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A-419-19

2020 FCA 129

The Honourable Michel Girouard (*Appellant*)

v.

The Attorney General of Canada (*Respondent*)

and

The Attorney General of Quebec (*Third Party*)

INDEXED AS: GIROUARD V. CANADA (ATTORNEY GENERAL)

Federal Court of Appeal, de Montigny, Gleason and Locke JJ.A.—By videoconference hosted by the Registry, June 18 and 19; Ottawa, August 19, 2020.

Judges and Courts — Appeal from Federal Court decision dismissing appellant's applications for judicial review and answering constitutional questions in negative — Decision of Canadian Judicial Council (Council) on judicial review in Federal Court, subject of this appeal, following initial decision of Council recommending Minister of Justice of Canada (Minister) not remove appellant from office because of allegations against appellant — Appellant appointed to Superior Court of Quebec in 2010 — Complaint about appellant filed with Council; Council reviewing it, appointing Inquiry Committee to look into complaint — Inquiry Committee concluding allegation appellant purchased illegal substance not proven — Two members of Inquiry Committee however identifying six "contradictions, inconsistencies and implausibilities" raising in members' view "deep and serious concerns" about appellant's credibility, integrity — Minister, Minister of Justice of Quebec calling for new investigation into findings of misconduct — Second Inquiry Committee determining three allegations established, recommending appellant's removal from office — Federal Court decision under appeal disposing of all of appellant's applications for judicial review, constitutional questions — – Issues whether Federal Court properly identified applicable standards of review; whether Council's decision reasonable; whether two inquiries concerning appellant distinct from each other; whether appellant's rights to procedural fairness respected; whether appellant's language rights respected; whether Judges Act, ss. 60, 61(3)(c), 63-66 (concerning, inter alia, inquiries), by-laws enacted under Act, s. 61(3)(c), constitutionally valid — No doubt constitutional, procedural fairness issues subject to standard of correctness, while Council's findings on questions of fact or of interpretation of Council's enabling statute or Canadian Judicial Council Inquiries and Investigations By-laws, 2015 (2015 By-laws) must be assessed on standard of reasonableness — These standards precisely ones Federal Court applied in reasons — Appellant faulting Federal Court, Council for not accepting appellant's arguments or explanations — This not sufficient to demonstrate Council's decision unreasonable, or Federal Court not correctly applying standard of reasonableness — Council having complete authority to consider, weigh, ultimately reject explanations given by appellant — Barring exceptional circumstances, reviewing court will not set aside findings of fact— In this case, Federal

Court correct to conclude appellant did not meet burden of proof, provided no evidence of such exceptional circumstances — Appellant not convincing Court interpretation of 2015 By-laws, s. 3(4)(c) (applying principle of separation of functions), adopted by Council, endorsed by Federal Court, unreasonable, not defensible in respect of applicable facts, law — Council only having authority to make recommendations under Act, ss. 63-65 — Two inquiries separate; principles of separation of functions, estoppel not violated; reasonable, informed person would not believe Council would not render fair decision — Appellant given fair, open procedure, able to make all arguments during second inquiry — In this case, Federal Court did not err in finding Council not required to hear appellant on translation issue — Appellant's argument claiming inquiry process concerning superior court judges related to administration of justice, therefore falling under provincial jurisdiction pursuant to Constitution Act, 1867, s. 92(14),unequivocally rejected by Federal Court, Court correct in doing so — No doubt Act, Part II, by-laws enacted thereunder constituting implementation of power to remove superior court judges assigned to federal authorities under Constitution Act, 1867, s. 99(1) — Appeal dismissed.

Constitutional Law — Charter Rights — Language Rights — Appeal from Federal Court decision dismissing applications for judicial review of appellant recommended for removal by Canadian Judicial Council under Judges Act, s. 65(2)(b) — Federal Court also answering appellant's constitutional questions in negative — Federal Court correct in concluding appellant's language rights not violated — Appellant arguing Court should recognize Charter, s. 16(1) confers substantive rights, but this argument erroneous — Charter, s. 16(1) declaratory or interpretive provision in nature, not for Court to change state of law on issue — Appellant claiming right to be understood by decision maker in appellant's language of choice; however, right not falling within ambit of Charter, s. 16, but rather within procedural safeguards.

Constitutional Law — Distribution of Powers — Appeal from Federal Court decision dismissing appellant's applications for judicial review of decision by Canadian Judicial Council recommending removal from office under Judges Act, s. 65(2)(b) — Federal Court also answering appellant's constitutional questions in negative — Federal Court correct in rejecting appellant's argument claiming inquiry process concerning superior court judges related to administration of justice, therefore falling under provincial jurisdiction pursuant to Constitution Act, 1867, s. 92(14) — No doubt Act, Part II, by-laws enacted thereunder constituting implementation of power to remove superior court judges Constitution Act, 1867, s. 99(1) assigns to federal authorities — Scope of Constitution Act, 1867, s. 92(14) must be determined on basis of other related powers found in other provisions, namely in Act, ss. 96-100 — In stipulating Governor General appoints superior court judges, has power to remove them from office, while Parliament fixes, provides judges' salaries, Constitution Act, 1867 clearly ousts provincial jurisdiction on any matters relating to these issues — Thus, purposive reading of Constitution Act, 1867, ss. 96-100 leading to conclusion inquiry process prior to removal from office also falling within authority of Parliament.

This was an appeal of a Federal Court decision dismissing the appellant's applications for judicial review and answering the constitutional questions he raised in the negative. This appeal was the conclusion of a long saga to ultimately determine whether the appellant was guilty of misconduct and could, on that ground, be subject to a recommendation from the Canadian Judicial Council (Council) under paragraph 65(2)(b) of the *Judges Act* that he be removed from office. The Council's decision that had been subject to review before the Federal Court, which was the subject of this appeal, followed an initial Council decision that had recommended against the Minister of Justice removing Justice Girouard from office by reason of the allegations made against him by the Chief Justice of the Superior Court of Québec at the time. Throughout the proceedings before the Council in the second inquiry, counsel for the appellant filed no fewer than 24 applications for judicial review disputing various aspects of the procedure followed and raising three constitutional questions before the Federal Court.

The appellant was appointed to the Superior Court of Québec in 2010, after having practised law for 25 years. After having been informed that the appellant had been identified by a drug trafficker as being one of his clients, the Chief Justice of the Superior Court filed a complaint with the Council for the purposes of having the appellant's conduct reviewed. A review panel found that an inquiry committee should be constituted to carry out a more thorough inquiry into the issue. The Council therefore constituted an inquiry committee, which unanimously found that the third allegation (that two weeks before his appointment, the appellant had allegedly purchased an illicit substance) had not been proven. In such circumstances, the Committee did not find it appropriate to continue the inquiry into the other allegations. However, two of the Inquiry Committee members identified six "contradictions, inconsistencies and implausibilities" that, in their view, raised "deep and serious concerns" about the appellant's credibility and integrity. Concerned by the findings of misconduct made by the majority of the Inquiry Committee, the Minister of Justice of Canada and the Minister of Justice of Quebec wrote to the Council less than two months after having received the first report in order to request a new inquiry into those findings. Further to that request, the Council constituted a second Inquiry Committee which unanimously determined that three of the allegations had been established and recommended that the appellant be removed from office. However, three Council members dissented on the ground that the appellant's right to a fair hearing had not been respected. The Federal Court decision that was the subject of this appeal disposed of all of the appellant's applications for judicial review, as well as the constitutional questions. In particular, the Federal Court found that: procedural fairness did not require that the appellant be permitted to appear before the Council or to respond to the minority's concerns; the rule of separation of functions had not been violated; and the elimination of the independent counsel did not violate the principles of judicial independence, fundamental justice or procedural fairness.

The issues were whether the Federal Court properly identified the applicable standards of review; whether the Council's decision was reasonable; whether the two inquiries concerning the appellant were distinct from one another; whether the appellant's right to procedural fairness was respected; whether the appellant's language rights were respected; and whether section 60, paragraph 61(3)(c), and sections 63 to 66 of the Act and the by-laws enacted under the authority of paragraph 61(3)(c) of the Act are constitutionally valid.

Held, the appeal should be dismissed.

There is no doubt that constitutional issues and procedural fairness issues are subject to the standard of correctness, while the Council's findings on questions of fact or interpretation of its enabling statute or the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015* (the 2015 By-laws) must be assessed on a standard of reasonableness. These standards have been applied at least since *Dunsmuir v. New Brunswick*, and the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* has not changed the law in this regard. These are precisely the standards that the Federal Court adopted in its reasons, and the appellant did not seem to question the choice of these standards. Rather, the appellant submitted that the Federal Court did not correctly apply the standard of reasonableness with regard to the merits of the Council's decision, an issue that was considered in the reasonableness review of the Federal Court's decision.

Counsel for the appellant did not present any arguments to demonstrate that the Council's recommendation for removal was unreasonable. Rather, what the appellant faulted the Federal Court and the Council for was not accepting his arguments or his explanations. This was insufficient to demonstrate that the Council's decision was unreasonable or that the Federal Court did not correctly apply the standard of reasonableness. Instead of trying to demonstrate how the Council's reasoning process lacked justification, transparency or intelligibility, or how its recommendation fell outside the range of possible, acceptable outcomes in respect of the relevant legal and factual constraints, the appellant submitted that neither the Council nor the Federal Court had taken into

account his submissions or addressed his arguments. A plain reading of the Council's report to the Minister showed that the lengthy submissions filed by the appellant following the Inquiry Committee's report were taken into consideration. Not accepting a party's submissions made by is not tantamount to not considering them. The Council had complete authority to consider, weigh and ultimately reject the explanations given by the appellant. This was precisely its role. The appellant's allegation that the Council did not take into account his submissions or the evidentiary record was unfounded. It was up to the administrative decision maker to assess the evidence before it, and, barring exceptional circumstances, a reviewing court will not set aside findings of fact. In this case, the Federal Court was correct to conclude that the appellant had not met his burden of proof and had provided no evidence of such exceptional circumstances. There was no basis for concluding, on reading the joint letter from the ministers, that their decision to request a second inquiry was based on essentially political reasons instead of on the importance of ensuring public confidence in the integrity of the judiciary.

