T-1713-18

T-2055-18

2020 FC 629

The Honourable Justice Patrick Smith (*Applicant*)

v.

The Attorney General of Canada (*Respondent*)

and

The Canadian Judicial Council, the Canadian Superior Court Judges Association and **the Ontario Superior Court Judges' Association** (*Interveners*)

INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL)

Federal Court, Zinn J.—Toronto, January 21; Ottawa, May 21, 2020.

Judges and Courts — Judicial review of Canadian Judicial Council's (CJC) decision to constitute Judicial Conduct Review Panel (Review Panel), Review Panel's conclusion that applicant contravening Judges Act, s. 55 — Applicant, Ontario Superior Court of Justice judge, accepting appointment to position of Interim Dean of law school — Chief Justice granting applicant special leave pursuant to Judges Act, s. 54(1)(a) after obtaining approval from Minister of Justice — Executive Director of CJC of view that in light of Judges Act, ss. 54, 55, general duties, ethical obligations of Judges, acceptance by applicant of Interim Dean role may warrant consideration by Council — Referring matter to Judicial Conduct Committee Vice-Chairperson — Matter referred to Review Panel — Review Panel concluding that leave of absence granted under Judges Act, s. 54 not removing prohibition under s. 55 — Finding applicant breaching ethical obligations, impermissibly using prestige of judicial office — Vice-Chairperson endorsing Review Panel's decision — Whether Review Panel decision reasonable, CJC proceedings procedurally unfair or abuse of process — Review Panel's interpretation of Judges Act, s. 55 unreasonable — "Prohibition" identified by Review Panel not "on judges carrying on extra-judicial activities" but rather on judges engaging "in any occupation or business other than his or her judicial duties" — Review Committee's broad interpretation exhibiting neither justification nor intelligibility —Applicant not breaching s. 55 when accepting appointment — S. 55 not complete ban on judges taking on non-judicial roles — S. 54 allowing for leave from judicial duties for reasons not inconsistent with those duties — Review Panel's decision as to ethical breach by applicant unreasonable — Review Panel failing to examine applicant's conduct on basis of informed public exercising mature judgment — CJC process involving applicant unfair, contrary to interests of justice — Constituting abuse of process — Nothing in record explaining how, on what basis Executive Director concluding that referral to Judicial Conduct Committee in public interest, due administration of justice — Applicant also denied procedural fairness by Executive Director — Not receiving fundamental procedural right to know case to be met — Initial referral to Judicial Conduct Committee failing to accord with CJC procedures — Executive Director raising matter on his own in absence of public complaint — In such circumstances, Executive Director ought to weight conduct against test set out in Baker v. Canada (Minister of Citizenship and Immigration) for conduct worthy of removal from bench, be convinced that conduct could result in such a finding — Here, removal of applicant by Minister of Justice inconceivable — Applications allowed.

These were applications for judicial review of the Canadian Judicial Council's (CJC) decision to constitute a Judicial Conduct Review Panel (Review Panel) and of the Review Panel's conclusion that the applicant contravened section 55 of the *Judges Act*.

The applicant, an Ontario Superior Court of Justice judge, accepted an appointment as Interim Dean of the Bora Laskin Faculty of Law at Lakehead University (the Law School). After obtaining the approval of the Minister of Justice, the Chief Justice granted the applicant special leave pursuant to paragraph 54(1)(a) of the *Judges Act* to accept the assignment, subject to certain parameters, including that his role be confined to "academic leadership". The Executive Director of the CJC subsequently wrote to the applicant informing him that "in light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." The Chief Justice informed the Executive Director of the CJC that the appointment would attract no remuneration, that the applicant's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation. The Executive Director nevertheless referred the matter to the Vice-Chairperson of the Judicial Conduct Committee (Vice-Chairperson). The applicant responded that he did not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School. The applicant later signed a written agreement setting out the limitations of his appointment with Lakehead University. In August 2018, the Executive Director advised the applicant that the Vice-Chairperson had decided to constitute a review panel in respect of the appointment. The CJC later issued a press release stating that the applicant's decision to become Interim Dean raised some questions about whether such duties were compatible with judicial office. The Vice-Chairperson's reasons for referral rested on his view that the applicant accepted the role without considering the reaction from First Nations chiefs or the potential effect on the prestige of judicial office. Following notice that the matter had been referred to the Review Panel, the applicant advised the Executive Director that he had resigned from his position at the Law School in September 2018 and would return to his judicial duties with the Superior Court of Justice. The Review Panel concluded that section 55 of the *Judges Act* "requires judges … to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that the applicant had breached an ethical obligation to avoid becoming involved in public controversy, and he had impermissibly used the prestige of judicial office to bolster the Law School, but his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an inquiry committee. The Vice-Chairperson endorsed the decision of the Review Panel and concluded that in light of the applicant's resignation from the position, no further measures were needed. The applicant sought a declaration that he did not contravene section 55 of the Judges Act.

The main issues were whether the decision of the Review Panel was reasonable, and whether the CJC proceedings were procedurally unfair or an abuse of process.

Held, the applications should be allowed.

The interpretation given by the Review Panel to section 55 of the *Judges Act* was unreasonable. The "prohibition" identified by the Review Panel is set out in clear and explicit terms in the English version. However, the prohibition is not "on judges carrying on extra-judicial activities". Rather, it is on judges engaging "in any occupation or business other than his or her judicial duties". The Review Committee interpreted the phrase "occupation or business" in isolation from its context. Properly read, the phrase says that judicial duties are an occupation or business. By failing to include and examine this critical qualifier in its initial summary of the section, the Review Panel may have engaged in "reverse engineering" to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. In ignoring the context, the Review Panel's reasoning failed to properly apply the modern principle of statutory construction. The Review Panel's conclusion that the phrase "occupation or business" is to be broadly interpreted exhibited neither justification nor

intelligibility. It was problematic in several respects, including the failure to consider the entire phrase. When considering the legislative history of section 55, the Review Panel did not address or consider the original wording of the provision. In neither official language do the words of section 55 support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge's regular remuneration. The Review Panel's reasoning was flawed and led to an unreasonable conclusion on interpretation. The applicant did not breach section 55 of the *Judges Act* when he accepted the appointment of Interim Dean. There is nothing in the language of section 54 of the *Judges Act,* suggesting that leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. This leave provision was not enacted to be used exclusively for absences "such as an illness, a period of recovery from accident or parental leave" as the Review Panel suggested. Leaves under section 54 are not restricted to maternity or parental leaves. Section 55 is not a complete ban on judges taking on non-judicial roles. Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances and section 54 of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with those duties. The decision of the Review Panel as to the ethical breach of the applicant in accepting the appointment was unreasonable and could not stand. The Review Panel failed to examine whether the applicant's conduct unnecessarily exposed him to criticism or attack on the basis of an informed public exercising mature judgment.

The CJC process involving the applicant was unfair to the point that it was contrary to the interests of justice. It was an abuse of process. The CJC disciplinary procedure was misused from the beginning, i.e. when the Executive Director determined that the applicant accepting the appointment to the Law School was a matter that "warrants consideration." There was nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The Executive Director placed no weight on the Minister's approval of the applicant's appointment. The Minister's approval could not reasonably be said to be "unofficial" simply because she did not expressly use the word "approved." In addition to the improper decision of the Executive Director that the matter "warrants consideration" there was evidence in the record that the applicant was also denied procedural fairness by the Executive Director. Specifically, the applicant was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements. The Executive Director failed to give to the applicant the fundamental procedural right to know the case to be met. If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then the applicant was entitled to know that and respond to it. Accordingly, the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner. In raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so. The Executive Director ought to weigh conduct against the test set by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* for conduct worthy of removal from the bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

The declarations sought by the applicant were appropriate. The Court declared that the applicant, in accepting the appointment of Interim Dean, did not breach section 55 of the *Judges Act*, nor did he breach his judicial ethics.

STATUTES AND REGULATIONS CITED

An Act to amend the Act respecting the Judges of Provincial Courts, S.C. 1905, 4-5 Edward VII, c. 31, s. 7.

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, s. 2(1).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 99.

Federal Courts Rules, SOR/98-106, rr. 109, 303(2).

Judges Act, R.S.C. 1906, c. 138, s. 33.

Judges Act, R.S.C., 1985, c. J-1, ss. 54 to 56.1, 54, 55, 56, 56.1, 57.

Judges Act, 1946 (The), S.C. 1946, c. 56, s. 34.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3.

CONSIDERED:

Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, 441 D.L.R. (4th) 269; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103, [2007] 4 F.C.R. 714.

REFERRED TO:

Girouard v. Canada (Attorney General), 2018 FC 865, [2019] 1 F.C.R. 404, affd 2019 FCA 148, [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *Girouard v. Canada (Attorney General)*, 2019 FC 434; *Girouard v. Canada (Attorney General)*, 2019 FC 1282; *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89; *Ennis v. Canada (Attorney General)*, 2020 FC 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501, 122 C.P.R. (4th) 195.

AUTHORS CITED

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996).

Canadian Judicial Council. *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, 2015.

Canadian Judicial Council. News Release, "Canadian Judicial Council review of a matter involving the Honourable Patrick Smith" (3 October 2018).

Canadian Judicial Council. *Ethical Principles for Judges*, 2004.

Canadian Judicial Council. *Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith*, November 5, 2018.

Canadian Judicial Council. *Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018.

"Justice Patrick Smith named interim dean of Lakehead law school", CBC News (May 3, 2018).

McQuigge, Michelle. "*Judge fights against disciplinary body's ruling that said he engaged in misconduct*", Toronto Star (27 September 2018).

Schmitz, Cristin. "Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University", *The Lawyer's Daily* (4 October 2018).

APPLICATIONS for judicial review of the Canadian Judicial Council's decision to constitute a Judicial Conduct Review Panel and of the Review Panel's conclusion that the applicant contravened section 55 of the *Judges Act*. Applications allowed.

APPEARANCES

Brian Gover and *Pam Hrick* for applicant.

Michael H. Morris, *Joseph Cheng* and *Elizabeth Koudys* for respondent.

Christopher D. Bredt, *Ewa Krajewska* and *Teagan Markin* for intervener Canadian Judicial Council.

Richard P. Stephenson and *Michael Fenrick* for intervener Canadian Superior Courts Judges Association.

Tom Curry, *Scott Rollwagen* and *Margaret Robbins* for intervener Ontario Superior Court Judges' Association.

SOLICITORS OF RECORD

Stockwoods LLP, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener Canadian Judicial Council.

Paliare Roland Rosenburg Rothstein LLP, Toronto, for intervener Canadian Superior Courts Judges Association.

Lenczner Slaght Royce Smith Griffin LLP, Toronto, for intervener Ontario Superior Court Judges' Association.

The following are the reasons for judgment and judgment rendered in English by

Zinn J.:

"The fact that Judge Patrick Smith is in danger of removal is a sobering illustration of the 'no good deed goes unpunished' saying."

Christie Blatchford

I. INTRODUCTION

[1] The Honourable Justice Patrick Smith (Justice Smith) is a judge of the Superior Court of Justice of Ontario.

[2] He challenges two decisions of the Canadian Judicial Council (CJC). The first is the August 28, 2018, decision of Québec Superior Court Associate Chief Justice Robert Pidgeon, in his capacity as Vice-Chairperson of the Judicial Conduct Committee (Pidgeon A.C.J.), to constitute a Judicial Conduct Review Panel (Review Panel) (Court File T-1713-18). Second, Justice Smith challenges the November 5, 2018, decision of the Review Panel *[Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith]* (Court File T-2055-18).

