for such a restriction, the evolution of the principle of judicial independence demands that such a restriction be read into it.

> ***Reference re Remuneration of Judges,*** **[1997] 3 S.C.R. 3, at paras. 89, 104-105**

37. The Federal Court of Appeal, for its part, gave a narrow interpretation of the constitutional text and the jurisprudence of this Court, without considering the evolution of the principle of judicial independence.

> ***Valente,*** **supra;** ***Beauregard,*** **[1986] 2 S.C.R. 56;** ***Therrien,*** **[2001] 2 S.C.R. 3;** ***Ruffo,*** **[1995] 4 S.C.R. 267;** ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,*** **supra**

38. The establishment of the Council in 1971, and then the entrenchment of paragraph 11*(d)* of the *Canadian Charter of Rights and Freedoms*, are part of this evolution which tends towards the "*adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence.*"

> ***Valente,*** **supra, at paras. 24-39**

39. In *Valente*, the Court had to decide whether paragraph 11*(d)* of the *Charter* should be interpreted so as to constitutionalize the highest guarantee of security of tenure, namely removal from office by Parliament, for all levels of the judiciary, including provincially appointed judges. The Court was of the opinion that such an interpretation would amount to rewriting section 99 of the *Constitution Act, 1867*, which provides such a guarantee only to federally appointed judges. Justice Le Dain:

> *The standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is <u>common</u> to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.* [Emphasis added.]
>
> ***Valente,*** **supra, at para. 26**

40. What is "common" to the various approaches to the essential conditions of judicial independence in Canada, including the federal approach, is:

    a) That a judge may be removed from office only for cause related to the performance of his judicial functions; and

    b) That such cause be established following a "judicial inquiry" procedure in which the judge who is the subject of an inquiry must be given an opportunity to be heard, to cross-examine witnesses, and to adduce evidence.

Valente, supra, at paras. 29-31

41. Justice Le Dain continued by observing that, until paragraph 11*(d)* was entrenched, judicial independence was largely guaranteed by tradition. Justice Le Dain:

> *Tradition, reinforced by public opinion, operating as an effective restraint upon executive or legislative action, is undoubtedly a very important objective condition tending to ensure the independence in fact of a tribunal. That it is not, however, regarded by itself as a sufficient safeguard of judicial independence is indicated by the many calls for specific legislative provisions or constitutional guarantees to ensure that independence in a more ample and secure measure.*

Valente, supra, at para. 36

42. *Valente* thereby sets up judicial inquiries as a constitutional imperative in the absence of a mechanism for removal by Parliament. However, *Valente* does not adjudicate on whether, within the federal framework, removal by Parliament is a sufficient guarantee of security of tenure, or if the *Constitution Act, 1867* must be interpreted as including the procedure conducted by the Council as a necessary precondition for removal by Parliament under section 99.

43. Paragraph 11*(d)*, which provides a guarantee that applies to both provincial and federal courts, is thus intended to be the entrenchment of an express guarantee of the principle of judicial independence, which presupposes the existence of an "*effective restraint*" on the Executive or Parliamentary power of removal.

44. The Council intends to argue that the guarantee of an "*effective restraint* " must be provided at both the federal and provincial levels. The Federal Court of Appeal, for its

part, does not justify why its application should be limited to provincially appointed judges. It is important that this Court have the last word on this issue.

ii. *The process of inquiry and recommendation is a constitutional function of the Council*

45. If the inquiry and recommendation process for which the Council is responsible is a constitutional imperative prerequisite to the removal of federally appointed judges, it follows that the federal legislator cannot have *carte blanche* to abolish or amend it.

46. This Court has already recognized that changes to the remuneration of judges made in the absence of an independent remuneration committee are clearly unconstitutional. The Council argues that, similarly, the removal of a judge voted in absence of a recommendation to that effect made by an independent committee would render such a removal unconstitutional. However, the Court has not yet ruled on this issue.

***Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General),* [2016] 2 S.C.R. 116, at para. 36**

47. The Council intends to argue that, even if the legislator could abolish the Council, modify its composition or amend the procedure, its powers of removal under section 99 of the *Constitution Act, 1867* could not be exercised without establishing a process of inquiry on the conduct of judges that would satisfy the constitutional guarantee of security of tenure.

48. If, in exercising its powers to conduct inquiries or investigations and make recommendations, the Council performs a constitutional function, it follows that its powers in that regard are of constitutional origin, in which case its decisions in this area are not made under an Act of Parliament. That said, its decisions should not be subject to review by the Federal Court.