The principle of separation of functions arises from the need to ensure that a decision-making process is free of any apprehension of bias. It was pursuant to this principle that paragraph 3(4)(c) of the 2015 By-laws was adopted to set out who is eligible to be members of the Inquiry Committee. The appellant argued that this provision was violated because both inquiries dealt with the same issue, namely his credibility. In finding as it did that the 2015 By-laws do not prevent a person from sitting as a member of an inquiry committee unless that person was on the review panel that deliberated on the appropriateness of establishing that Inquiry Committee, the Council was simply agreeing with the ruling of the second Inquiry Committee. The appellant did not convince the Court that this interpretation of paragraph 3(4)(c) of the 2015 By-laws, adopted by the Council and confirmed by the Federal Court, was unreasonable and not defensible in respect of the applicable facts and law. The more fundamental issue was whether an informed person could have a reasonable apprehension of bias as a result of the fact that judges involved in the first inquiry process also participated in the second process, as members of either the Review Panel or the Council. The second complaint was fundamentally different from the first: it concerned different allegations and covered different periods. Although there may be some overlap between the two, and the first inquiry was what triggered and served as a backdrop for the second, a reasonable person properly informed of the circumstances would not believe that the decision makers involved in the second complaint were incapable of making a fair decision. The Council's decisions are not binding decisions; it only has the authority to make recommendations under sections 63 to 65 of the Act. That being the case, the Report prepared by the Council pursuant to section 65 could not be likened to a decision that definitively resolves a dispute, and therefore the doctrines of estoppel or *res judicata* could not apply. Therefore, the two inquiries were separate, the principles of the separation of functions and of estoppel had not been violated, and a reasonable and informed person would not believe that the Council, whether knowingly or unconsciously, would not render a fair decision.

The only argument made by the appellant with respect to procedural fairness that merited closer examination was that relating to the breach of procedural fairness that allegedly arose out of the violation of his language rights. The appellant was given a fair and open procedure and was able to make all of his arguments during the second inquiry. The Council was not required to reread the entire transcript to arrive at its own determination of the facts as found by the Inquiry Committee. That was not its role. Its role was instead to form its own judgment as to the recommendation that had to be made to the Minister, taking into account both the report of the Inquiry Committee and the submissions of the judge. All of the Council members had access to the same record before making their decision. There was no doubt that the appellant had every possible opportunity to argue his point of view. The appellant was heard during an eight-day hearing before the second Inquiry Committee, filed a number of applications for judicial review, made submissions before both the Inquiry Committee and the Council and therefore had every opportunity to present his version of the facts. In this case, the Federal Court did not err in finding that the Council was not required to hear

the appellant on the issue of the translation of the documents in the record. More fundamentally, breaches of procedural fairness of which a party became aware following the decision of an administrative agency must be raised before the reviewing court and not before the administrative agency itself.

As for the appellant's language rights, the Federal Court was correct in concluding that the appellant's language rights had not been violated. The appellant argued that the Court should recognize that subsection 16(1) of the *Canadian Charter of Rights and Freedoms* confers substantive rights and can fill the gaps in the other provisions guaranteeing language rights in the Charter. This argument was erroneous, and the appellant did not cite any decisions in support of his claim. Subsection 16(1) of the Charter is a provision that is declaratory or interpretive in nature, and it was not for the Court to change the state of the law on this issue. In any event, the equality of status and equal rights and privileges for both official languages enshrined in that provision was completely respected, and the appellant's right to communicate with the second Inquiry Committee and the Council in the official language of his choice was in no way fettered. What the appellant claimed was the right to be understood by the decision maker in the language of his choice, but this right did not fall within the ambit of section 16 of the Charter but rather within the procedural safeguards.

With respect to the constitutionality of section 60, paragraph 61(3)(c), and sections 63 to 66 of the Act and the by-laws enacted under the authority of paragraph 61(3)(c) of the Act, this argument was unequivocally rejected by the Federal Court, which was correct to do so. In the appellant's view, the inquiry process concerning superior court judges is related to the administration of justice and therefore falls under provincial jurisdiction pursuant to subsection 92(14) of the *Constitution Act, 1867*. There can be no doubt that Part II of the Act and its by-laws constitute the implementation of the power to remove superior court judges that subsection 99(1) of the *Constitution Act, 1867* assigns to federal authorities. It would be completely illogical for those authorities to be given the power to remove superior court judges, but not the power to establish the inquiry process leading up to it that is required in order to respect judicial independence and its corollary, security of tenure. The scope of subsection 92(14) of the *Constitution Act, 1867* must be determined on the basis of the other related powers found in other provisions, namely in sections 96 to 100 of that Act, and of the structure of government that those provisions are intended to implement. In stipulating that the Governor General appoints superior court judges and has the power to remove them (on address of the Senate and House of Commons) and that Parliament fixes and provides their salaries, the *Constitution Act, 1867* clearly ousts provincial jurisdiction on any matters relating to these issues. Therefore, a purposive reading of sections 96 to 100 of the *Constitution Act, 1867* had to lead to the conclusion that the inquiry process prior to a removal must also fall within the authority of Parliament.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 11(d), 14, 16–23.

Canadian Judicial Council Inquiries and Investigations By-laws, SOR/2002-371, ss. 1.1(2), 5(1).

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, ss. 2(1), 3(1),(2),(3),(4), 4, 5–8, 11, 12, 15.

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], ss. 92(14), 96–100, 133.

Courts of Justice Act, C.Q.L.R., c. T-16, s. 281.

Judges Act, R.S.C., 1985, c. J-1, ss. 58–71.

Official Languages Act, R.S.C. (1985) (4th Suppl.), c. 31, ss. 3(2), 14–16, 22.

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549; *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31.

CONSIDERED:

Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267; *Therrien (Re),* 2001 SCC 35, [2001] 2 S.C.R. 3; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, [2007] 4 F.C.R. 714; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Kane v. U.C.B. Council of Directors,* [1980] 1 S.C.R. 1105; *SITBA v. Consolidated-Bathurst Packaging Ltd.* [1990] 1 S.C.R. 282.

REFERRED TO:

Canadian Judicial Council v. Girouard, 2019 FCA 148, [2019] 3 F.C.R. 503; *Girouard v. Canadian Judicial Council*, 2015 FC 307; *Girouard v. Canada (Attorney General)*, 2017 FC 449, [2017] F.C.J. No. 675 (QL); *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404; *Girouard v. Canada (Attorney General)*, 2020 FC 557; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *The Queen v. Beauregard*, [1986] 2 S.C.R. 56; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911; *Taylor v. Canada (Attorney General)*, 2001 FCTD 1247, [2002] 3 F.C. 91 aff'd 2003 FCA 55, [2003] 3 F.C. 3 leave to appeal to S.C.C. refused, 2978 (September 25, 2003); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Bank of Montreal v. Li*, 2020 FCA 22; *Stoneham and Tewkesbury v. Ouellet*, [1979] 2 S.C.R. 172; *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769(T.D.); *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Council*, [1994] 1 S.C.R. 202; *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 FC 317; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409; *Stevens v. Conservative Party of Canada*, 2005 FCA 383, [2006] 2 FC 315; *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4th) 260, 1993 CarswellOnt 872

(Ont. Gen. Div.), rev'd on another point (1995), 23 O.R. (3d) 431, 1995 CarswellOnt 502 (Ont. C.A.), leave to appeal to S.C.C. refused (1995), 195 N.R. 399; *R. v. Beaulac,* [1999] 1 S.C.R. 768; *Kitkatla Band v. British Columbia (Minister of Small and Medium Enterprises, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Attorney General of Ontario v. OPSEU*, [1987] 2 S.C.R. 2.

AUTHORS CITED

Canadian Judicial Council. *CJC Manual of Practice and Procedure for Inquiry Committees*, September 17, 2015.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Déziel, Superior Court of Québec. *Report of the Canadian Judicial Council to the Minister of Justice*, December 2, 2015.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Committee decision on preliminary grounds*, April 4, 2017.

Canadian Judicial Council. Proceedings and report regarding Justice Michel Girouard, Superior Court of Québec. *Dissent*, February 20, 2018.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Final version request for disclosure of documents 22 Feb.* February 22, 2017.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Joint letter from ministers*, June 14, 2016.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Report of the Inquiry Committee of the Canadian Judicial Council*, November 6, 2017.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Report of the Inquiry Committee to the Canadian Judicial Council*, November 18, 2015.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard, Superior Court of Québec. *Report of the Canadian Judicial Council to the Minister of Justice*, April 20, 2016.

Canadian Judicial Council. Proceedings and reports regarding Justice Michel Girouard. *Report to the Minister*, February 20, 2018.

Canadian Judicial Council. Proceedings and reports regarding Justice Theodore Matlow, Ontario Superior Court of Justice. *CJC Report to the Minister of Justice*, December 3, 2008.

APPEAL from a Federal Court decision (2019 FC 1282, [2020] 2 F.C.R. 199) dismissing the applications for judicial review and responding in the negative to the constitutional questions raised by the appellant, who was recommended for removal by the Canadian Judicial Council pursuant to paragraph 65(2)(b) of the *Judges Act*. Appeal dismissed.