[3] The Review Panel concluded that Justice Smith, in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University (the Law School), contravened section 55 of the *Judges Act*, R.S.C., 1985, c. J-1 [the Act]. It further found that Justice Smith failed in his "ethical obligations as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office." It recommended that an Inquiry Committee not be constituted, and remitted the matter back to Pidgeon A.C.J. for a decision on the most appropriate way to resolve the matter.

[4] Pidgeon A.C.J., in a letter to Justice Smith dated November 6, 2018 (Letter of Concern), writes that he "fully support[s] the Panel's reasons and conclusions" and describes the decision to accept the role of Interim Dean as "ill-advised." As Justice Smith had resigned as Interim Dean (Academic) of the Law School prior to the decision of the Review Panel and had resumed his judicial duties, it was concluded that no further measures were necessary.

[5] In their memoranda and oral submissions, Justice Smith and the CJC focused on the decision of the Review Panel and the subsequent Letter of Concern as they overtook the decision to refer the conduct of Justice Smith to the Review Panel. Likewise, I shall focus on the decision of the Review Panel and the Letter of Concern, except when relevant to the submission of Justice Smith that the CJC proceedings were procedurally unfair and an abuse of process.

[6] The Review Panel decision and this application bring into issue the interpretation of several sections of the *Judges Act*, which are reproduced in Appendix A.

[7] For the reasons that follow, I conclude that these applications must be allowed. The decision of the Review Panel is not reasonable, and the CJC procedure was applied unfairly to Justice Smith and was an abuse of process. Justice Smith is entitled to a meaningful remedy.

II. BACKGROUND

A. Procedural History

[8] Both applications for judicial review were under case management. By her July 4, 2019 order, the Case Management Judge consolidated these applications. Pursuant to rule 109 of the *Federal Courts Rules*, SOR/98-106 [Rules], leave to intervene was granted to the Canadian Superior Courts Judges Association and the Ontario Superior Court Judges' Association.

[9] The Attorney General of Canada was named as the respondent pursuant to subsection 303(2) [of the Rules]. The Attorney General agrees with Justice Smith that the decision of the Review Panel is unreasonable, and that its interpretation of sections 54 to 56.1 of the *Judges Act*, as adopted by Pidgeon A.C.J. in the Letter of Concern, is unreasonable.

[10] The Case Management Judge granted the CJC leave to intervene in these applications, restricted to the issue of its jurisdiction. That issue was resolved by the decisions in *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404, appeal dismissed *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019.

[11] In her October 17, 2019 order, the Case Management Judge expanded the scope of the CJC’s intervention permitting it to defend its decision on the merits, within

the parameters set out by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147.

B. Facts

[12] On April 16, 2018, the Interim President and Vice Chancellor, Lakehead University, wrote to Justice Smith asking him to accept an appointment to the position of Interim Dean of the Law School. The Law School has existed only since 2013. Its mandate is "Aboriginal and Indigenous Law, Natural Resources and Environmental Law, and small firm and Sole Practice." The second permanent dean of the Law School, Angelique EagleWoman, resigned earlier in 2018, alleging institutional racism. In her letter to Justice Smith, the Interim President notes the importance that it "maintain the confidence and support of the Law Society of Ontario, the Federation of Law Societies of Canada, and of our local bar and extended communities." The Interim President explains why he is being asked to take on this interim position:

> We make this urgent request based on your knowledge, skills, and experience as a Judge of the Superior Court of Ontario. In addition, your long standing connections and the respect you garner in the local, provincial and national legal communities, combined with your significant work with Indigenous communities and your important publications focused on Aboriginal Law in Canada, are critical to the ongoing evolution and success of the Faculty of Law.

[13] Justice Smith sits in the Northwest Region and before becoming a judge in 2001, practised law in Thunder Bay for 25 years. He has significant expertise in Aboriginal and Indigenous law. In October 2009, he was appointed to the Specific Claims Tribunal. Justice Smith worked with former judge and current Senator Murray Sinclair, Chair of the Truth and Reconciliation Commission, on various judicial education initiatives, including developing and co-chairing a three-day intensive course, sponsored by the National Judicial Institute on Aboriginal Law for judges from across Canada, and creating and updating a Judicial Bench Book on Aboriginal Law. He is often invited by legal organizations to speak on Aboriginal and Indigenous law, and is called upon regularly by judges across Canada to assist with the mediation of land claims and other litigation between First Nations and various levels of government.

[14] Justice Smith informed the Honourable Heather J. Forster Smith, Chief Justice of the Superior Court of Justice (the Chief Justice) of the request from the Law School. In his letter, Justice Smith says, "the affairs at the school are in a crisis." This characterization of the situation at the Law School is not questioned. He asked for the approval of his Chief Justice and the Minister of Justice to accept this short-term appointment.

[15] The Chief Justice wrote to Minister of Justice, Jody Wilson-Raybould, expressing her support for Justice Smith to accept this role. She notes that this request "would take him outside of his judicial duties in a role that is unprecedented for a judge of our Court." She also notes that Justice Smith is a supernumerary judge "so the impact may be less than it would in other circumstances, particularly until the fall." As a supernumerary judge, Justice Smith performs judicial duties for only six months each year. She indicates that this is an exceptional situation and "an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations."

[16] The Chief Justice proposes to grant Justice Smith a leave of up to six months, from June 1, 2018, into November 2018, under the authority given to her in paragraph 54(1)(a) of the *Judges Act*. She notes that anything beyond that would require an Order in Council.

[17] The Chief Justice writes that Justice Smith appreciates that he can only accept the role "within certain clear parameters" including that his role be confined to "academic leadership." He would delegate administrative authority over recruitment, financial decisions, and academic appeals to others within the school. Lastly, she observes, "given the restrictions of s. 55 of the Judges Act (which prohibits extra-judicial employment, occupation or business) he could not accept any remuneration from the university."

[18] On April 27, 2018, the Minister replies:

> As Chief Justice, you have authority to grant Justice Smith a "special leave" under the *Judges Act*, for a period up to six months.…
>
> I have no concerns about your granting Justice Smith a "special leave" from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. [Emphasis added.]

[19] On April 30, 2018, the Chief Justice granted Justice Smith special leave pursuant to paragraph 54(1)(a) of the *Judges Act* from June 1, 2018, to accept the assignment of Interim Dean at the Law School, subject to the parameters set out in her letter to the Minister of Justice.

[20] On May 9, 2018, the Executive Director of the CJC, Norman Sabourin, wrote to Justice Smith, with a copy to his Chief Justice. He observed that pursuant to section 4.2

of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the Review Procedures), in addition to receiving and reviewing complaints, he may "review any other matter involving the conduct of a superior court judge that comes to the attention of the Executive Director and appears to warrant consideration." He further noted that under section 4.3 of the Review Procedures, if he determines that the matter warrants consideration, he "must" refer it to the Judicial Conduct Committee.

[21] With that background, Mr. Sabourin writes in his letter to Justice Smith that media reports indicate that he has accepted to serve as "Dean of Lakehead University (on an interim basis)" and he attaches a CBC web report posted May 3, 2018, entitled "Justice Patrick Smith named interim dean of Lakehead law school." It reports on the departure of former Dean Angelique EagleWoman who on stepping down said, "Systemic issues within the university and challenges to implementing the Bora Laskin Faculty of Law's Aboriginal and Indigenous law mandate have made my continued involvement in the law school untenable." The news report concludes with the reaction of some Indigenous leaders to the situation at the Law School:

> Since then Indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for "immediate change" at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman's successor, that an independent review examine "all issues and allegations" raised by her and that appropriate measures are subsequently taken.

[22] Mr. Sabourin says, "in light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." Prior to reaching any decision, Mr. Sabourin invites Justice Smith's views.

[23] The Chief Justice quickly responds by letter of May 11, 2018, noting that Justice Smith is unable to respond as he is out of the country. She assures Mr. Sabourin that she considered the request "very carefully taking into account the CJC's ethical principles and the Judges Act." She informs him that she obtained assurances that the appointment would attract no remuneration, that Justice Smith's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation. Further, she informs Mr. Sabourin that she had sought and obtained approval from the Minister of Justice. She closes her letter with the following:

> I trust that the above clarifies how the matter unfolded and that it was thoroughly

considered and approved both by me and the Minister of Justice. As such, I trust that you will agree that any further review of this matter is unwarranted.

I anticipate that this explanation will satisfy all concerns you may have, but if not, please advise me and we may be able to suggest possible solutions.

[24] This response apparently did not satisfy Mr. Sabourin. He did not accept the invitation of the Chief Justice to contact her; he referred the matter to Pidgeon A.C.J.. On his behalf, Mr. Sabourin requests "more information about the precise scope and nature of the duties". Justice Smith will undertake at the Law School and asks for his comments on the following:

* who first contacted you in respect of the proposed appointment as Dean;

* whether you have been granted leave from your judicial duties and, if so, by whom and on what basis;

* whether, in your view, section 55 of the Judges Act is a bar to a judge engaging in professional activities other than judicial duties, whether remunerated or not;

* whether you intend to engage in any judicial activities while acting as Dean;

* whether there is any possibility of litigation in relation to Lakehead University;

* whether the public confidence in the judiciary might be undermined by your engaging in the activities you propose at Lakehead University.

[25] Justice Smith responds directly to Pidgeon A.C.J. on May 24, 2018. He points out that the position he was invited to fulfill is not Dean of the Law School, as Mr. Sabourin's letter states, but Interim Dean. He reiterates that he has been granted a leave of absence from his judicial duties by his Chief Justice who has consulted with the Minister of Justice who has "no concerns" with that.

[26] Justice Smith responds that he does not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School:

While I do not believe that this provision creates a blanket ban on engaging in any "professional activities other than judicial duties", I am hesitant to opine in the abstract on the circumstances in which section 55 prohibits such activities. I am pleased, however, to have the opportunity to provide submissions on whether this provision prohibits my proposed activities as Interim Dean.

The role of "Interim Dean", as defined above, does not in my respectful view qualify as an "occupation or business" in which the Legislature intended to prohibit judges from engaging. The Legislature intended to prohibit judges from moonlighting in other roles – particularly remunerative ones – that could undermine their ability to devote themselves

fully to their judicial duties.

Moreover, the role that I intend to play at the Bora Laskin Faculty of Law is not unlike a study leave granted to a judge to reflect, research, or teach at a Canadian Law School, as authorized by the Canadian Judicial Council and the Minister of Justice.

Further, section 55 must be read in conjunction with section 54, which expressly contemplates that a judge may "be granted a leave of absence from his or her judicial duties." It is necessarily inferred that during a period of leave granted pursuant to section 54, a judge is relieved of the obligation in section 55 to "devote himself or herself exclusively to those judicial duties."

Viewed in this context, as well as in the circumstances in which I would be fulfilling the temporary role of Interim Dean (i.e., during a period of leave pursuant to section 54), I respectfully submit that section 55 does not prohibit taking on this role, as defined above.

Nevertheless, if this remains a concern for you, I would be open to suggestions on how this role might be more tightly tailored or differently stylized (e.g., "Interim Academic Dean", "Interim Dean/Judge-in-Residence", "Academic Lead" or "Special Academic Advisor") to ensure I do not run afoul of section 55.