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

B) Issue 2: What consequences flow from the judicial and constitutional nature of the Council's decisions, particularly with regard to the review of their legality?

i. *Judicial discipline must be exercised by bodies emanating from the judicial branch*

49. Before *Valente*, before the entrenchment of paragraph 11*(d)*, and before the establisment of judicial councils, inquiries into the conduct of judges who were subject to removal from office were held by commissions of inquiry, appointed by the executive branch.

50. The Federal Court of Appeal relies on this historical reality to determine that the Council's powers to conduct inquiries or investigations do not have a constitutional status, but instead are conferred upon the Council by statute.

51. This Court has reiterated that inquiries aimed at establishing cause for removal of a judge from office must be "judicial" inquiries, without, however, fully defining the meaning of this term.

> ***Valente*, supra, at para. 30; *Therrien*, supra, at para. 39; *Moreau-Bérubé v New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at paras. 46-47**

52. This Court has very strongly suggested that the guarantee of security of tenure demands that judicial discipline must be exercised by a fully independent body, namely a body composed primarily of judges who themselves enjoy judicial independence. As was expressed by Professor H.P. Glenn, cited by this Court in *Therrien* and *Moreau-Bérubé*:

> [TRANSLATION] *If we take as our starting point the principle of judicial independence – and I emphasize the need for this starting point in our historical, cultural and institutional context – I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question*.
>
> **H.P. Glenn, cit. *Therrien*, supra, at para. 57; *Moreau-Bérubé*, supra, at para. 47**

53. It follows from this proposition that the phrase "judicial inquiry", used in *Valente*, means an inquiry conducted by judges, acting in their capacity as judges. That is how it was

interpreted by the Court of Appeal of Quebec, relying on the decision of the Court of Queen's Bench for Alberta in *R. v. Campbell*:

> *Not only would it be unlikely that Le Dain J. would use the phrase «judicial inquiries» in any way except its usual meaning – an inquiry by a judge or judges, but the purpose of the inquiry into a judge's conduct as part of the process of deciding whether he or she should be removed from office, is so serious that it would be unacceptable that the inquiry be conducted except by judges.*
>
> ***Québec (Conseil de la magistrature)*, [2000] RJQ 638, at paras. 96-97**

54. On the other hand, the Federal Court of Appeal is of the view that the phrase "judicial inquiry" does not mean an inquiry conducted by persons having the constitutional status of judges. In the view of the Federal Court of Appeal, this phrase means an inquiry ensuring a high degree of procedural fairness, which implies that it could be held by non-judges, or by a body composed primarily of non-judges.

***Canadian Judicial Council v. Girouard*, supra, at paras. 65-68**

55. The Federal Court of Appeal concludes that, in any case, even if "judicial inquiry" means an "inquiry conducted by judges", such an imperative applies only to procedures for removing provincially appointed judges and finds no application in the present context.

56. It is important for this Court to rule on the definition of "judicial inquiry", since it has a direct impact on the constitutional standard of security of tenure of federally appointed judges.

57. Furthermore, it is important for this Court to rule on the nature of the Council's decisions and on the consequences that would flow from their "judicial" status, particularly with regard to the review of their legality.

ii. *The* sui generis *nature of the Council's "judicial" decisions*

58. If inquiries or investigations into the conduct of judges are the exclusive responsibility of the judicial branch and, within the current federal legislative framework of the Council, it follows that the Council's decisions are "judicial in nature", in that they are decisions

made by the Council as part of a function which, constitutionally, must be assigned to a body composed primarily of judges.

59. Certainly, such decisions differ from ordinary judicial decisions: they are not the result of a *lis inter partes*; they are the outcome of a procedure that is partly inquisitorial; they are, in the end, in the nature of a recommendation and not of a binding order.

60. Even though such decisions are *sui generis* in nature, it nevertheless remains that they are decisions made by judges, or by a body composed primarily of judges, and that this must have consequences on the attributes of such decisions. The fact that the *Judges Act* sets out the Council's powers collectively does not alter the fact that the Council is a body composed of chief justices and associate chief justices who:

    a) Perform a role that constitutionally belongs to the judicial branch; and
    b) Are appointed to the Council because they are the leaders of Canada's judicial branch.

61. It is important that this Court rule on what the judicial nature of the Council's decisions implies by way of consequence or, at least, what the status of the Council's members implies with regard to the decisions they make.

iii. *Consequence 1: The review of the legality of the Council's decisions*

62. In the absence of legislative action providing for a right of appeal or judicial review, ordinary decisions made by the judicial branch are final and definitive. What about the Council's *sui generis* decisions?