APPEARANCES

Louis Masson and *Gérald R. Tremblay* for appellant.

Claude Joyal, *Pascale-Catherine Guay* and *Lindy Rouillard-Labbé* for respondent.

Jean-Yves Bernard for third party.

SOLICITORS OF RECORD

Therrien Couture Joli-Cœur LLP., Québec and *McCarthy Tétrault LLP*, Montréal, for appellant.

Deputy Attorney General of Canada for respondent.

Ministère de la Justice and Attorney General of Québec, Montréal, for third party.

The following is the English version of the reasons for judgment rendered by

[1] DE MONTIGNY J.A.: This appeal is the conclusion (subject to a possible appeal to the Supreme Court) of a long saga to ultimately determine whether the Honourable Michel Girouard was guilty of misconduct and could, on that ground, be subject to a recommendation from the Canadian Judicial Council (the Council) under paragraph 65(2)(b) of the *Judges Act*, R.S.C., 1985, c. J-1 (the Act) that he be removed from office. As in all cases of this nature, the resolution of this dispute is of central importance not only for Justice Girouard, whose career and reputation are at stake, but also for the integrity of the judiciary as a whole and, thereby, for the administration of justice in this country.

[2] An unusual and, no doubt, unique case in Canadian history, the Council's decision that was subject to review before the Federal Court and that is now before us on appeal follows an initial Council decision that recommended against the Minister of Justice removing Justice Girouard from office by reason of the allegations made against him by the Chief Justice of the Superior Court of Québec at the time. It was in order to shed light on some of the findings made by the majority of the first Inquiry Committee, which the Council declined to act on in its first report, that the Minister of Justice of Canada and the Minister of Justice of Quebec made a request to the Council that a new inquiry be held, which led to the second decision that is the subject of this appeal.

[3] Throughout the proceedings before the Council in the second inquiry, counsel for Justice Girouard filed no fewer than 24 applications for judicial review, disputing various aspects of the procedure followed and raising three constitutional questions before the Federal Court. Those various proceedings demonstrate both the complexity of this case as well as the vigour with which Justice Girouard's rights were defended.

[4] After a thorough and exhaustive analysis of the arguments presented by Justice Girouard with regard to the establishment of the second Inquiry Committee and its inquiry process, the second Inquiry Committee's decision on the preliminary motions, and the Council's report recommending his removal, Justice Rouleau (a judge of the Court of Appeal for Ontario sitting as a deputy judge of the Federal Court) dismissed the application for judicial review and answered the constitutional questions in the negative [*Girouard v. Canada (Attorney General)*, 2019 FC 1282, [2020] 2 F.C.R. 199].

[5] After carefully reviewing the case and considering all of the arguments put forward by counsel for Justice Girouard challenging that judgment, I am of the opinion that the appeal should be dismissed. In my view, the Federal Court did not err in finding that the Council's decision to recommend Justice Girouard's removal was reasonable. Moreover, I find that there was no breach of the principles of procedural fairness and that Justice Girouard was given full opportunity to be heard and to make submissions. Although it might have been desirable for certain portions of the transcript of the hearings before the second Inquiry Committee to have been translated, I nonetheless find that Justice Girouard was not prejudiced by this and that it would not be appropriate to set aside the Council's decision on that ground, as I will explain later.

I. History of this litigation

[6] The various stages of this and the preceding case were meticulously recounted by Justice Rouleau in his judgment, were summarized in detail by this Court in a previous decision that confirmed that the Council is subject to judicial review before the Federal Court, by the various judges of the Federal Court who dealt with several motions filed by Justice Girouard in the first and second inquiries, and by the inquiry committees constituted by the Council to consider the two complaints against Justice

Girouard. See: *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503; *Girouard v. Canadian Judicial Council*, 2015 FC 307; *Girouard v. Canada (Attorney General)*, 2017 FC 449, [2017] F.C.J. No. 675 (QL); *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404; *Girouard v. Canada (Attorney General)*, 2020 FC 557; Report of the first Inquiry Committee, November 18, 2015 [*Report of the Inquiry Committee to the Canadian Judicial Council*] (Appeal Book (AB), Vol. 5, tab 43); Report of the second Inquiry Committee, November 6, 2017[*Report of the Inquiry Committee to the Canadian Judicial Council*] (AB, Vol. 3, tab 21). For the purposes of this appeal, I need only refer to the key milestones that led the Council to recommend Justice Girouard's removal in its Report to the Minister of Justice of Canada dated February 20, 2018 [*Report to Minister*].

[7] Justice Girouard was appointed to the Superior Court of Québec on September 30, 2010, after having practised law in Abitibi, Quebec, for 25 years. After having been informed by the Director of Criminal and Penal Prosecutions that Justice Girouard had been identified by a drug trafficker as being one of his clients, the Chief Justice of the Superior Court filed a complaint with the Council for the purposes of having Justice Girouard's conduct reviewed. In his letter to the Council dated November 30, 2012, the Chief Justice added that a video identifies Justice Girouard [TRANSLATION] "allegedly carrying out a transaction, presumed to be a cocaine purchase, that occurred approximately thirteen days before Justice Girouard's appointment" (AB, Vol. 4, tab 24).

[8] A review panel consisting of Chief Justice J. Ernest Drapeau, Chief Justice Glenn D. Joyal and Justice Arthur J. LeBlanc found, after conducting a review, that an inquiry committee should be constituted to carry out a more thorough inquiry into the issue (Report of the Review Panel, AB, volume 4, tab 33).

[9] Pursuant to subsection 63(3) of the Act and in accordance with the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371, repealed, SOR/2015-203, section 15 (the 2002 By-laws), the Council therefore constituted an inquiry committee consisting of Chief Justice Richard Chartier, Chief Justice Paul

Crampton and Ronald LeBlanc, Q.C. Eight allegations were initially identified by independent counsel; following the pre-hearing conferences and hearings, some of those allegations were withdrawn and others were amended. At the end of its inquiry, the Committee unanimously found that the third allegation (i.e., that two weeks before his appointment, Mr. Girouard allegedly purchased an illicit substance) had not been proven. In such circumstances, the Committee did not find it appropriate to continue the inquiry into the other allegations (regarding the purchase and use of illicit substances by Mr. Girouard when he was a lawyer in the late 1980s and early 1990s and his failure to disclose this fact in his personal history form, submitted as part of his application for the federal judiciary).

[10] However, two of the Inquiry Committee members identified six "contradictions, inconsistencies and implausibilities" that, in their opinion, raised "deep and serious concerns" about Justice Girouard's credibility and integrity. This "Majority Report", as it was subsequently called, had a determinative effect on the subsequent sequence of events. Upon reviewing Justice Girouard's testimony, Chief Justice Crampton and Mr. LeBlanc wrote the following:

> In short, on the basis of all the evidence submitted to the Committee to date, and subject to our comments below about the possibility of bringing a further count, we cannot, with great regret, accept Justice Girouard's version of the facts. Although this implies nothing about the nature of the object that was exchanged, we wish to express our deep and serious concerns about Justice Girouard's credibility during the inquiry and, consequently, about his integrity. In our opinion, Justice Girouard deliberately attempted to mislead the Committee by concealing the truth. [Footnotes omitted.]
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> Report of the first Inquiry Committee dated November 18, 2015, at paragraph 227; AB, Vol. 5, tab 43, at page B-4990.

[11] Stating that they were of the opinion that Justice Girouard did not demonstrate a level of conduct that is irreproachable through his lack of candour during his testimony, Chief Justice Crampton and Mr. LeBlanc found that Justice Girouard had placed himself in a position incompatible with the due execution of the office of judge pursuant to paragraph 65(2)(d) of the Act and recommended his removal. In their opinion, keeping Justice Girouard as a judge of the Superior Court of Québec would undermine the integrity of the justice system. In his dissent, Chief Justice Chartier stated that he was of

the opinion that the inconsistencies, errors and weaknesses in Justice Girouard's testimony affected the reliability of the testimony much more than the credibility of the witness. Chief Justice Chartier was also of the opinion that procedural fairness required that Justice Girouard be given an opportunity to respond to the new concerns raised by his colleagues.

[12] In its Report to the Minister of Justice of Canada, the Council accepted the Inquiry Committee's finding that the third allegation had not been proven on a balance of probabilities, but refused to act on the majority recommendation that Justice Girouard should be removed from office because of the lack of candour and transparency in his testimony:

> In this Report, we do not consider the majority's conclusion that the judge attempted to mislead the Committee by concealing the truth and that such conduct places him in a position incompatible with the execution of his office. The Council takes this approach because the judge was not informed that the specific concerns of the majority were a distinct allegation of misconduct to which he must reply in order to avoid a recommendation for removal.
>
> *Report of the Canadian Judicial Council to the Minister of Justice*, dated April 20, 2016, at paragraph 42; AB, Vol. 5, tab 44, at page B-5011.

[13] Stating that they were concerned by the findings of misconduct during the inquiry that were made by the majority of the Inquiry Committee, the Minister of Justice of Canada and the Minister of Justice of Quebec wrote to the Council less than two months after having received the first report in order to request that the Council hold a new inquiry regarding those findings. In the opinion of the two ministers, such an approach was necessary not only to determine whether Justice Girouard had become incapacitated or disabled from the due execution of the office of judge because of his conduct during the inquiry, but also to dispel any doubts about him. It is important to note that in the opinion of the two ministers, this course of action was consonant with the purpose of the disciplinary process to ensure public confidence in the judiciary, and was the course of action "that is fair to Justice Girouard in the circumstances" (AB, Vol. 5, tab 45, at page B-5016).