[27] Justice Smith says that the restrictions placed on him to providing academic leadership "are intended, in part, to insulate me from concerns about future litigation." Upon his return to judicial duties, he will recuse himself from any matter in which Lakehead University is a party.

[28] Additionally, he expresses his view that public confidence in the judiciary would be enhanced and not undermined by him engaging in the proposed activities at the Law School:

I share Chief Justice Smith's concerns about the current risk to Lakehead University's Faculty of Law, which includes a real possibility that the Faculty may collapse. I have only accepted to take on the role of Interim Dean in order to try to help the Faculty navigate a period of real crisis. I do not believe the public confidence in the judiciary could be undermined by me providing assistance to the Faculty as proposed. To the contrary; I believe the public confidence in the judiciary would be <u>enhanced</u> by knowing that a judge of the Superior Court is willing and enthusiastic to answer a call to service made by Lakehead University to assist its Faculty of Law through an existential crisis, while also ensuring full compliance with his obligations as a judge. That confidence would only be further enhanced by knowing that the Chief Justice of the Ontario Superior Court of Justice, the federal Minister of Justice, and the Canadian Judicial Council are united in their support of this effort to ensure that a Law Faculty with such important mandates continues to survive and thrive, and to address one of the Truth and Reconciliation Commission's Calls to Action in furthering the project of reconciliation. This will contribute to the public perception of the judiciary and the Canadian Judicial Council as relevant and responsive to a crisis in the community. [Emphasis in original.]

[29] The Chief Justice also wrote to Pidgeon A.C.J. on May 28, 2018, repeating her support of Justice Smith accepting the position. Further, she provided a legal opinion from former Ontario Deputy Attorney General Murray Segal who, after outlining the legislative history of and parliamentary intention regarding sections 54 and 55 of the *Judges Act* concludes that the appointment did not contravene section 55 of the *Judges Act*:

> In sum, our view is that ss. 54 and 55 of the *Judges Act* did not prevent Chief Justice H. Smith from granting special leave to Justice P. Smith to act as Acting Dean in a limited capacity, nor do they prevent Justice P. Smith from taking such leave.
>
> Granting special leave was within Chief Justice H. Smith's power and did not contravene s. 55 of the *Judges Act*. When leave is granted under s. 54, it must be for a purpose that is consistent with the office of the judge and judicial ethics, and it must be particularly sensitive to the judge's eventual return to the bench. These considerations were apparent in Chief Justice H. Smith's decision to grant leave on carefully designed conditions. Given the plain meaning and history of ss. 54 and 55, the history of judges pursuing roles in academia, and the principles of judicial ethics, granting special leave for Justice P. Smith to take on a closely circumscribed role as Acting Dean did not contravene s. 55. Emphasis added.

[30] In his opinion, Mr. Segal notes, as had Justice Smith, that academic leaves of absence established by the CJC were not viewed as offending the *Judges Act* or a judge's ethical principles. Further, he points out that there are precedents for a Superior Court justice acting as Dean of a law school. Former Chief Justice Gerald Fauteux was a justice of the Superior Court of Québec while serving as Dean of McGill Law School (1949–1950) and a justice of the Supreme Court of Canada while serving as Dean of Ottawa Law School (1953–1962). Mr. Segal also points out that while a Superior Court judge, Justice Bora Laskin joined the Board of Governors of York University (1967–1970) and was Chair of the Ontario Institute for Studies in Education.

[31] Mr. Segal recommends some additional conditions on Justice Smith's role at the Law School, including that a written agreement be entered into setting out the limitations of his appointment. Justice Smith and Lakehead University signed such a written agreement on May 31, 2018, and it was sent to Pidgeon A.C.J.. His position title was modified to Interim Dean (Academic) to reflect the limitations on his role.

[32] On July 12, 2018, Pidgeon A.C.J. sought further information from Justice Smith on the additional limitations on his role (as recommended in Mr. Segal's opinion), his duties, the written agreement, and the status of the search for a permanent dean. Justice Smith replied on July 17, 2018, stating that the agreement embodied the additional recommended limitations, except the condition that he approach his Chief Justice if there was a change in circumstances or the appearance of controversy. In its

place, he confirmed that he had “undertaken to Chief Justice Smith to approach her or her office immediately should circumstances change, or any issues arise which may raise new ethical implications, possibly lead to public controversy, or generally on which I require direction.”

[33] Mr. Sabourin notified Justice Smith by telephone on August 20, 2018, that Pigeon A.C.J. decided to constitute a Review Panel in respect of the appointment, and that a press release would be issued by the CJC.

[34] Justice Smith replied on August 23, 2018, providing an update on his duties and the results he had achieved, and asking the CJC not to issue a press release because of the negative effect this would have on the morale and reputation of the Law School. The CJC later issued a Press Release on October 3, 2018 [“Canadian Judicial Council review of a matter involving the Honourable Patrick Smith”], stating, “Specifically, the decision of the Honourable Patrick Smith to become the Interim Dean of the Bora Laskin Law School at Lakehead University raises some questions about whether such duties are compatible with judicial office.”

[35] Justice Smith received a letter from the CJC dated August 28, 2018, attaching the reasons for the decision to appoint a Review Panel “in respect of your appointment as Dean [*sic*] of the Faculty of Law at Lakehead University.” Justice Smith was invited “to provide any written comments you may wish to make to the Panel, including on whether or not an Inquiry Committee should be constituted.”

[36] The reasons provided by Pidgeon A.C.J. for the referral include his interpretation of the relevant provisions of the *Judges Act*. However, and contrary to the explanation in the press release, his decision to refer rests on his view that Justice Smith accepted the role “without considering the possible public controversy associated with the reaction from First Nations chiefs and without considering the political environment or the potential effect on the prestige of judicial office.”

[37] The reasons for referral [*Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018], in relevant part, are as follows [at pages 3, 5, 6, 7,10, 11]:

> …. I begin my review by noting that this matter raises a question of interpretation with regard to sections 54, 55 and 56 of the *Judges Act*. Indeed, Justice Smith and his Chief Justice obtained a legal opinion in this respect (attached), prepared by Mr. Murray Segal, former Deputy Attorney General of Ontario. Mr. Segal provides a broad interpretation of sections 55 and 56 of the *Judges Act*:

> The history of s. 55 and its predecessors does not suggest that it was targeted at preventing judges from engaging in unpaid academic pursuits. The history of s. 55 suggests it was aimed at preventing judges from: (1) engaging in paid employment while acting as judges, and thereby neglecting their judicial duties; (2) being involved in commercial enterprises; and (3) being involved in matter of public controversy. [Emphasis added by Pidgeon ACJ.]

…

In my view, a somewhat different interpretation must be given to the provision in question. In my respectful opinion, the question for Council in this matter is whether Justice Patrick Smith's conduct in accepting an appointment as Interim Dean of the Law Faculty potentially contravenes the *Judges Act* or his ethical obligations as a member of the judiciary.

…

Section 55 of the *Judges Act* requires judges to devote themselves exclusively to their judicial duties, and to abstain from businesses and occupations falling outside the judicial sphere. This is confirmed by the legislative history of sections 55, 56 and 56.1 of the *Judges Act*. Being granted a leave of absence under section 54 of the *Judges Act* does not permit a judge to take on a business or occupation outside of the judicial sphere (except for acting as a commissioner, arbitrator, adjudicator, referee conciliator or mediator on any commission or on any inquiry, provided certain statutory conditions under section 56 of the *Judges Act* are met). The meaning of "occupation" should be broadly interpreted to capture all non-judicial activities that interfere with the judicial role, whether due to their onerous or time-consuming nature or given their incompatibility with judicial office.

In addition, it is worth noting that in a decision rendered on 22 June 2015 (attached), regarding a complaint made against an Ontario Court of Appeal judge who had accepted a position as chancellor at Brescia University College, the Chairperson of the Judicial Conduct Committee, the Honourable Michael MacDonald, concluded:

> Chief Justice MacDonald came to the opinion that Justice Gillese's appointment to the Chancellor's post did not place her in a position that is incompatible with her judicial functions. Chief Justice MacDonald took into consideration the strict limitations that were agreed upon by officials from Brescia and by Justice Gillese, as well as her pro-active course of action which included discussions with her Chief Justice to avoid any potential conflict and limit any associated risks. In these specific circumstances, Chief Justice MacDonald agrees with Chief Justice Strathy that Justice Gillese's acceptance of this ceremonial post is not contrary to judicial ethics and may, in fact, be of benefit to the judiciary. [Emphasis added by Pidgeon A.C.J..]

Note that in that case, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from Chief Justice MacDonald regarding the interpretation of sections 55 and 56 of the *Judges Act*, suggested the following:

> The words "occupation and business" cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words "occupation or business" certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

…

> After considering the interpretation of the relevant legislative provisions, only one question remains: did Justice Smith err by incorrectly assessing the situation, that is, by erroneously weighing the inherent risks of the situation? [Emphasis added.]
>
> My answer is that he did….
>
> …
>
> In summary, I am of the view that Justice Patrick Smith engaged in misconduct by accepting a position as Interim Dean without considering the possible public controversy associated with the reaction from chiefs of First Nations and without considering the political environment or the potential effect on the prestige of judicial office.
>
> I had to answer this question bearing in mind that (1) an interim or permanent dean is the public face of a faculty and (2) Justice Smith accepted the appointment while the media attention was underway. In addition, and with respect, it is my opinion that the situation is exacerbated by his erroneous assessment of the risks that will continue to exist at an institution where litigation would surely come before the Court of which he is a member.
>
> I therefore conclude that the matter might be serious enough to warrant the removal of Justice Patrick Smith from office. I accordingly refer the matter to a Review Panel, in keeping with subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*, to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*.

[38] Subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 (the By-laws) provides:

> **Establishment of Judicial Conduct Review Panel**
>
> **2 (1)** The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

[39] In concluding that the conduct of Justice Smith was contrary to judicial ethics, Pidgeon A.C.J. relies on passages from the CJC's *Ethical Principles for Judges* (the Ethical Principles), and particularly the following statement under the heading "Impartiality:" "Judges are free to participate in civic, charitable and religious activities subject to the following consideration: … (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation." He also notes section C.9 of the Commentary:

> **C.9** Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

[40] The Court notes that Pidgeon A.C.J. does not reference the statement in the Ethical Principles that it is provided for guidance and "does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval."

[41] I also note that in the referral decision Pidgeon A.C.J. writes [at page 8] that the conditions imposed on Justice Smith in the role of Interim Dean (Academic) "for all intents and purposes would limit his role to a ceremonial one." This suggests that his role was no different from that of Justice Gillese as chancellor of a university.

[42] Justice Smith outlines the duties he performed in this role in a letter to Mr. Sabourin. He says that he delivered an address to graduating students of the Law School; he recommended the installation of a video conference facility to connect academics, elders, jurists, and others with the student body; through his efforts Senator Murray Sinclair delivered a keynote address during a special lecture at the Law School; and his efforts resulted in the engagement with the Aboriginal Advisory Committee regarding the content of Indigenous courses, and the provision of support for and connection with Indigenous students. While these arguably take his role outside a purely ceremonial one, as is noted by Pidgeon A.C.J. elsewhere in his reasons, the content of his role is not examined by the Review Panel in its decision. In my view, his duties as reflected in the record are consistent with the description given by his Chief Justice as one of academic leadership.