63. The *Judges Act* does not expressly provide for a mechanism to appeal or review the Council's final recommendations. In enacting the *Judges Act*, the legislator established a judicial council consisting of all chief justices and associate chief justices in the country, who have extensive experience, indeed a constitutional responsibility, in exercising judicial discipline within their respective courts. The legislator tasked those judges with

making inquiries or investigations into the conduct of judges, in order to protect the integrity of the judiciary as a whole.

64. Is the Council's composition sufficient to ensure respect for procedural fairness? It is essential that this Court rule on this issue, because the guarantee of security of tenure of judges demands that judicial inquiries conducted by judicial councils provide the highest degree of procedural fairness.

***Moreau-Bérubé,* supra, at para. 75**

65. If the *Judges Act* does not provide for an appeal or review mechanism, how can respect for procedural fairness be ensured?

66. In the absence of an express appeal or review mechanism, lower courts have determined that the legality of the Council's decisions must be reviewed within the institutional framework established by the *Federal Courts Act*. It is important that this Court decide if such an interpretation of the *Federal Courts Act*, which treats the Council as a "federal board, commission or other tribunal", sufficiently takes into account the Council's constitutional role and the judicial nature of its decisions regarding the removal of judges from office.

67. More generally, in the absence of express legislative action, it is essential that this Court rule on the appropriateness of:

i. Assigning the review of the legality of the Council's decisions to a single judge, whether it be a judge from the Federal Court or a judge from a provincial superior court; or
ii. Interpreting the *Supreme Court Act*, R.S.C., 1985, c. S-26 so that this Court, "*as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada*", has supervisory jurisdiction over the Council.

68. Finally, if this Court is of the opinion that the legislative void in the *Judges Act* must be filled differently, but that existing review mechanisms are somehow deficient, it would be essential for this Court, for the benefit of the legislator, to establish structural principles for a review mechanism that takes into account the Council's position within the constitutional organization.

iv. *Consequence 2: The definition of "federal board, commission or other tribunal"*

69. Although this Court has ruled on the "sweeping" scope that must be given to the definition of "federal board, commission or other tribunal", it would be important for this Court to consider the limits of this scope, particulary its implicit exceptions.

***Telezone*, [2010] 3 S.C.R. 585, at para. 3**

70. The definition of "federal board, commission or other tribunal" was amended to expressly exclude the House of Commons and the Senate. However, prior to this amendment, the Federal Court of Appeal had excluded both houses of Parliament from the definition of "federal board, commission or other tribunal", on the grounds that they play a central role within the constitutional organization, so that they cannot be defined as a "federal board, commission or other tribunal" in the same manner as any federal administrative decision-maker. Justice Iaccobucci, then Chief Justice of the Federal Court of Appeal:

> *To treat the Senate as if it were a federal board, commission or tribunal not only belittles its role but also goes beyond the ordinary meaning of those terms. In this respect, I agree with Strayer J. that it is not part of normal parlance to speak of the Senate as merely another federal board subject to judicial review jurisdiction.*

***Southam*, [1990] 3 FC 465, at para. 29**

71. For all practical purposes, the opposite interpretation would have had the effect of substituting the Federal Court for Parliament as a central body within our constitutional regime. In the opinion of Justice Iaccobucci, section 2 was not sufficiently clear to effect such a constitutional reorganization.

72. Of course, the Council does not play the central role that both houses of Parliament perform within our constitutional regime. It nevertheless plays a central role in the

administration of the judicial system, indeed in our constitutional organization, in that it ensures that the process for removing judges from office is in keeping with the principle of judicial independence.

73. By analogy, if section 2 of the *Federal Courts Act* is interpreted as including the Council, it assumes an intent on the part of the legislator to make Federal Courts the final arbiters of judicial discipline issues, with regard to both statutory courts and courts of inherent jurisdiction.

74. Yet, it is clear on the face of the *Judges Act* that the legislator intended that the most senior judges of the country, assembled in a judicial body exercising a constitutional function, be the arbiters of judicial discipline issues, which are of paramount importance to the integrity of the federal judiciary.

75. It would be important for this Court to rule on whether section 2 of the *Federal Courts Act* is a sufficiently clear expression of the legislator to the effect that the extraordinary process of ensuring respect for the principle of judicial independence be itself subject to the ordinary and generic process of reviewing legality in administrative law.

IV. PART IV: ORDER SOUGHT

76. The Council respectfully seeks application for leave to appeal from the decision of the Federal Court of Appeal in *Canadian Judicial Council v. Girouard*, 2019 FCA 148, without costs.

Respectfully submitted on this ____ day of August 2019.

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