[14] Further to that request, the Council constituted a second Inquiry Committee consisting of Chief Justice Drapeau, Chief Justice Joyal, Associate Chief Justice Marianne Rivoalen, Bâtonnier Bernard Synnott, Ad. E., and Paule Veilleux, a lawyer. It should be noted that the second inquiry proceeding was conducted in accordance with the *Canadian Judicial Council Inquiries and Investigations By-laws* (2015), SOR/2015-203 (the 2015 By-laws), which came into force on July 28, 2015. The misconduct allegations against Justice Girouard were set out in four allegations, which were stated in the Notice of Allegations dated December 23, 2016, as amended on February 22, 2017, and as further amended on May 17, 2017 (AB, Vol. 7, tab 57). One of them, that is, that Justice Girouard falsely told the first Inquiry Committee that he never used or obtained drugs, was rejected. The three others, which it bears reproducing, read as follows:

> **First Allegation:**
>
> Judge Girouard has become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct during the inquiry conducted by the First Committee, *which misconduct is more fully set out in the findings of the majority reproduced at paragraphs 223 to 242 of its Report*:
>
> (a) Judge Girouard failed to cooperate with transparency and forthrightness in the First Committee's inquiry;
>
> (b) Judge Girouard failed to testify with transparency and integrity during the First Committee's inquiry;
>
> (c) Judge Girouard attempted to mislead the First Committee by concealing the truth.
>
> …
>
> **Third Allegation:**
>
> Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct and failure in the due execution of the office of judge (ss. 65(2)(b) and (c) of the *Judges Act*), by falsely stating before this Inquiry Committee that he never used cocaine when he was a lawyer.
>
> **Fourth Allegation**
>
> Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct and failure in the due execution of the office of judge (ss. 65(2)(b) and (c) of the *Judges Act*), by falsely stating before this Inquiry Committee that he never became acquainted with and was never provided a copy of Volume 3 of the Doray Report before May 8, 2017, his testimony on point being:

> “A. That is... that is... I was never shown Volume 3, even in the first inquiry, never; I saw it for the first time on Monday, May 8, this week; O.K.?
>
> That is...
>
> Q. But…
>
> A. ...the truth!”

[15] After a three-day hearing, the second Inquiry Committee rendered its first decision on February 22, 2017 [*Final Version Request for Disclosure of Documents 22 Feb* (French only)]; that decision was with respect to a number of preliminary motions and constitutional questions submitted by Justice Girouard. That approximately 50-page decision addresses many of the objections that were again raised by Justice Girouard before the Federal Court and before us, and I will deal with them in greater detail in my analysis.

[16] In the 86-page final report that it submitted to the Council on November 6, 2017 (AB, Vol. 13, at page B-6929), the second Inquiry Committee unanimously determined that the three allegations reproduced in paragraph 14 of these reasons had been established on a strong balance of probabilities by clear and convincing evidence, and it recommended the removal of Justice Girouard. The second Inquiry Committee came to this conclusion after having reviewed the transcript of the 14 days of hearings before the first Inquiry Committee and after having heard the testimony of the parties over eight days (three of which were spent hearing from Justice Girouard).

[17] The second Inquiry Committee was well aware of the unique nature of the inquiry it was responsible for conducting, particularly with regard to the first allegation, and it turned its mind to the weight that should be given to the statements made by the majority of the first Inquiry Committee. In this respect, the second Inquiry Committee found that it was not bound by the findings of Chief Justice Crampton and Mr. LeBlanc and that it had to weigh them in light of the explanations provided by Justice Girouard:

> All things considered, we concluded it was appropriate to accept the findings of the majority underlying that Allegation only if it was shown they were both free from error and reasonable, and only to the extent they withstood our assessment of the evidence deemed reliable.

Report of the second Inquiry Committee, at paragraph 5; AB, Vol. 13, tab 91, at page B-6933. See also to the same effect paragraph 31.

[18] After considering each of the inconsistencies and implausibilities raised by the majority of the first Inquiry Committee in light of the explanations provided by Justice Girouard, the five members of the second Inquiry Committee found that no error vitiated those findings and that no element of Justice Girouard's testimony was a basis for their rejection. In this regard, the second Inquiry Committee noted that Justice Girouard did not testify in a frank and transparent manner, that it was "sometimes necessary to repeatedly, and unnecessarily, reformulate the questions before [he] finally saw fit to answer them" and that he behaved like an "uncooperative and obstinate witness, who was often disinclined to answer promptly and fully questions put to him" (Report of the second Inquiry Committee, at paragraphs 95 and 96; AB, Vol. 13, tab 91, at page B-6955). Having concluded that Justice Girouard's misconduct as identified in the first allegation had been established on a balance of probabilities, the second Inquiry Committee found that the misconduct was destructive of the integrity of the justice system and that it undermined public confidence in such a fashion as to render Justice Girouard incapable of discharging his judicial functions. As previously mentioned, the second Inquiry Committee came to the same conclusion for the third and fourth allegations.

[19] In the Council's Report to the Minister of Justice dated February 20, 2018, it adopted the second Inquiry Committee's preliminary decision with regard to the complaints advanced by Justice Girouard concerning jurisdiction and procedure, and responded to the other concerns raised by Justice Girouard in his written submissions to the Council regarding other procedural issues. The Council also accepted the second Inquiry Committee's findings regarding the first allegation and held that there was no need to examine the second Inquiry Committee's findings regarding the third and fourth allegations. After having noted that the critical evidence underlying the first allegation was Justice Girouard's testimony concerning a video recording of a meeting he had with a drug trafficker who was his client at the time, the Council wrote the following:

> We find it telling, and compelling, that nowhere in the Judge's submission or in the Report [of the second Inquiry Committee] is there a simple, rational, coherent, all-encompassing or satisfying explanation of what takes place in the 17 second video. After being afforded natural justice – notice of the Allegations, the assistance of counsel and an opportunity to be heard by an impartial tribunal – the Judge was unable to give any credible explanation of his conduct which was consistent with and justified his testimony before the First Committee. We conclude he is simply unwilling to provide a truthful explanation. He failed to do so before the Committee and he failed to do so in his written submissions to Council.
>
> Certified tribunal record, at paragraph 59; AB, Vol. 10, tab 82, at pages B-6373 and B-6374.

[20] However, three Council members (Chief Justice Smith, Chief Justice Bell and Associate Chief Justice O'Neil) dissented on the ground that Justice Girouard's right to a fair hearing had not been respected. Their dissent was based on the fact that the record that the unilingual English-speaking members of the Council had access to was not the same as that which was available to the bilingual members because the transcripts of the evidence presented before the first Inquiry Committee and the second Inquiry Committee were not translated and distributed in both official languages to all of the members.

[21] Justice Girouard filed 24 applications for judicial review before the Federal Court. In those applications, he raised different grounds for having the decisions of the second Inquiry Committee, the Council, and the Minister set aside. Some of the motions were dismissed and others were consolidated through an order of Justice Simon Noël, issued on May 3, 2018. The Federal Court decision that is the subject of this appeal disposed of all of the applications for judicial review, as well as the constitutional questions raised in the Notice of Constitutional Questions filed on January 26, 2017.

II. The Federal Court decision

[22] The Federal Court applied the standard of correctness to the constitutional and procedural fairness issues and the standard of reasonableness to the Council's interpretation of the Act, that is, its enabling statute, and the 2015 By-laws and their application to Justice Girouard's situation. In doing so, the Federal Court dismissed all of the applications for judicial review that were filed by Justice Girouard. The Court's reasons consist of 258 paragraphs and deal with all of the arguments put forth by

counsel for Justice Girouard. Although it is risky to try to summarize such a long judgment, I find that the following statements outline its principal findings:

- Procedural fairness did not require that Justice Girouard be permitted to appear before the Council or to respond to the minority's concerns. He had the opportunity to understand the allegations against him and to respond to them at each stage of the process; procedural fairness and the *audi alteram partem* rule do not go so far as to allow him to attend and participate in the Council's deliberations or to make representations on the issues raised by the minority.

- The principle of the separation of functions, as codified in paragraph 3(4)(c) of the 2015 By-laws, was not violated because Chief Justice Drapeau and Chief Justice Joyal were members of the Review Panel established for the first complaint and then members of the second Inquiry Committee. The above-mentioned provision states that "a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted" is not eligible to be a member of the Inquiry Committee. However, the second inquiry dealt with an inquiry request distinct from that which was reviewed by those judges in the context of the Review Panel's work prior to the first investigation. The same reasoning applies for the 13 Council members who sat as members of the first and the second panel of the Council. Moreover, the Review Panel's statements do not give rise to a reasonable apprehension of bias when they are considered in context, and there is no reason to believe that Chief Justice Drapeau and Chief Justice Joyal did not act impartially as members of the second Inquiry Committee.

- The elimination of the independent counsel after the 2015 By-laws were enacted does not violate the principles of judicial independence, fundamental justice or procedural fairness. The lawyers designated to participate in the second Inquiry Committee did not act as prosecutors and had only one goal, namely the search for the truth.

- There is no reviewable error in the inquiry request made by the Minister of Justice of Canada and the Minister of Justice of Quebec; its sole purpose was the public interest in the proper administration of justice. The briefing notes on which Justice Girouard relied do not establish that the decision of the Minister of Justice of Canada was motivated by political considerations. In addition, the Ministers' request did not dictate the approach that the Council had to take; the second Inquiry Committee was free to reframe the subject matter of the inquiry if it deemed it necessary.