[43] Following notice that the matter had been referred to the Review Panel, Justice Smith's counsel wrote to Mr. Sabourin on September 4, 2018, stating that he had resigned his position at the Law School effective September 14, 2018, and would return to his judicial duties with the Superior Court of Justice on the following business day.

[44] On September 14, 2018, counsel for Justice Smith wrote to the CJC requesting that Pidgeon A.C.J. reconsider his decision to refer the matter to the Review Panel. Mr. Sabourin replied on September 19, 2018, that Pidgeon A.C.J. believes he is unable to reconsider his decision and that his function in the matter has concluded, unless and

until the Review Panel returns it to him after a conclusion that no Inquiry Committee should be constituted.

[45] Justice Smith provides written submissions to the Review Panel on September 27, 2018, and his Chief Justice provided her comments on October 10, 2018.

[46] On September 24, 2018, Justice Smith commenced his application for judicial review challenging the decision to refer the matter to the Review Panel and refusing to reconsider that decision. He also brought a motion seeking an order staying the Review Panel's consideration of the matter referred to it.

[47] Counsel for Justice Smith together with counsel for the Attorney General on October 1, 2018, wrote to the CJC, asking the Review Panel not to proceed with the review until the stay motion had been decided. The CJC replied that the request had been put before the Chair of the Review Panel. The Panel never responded. The stay motion was adjourned at the request of counsel for Justice Smith and the Attorney General of Canada, and subsequently rescheduled by the Court to a special sitting on November 20, 2018. The CJC was informed of this revised hearing date. Prior to the scheduled motion date, the Review Panel issued its decision, rendering the motion moot.

[48] The Review Panel issued its decision on November 5, 2018. It concluded [at paragraph 47] that section 55 of the *Judges Act* "requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that, regardless of the interpretation of these sections, Justice Smith breached an ethical obligation to avoid becoming involved in public controversy, and he impermissibly used the prestige of judicial office to bolster the Law School. The Review Panel found that as Justice Smith had no bad behaviour or improper motives, his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an Inquiry Committee.

[49] The matter then returned to Pidgeon A.C.J. [at paragraph 80] to make "a decision on the most appropriate way to resolve this matter." He endorsed the decision of the Review Panel and noted that Justice Smith had resigned from the position and returned to his judicial duties. He concluded that no further measures were needed.

[50] On November 6, 2018, the CJC told two reporters that the Review Panel had reached its decision and that it would be released that day without having so informed

Justice Smith or his counsel. The CJC published a press release on its Web site the same day, with a link to the Panel Decision.

III. ISSUES

[51] These applications focus on three issues:

i. whether the decision of the Review Panel decision is reasonable;
ii. whether the CJC proceedings were procedurally unfair or an abuse of process; and
iii. if the applications succeed, what is the appropriate remedy?

IV. ANALYSIS

A. Is the Review Panel Decision Reasonable?

[52] The Review Panel [at paragraph 76] reached two conclusions concerning the conduct of Justice Smith. First, that Justice Smith breached section 55 of the *Judges Act*. Second, that Justice Smith breached his ethical obligation "to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office" and he and the Superior Court of Justice, in lending their support to the Law School, put their reputations at risk.

[53] All parties agree, as does the Court, that the standard of review of the Review Panel decision is reasonableness, regardless of whether one is reviewing its interpretation of section 55 of the *Judges Act* or its finding that Justice Smith breached his ethical obligations.

[54] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), at paragraph 16, teaches that there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions." Moreover, it makes it clear at paragraph 115 that "Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard."

[55] As the Supreme Court explains at paragraph 87 of *Vavilov,* "a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome."

[56] In *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, 441 D.L.R. (4th) 269, which was issued with *Vavilov*, the majority at paragraph 31, explains

that when conducting a reasonableness review, a court should start with the reasons, looking to see if there is a coherent and rational chain of analysis based on the facts and law:

> A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[57] Other helpful guidance from *Vavilov*, when conducting a reasonableness review, includes the observation at paragraph 105 that a decision "must be justified in relation to the constellation of law and facts that are relevant to the decision." We are told at paragraph 106 that these considerations are many and varied:

> It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[58] In *Vavilov*, like the present matter, the decision under review involved the decision maker's interpretation of a statutory provision. The Supreme Court at paragraphs 115 to 124 provides extensive guidance to a reviewing court when reviewing such decisions. The main principles therein on which I rely in reviewing the Review Panel's interpretation of section 55 of the *Judges Act*, are the following:

> 1. The proper approach to interpreting a statutory provision, whether done by a court or an administrative decision maker, is the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "'in their entire context and in their grammatical and ordinary sense harmoniously with the

scheme of the Act, the object of the Act, and the intention of Parliament'" (paragraphs 117–118);

2. "[T]he merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision." "[T]he usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are 'precise and unequivocal', their ordinary meaning will usually play a more significant role in the interpretive exercise" (paragraph 120); and

3. "[E]ven though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the 'correct' interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" [italics in original] (paragraph 124).

[59] The CJC, at paragraph 67 of its memorandum of argument, and referencing *Girouard v. Canada (Attorney General)*, 2019 FC 434, at paragraph 26; *Girouard v. Canada (Attorney General)*, 2019 FC 1282, at paragraph 71; and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 (*Moreau-Bérubé*), at paragraphs 44 and 49; submits, "The composition and constitutional role of the Council demands deference to its assessment of judicial conduct."

[60] Justice Smith takes issue with the claim of the CJC that it has any such constitutional role. He correctly notes that the Federal Court of Appeal has concluded that the investigative power of the CJC is a statutory power and that the only procedure provided for in the constitution for removal of a superior court judge is that set out in subsection 99(1) of the *Constitution Act, 1867*: See *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503, paragraphs 38–46.

[61] He further notes that the CJC at paragraphs 10, 67, and 87 of its memorandum, contends that it has a constitutional role in judicial discipline delegated to it under the *Judges Act*, that it is a special body with a special purpose performing the essential constitutional task of determining the boundaries of ethical judicial conduct and judicial independence, and that the composition and constitutional role of the Council demands deference to its assessment of judicial conduct. He submits that in making those submissions, the CJC has clothed itself with a role that does not belong to it. He says that the only constitutional actor in this process is the Minister of Justice, who is responsible for making any address to Parliament under section 99 of the *Constitution Act, 1867*.

[62] I agree with the submissions of Justice Smith that only the Minister of Justice plays a constitutional role in the matter of judicial conduct.

[63] I also agree with the submissions of the Attorney General of Canada regarding deference. Although the concept of deference in judicial review continues to have a role, *Vavilov*, at paragraphs 30 and 31, makes it clear that the previous rationale for the proposition that deference is owed by a reviewing court to the decision maker's relative expertise, no longer holds true:

> While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.
>
> …
>
> We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. [Italics in original.]

[64] In summary, as the Supreme Court states at paragraph 58 of *Vavilov*, "the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review."

[65] The CJC also cites paragraph 49 of *Moreau-Bérubé* wherein the Supreme Court of Canada writes, "There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage." With respect, I may not enjoy a legal or judicial advantage to the Review Panel, but neither do I suffer any disadvantage. Indeed, one might ask what advantage the Review Panel has in this matter in light of the Attorney General and two judges' associations, one of which represents superior court judges across Canada, expressing the view that the Review Panel's decision is unreasonable. The point surely is that judicial review is not a quantitative analysis, but a qualitative one; one judge is as well placed as several when performing that task.

[66] In any event, *Moreau-Bérubé* was decided before *Vavilov* and the Supreme Court of Canada's "revised framework" for judicial review of administrative decisions. Thus, it must be read with some caution. The comment the CJC relies on is directed at the suggested expertise of the decision maker and that is no longer the separate consideration it once was.

[67] The standard of review applicable to Justice Smith's claim that the CJC process and resulting decision was procedurally unfair and an abuse of process is not reasonableness. In my view, *Vavilov* has not changed the law pertaining to procedural fairness; the standard of review remains correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43; and see *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4, at paragraph 23; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89, at paragraph 12; *Ennis v. Canada (Attorney General)*, 2020 FC 43, at paragraph 18. Whether a particular process was procedurally fair remains "'eminently variable', inherently flexible and context-specific": *Vavilov*, at paragraph 77. This Court will consider whether the process employed was *fair* in the specific context of the decision, having regard to the *Baker*[1] factors: *Vavilov*, at paragraph 23; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraphs 40, 54–56.

(1) *Section 55 of the* Judges Act

[68] I turn first to consider whether the Review Panel's interpretation of section 55 of the *Judges Act* is reasonable. Did it read the words of that section "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament?"

[69] In conducting this exercise it is important to recall that federal statutes are bilingual, in French and in English, and both are equally authoritative. The shared meaning principle stipulates that in cases of discrepancies between the English and French versions of a statute, the meaning common to both versions must be accepted, unless evidence of legislative intent indicates otherwise: *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217. If the meaning of one version is broader than the other, the narrower version should be adopted: *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501 122 C.P.R. (4th) 195.

[70] Section 55 was first enacted in 1905 as section 7 of *An Act to amend the Act respecting the Judges of Provincial Courts*, S.C. 1905, 4-5 Edward VII, c. 31. The marginal note to section 7 is "Judges restricted to judicial duties / *Les juges ne s'occuperont que de leurs fonctions judiciaires*" and it reads as follows:

> Judges restricted to judicial duties
>
> **7.** No judge mentioned in this Act shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or for others, engage in any occupation or business other than his judicial duties; but every

[1] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.

such judge shall devote himself exclusively to such judicial duties.

[71] This provision is section 33 of the *Judges Act*, R.S.C. 1906, c. 138, headed "JUDGES NOT TO ENGAGE IN BUSINESS / *LES JUGES NE PEUVENT SE LIVRER AUX AFFAIRES*" and with a marginal note that reads "No judge to engage in business other than his judicial duties / *Les juges doivent se consacrer exclusivement à leurs fonctions judiciaires*". It reads as follows:

> No judge to engage in business other than his judicial duties
>
> **33.** No judge of the Supreme Court of Canada or of the Exchequer Court of Canada or of any superior or county court in Canada shall, either directly, or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

[72] The heading of sections 55 to 56.1, as they currently read, is "EXTRA-JUDICIAL EMPLOYMENT / *FONCTIONS EXTRAJUDICIARES*" and the marginal note for section 55 is "Judicial duties exclusively/*Incompatibilités*". Section 55 reads:

> **Judicial duties exclusively**
>
> **55** No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

[73] The Review Panel at paragraphs 38 and 39 of its decision says of section 55:

> …. Although its wording has been changed periodically, the section has always been comprised of two foundational components:
>
> (a) A prohibition on judges carrying on extra-judicial activities; and
>
> (b) A requirement that judges devote themselves exclusively to their judicial duties.
>
> The prohibition, and the requirement are set forth in clear and explicit terms in the current version of section 55. [Emphasis added.]

[74] The noted prohibition component on "carrying out extra-judicial activities" is found in the first phrase of the English language version of the section—"No judge shall … engage in any occupation or business other than his or her judicial duties." However, the French language version reads differently. A more literal translation of the French version is that "Judges shall devote themselves to their judicial functions to the exclusion of any other activity." This does not appear to have the two components noted

by the Review Panel. Rather, it is directed only to the second foundational component identified by the Review Panel - a requirement that judges devote themselves exclusively to their judicial duties.