- The second Inquiry Committee did not err in ruling that during the cross-examination of Justice Girouard, he had to stop referring to a compendium that was prepared by his counsel and that included excerpts from his testimony before the first Inquiry Committee. In addition, Justice Girouard did not demonstrate that he was prejudiced by that decision.

- The second Inquiry Committee did not reverse the burden of proof. It considered the findings of the majority of the first Inquiry Committee as a starting point, but it then considered the evidence and the explanations provided by Justice Girouard before it and independently reviewed the transcripts, the exhibits and the relevant evidence. It also considered the dissent of Chief Justice Chartier in the first Inquiry Committee's report.

- The Council did not reverse the burden of proof when it accepted the second Inquiry Committee's finding. The Council is not required to repeat an inquiry committee's work or to review the evidence in its entirety unless there is an error that may be qualified as palpable and overriding. Its role is instead to draw its own conclusions with regard to the recommendation to be made to the Minister. No serious factual errors have been demonstrated in the second Inquiry Committee's report, and the Council's decision to accept its recommendation was reasonable in the circumstances.

- Justice Girouard's language rights as guaranteed by section 133 of the *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] (C.A., 1867), sections 14, 16, and 19 to 22 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K) [R.S.C., 1985, Appendix II, nº 44] (the Charter) and sections 14 and 16 of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 (*Official Languages Act*), were not infringed. Justice Girouard was able to testify and present his case in the language of his choice. Part III [sections 14–20] of the *Official Languages Act* was not violated on the ground that some Council members did not understand French because the Council is not a "federal court" within the meaning of subsection 3(2) of that statute.

- The Council was not required to translate all of the transcripts of the inquiry conducted by the second Inquiry Committee because they were not part of the record that the Council was required to consult before arriving at its own recommendation to the Minister. Moreover, Justice Girouard suffered no prejudice from the fact that the transcripts were not translated to the extent that he did not identify any explanation that he gave to the second Inquiry Committee to justify his conduct and that was not considered in its report.

- Section 60, paragraph 61(3)(c) and sections 63 to 66 of the Act, subsections 1.1(2) and 5(1) of the 2002 By-laws, subsections 2(1), 3(1) to 3(3), section 4, and subsection 5(1) of the 2015 By-laws and sections 3.1, 3.2 and 3.3 of the *Handbook of Practice and Procedure of the CJC Inquiry Committees* (Handbook of Practice) are *intra vires* Parliament's authority. The power to investigate the conduct of judges is directly linked to the federal power to appoint, pay, and remove superior court judges.

[23] It is from this Federal Court decision that Justice Girouard appeals.

III. Issues

[24] Counsel for Justice Girouard raised several issues before us and in substance challenge each and every finding of the Federal Court. In my view, those issues can be usefully restated as follows:

(a) Did the Federal Court properly identify the applicable standards of review?

(b) Is the Council's decision reasonable?

(c) Were the two inquiries concerning Justice Girouard distinct from one another, as the respondent argues, or did they have the same subject matter, as the appellant argues? In my opinion, the answer to this question is crucial to determining whether there was a violation of the rule of separation of functions codified in the 2015 By-laws and of the principle of estoppel, which bars the reopening of cases.

(d) Was the appellant's right to procedural fairness respected? I include in this issue the appellant's claims that he had the right to be heard in respect of the concerns expressed by the dissenting members of the Council, as well as his arguments related to the reversal of the burden of proof and his right to consult the compendium during his cross-examination.

(e) Were the appellant's language rights respected?

(f) Are section 60, paragraph (61)(3)(*c*), and sections 63 to 66 of the Act and the by-laws enacted under the authority of paragraph (61)(3)(c) of the Act constitutionally valid?

IV. Analysis

- *The constitutional and legal context of this dispute*

[25] Judicial independence is one of the pillars upon which the Canadian Constitution rests and one of the foundations of democratic societies. It is entrenched in the preamble to the C.A., 1867, in section 11(d) of the Charter, and in unwritten constitutional principles. It has been discussed by the Supreme Court in numerous

judgments in various contexts over the past 40 years, and its importance no longer needs to be demonstrated: see, in particular, *Valente v. The Queen*, [1985] 2 S.C.R. 673, (1985), 52 O.R. (2d) 779; *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, (1986), 30 D.L.R. (4th) 481; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1 (*Ruffo*); *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.; Ref. re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, (1997), 150 D.L.R. (4th) 577; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 (*Therrien*); *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 (*Moreau-Bérubé*); *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116 (*Conférence des juges de paix magistrats*).

[26] The objective guarantees of judicial independence—security of tenure, financial security and administrative independence—are intended to promote public confidence in the administration of justice and to ensure the rule of law and the separation of powers. As stated by the Supreme Court in *Conférence des juges de paix magistrats*, "judicial independence belongs not to judges, but to the public" (at paragraph 33). Similarly, this Court stated the following in *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, [2007] 4 F.C.R. 714 (*Cosgrove*), at paragraph 32:

> … judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at paragraphs 58-59.

[27] It is from this perspective that the Council was created in 1971, through amendments to the Act. Aware that it is not always easy to determine when the obligation of good behaviour under section 99 of the C.A., 1867 has been violated as

well as which type of misconduct is serious enough to warrant the removal of a judge, Parliament created this body, which consists of all of the chief justices, senior associate chief justices, and associate chief justices of the superior courts. These provisions are now found in Part II [sections 58–71] of the Act, and one of the Council's important objects is to investigate the conduct of judges (paragraph (60)(2)(c)). To fulfill this mandate, the Council investigates allegations of misconduct. When the allegations are serious enough to warrant a full inquiry, the Council conducts such an inquiry, at the end of which it provides a report to the Minister of Justice. In accordance with subsection 65(2), the Council may recommend the removal of a judge where, in its opinion, the judge has become incapacitated or disabled from the due execution of the office of judge by reason of

> **65** ….
>
> **Recommendation to Minister**
>
> **(2)** …
>
> **(a)** age or infirmity,
>
> **(b)** having been guilty of misconduct,
>
> **(c)** having failed in the due execution of that office, or
>
> **(d)** having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.

[28] The Act is not explicit as to the procedure the Council must follow when investigating the conduct of a judge. It only provides that the Council may constitute an inquiry committee comprising one or more of its members together with such members, if any, of the bar, as may be designated by the Minister (subsection 63(3)). The parameters of the federal judiciary's disciplinary process can, for the most part, be found in the 2015 By-laws, enacted under the authority of paragraph 61(3)(*c*) of the Act, as well as in the Handbook of Practice and the Council's Complaints Procedures.

[29] At paragraphs 47 to 65 of its reasons, the Federal Court aptly described the inquiry process and the respective roles of the review panel, the inquiry committee and the Council, such that there is no need for me to describe them again in detail. I will

simply draw attention to certain aspects of the process, for a better understanding of what follows.

[30] A distinction must be drawn between inquiries and investigations. When the Minister of Justice or the attorney general of a province requests an inquiry into the conduct of a judge in accordance with subsection 63(1) of the Act, as was the case for the second inquiry, the Council *must* in principle conduct such an inquiry without going through the review panel step. This will apply unless the request does not allege bad faith or abuse of office, and does not on its face disclose an arguable case for removal: *Cosgrove*, at paragraph 52. However, for an investigation, any person may file a complaint against a judge: in such a case, the chairperson or vice-chairperson of the Council's Judicial Conduct Committee briefly examines the complaint and submits it to a review panel if he or she determines that the complaint might warrant the removal of the judge (2015 By-laws, subsection 2(1)). This is the process that was followed for the first complaint, which was filed by the Chief Justice of the Superior Court of Québec.

[31] It is important to mention that the sole function of a review panel is to determine whether the complaint might be serious enough to warrant the removal of the judge. If so, an inquiry committee will be constituted and will consider the review panel's written reasons and statement of issues (2015 By-laws, subsection 5(1)).

[32] Subsection 63(3) of the Act provides that an inquiry committee comprises one or more of the Council's members together with such members, if any, of the bar, as may be designated by the Minister of Justice. Subsection 3(1) of the 2015 By-laws stipulates that an inquiry committee is composed of an uneven number of members, the majority of whom are from the Council. In practice, these committees consist of five people (three Council members and two members of the bar), and more rarely of three people (two Council members and one member of the bar). Under subsection 3(4) of the 2015 By-laws, "a member of the … Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted" may not be a member of the inquiry committee. Lastly, section 4 of the 2015 By-laws gives the inquiry committee

the authority to engage legal counsel and other persons “to provide advice and to assist in the conduct of the inquiry.”

[33] An inquiry committee must conduct its inquiries or investigations in accordance with the principle of procedural fairness (2015 By-laws, section 7). Among other things, it must inform the judge of all complaints or allegations against him or her and allow the judge to respond fully to them (2015 By-laws, subsections 5(2) and (3)). The judge subject to an inquiry or investigation, also has the right to be heard and to be represented by counsel (the Act, section 64).

[34] After hearing the parties, the inquiry committee submits a report to the Council setting out the results of the inquiry and its findings as to whether a recommendation should be made for the judge’s removal. Only Council members who did not participate in the review panel or the inquiry committee or in any other previous step of the process may participate in the consideration of the inquiry committee’s report and in the deliberations (2015 By-laws, section 11). The Council may refer all or part of the matter back to the inquiry committee if it is of the opinion that the committee’s report requires a clarification or that a supplementary inquiry or investigation is necessary (2015 By-laws, section 12). After reviewing the committee’s report and the judge’s written submissions, the Council determines whether the impugned conduct meets the criteria set out in subsection 65(2) of the Act and whether a recommendation for the judge’s removal should be made to the Minister of Justice.

[35] That is an overview of the steps in the removal process, which is triggered by the filing of a complaint against a judge. As stated earlier, the review panel step is not required when the Minister or a provincial attorney general requests the constitution of an inquiry committee. It is then up to the Minister to determine whether to ask Parliament to remove the judge; this decision rests with the Minister, who is not bound by the Council’s recommendation.

[36] Before concluding this description, it is worth noting that the role of the Council and its committees is not to resolve a dispute between parties, much less to rule on the criminal culpability of a judge. Paragraph (60)(2)(*c*) of the Act provides that an object of

the Council is to make the inquiries and the investigation of complaints or allegations and to make recommendations, like any commission of inquiry: see *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911; *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 F.C. 91, affd 2003 FCA 55, [2003] 3 F.C. 3, leave to appeal to S.C.C. refused [2003] 2 S.C.R. xi (September 25, 2003). The Supreme Court was very clear in this regard in *Ruffo*. While the comments made in that matter were in the context of the disciplinary process established by the *Courts of Justice Act*, C.Q.L.R., c. T-16 (*Courts of Justice Act*), the relevant provisions of that regime are substantially to the same effect as the corresponding sections of the Act. It is relevant to reproduce the comments of the Court, which were also restated in *Therrien* (at paragraph 103):

> … Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth. [Emphasis added.]
>
> In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the [*Courts of Justice Act*] confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it. [Emphasis in original.]
>
> *Ruffo*, at paragraphs 72–73.

A. *Did the Federal Court properly identify the applicable standards of review?*

[37] When this Court is sitting in appeal from the Federal Court on judicial review, it is well established that its role is to determine whether the appropriate standard of review was identified and whether it was applied correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraph 45; *Bank of Montreal v. Li*, 2020 FCA 22, 443 D.L.R. (4th) 688, at paragraph 22.

[38] There seems to me to be no doubt that constitutional issues and procedural fairness issues are subject to the standard of correctness, while the Council's findings on questions of fact or of interpretation of its enabling statute or the 2015 By-laws must be assessed on a standard of reasonableness. These standards have been applied since at least *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), and the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), has not changed the law in this regard. On the contrary, the Supreme Court reiterated the presumption that reasonableness is the generally applicable standard in judicial review, with certain well-defined exceptions (*Vavilov*, at paragraph 16). These are precisely the standards that the Federal Court adopted in its reasons, and the appellant does not seem to question the choice of these standards.

[39] Rather, the appellant submits that the Federal Court did not correctly apply the standard of reasonableness with regard to the merits of the Council's decision. In particular, the appellant contends that the Federal Court did not give sufficient reasons for its decision and did not take into account the legal and factual constraints, as identified in *Vavilov*, which may limit the range of options available to the Council in making its decision. I will now turn my attention to that issue.

B. *Is the Council's decision reasonable?*

[40] Even though the Federal Court's decision in this matter was rendered a few months before *Vavilov*, I am of the view that it nevertheless respects the spirit of that judgment and the principles that emerged from it. Moreover, the Supreme Court made a point of referring to its previous decision in *Dunsmuir* several times in its assessment of what constitutes a reasonable decision, and reiterated that the hallmarks of such a decision are "justification, transparency and intelligibility … and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at paragraph 99).

[41] In addition, I note that the legal and factual constraints identified in *Vavilov* had already been identified in the earlier case law, and the reasons in *Dunsmuir* made

reference, if not explicitly, then at least implicitly, to them. Furthermore, the Supreme Court took care to mention that these elements, while they may be relevant in determining whether a decision is reasonable, are not a "checklist" for conducting reasonableness review; they may vary in significance depending on the context (*Vavilov*, at paragraph 106).

[42] Ultimately, the onus is always on the applicant to demonstrate that a decision is unreasonable, and reasonableness must be assessed taking into account both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov*, at paras. 75 and 87). Reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision-makers (*Vavilov*, at paragraphs 75 and 82). In other words, the role of a reviewing court is to consider the reasonableness of the decision made, not to assess that decision against the decision it would have made:

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.
>
> *Vavilov*, at paragraph 83.

[43] Counsel for the appellant did not present any arguments, either in written submissions or oral representations, to demonstrate that the Council's recommendation for removal was unreasonable. Rather, what the appellant faults the Federal Court and the Council for, in short, is not accepting his arguments or his explanations. This is insufficient to demonstrate that the Council's decision was unreasonable or that the Federal Court did not correctly apply the standard of reasonableness.

[44] Instead of trying to demonstrate how the reasoning process followed by the Council lacks justification, transparency or intelligibility, or how its recommendation falls outside the range of possible, acceptable outcomes in respect of the relevant legal and factual constraints, Justice Girouard submitted that neither the Council nor the Federal

Court had taken into account his submissions or addressed his arguments. Despite the energy and conviction of his counsel in trying to satisfy us of this, I cannot accept this argument.

[45] A plain reading of the Council's report to the Minister shows that the lengthy submissions filed by Justice Girouard following the Inquiry Committee's report were taken into consideration. Before reaching its conclusions, the Council took care to address the many procedural issues raised by Justice Girouard, at paragraphs 23 to 46 of its Report. Then, after considering the Inquiry Committee's report, the Council wrote the following:

> Nowhere in the Judge's 116-page submission to Council does he challenge the Committee's description of what took place during his meeting with his client on 17 September 2010.
>
> We find it telling, and compelling, that nowhere in the Judge's submission or in the Report is there a simple, rational, coherent, all-encompassing or satisfying explanation of what takes place in the 17 second video. After being afforded natural justice — notice of the Allegations, the assistance of counsel and an opportunity to be heard by an impartial tribunal — the Judge was unable to give any credible explanation of his conduct which was consistent with and justified his testimony before the First Committee. We conclude he is simply unwilling to provide a truthful explanation. He failed to do so before the Committee and he failed to do so in his written submissions to Council.

Report to Minister, at paragraphs 58–59; AB, Vol. 9, tab 74, at pages B-6184 and B-6185.

[46] Once again, not accepting a party's submissions is not tantamount to not considering them. The Council had complete authority to consider, weigh and ultimately reject the explanations given by Justice Girouard. That is precisely its role.

[47] I would add that the Council's recommendation must be read in light of the reasons of the second Inquiry Committee on the preliminary motions and in light of the second Inquiry Committee's report. Several of the procedural and jurisdictional arguments raised by Justice Girouard in his submissions to the Council had already been addressed by the Committee in its two decisions, and the Council explicitly adopted the reasons given in those decisions in its own decision (*Report to Minister*, at paragraphs 23; AB, Vol. 9, tab 74, at page B-6178).

[48] In short, I am of the view that Justice Girouard's allegation that the Council did not take into account his submissions or the evidentiary record is unfounded. The appellant's allegation that the Federal Court erred in finding that he did not provide the second Inquiry Committee with any explanation for the credibility issues identified in his testimony is no more acceptable. It was not enough to reiterate his version of the facts and his explanation of what took place during the 17 seconds captured on video to establish that the second Inquiry Committee (and, subsequently, the Council) had erred in their description and understanding of the facts. As the Supreme Court noted in *Vavilov* (at paragraph 125), it is up to the administrative decision maker to assess the evidence before it, and, barring exceptional circumstances, a reviewing court will not set aside findings of fact. In this case, the Federal Court was correct to conclude that the appellant had not met his burden of proof and had provided no evidence of such exceptional circumstances.

[49] Lastly, the appellant also submitted that the Ministers of Justice decided to request a second inquiry for strictly political reasons, relying essentially on substantially redacted briefing notes. For the reasons given by the Federal Court at paragraphs 140 to 145 of its decision, I am of the opinion that the appellant did not succeed in rebutting the presumption that the Minister and attorneys general are presumed to perform their duties and make their decisions in the public interest: *Cosgrove*, at paragraph 51.

[50] It is common practice within the apparatus of government to inform ministers of the different options available to them and of their respective advantages and disadvantages, and to make recommendations. It goes without saying that ministers must be aware of the potential economic, legal and political impacts of their decisions. However, there is no basis for concluding, on reading the joint letter from the Ministers, that their decision to request a second inquiry was based on essentially political reasons instead of on the importance of ensuring public confidence in the integrity of the judiciary.

C. *Were the two inquiries concerning Justice Girouard separate from one another?*

[51] Counsel for Justice Girouard vigorously argued that the principles of procedural fairness were not respected in the second inquiry. Counsel for Justice Girouard placed particular emphasis on an alleged violation of the principle of the separation of functions arising from the fact that Chief Justice Drapeau and Chief Justice Joyal sat on both the Review Panel for the first complaint and the Inquiry Committee for the second complaint, that Chief Justice MacDonald constituted the Review Panel for the first complaint and subsequently chaired the deliberations of the second panel of the Council, that 13 Council members participated in both panels of the Council, and that the Executive Director of the Council assumed several roles throughout the inquiry. Counsel for Justice Girouard also alleged that the second inquiry was contrary to the principle of estoppel, which bars the reopening of cases. In my view, those arguments do not stand up to analysis and rest on the erroneous premise that the first and second inquiries are one and the same, or that the second inquiry was simply an extension of the first inquiry; the Federal Court was correct to reject these arguments.

[52] The principle of the separation of functions arises from the need to ensure that a decision-making process is free of any apprehension of bias. In *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, (1996), 140 D.L.R. (4th) 577, the Supreme Court noted that the overlapping of functions could be problematic when an administrative agency performs investigative and adjudicative functions. Such an agency may as an institution, participate in the investigation, summoning and adjudication process without any problem, but that is not the case when the same director is involved in each of these steps. Some form of separation between directors is necessary so as not to cause an informed person to have a reasonable apprehension of bias.