[75] I agree with the Review Panel that the "prohibition" it identifies is set out in clear and explicit terms in the English version. However, the Review Panel does not accurately capture that prohibition in its passage quoted above. The prohibition is not, as it writes [at paragraph 38], "on judges carrying on extra-judicial activities" [emphasis added.] Rather, as the section explicitly states, it is on judges engaging "in any occupation or business other than his or her judicial duties" [emphasis added.]

[76] Although subsequently the Review Panel interprets the phrase "occupation or business" it does so in isolation from its context. The full phrase—"any occupation or business other than his or her judicial duties"—provides an important interpretative context. Properly read, it says that judicial duties are an occupation or business. They are therefore reliable examples of what is meant by the phrase "occupation or business" guiding the reader in how the phrase is to be interpreted. The same holds true if one looks to the French language phrase "*à leurs fonctions judicaires à l'exclusion de toute autre activité*".

[77] The failure to include and examine this critical qualifier in its initial summary of the section leads me to wonder whether the Review Panel is engaging in "reverse engineering" to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. The Supreme Court of Canada at paragraph 121 of *Vavilov* expressly warned against that manner of proceeding. In any event, in ignoring the context, the Review Panel's reasoning fails to apply properly the modern principle of statutory construction.

[78] When the Review Panel does turn its attention to the phrase "occupation or business" albeit standing alone, it concludes that it is to be broadly interpreted. It reaches that conclusion by looking at the French language equivalent—"*activité*"—and dictionary definitions of the English language word occupation [at paragraphs 40–41]:

> The prohibition in the English version is expressed in terms of an "occupation or business", whereas the French version uses the broader term "*activité*". The English version, by referring to "occupation or business" may imply that the prohibition is limited to some form of remunerative livelihood, but the French version, by using the broader term, is more explicit in prohibiting any activity other than judicial functions.
>
> The broader interpretation of the word "occupation" to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word and with the French version of section 55. [Emphasis added.]

[79] This reasoning exhibits neither justification nor intelligibility. It is problematic in several respects, including the failure to consider the entire phrase as previously discussed.

[80] First, the Review Panel states [at paragraph 41] that the "broader interpretation of the word 'occupation' to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word" but it does not point to any dictionary definition it relies on. The record contains none, leading me to question whether any were before the Review Panel.

[81] Second, while one use of the English word "occupation" might be said to include non-remunerative activity—such as in the statement "On Saturdays my occupation is chauffeur because every Saturday I drive my son to his football match"—others (and I suggest most) clearly reflect remunerated activities. In response to the question: "What is your occupation?" I daresay the response of four members of the Review Panel would be "Judge"—a paid occupation.

[82] Third, the Review Panel only examines the word "occupation" and ignores the word "business" in section 55. In my view, the plain and clear import when it is said that one is engaging in business is that they are being remunerated.

[83] The view of the Review Panel that section 55 is to be interpreted as prohibiting any activity (remunerated or not) other than judicial functions is not one shared by all. Indeed, as Pidgeon A.C.J. himself noted in his letter referring the matter to the Review Panel, in 2015, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from the Judicial Conduct Committee regarding the interpretation of sections 55 and 56 of the *Judges Act*, said [reasons for referral, at page 7]:

> The words "occupation and business" cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words "occupation or business" certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

[84] The Review Panel considers the legislative history of section 55 and, in reference to the opinion of Murray Segal, notes, "some of the remarks during the initial debates in the House of Commons in 1905, including those of Prime Minister Laurier, reflected a concern to restrict the commercial activities of judges." In those debates, the Prime Minister, responding to a question of whether the provision would prevent judges from acting as arbitrators in a reference involving Canada and the Provinces, responded:

> But what parliament intends and what we are all agreed to is that judges should not be allowed to participate in any kind of business which is of a commercial character; they

should not be directors of insurance companies or banks or such. But as regards anything of a judicial character, I do not think any one has the intention of preventing the judges from acting. [Emphasis added.]

[85] A statement made by the Prime Minister at the time as to the intent of Parliament and its members ought to be accorded significant weight, if not considered conclusive on the issue of parliamentary intent. However, in response to the Prime Minister's statement, the Review Panel writes [at paragraph 42]:

…. other members took a broader view. The Minister of Justice, Charles Fitzpatrick (later Chief Justice of Canada) commented that "The less a judge has to do with matters which are not clearly within the scope of his duties, the better for himself and the dignity of the bench."

[86] I agree with the submission of the Attorney General of Canada, that the Review Panel ignores the context in which that statement was made. In extracting a single sentence from its context, the Review Panel gives it a meaning it does not have.

[87] The Minister of Justice had been asked by Mr. Foster whether the provision being debated would prevent judges from "going on commissions." The context discloses that the Minister of Justice was not, as the Review Panel says, stating his preference that judges do nothing outside their judicial duties, rather his comment focuses on judges sitting on minor commissions, as the full report shows:

Mr. FOSTER. Will that [clause] prevent judges from going on commissions? We know that a good deal of discussion has arisen of late about judges being appointed to commissions at various times. Sometimes these are high matters of interest in which it might be desirable to appoint judges; but in other cases they are minor matters, and the judges are left open to a great deal of criticism and cross currents of opinion, which do not seem to add very much to the dignity of the bench or to the respect in which judges should be held throughout the country. In fact, when you take a judge from the bench and make him commissioner in a matter involving other than legal points, you rather take his robe of dignity from him. He becomes then more like an ordinary individual and becomes subject to criticism to which a judge ought not to be subject. He comes down, so to speak, into the general arena, and stands to get a good deal of dust upon his clothes. I would like to know how far this goes towards preventing judges taking up commissions of the smaller kind and which are outside their judicial functions, or international affairs. I quite agree that on an international commission it may be quite necessary to have judges; but the Minister of Justice will understand what I allude when I say that there are commissions and employments which, when participated in by judges, detract from the general respect to which the bench ought to be held.

Mr. FITZPATRICK. This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest that they should be so employed. I think the less a judge

> has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the bench. Of that I am absolutely convinced. I would even go so far as to say that I entertain grave doubts as to the constitutionality of such appointments. That question arose in Parliament when it was decided by the British Parliament to refer matters arising out of contested elections to the courts. When the courts were first charged with the duties investigating such matters, Chief Justice Cockburn wrote a strong letter of protest from the constitutional standpoint. That protest was of no avail, but nevertheless it showed that there was considerable doubt as to the right of the judges to sit in such matters. There are cases, however, where it is in the public interest that we should utilize the service of the judges outside the bench, but only in matters of urgent public necessity.

[88] The Attorney General of Canada also references Bill 13 in 1906, which proposed further amendments to the section. It was introduced, but failed to receive Royal Assent. Importantly, and not referenced by the Review Panel, there was further discussion "providing additional insight into the intention of Parliament." Specifically, there was reference to the ability of a judge to teach in a law school, notwithstanding the restrictions set out in the *Judges Act*. The same Minister of Justice, Mr. Fitzpatrick, was asked whether "the law of last year excludes also the teaching in universities." The Minister responded that it did not prohibit teaching:

> No. I would be disposed, myself, to think, and I was acting upon that supposition, that those who are engaged in the teaching of the law in connection with our universities would not come within the law of last session. I think that must fairly be considered as in line with the performance of their professional work and I expressed that opinion, I think, last session when the Act was passed. [Emphasis added.]

I will add that it is my experience that judges are not remunerated when asked to teach in law schools.

[89] When considering the legislative history of section 55, the Review Panel does not address or consider the original wording of the provision. The English language version reads, "No judge … shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever … engage in any occupation or business other than his judicial duties ". The French language version reads, "*Aucun juge … ne peut se livrer ni directement ni indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d'affaires, non plus qu'en aucune autre manière … à une occupation ou affaire autre que ses fonctions judiciaires*."

[90] In neither language do these words support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements.

[91] At paragraph 43 of its decision, the Review Panel asserts that the legislated exceptions to the general prohibition in section 55 reinforces the broader interpretation it has given to section 55:

> Furthermore, the broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is reinforced by the narrow and specific exceptions to the general prohibition in section 55.

[92] It states that the narrow and specific exceptions are those set out in sections 56 and 56.1 of the *Judges Act*; namely, (1) a judge acting in a specific dispute resolution capacity when expressly authorized by an Act of Parliament or a Provincial Legislature, or the Governor in Council or lieutenant governor in council of a province, (2) a judge acting as an arbitrator or assessor of compensation or damages under a public Act of Canada or a province, and (3) Madam Justice Arbour serving as Prosecutor of the United Nations International Tribunal.

[93] The Review Panel [at paragraph 41] provides no reason or explanation why these exceptions provide support for its “broader interpretation of the word ‘occupation’ to include ‘non-remunerative’ pursuits and activities”. Indeed, it is not obvious or evident how these exceptions support the view of the Review Panel. Its reasoning is unintelligible.

[94] It is to be noted that none of these exceptions is stated to be on a non-remunerated basis. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, in my view, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge’s regular remuneration. The remuneration received when performing these exceptional duties cannot be said to be remuneration for judicial duties, as the judge is not performing his judicial duties when acting as a commissioner or arbitrator. Even if it were otherwise, the exception regarding Justice Louise Arbour in section 56.1 expressly provides that she may elect to receive a leave of absence to accept the position offered by the United Nations without receiving her judge’s pay if she receives remuneration from the United Nations. In fact, the record shows that the United Nations insisted that she not be remunerated as a judge but that it pay her. In her circumstance, one of the exceptions the Review Panel relies on to support its interpretation, it is without doubt that the exception to judicial duties is remunerated. Accordingly, it cannot be said to support the interpretation given by the Review Panel.

[95] For these reasons, I find that the analysis of the Review Panel, the manner in which it reaches its interpretation of section 55, is not in keeping with the modern principle of interpretation. The Review Panel, in its analysis, fails to read the words of the section "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Specifically, it ignores some words; it fails to properly consider the legislative history of the provision; it fails to properly consider the context in which the provision is found; and it fails to properly consider all of the evidence of Parliamentary intention. As such, the reasoning is flawed and leads to an unreasonable conclusion on interpretation.

[96] The Review Panel concludes its interpretation of section 55 at paragraphs 46 to 48 of its decision, as follows:

> In summary, section 55 of the *Judges Act* contains a prohibition on judges carrying on extra-judicial activities and a requirement that judges devote themselves exclusively to their judicial functions. In circumstances in which Parliament is of the view that there is a sufficiently important public goal to justify judges engaging in other activities, it has legislated specific, narrowly defined exceptions.
>
> Accordingly, the Review Panel has concluded that:
>
> (a) Section 55 requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role, and
>
> (b) Subject to those exceptions, judges are prohibited from engaging in any other occupation, whether paid or unpaid.
>
> The above-noted conclusions are consistent with the objectives of maintaining judicial independence and the preservation of the dignity and respect associated with the judicial office. Section 55 of the *Judges Act* is also intended to promote the efficient administration of justice and to uphold the dignity and integrity of the judiciary by restricting judges, except in very limited circumstances, to performing judicial functions. [Emphasis added.]

[97] The Review Panel [at paragraph 47] does not explain what it means by "any other occupation, whether paid or unpaid" but at paragraph 43 it describes its "broader" interpretation of the word "occupation" to include "non-remunerative pursuits and activities" (emphasis added).

[98] Counsel for the CJC, in its memorandum, says that the interpretation the Review Panel gives to section 55 is that it is "to prohibit judges from devoting their 'productive time' to vocations other than judging, such that they will work as judges" (emphasis added). In my view, counsel's characterization does not reflect the interpretation given

the section by the Review Panel. Nowhere in its decision does the Review Panel use the phrase “productive time” or the word “vocation.”