[53] There is no doubt that it was pursuant to this principle that paragraph 3(4)(c) of the 2015 By-laws, which stipulates the following, was adopted:

> **3** …
>
> **Persons not eligible to be members**
>
> **(4)** The following persons are not eligible to be members of the Inquiry Committee:

…

> **(c)** a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted.

[54] Justice Girouard argues that this provision was violated because both inquiries dealt with the same issue, namely his credibility. In his opinion, the Council erred in its interpretation of that provision in finding that it applies only to the extent that the Inquiry Committee was established to investigate the issues reviewed by the Review Panel with regard to the same complaint, which the Council found was not the case. Like the Federal Court, I find that this argument by Justice Girouard cannot be accepted.

[55] In finding as it did that the 2015 By-laws do not prevent a person from sitting as a member of an inquiry committee unless that person was on the review panel that deliberated on the appropriateness of establishing that inquiry committee, the Council was simply agreeing with the ruling of the second Inquiry Committee (Council's Report to the Minister, at paras. 29–32; AB, volume 9, tab 74, at p. B-6179). In its reasons concerning the preliminary motions, the second Inquiry Committee justified its position as follows:

> … a reasonable interpretation of paragraph 3(4)(c) of the *By-laws* leads to the conclusion that it applies to an Inquiry Committee whose mandate is to investigate issues identified by the Review Panel. Therefore, it does not apply at all to the matter at hand, since the request for an inquiry made by the Ministers in June 2016 triggered a new inquiry dealing with issues separate from those that were reviewed by Chief Justice Drapeau and Chief Justice Joyal within the context of the Review Panel which considered the complaint made by the former Chief Justice of the Superior Court of Quebec, the Honourable François Rolland.
>
> *Decision of the Committee on the preliminary motions*, April 4, 2017, at paragraph 126; AB, Vol. 12, tab 87, at page B-6845 (emphasis added).

[56] The appellant has not convinced me that this interpretation of paragraph 3(4)(c) of the 2015 By-laws, adopted by the Council and confirmed by the Federal Court, is unreasonable and is not defensible in respect of the applicable facts and the law. In any event, the more fundamental issue is whether an informed person could have a reasonable apprehension of bias as a result of the fact that judges involved in the first

inquiry process also participated in the second process, as members of either the Review Panel or the Council.

[57] As previously mentioned, Justice Girouard's arguments with regard to the Council's lack of impartiality in the review of the second complaint rests on the premise that the two inquiries were in fact one inquiry. In my view, this argument does not stand up to analysis, and it was rightly rejected by the second Inquiry Committee in its decision on the preliminary motions, by the Council itself and by the Federal Court.

[58] What was at issue in the first inquiry was the alleged purchase by Justice Girouard (when he was still a lawyer) of an illicit substance, a transaction captured on a video recording. It is true that in its Report on the first complaint, the Review Panel raised doubt as to Justice Girouard's credibility after he provided [TRANSLATION] "troubling" explanations for those images. The Review Panel stated the following: [TRANSLATION] "[t]o the extent that it could be proved that Justice Girouard had tried to mislead the … Council, in response to requests for comments with regard to his conduct, this could, in itself, amount to serious misconduct with respect to the integrity that is required of all judges". It therefore stated that the constitution of an inquiry committee to look into the matter was justified (Report of the Review Panel, at paragraph 26; AB, Vol. 4, tab 33, at page B-210). This warrants two comments.

[59] First, the function of the Review Panel was to review the allegations that gave rise to the complaint; in this case, Chief Justice Rolland's concern related essentially to Justice Girouard's alleged purchase of an illegal substance prior to his appointment to the judiciary. However, the Review Panel's mandate was not limited by the allegations that gave rise to the complaint. As the Review Panel noted, citing an excerpt from the decision of another inquiry committee, any other information that could affect a judge's ability to sit as a judge could also be relevant for the purposes of a review at that stage (Report of the Review Panel, at paragraph 9; AB, Vol. 4, at page B-206). In fact, the Review Panel identified in its Report a number of other concerns that it considered to warrant a more thorough review by an inquiry committee (see, in particular, paragraphs 19, 20, 28 and 30 of the Report of the Review Panel).

[60] Second, it is important not to lose sight of the Review Panel's mandate. As the Federal Court noted, a review panel's role is not to arrive at firm conclusions as to whether the Council should recommend that a judge be removed, but rather to determine whether an inquiry committee should be formed to fully investigate all of the allegations made against a judge. That was precisely how the Review Panel that was established after the first complaint described its role:

> [TRANSLATION] A review panel's mandate is not to decide questions of evidence. Its mandate is to gather information and to decide, in light of this information, how to proceed, in accordance with the provisions of the Act, the By-laws and the Procedures. This step is part of a "screening procedure", as described by the Federal Court of Appeal in *Cosgrove*, 2007 FCA 103.
>
> Report of the Review Panel, at paragraph 8; AB, Vol. 4, tab 33, at page B-206.

[61] The eight initial allegations identified by the independent counsel made reference to all of the Review Panel's concerns. The seventh allegation, in particular, was that "[o]n or about January 11, 2013 and on or about August 14, 2013, Justice Girouard tried to mislead the Canadian Judicial Council by providing explanations that concealed the truth about the video recording of the transaction on September 17, 2010" (Report of the first Inquiry Committee, at page 8; AB, Vol. 5, tab 43, at page B-4953). That allegation was subsequently withdrawn because it was to some extent subsumed under the third allegation; the fifth allegation and the eighth allegation were also withdrawn. All of the allegations that were retained and restated therefore concerned Justice Girouard's conduct when he was a lawyer or his submissions to the Council before the decision to constitute a review panel was made, and not his credibility or conduct before the Review Panel.

[62] The Inquiry Committee subsequently decided to first examine the third allegation relating to Justice Girouard's alleged purchase of an illicit substance from one of his clients; that was the transaction that was captured on a video recording. Having unanimously found that the allegation in question had not been proven on a balance of probabilities, the Committee concluded that it would be inappropriate to continue the inquiry into the other allegations.

[63] Two of the three members of the Inquiry Committee nevertheless found that the contradictions, inconsistencies and implausibilities in Justice Girouard's testimony raised serious doubts as to his credibility and recommended that he be removed on the grounds that he had deliberately tried to mislead the Committee. The third judge, in dissent, was of the opinion that the contradictions noted by his colleagues could be explained and were not sufficiently serious to give rise to real doubt about his credibility.

[64] It is not for me to comment on those findings. However, I cannot help but make the following remarks. It may seem paradoxical to conclude that there was no drug transaction (at least on the balance of probabilities), but that Justice Girouard misled the Committee. As the Council noted in its first Report to the Minister, the reasoning of the majority does not make it possible to resolve this dilemma (Council's *Report of the Canadian Judicial Council to the Minister of Justice*, dated April 20, 2016, at paragraph 45; AB, Vol. 5, tab 44, at page B-5011).

[65] I also note that the first Inquiry Committee relied, erroneously, on decisions rendered in a criminal law context to state that the fact that a testimony is not accepted by reason of a lack of reliability or credibility cannot establish, in itself, a fact in dispute. In civil matters, as the second Inquiry Committee noted, the judge may consider the assertions of a party deemed not to be credible as denials and the party's denials as admissions: see *Stoneham and Tewkesbury v. Ouellet*, [1979] 2 S.C.R. 172, at page 195, 278 N.R. 361, cited in the Report of the second Inquiry Committee, at paragraph 88 (AB, Vol. 13, tab 91, at page B-6952).

[66] Lastly, it is important to emphasize the fact that the misconduct for which the majority criticized Justice Girouard was not that which formed the subject matter of allegations three or seven. Undoubtedly, that is why Chief Justice Chartier found that it would be more in accordance with procedural fairness to provide Justice Girouard with another opportunity to respond to the concerns identified by the majority judges, namely by means of a new allegation.

[67] The Council did not accept that suggestion and simply accepted the Committee's finding that the third allegation had not been proven on a balance of probabilities. As for

the conclusions of the majority and of the minority of the Committee concerning Justice Girouard's testimony, the Council dealt with them as follows:

> In this Report, we do not consider the majority's conclusion that the judge attempted to mislead the Committee by concealing the truth and that such conduct places him in a position incompatible with the execution of his office. The Council takes this approach because the judge was not informed that the specific concerns of the majority were a distinct allegation of misconduct to which he must reply in order to avoid a recommendation for removal.
>
> Because the judge was entitled to this kind of notice and did not get it, the Council does not know whether the majority's concerns would have been resolved had it received an informed response to them from the judge.
>
> Because we do not know if the majority's concerns would have been resolved, the Council, itself, cannot act upon the majority's concerns as if they were valid.
>
> *Report of the Canadian Judicial Council to the Minister of Justice*, at paragraphs 42–44; AB, Vol. 5, tab 44, at page B-5011.

[68] It was the ministers of Justice who acted on the majority's concerns. In the ministers' request to the Council to conduct a new inquiry, it is clear that the objective was to shed light on the findings of misconduct during the inquiry that were made by the majority. According to the ministers, it was necessary to conduct a new inquiry not only to "determine whether Justice Girouard is guilty of misconduct or has otherwise become incapacitated from the due execution of the office of judge … as a result of his conduct during the inquiry", but also because it was the course of action that is "fair to Justice Girouard" (*Joint letter from Ministers* of Justice received by the Council on June 14, 2016; AB, Vol. 5, tab 45, at page B-5016; emphasis added). The four allegations examined by the second Inquiry Committee (reproduced at paragraph 14 of these reasons) also involve Justice Girouard's conduct during the first inquiry.