[99] It is unclear what legal counsel means by “productive time.” Other than time when sleeping, it is arguable that all of one’s time is productive time. As I pointed out at the hearing, my experience is that judging is not a 9 am to 5 pm, five days a week job. Judges, like lawyers and many others, work days, nights, and weekends.

[100] The Review Panel’s interpretation [at paragraph 41] of “‘occupation’” as including “non-remunerative pursuits and activities” [emphasis added] gives it a much broader definition than the word “vocation.” “[P]ursuits and activities” includes most of what one does in daily life, including taking children and grandchildren to soccer and ballet classes, attending choir practice, going to the gym, quilting and knitting, etc. Again, as was pointed out to counsel at the hearing, the phrase “pursuits and activities” includes writing a mystery novel. Even if written at night and on weekends, as our former Chief Justice did, is that a non-judicial activity done in a judge’s productive time? If so, did the former Chief Justice of Canada breach section 55 of the *Judges Act* in doing this prior to her retirement? Her activity certainly conflicts with the interpretation of section 55 given by the Review Panel.

[101] This question and these examples illustrate the unreasonableness of the outcome of the Review Panel’s interpretation. Its interpretation restricts judges from all non-judicial activities or pursuits, other than the narrow exceptions in sections 56 and 56.1 of the Act.

[102] For these reasons, I find the interpretation given by the Review Panel to section 55 of the *Judges Act* to be unreasonable.

(2) *The Impact of a Section 54 Leave of Absence on Section 55*

[103] After interpreting section 55, the Review Panel turns to section 54 of the *Judges Act* and the impact a leave of absence granted thereunder may have on a judge’s obligations under section 55.

[104] The Review Panel sees a leave of absence granted under section 54 as relieving a judge from the obligation in section 55 to “devote himself or herself exclusively to those judicial duties” but finds that it does not affect the prohibition in that section on carrying out extra-judicial duties. It finds that section 54 does not permit a judge, while on a leave of absence, taking up extra-judicial activities. In support of that interpretation, the Review Panel relies on (1) its interpretation of section 55 (which I have found to be

unreasonable), and (2) the language of section 54. It writes at paragraph 51 of its decision:

> There is nothing in the language of section 54 of the *Judges Act*, to suggest that leaves of absence properly granted and with proper notices issued, may be granted to enable judges to take on responsibilities outside of the judicial sphere.

[105] I begin by noting that there is nothing in the language of section 54 of the *Judges Act,* suggesting that such leaves of absence may <u>not</u> be granted to enable judges to take on responsibilities outside of their judicial duties. Indeed, as noted by Justice Smith, that has previously happened and with the approval of the CJC:

> In Canada, the Council's Study Leave Program has permitted judges to take academic leaves longer than six months to engage in teaching, talks with faculty, curriculum development, organizing conferences, guest lectures, and both formal; and informal discussions with students.

[106] The Review Panel provides no review of the legislative history of section 54, nor does any analysis of parliamentary intent. The Attorney General of Canada provides a very informative history of section 54 that supports an interpretation different from that provided by the Review Panel of both sections 54 and 55.

[107] The leave of absence provisions in section 54 were introduced in 1946, in a slightly different wording than at present. Section 34 of *The Judges Act, 1946*, [S.C. 1946] 10 George VI, c. 56 provides that no judge is to be granted a leave of absence from judicial duties for a period in excess of 30 days without the approval of the Governor in Council. If a judge were absent for a period in excess of 30 days without that approval, the judge and the Chief Justice are to inform the Minister of Justice.

[108] A reading of the Parliamentary debates confirms the submission of the Attorney General of Canada at paragraphs 42 and 43 of his memorandum, reproduced below, that this leave provision was not enacted to be used exclusively for absences "such as an illness, a period of recovery from accident or parental leave" as the Review Panel suggests at paragraph 49 of its decision:

> In enacting this provision, a concern was raised during the debates that some judges had been absent from the bench for several months without having obtained any sort of permission for a leave of absence. The Minister of Justice stated, "I think the clause does

> indicate, if it is passed by parliament, that parliament wants the Minister of Justice to see to it that gentlemen who are absent without leave are not paid."
>
> There is no indication here that this provision was enacted to be used exclusively for circumstances of disability or parental leave. Rather, the rationale for the provision was to ensure that judges were not being paid when they were absent from the bench, for any reason.

[109] In 1996, the section was amended to create the current system. Leaves of six months or less can be granted by a chief justice but a longer leave requires approval from the Governor in Council. The debates indicate that the revision was recommended:

> … by the 1992 Triennial Commission on Judges' Salaries and Benefits and endorsed by the Canadian Judicial Council. It allows a judge to request maternity or parental leave without having to seek cabinet approval.

[110] I agree with the Attorney General of Canada that leaves under section 54 are not restricted to maternity or parental leaves. The reference above to those purposes was to illustrate and support the expansion of the leave period from 30 days to 6 months. Evidence of that is the statement then Justice Minister Rock gave to the Standing Senate Committee on Legal and Constitutional Affairs when it was considering the amendment to the *Judges Act* relating to Justice Louise Arbour [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996)]. He stated, "It might be noted that the Judges Act already provides for judges to be granted leaves of absence in order to perform non-judicial duties, such as serving as commissioners of inquiry … or to assist foreign countries developing codes of human rights" (emphasis added). While the first exception is provided for in section 56, the second exception is not. Later, the Minister of Justice describes the parameters of leaves other than for personal reasons:

> [Mr. Rock:] Second, while [judges] are there they should only be doing the work of judges and not working on the side for businesses or in some other fashion. While that is an important principle, the Judges Act itself already contemplates exceptions. As I mentioned in my opening remarks, a judge might be appointed to chair a commission of inquiry or to arbitrate a dispute. That goes on all the time. It is a necessary adjunct to a judge's life.
>
> Senator Beaudoin: We agree entirely.
>
> Mr. Rock: What I am suggesting, senator, is that it is consistent with section 56. It grows out of the same notion that we would permit a sitting judge to leave her duties for a stated period to go on an international organization and fulfil a worthy endeavour. That is not inconsistent with her judicial role. [Emphasis added.]

[111] The Attorney General concludes with his submission as to the proper interpretation of section 55:

> This legislative history demonstrates that Parliament did not intend for section 55 of the Act to act as a complete ban on judges taking on non-judicial roles. Section 55 instead functions to prohibit judges from taking on employment in a commercial, private, or political capacity that could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. The record consistently reiterates that judges should remain able to assume non-judicial roles in certain circumstances, particularly when that role serves an important public purpose. Additionally, the legislative record demonstrates that section 54 of the Act is to be read together with sections 55-57 and allows for a leave from judicial duties for a variety of reasons, including to assume a non-judicial role, as long as that role would not otherwise conflict with his or her eventual return to the bench.

[112] I agree (1) that section 55 of the Act is not a complete ban on judges taking on non-judicial roles; (2) that Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances; and (3) that section 54 of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with the judge's judicial duties.

[113] I further agree that section 55, interpreted using the modern principle of interpretation, provides that a judge cannot assume employment in a commercial, private, or political capacity as that could call into question their judicial independence or threaten public confidence in the integrity and impartiality of the judge and the judiciary. These are inconsistent with his or her judicial duties. It is a matter for the chief justice or Minister of Justice to determine whether a leave request under section 54 warrants being granted. It is expected that they will consider whether the purpose of the leave serves an important public purpose and whether it could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. However, these requirements cannot be read into section 55.

[114] Collectively, the three findings set out above at paragraph 112 result in the conclusion that Justice Smith did not breach section 55 of the *Judges Act* when, on a leave of absence granted by his Chief Justice and approved by the Minister of Justice, he accepted the appointment of Interim Dean (Academic) of the Law School.

(3) *Ethical Obligations*

[115] I turn next to the Review Panel finding that Justice Smith breached his ethical duties. It writes [at paragraph 76]:

> (d) Regardless of the interpretation ascribed to sections 54 to 56.1 of the *Judges Act*, Justice Smith has an ethical obligation as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. There were also reputational risks to Justice Smith and to the Ontario Court

> of Justice associated with lending their support to the Faculty of Law at Lakehead during a time of crisis.
>
> (e) In the circumstances facing Justice Smith in 2018, notwithstanding his genuine desire to help the Faculty of Law at Lakehead, his decision to accept an appointment as Interim Dean (Academic) at the Faculty of Law was ill-advised.

[116] In so concluding, the Review Panel considered the Ethical Principles and the past circumstances of Justice Fauteux serving as Dean of two separate law schools, and Justice Gillese occupying the position of university Chancellor.

[117] With respect to Justice Fauteux, the Review Panel [at paragraph 61] says only "that societal norms are shifting, and that it is much more likely in the present day that individuals assuming leadership roles within universities will be required to deal with controversial and highly public topical issues, than was formerly the case." Even if the Review Panel had any evidence that universities in the 1960s dealt with fewer controversial and highly public topical issues than today (and none is in the record), the Review Panel fails to note that unlike Justice Fauteux, Justice Smith's deanship was limited to academic matters —an area that can hardly be said to be a wellspring of "controversial and highly public topical issues".

[118] With respect to Justice Gillese, the Review Panel notes [at paragraph 62] that the CJC agreed to her appointment as Chancellor because "of the strict limitations" agreed to by the university and the judge, and because "of the ceremonial nature of the post." This fails to reference the view of Pidgeon A.C.J. that the limitations agreed to by Justice Smith and the Law School limited his role to a ceremonial one. As to the conditions, it writes [at paragraph 74], "the use of such conditions may be an imperfect attempt to address unknowable contingencies arising in a dynamic environment". Nonetheless, significant conditions were agreed upon that removed Justice Smith from the administration of the Law School and the university. Most importantly, he had undertaken to inform and seek guidance from his Chief Justice if circumstances changed or "any issues arise which may raise new ethical implications, or [possibly] lead to public controversy" [at paragraph 72]. A condition not mentioned by the Review Panel.

[119] Moreover, and critically, his acceptance of the Interim Dean (Academic) role with these conditions was approved by his Chief Justice. If his decision was ill-advised, what does that say of the decisions of his Chief Justice and the Minister of Justice?

[120] The role of his Chief Justice both in terms of consenting to the appointment and her subsequent role should any public controversy arise was worthy of consideration and weight. In *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at paragraph

59, Justice Gonthier for the majority, notes the important role a chief justice plays in ethical decisions:

> We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.

[121] The underpinning for the conclusion the Review Panel reaches on its consideration of the judicial ethics question is: (1) media reports that the former Dean had threatened litigation; (2) the possibility of litigation should the Law Society of Ontario remove the Law School's accreditation; (3) "extensive" media reports "which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law's Indigenous mandate and some criticism of Justice Smith's appointment from Indigenous leaders" [at paragraph 27]; and (4) that prior to accepting the appointment, the CJC Executive Director informed Justice Smith that it could be a matter for the CJC's consideration.

[122] As to the first two of these, although any litigation by the former Dean would come before the Superior Court, Justice Smith had already and appropriately indicated that he would recuse himself from any litigation in his Court relating to the University. This removes all possibility that he would be in a conflict of interest, or even appear to be in one, should litigation arise. This is equally true if a decision on accreditation were challenged before the Divisional Court. Justice Abella in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 (*Yukon*), at paragraph 59 noted the absence of restrictions on judges' associations when there is little likelihood of potential conflict:

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

[123] Should the former Dean sue the Law School, it is extremely unlikely that she or any reasonably informed person would think her suit could be influenced by Justice

Smith's involvement with the Law School. She is a lawyer and knows otherwise. Moreover, her taking legal action was not a certainty when the Review Panel report issued.

[124] The Review Panel's consideration of litigation regarding the accreditation of the Law School is entirely speculative and unworthy of its consideration. Again, both the Law School and the Law Society of Ontario being well informed of judicial matters would be extremely unlikely to have any concern if Justice Smith accepted the appointment and recused himself from such litigation.

[125] At paragraph 60 of *Yukon*, Justice Abella considers the Ethical Principles and observes that they "advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role" (emphasis added). Moreover, she wisely observes at paragraph 61, "We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case." The decision of the Review Panel, in my assessment, in examining whether Justice Smith's conduct unnecessarily exposed him to criticism or attack, fails to do so on the basis of an informed public exercising mature judgment.

[126] The Review Panel [at paragraph 27] exaggerates when it writes of the "extensive" media coverage generated by Justice Smith's appointment. There was some coverage; however, most of the media coverage was directed to the University and the resignation of the Dean. There was very little directed to Justice Smith's interim appointment and even the Review Panel describes it as "arguably unfounded" [at paragraph 64]. Moreover, as is noted by Pidgeon A.C.J. in his referral decision, following a meeting between a First Nations advisory committee and the university on May 10, 2018, "no public comments were made subsequently."

[127] I agree entirely with the submission of the Canadian Superior Courts Judges Association at paragraph 49 of its memorandum of argument that "CJC's response to Justice Smith's acceptance of the appointment resulted in a torrent of public criticism, not of Justice Smith or his conduct, but of the CJC itself." This criticism from judges, lawyers, and the public directed to the CJC's conduct far outweighs and is more damning than the sparse coverage directed to Justice Smith.

[128] As to the Review Panel relying on Justice Smith having received the letter from the Executive Director of the CJC as a fact underpinning its decision, I concur with the submission of The Canadian Superior Courts Judges Association that the letter "raised particularized concerns" and must be considered against the backdrop of the consent of

the Chief Justice and the Minister of Justice. As it submits "the CJC's Executive Director has no status or authority to advise judges on ethical matters and it would raise significant constitutional issues if he did."

[129] The CJC submits, "Judicial ethics prohibit the prestige of judicial office from being used to bolster the reputation, status or public confidence in extra-judicial organizations." The Ethical Principles do not make that broad statement. Section C.1 under Statement 6 dealing with impartiality provides that while judges are free to participate in "civic, charitable and religious activities" they "should not solicit funds … or lend the prestige of judicial office to such solicitations." The commentary to that section repeats the same in C.6. C.10 speaks of using the prestige of judicial office to advance a person's private interests.

[130] The association of a judge with any extra-judicial organization will, to some degree, bolster its reputation, status and public confidence. It is for precisely that reason that law schools seek to have judges teach. I daresay it was also for such reason that McGill and Ottawa Law School sought out Justice Fauteux as their Dean, and Brescia University College sought out Justice Gillese as its Chancellor. If that were the test, then no judge could ever join or participate in any extra-judicial civic, religious, or charitable organization.

[131] For these reasons, I find the decision of the Review Panel as to the ethical breach of Justice Smith in accepting this appointment to be unreasonable and it cannot stand.

B. Were the Proceedings Procedurally Unfair Amounting to an Abuse of Process?

[132] Counsel for Justice Smith submits that the CJC's "treatment of Justice Smith's case from its inception has been unfair and oppressive, such that it is an abuse of the Council's process."

[133] The Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraph 120, held that it is an abuse of process where an administrative proceeding has been conducted so unfairly that it is contrary to the interests of justice:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-

> Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[134] The judicial conduct review process established by the CJC is ultimately directed to the possible removal of a judge because of conduct. In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paragraph 147, the Supreme Court describes the severity of conduct that warrants removal:

> …. before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. [Emphasis added.]

[135] When analyzing whether the process of the CJC regarding the conduct of Justice Smith was so unfair as to constitute an abuse of process, this high standard should be kept in mind because, as is discussed below, the referral to the Review Panel can only be done if it is determined that the conduct may be serious enough to warrant removal from office.

[136] The submission of Justice Smith is that on the facts of this matter, the CJC misused its disciplinary procedure in a manner that is excessive and unreasonable, putting Justice Smith's livelihood and reputation at risk, causing him prejudice, and eroding public confidence in the judiciary and the fairness of the CJC's process. This is a serious allegation; however, on the record before me, I find that the CJC did misuse its disciplinary procedure in a manner that is excessive and unreasonable.

[137] I find that the CJC disciplinary procedure was misused from the beginning — when the Executive Director determined that Justice Smith accepting the appointment to the Law School was a matter that "warrants consideration."

[138] Subject to my comments below at paragraphs 171 to 175, I take no issue with the Executive Director, on May 9, 2018, writing to Justice Smith, informing him that this appointment has come to his attention and that under section 4.2 of the Review

Procedures, it appears to him to be a matter that may warrant consideration. Although he references “Media reports”, he attaches only one, a CBC web post that reports that Justice Smith has accepted the appointment.

[139] The Court notes that there is nothing in that attached report that criticises Justice Smith’s conduct in accepting the position, nor is anything reported that is critical of the Law School appointing him on an interim basis. One part of the report sets out the position of some indigenous leaders about the conduct of the Law School, but this report does not show any objection by it to this appointment or to Justice Smith:

> Since then indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for “immediate change” at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman’s successor, that an independent review examine “all issues and allegations” raised by her and that appropriate measures are subsequently taken.

[140] In his letter to Justice Smith, the Executive Director writes, “In light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges, the information provided in these news reports brings me to the view that the situation may warrant consideration by Council.” Based on the single report attached to the letter, one can only conclude that the “situation” that concerned the Executive Director was that Justice Smith accepted this appointment.

[141] Indeed, that appears to be exactly how the Chief Justice, who was copied on the letter read it. She responds by letter of May 11, 2018, providing the background facts leading to the appointment. She provides the Executive Director with the letter from the Law School requesting Justice Smith to accept the appointment, the letter of the Chief Justice to the Minister of Justice concerning it, and the Minister’s response.

[142] Based on the record, these letters set out the facts on which the Executive Director made his decision that the matter warranted consideration by the CJC and, under section 4.3 of the Review Procedures, referred it to the Judicial Conduct Committee on May 16, 2018.

[143] Prior to making this determination, the Executive Director had to screen the matter as required under the Review Procedures. Indeed, in his affidavit, the Executive Director states that he refers every complaint or matter not falling within the exceptions described in section 5 of the Review Procedures, to the Chairperson of the Judicial Conduct Committee. Section 5 reads as follows:

5. Early Screening Criteria

For the purposes of these Procedures, the following matters do not warrant consideration:

(a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;

(b) complaints that do not involve conduct; and

(c) any other complaints that are not in the public interest and the due administration of justice to consider.

[144] How did the Executive Director fail to conclude that it is "not in the public interest and the due administration of justice" to consider the matter of Justice Smith's appointment?

[145] That question is asked because the information the Executive Director had leads me to only one conclusion; namely, that the referral to the Judicial Conduct Committee of the matter raised by the Executive Director himself was "not in the public interest and the due administration of justice to consider." I arrive at that conclusion based on the following facts:

1. The Law School approached Justice Smith to consider the appointment, in part because of his "significant work with Indigenous communities" and his publications focused on Aboriginal Law in Canada;

2. Justice Smith immediately informed his Chief Justice that he had been contacted "out of the blue" with this request and that he would "accept a short term appointment with your approval and that of the Minister of Justice";

3. The Chief Justice writes to the Minister of Justice setting out the facts, including the role being limited to academic leadership, describing this as a "very exceptional situation" and one which provides "an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations" and advising, "With your approval, I am anxious to authorize this special leave" (emphasis in original);

4. The Minister of Justice responds, "I have no concerns about your granting Justice Smith a 'special leave' … as outlined in your letter [and] in the event that more than six months is required, I will consider any requests for additional leave";

5. Justice Smith's judicial colleagues in the Northwest Region support him being granted a leave to take this appointment; and

6. No complaint was made to the CJC by anyone at any time regarding the conduct of Justice Smith in accepting this appointment.

[146] There is nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The information disclosed to Justice Smith prior to the referral did not indicate any public debate or concern about the appointment, and the approval of his Chief Justice and Minister of Justice belie any suggestion that it affected the due administration of justice.

[147] Again, without evidence from the Executive Director we do not know what weight he placed on the Minister's approval; however, based on his affidavit, I find that he gave it none. Regarding the Minister's letter, he swears:

> On 11 May 2018, the Applicant sent me an email attaching a letter from Chief Justice Heather Smith which he referred to as Leave of Absence Approval from Chief Justice Smith. On the same date, the Applicant sent another email attaching a letter from the Honourable Judy Wilson-Raybould, Minister of Justice and Attorney General of Canada (as she then was) which he referred to as a Letter of Approval of the Minister of Justice for Secondment as (Interim) Dean. The Minister's letter did not indicate that the Minister has made any decision in respect of the matter, but that the Minister recognized that the authority to grant leave for less than six months rested with Chief Justice Smith. The Minister concluded her letter thus: "I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from his regular duties as a supernumerary judge." [Emphasis added.]

[148] The following underlined passages of the Minister's letter are not referred to by Mr. Sabourin, and in my view, clearly show that the Minister made a decision, namely, that she has no concerns about the appointment and will consider an extension if asked:

> As Chief Justice, you have the authority to grant Justice Smith a "special leave" under the *Judges Act*, for a period up to six months. I also understand that Justice Smith's judicial colleagues in the Northwest Region are supportive of his taking a "special leave" in order to accept this position.
>
> I have no concerns about your granting Justice Smith a "special leave" from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from

his regular duties as a supernumerary judge. [Emphasis added.]

[149] The CJC and the Attorney General, echoing Mr. Sabourin, both submit that the response by the Minister was not an "approval" of the leave being granted. I disagree. The Chief Justice explicitly asked for the Minister's "approval" of her granting the leave. The Minister responded that she had no concerns with the leave being granted. The leave was granted by the Chief Justice who obviously considered the Minister's response to indicate approval. Further, Justice Smith indicated that he would accept the assignment with the approval of his Chief Justice and the Minister of Justice, and so he too viewed this as ministerial approval as he accepted the appointment.

[150] The position that there was no ministerial approval on these facts is absurd. If the Minister was not approving, then it was simple enough for her to say so. She did not. Moreover, she expressed a willingness to consider an extension which is not what one would expect from someone opposed to the initial leave. Apprised of all the facts, the Minister had no concerns.

[151] I find that the Minister's letter indicated her approval.

[152] Consider an analogy. A teenager who has a 10 p.m. curfew approaches father seeking a later curfew as the child and friends are going to a movie that runs longer than usual. Father says he is inclined to approve, but that they need to speak to mother. They go to mother to discuss the request and she responds that father can grant the request and she has no concerns. She adds that if the child is going to be later than an hour to seek her approval for an extension. On this basis, the child goes to the movie and arrives home 30 minutes past her 10 p.m. curfew. Is there anyone who would think it fair if the mother were to ground the child for having been 30 minutes late because she did not grant her approval? Can anyone seriously suggest that the mother had not made a decision on the request and had not approved it?

[153] The Court is equally troubled by the treatment Pidgeon A.C.J. gives to the approval of the Minister. In his decision to refer the matter to the Review Panel, he writes of the Minister's letter that she had "unofficially" approved the leave to allow Justice Smith to serve as Interim Dean. He writes [at page 5 of the reasons for referral]:

> …. In my view, Chief Justice Heather Smith's consent and support for Justice P. Smith's leave of absence, and the Minister of Justice's apparent lack of concern, are simply factors to be weighed in assessing the nature and gravity of Justice Patrick Smith's conduct, and whether this conduct is appropriate. [Emphasis added.]

[154] My view, as earlier stated, is that the Minister's approval cannot be reasonably said to be "unofficial" simply because she did not expressly use the word "approved." Second, it is not an honest description of the Minister's actions to describe them as an "apparent lack of concern" when she expressly writes, "I have no concerns." She is to be taken at her word.

[155] It is unclear to me what Pidgeon A.C.J. means when he writes that these approvals are factors to be weighed in assessing whether Justice Smith's "conduct is appropriate." Pidgeon A.C.J. referred the matter to the Review Panel. Under section 8.2(*d*) of the Review Procedures, he could do that only if he "determines that the matter may be serious enough to warrant the removal of the judge."

[156] Counsel for Justice Smith submits that the CJC "pursued Justice Smith knowing that the Minister of Justice had already approved of his actions." She says that "it is inconceivable that the Minister of Justice would make an address to both Houses of Parliament asking … for Justice Smith's removal on the basis of actions that he took with her express approval."

[157] I agree.

[158] Under section 8.2(*d*) of the Review Procedures, the Chairman of the Judicial Conduct Committee may "refer the matter to a Panel, in accordance with subsection 2(1) of the By-laws, if the Chairperson determines that the matter may be serious enough to warrant the removal of the judge." How, one must ask, could Pidgeon A.C.J. determine that the matter may be serious enough to warrant the removal of Justice Smith when removal will never occur?

[159] As in the case of the Executive Director, he could only have made this decision based on his improper characterization of the Minister's approval.

[160] In addition to the improper decision of the Executive Director that the matter "warrants consideration" there is evidence in the record that Justice Smith was also denied procedural fairness by the Executive Director.

[161] As noted above, the only information Justice Smith had as to the substance of the matter was the initial letter of the Executive Director attaching one web page reporting that he had accepted the appointment, and his reference to sections 54 and 55 of the *Judges Act* and "the general duties and obligations of judges." However, Pidgeon A.C.J., in his reasons for referring the matter to the Review Panel, indicates

that other material was before the Executive Director which guided his actions and decisions. He writes [at page 2]:

> Following Justice Smith's appointment as Interim Dean, First Nations leaders were upset and criticized the lack of prior consultation and failure to follow the recommendations of the national advisory committee on aboriginal issues. They called on the university to rescind the appointment.
>
> On 9 May 2018, given the public comments made in response to the statements made by First Nations chiefs, the Executive Director of the Canadian Judicial Council wrote to Justice Patrick Smith and his Chief Justice to obtain more information. [Emphasis added.]

[162] None of this information was provided to Justice Smith. Specifically, he was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements.

[163] Procedural fairness dictates that one is entitled to know the case to be met. This is a fundamental procedural right that the Executive Director failed to give to Justice Smith.

[164] A finding of judicial misconduct may result in the removal of the judge from office. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 , the Supreme Court observed that the duty of procedural fairness is flexible and variable and depends on an appreciation of many matters. These were said to include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[165] Specifically, at paragraph 25, it was observed, "The importance of a decision to the individuals affected … constitutes a significant factor affecting the content of the duty of procedural fairness." That factor alone, in the context of a complaint regarding judicial conduct, points to the CJC being required to accord a judge significant procedural fairness.

[166] If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then Justice Smith was entitled to know that and

respond to it. In an affidavit filed in this application, Justice Smith describes the response he would have provided if this were the concern.

[167] Justice Smith submits that the decision(s) to refer his acceptance of the appointment in the face of the approvals received and the lack of public complaint was done for an improper purpose. He points to statements made by the CJC in three publications:

1. The CJC Press Release ["Canadian Judicial Council review of a matter involving the Honourable Patrick Smith"] of October 3, 2018, announcing that the matter had been referred to the Review Panel, which says:

   > Council believes that all judges, and the public alike, will benefit from greater clarity regarding the permissible scope of activities for judges outside their normal judicial duties.

2. The report ["Judge fights against disciplinary body's ruling that said he engaged in misconduct" by Michelle McQuigge] in The Star [*Toronto Star*] of September 27, 2018, in which the Executive Director is quoted as saying: "We believe that all judges would benefit from clarity in this regard;" and

3. An article in *The Lawyer's Daily* of October 4, 2018 ["Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University" by Cristin Schmitz], in which the Executive Director is quoted as saying with respect to the referral to the Review Panel, "This will greatly assist [the judicial] council, and its Independence Committee, in its ongoing work of revising *Ethical Principles for Judges*, a project that is expected to be completed in the fall of 2019."

[168] Counsel for Justice Smith makes the following submission, with which I entirely agree:

> The purpose of judicial conduct proceedings is not to provide "clarity" to judges and the public. By improperly wielding its authority over Justice Smith in this way, including unreasonably and unnecessarily finding that he contravened s. 55 of the *Judges Act*, the Council abused its process. To the extent the Council wanted to provide such guidance, it should have done so through means other than launching frivolous and unfounded misconduct proceedings against Justice Smith.

[169] Accordingly, I conclude that the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner as Justice Smith was not informed of the Executive

Director's real concerns. I further find that the referral to the Review Panel failed to accord with the procedures established by the CJC in finding, based on an improper characterization of the Minister's consent, that "the matter may be serious enough to warrant removal of the judge." I further find that the review of Justice Smith's acceptance of the appointment was made, at least in part, for an improper purpose.

[170] I find that the CJC process involving Justice Smith was unfair to the point that it is contrary to the interests of justice. It was an abuse of process.

[171] Before concluding, I wish to address the submission made by The Canadian Superior Courts Judges Association that it was not proper for the Executive Director "to initiate a complaint." It points out that as the Executive Director has responsibility to conduct an initial screening that cannot occur in any meaningful fashion if he is also the person initiating the complaint. It submits that this circumstance results in the judge being denied "this essential procedural safeguard and, as in this case, be called to account for conduct that could not reasonably have led to removal."

[172] In *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103, [2007] 4 F.C.R. 714, the Federal Court of Appeal, at paragraph 77 commented on the advantages of the screening procedure:

> In practical terms, the screening procedure followed for an ordinary complaint under subsection 63(2) of the *Judges Act* is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint by remedial measures, without the establishment of an Inquiry Committee.

[173] Provided the Executive Director assiduously applies the same review procedure to a matter he raises on his own as he does to complaints made by others, this concern does not seem to arise.

[174] Nonetheless, the Court finds that in raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so.

[175] It is not as if the public never complains about judicial conduct. Evidence in the record shows that prior to 2005–2006 more than 150 complaints were filed annually. This suggests that if the Executive Director is raising a matter that is not the subject of a

complaint, it ought to be of sufficient gravity to warrant that action. In that regard the Executive Director ought to weigh the conduct against the test set by the Supreme Court of Canada for conduct worthy of removal from the bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

C. What is the Appropriate Remedy?

[176] Justice Smith seeks the following by way of remedy:

(a) A declaration that Justice Smith did not contravene section 55 of the *Judges Act*;

(b) An order quashing the Letter of Concern; and

(c) An order that the entry about the Council's actions in this matter on its website be changed to conform to this Court's decision and order.

[177] Typically, on a successful judicial review application, the decision under review is quashed and the matter referred back for a new decision. The remedy sought cannot be granted unless the Court finds that there is only one reasonable interpretation of the *Judges Act* and Justice Smith's actions do not breach it.

[178] The Supreme Court of Canada at paragraph 124 of *Vavilov*, recognized that a court might make a finding of statutory interpretation in a judicial review application, such as that here:

> Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. [Emphasis in original.]

[179] In this case, taking into account all of the factors in reviewing the reasonableness of the interpretation the Review Panel gave to section 55 of the *Judges Act*, I see this to be one of those situations where the analysis weighs overwhelmingly in favour of a different interpretation. Moreover, using the modern principle of interpretation, it is the only reasonable interpretation of section 55 of the *Judges Act*.

[180] It was never the intention of Parliament in enacting section 55, to prohibit judges from all non-judicial activities, and a reasonable interpretation must accord with that intention. Moreover, it has always been the intention of Parliament that section 55 prohibits judges from taking on employment in a commercial, private or political capacity, i.e. in businesses or occupations, and that is so whether the judge is sitting or on leave. A sitting judge is permitted to engage in non-commercial activities that do not impair his or her ability to perform judicial duties. Where the non-commercial activities duties cannot be performed without impairing the judge's ability to sit, the judge must obtain a leave of absence from his chief justice or Minister of Justice under section 54.

[181] In my view, that is the only reasonable interpretation of sections 54 and 55, based on the text of those sections, their statutory context, and their legislative history. That does not mean that a judge can be authorized to engage in any non-judicial activity that falls outside the scope of section 55 with impunity. There may be circumstances where an otherwise permissible activity the judge wishes to do may raise ethical concerns. As an example, a judge accepting a teaching assignment or writing a legal text may run afoul of his or her ethical obligations if he or she expresses a legal opinion on matters or issues that may later come before the judge. For this reason, judges wishing to engage in such acceptable activities ought to have a full and frank discussion of the role with their chief justice, and be prepared to step out of the role should any conflict with ethical duties present themselves.

[182] In light of this interpretation, the declarations Justice Smith seeks are appropriate, as nothing will be gained by sending this matter back to the CJC for consideration.

[183] All parties agreed that there should be no order made as to costs.

[184] Before concluding, I wish to thank all counsel for their precise and thoughtful written and oral submissions. They have greatly assisted me in my deliberations. This has been a challenging application; it has occupied a very significant portion of my time. The conclusions reached and findings made are the only ones available to me based on the evidence and the law.

JUDGMENT IN T-1713-18 (T-2055-18)

THIS COURT ORDERS that:

1. These applications for judicial review are allowed;

2. The decision of the Judicial Conduct Review Panel dated November 5, 2018, is quashed;

3. The letter dated November 6, 2018, from Associate Chief Justice Pidgeon in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council which relies on the decision of the Judicial Conduct Review Panel, is quashed;

4. Justice Patrick Smith was denied procedural fairness in the Canadian Judicial Council process considering his conduct in accepting the appointment as Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University, and it was an abuse of process;

5. The Court declares that Justice Patrick Smith in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University did not breach section 55 of the *Judges Act*, R.S.C., 1985, c. J-1, nor did he breach his judicial ethics;

6. The Canadian Judicial Council, within 10 days of this decision, shall post a copy of this judgment and reasons on its website, and shall provide a reference to it on all of its descriptions, references, reports, and decisions relating to its review of the conduct of Justice Patrick Smith; and

7. There is no order as to costs.

APPENDIX A

Judges Act, R.S.C., 1985, c. J-1

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

…

EXTRA-JUDICIAL EMPLOYMENT

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

…

Authorization

56.1 (1) Notwithstanding section 55, Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

…

PART II

Canadian Judicial Council

…

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

…

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

…

Inquiries concerning Judges

Inquiries

63 (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Investigations

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.