[69] In short, I find that the second complaint was fundamentally different from the first: it concerned different allegations and covered different periods. The first concerned essentially the purchase of an illicit substance, while the second related only to the testimony the appellant gave years later during the first inquiry. Although there may be some overlap between the two, and the first inquiry was what triggered and served as a backdrop for the second, I am satisfied that a reasonable person properly informed of

the circumstances would not believe that the decision makers involved in the second complaint were incapable of making a fair decision.

[70] For the same reason, I would reject Justice Girouard's argument based on the principles of estoppel and *res judicata*. Counsel for Justice Girouard argued that the Council had already decided on their client's credibility at paragraph 46 of its first Report when it wrote that it "would in any event have been unable to act on the majority's findings" given the dilemma in the majority's conclusions, which I alluded to earlier, the unanimous rejection of the third allegation based on a lack of sufficient evidence, and "in light of the minority conclusion about the judge's credibility" (emphasis added). In my view, this last phrase falls well short of meeting the requirements of estoppel and *res judicata*. A close reading of paragraphs 42 to 46 of the Report shows that the comment by Chief Justice Chartier is clearly *obiter*. The phrase that introduces paragraph 45 ("Although unnecessary for purposes of our conclusions"), which must be read together with paragraph 46, leaves no doubt in this regard. Moreover, paragraph 42, reproduced above at paragraph 67 of these reasons, clearly indicates that the Council expressly decided not to consider the findings of the majority of the Committee regarding Justice Girouard's attempt to mislead the Committee. In so doing, the Council accepted Justice Girouard's argument that the recommendation for removal by the majority of the first Committee Inquiry was *ultra petita* because it was founded on concerns that were not included in the notice of allegations that the Committee was required to investigate, and because he had not had the opportunity to respond to them (*Decision of the Committee on preliminary motions* of the second Inquiry Committee, at paragraph 63; AB, Vol. 3, tab 21, at page B-46). Consequently, it cannot be argued that the Council addressed the issues that concerned Justice Girouard's conduct during the first inquiry and that were the subject matter of the allegations underlying the second complaint.

[71] Lastly, it is important to keep in mind that the Council's decisions are not binding; it only has the authority to make recommendations under sections 63 to 65 of the Act. That being the case, the Report prepared by the Council pursuant to section 65 cannot be likened to a decision that definitively resolves a dispute, and therefore the doctrines of estoppel or *res judicata* cannot apply: see *Gratton v. Canadian Judicial Council*,

[1994] 2 F.C. 769, at page 801, (1994), 115 D.L.R. (4th) 81; *Taylor v. Canada (Attorney General)*, [2002] 3 F.C. 91 [cited above], at paragraph 49.

[72] I am therefore of the view, for all of the foregoing reasons, that the two inquiries are separate, that the principles of the separation of functions and of estoppel were not violated, and that a reasonable and informed person would not believe that the Council, whether consciously or unconsciously, would not render a fair decision.

D. *Was the appellant's right to procedural fairness respected?*

[73] The appellant argued that his right to procedural fairness was violated on several occasions. He complains namely that the 2015 By-laws no longer provide for the appointment of independent counsel as was the case under the previous By-laws (the 2002 By-laws), that the second Inquiry Committee denied him the right to refer to the compendium prepared by his counsel during his cross-examination, that the burden of proof was reversed a number of times during the second inquiry, and lastly that not all of the Council members had access to the same documentation because the transcript of the oral evidence was not translated into English and he was unable to make submissions in that regard.

[74] Except with respect to the last of those arguments, I will simply make very brief comments to the extent that I generally agree with how they were dealt with by the Federal Court and by the second Inquiry Committee in its reasons on the preliminary motions.

[75] With regard first to the elimination of independent counsel following the coming into force of the 2015 By-laws, Justice Girouard alleges that this is a violation of the rules of procedural fairness, relying on *Cosgrove*. It is true that in that case this Court identified the presence of independent counsel as one of the five factors for establishing the fairness of inquiries conducted by the Council (at para. 65). Clearly, that does not mean that the absence of one of those factors is fatal to the fairness of the entire process.

[76] As the second Inquiry Committee and the Federal Court noted, the Supreme Court gave its approval to a very similar procedure put in place by the *Courts of Justice Act* in *Therrien* and *Ruffo*. Like section 4 of the 2015 By-laws and sections 3.2 and 3.3 of the Handbook of Practice, section 281 of the *Courts of Justice Act* provides that Quebec's Conseil de la magistrature may retain the services of an advocate to assist the committee of inquiry, and section 22 of the [TRANSLATION] Rules of practice for the conduct of an inquiry committee stipulates that counsel retained by the inquiry committee is the advisor to the committee and intervenes under the authority of its chairperson. After citing the passage of *Ruffo* reproduced at paragraph 36 of these reasons, the Supreme Court wrote the following in *Therrien* [at paragraph 104]:

> I would also add that the committee's recommendation is not final with respect to the outcome of the disciplinary process, which then falls within the jurisdiction of the Court of Appeal and thereafter, if applicable, the Minister of Justice: *Ruffo*, *supra*, at para. 89. Accordingly, the role played by the independent counsel neither violates procedural fairness nor raises a reasonable apprehension of bias in a large number of cases in the mind of an informed person viewing the matter realistically and practically, and having thought the matter through.

[77] I find that these two Supreme Court decisions are an unequivocal response to the appellant's arguments concerning the role of the lawyer in the second Inquiry Committee.

[78] Justice Girouard's argument based on the second Inquiry Committee's refusal to allow him to consult a compendium during his cross-examination must also be rejected, for the reasons stated by the Federal Court. That compendium, prepared by counsel for Justice Girouard, contained excerpts of the testimony he had given before the first Inquiry Committee and described how the first Inquiry Committee addressed them. Contrary to Justice Girouard's arguments, that instrument was not an essential part of his submissions; the excerpts it contained had already been admitted into evidence, and it was therefore simply a tool to assist Justice Girouard in his presentation before the second Inquiry Committee. In this regard, it was for the Committee to determine how it could be used, and its decision is perfectly consistent with its responsibility to manage the proceedings. The decision that the second Inquiry Committee made does not

involve procedural fairness, but relates solely to the proper conduct of the cross-examination.

[79] I am also of the view that the Federal Court was correct in dismissing Justice Girouard's argument that he was the victim of a reversal of the burden of proof at each stage of the process. Justice Girouard reiterated to this Court the same arguments that he made to the Federal Court, without indicating how the manner in which Justice Rouleau addressed them was erroneous.

[80] In fact, Justice Girouard's arguments are based on a misunderstanding of the role of the second Inquiry Committee and of the Council. The second Inquiry Committee was well aware of the unique nature of the proceeding before it and, after careful consideration, arrived at the conclusion that "it was appropriate to accept the findings of the majority underlying that Allegation only if it was shown they were both free from error and reasonable, and only to the extent they withstood our assessment of the evidence deemed reliable" (Report of the second Inquiry Committee, at paragraph 5; AB, Vol. 13, tab 91, at page B-6933). That is precisely the approach that the second Inquiry Committee took to arrive at the following conclusion after a lengthy analysis that considered not only the findings of the first Inquiry Committee, but also the explanations of Justice Girouard and Chief Justice Chartier's dissenting opinion:

> We have considered the contradictions, inconsistencies and implausibilities identified by the majority of the First Committee, in the light of the explanations provided by Judge Girouard in his testimony at this inquiry. We find the majority's findings unfavourable to the credibility and integrity of Judge Girouard, which are targeted by the **First Allegation**, are free from error and reasonable. Furthermore, no evidence in the record, including the testimony of Judge Girouard, justifies their setting aside. We adopt them fully and find the facts underlying the **First Allegation** have been established on a strong balance of probabilities, by clear and convincing evidence. Finally, we find the misconduct identified in the **First Allegation** falls within ss. 65(2)(b) and (c) of the Judges Act.
>
> Report of the second Inquiry Committee [November 6, 2017], at paragraph 177; AB, Vol. 13, tab 91, at page B-6981.

[81] I see nothing objectionable in that approach. The second Inquiry Committee's mandate consisted in re-examining the findings of the first Inquiry Committee in light of

the new evidence gathered and namely in light of Justice Girouard's explanations. That is what was done, and I see no reversal of the burden of proof.

[82] The Council is no more guilty of reversing the burden of proof by stating that it would accept the second Inquiry Committee's findings unless it were demonstrated that they were unreasonable. The Council's role is not to hear the evidence again, unless there are palpable and overriding errors, but rather to make its own recommendation in light of the second Inquiry Committee's factual findings. Aside from his disagreement with the findings made by the second Inquiry Committee in its Report, Justice Girouard did not identify any errors that would require the Council to set them aside. As the Supreme Court noted in *Moreau-Bérubé* (at paragraph 70), the inquiry committee is the primary trier of fact and the Council's role is to exercise its judgment as to the appropriate recommendation to be made. That is what the Council did in this case, as indicated in paragraph 21 of its *Report to Minister* of Justice:

> In considering the Report, we gave appropriate weight to the Committee's findings, but considered its recommendations afresh, applying our independent judgement to the facts.
>
> [*Report to Minister*, February 20, 2018, footnote omitted]; AB, Vol. 9, tab 74, at page B-6177.

[83] The only argument by the appellant that merits closer examination is that relating to the breach of procedural fairness that allegedly arose out of the violation of his language rights. That argument has two components. The first is that some of the Council members who were involved in the decision to recommend that he be removed were unable to read the entire record because the transcript had not been translated; Justice Girouard's right to a fair hearing was therefore allegedly not respected as a result of the fact that not all of the Council members who were involved in the decision had access to the same record. The second component of that argument is that Justice Girouard should have been informed of the concerns of the dissenting judges in this regard and been given the opportunity to make submissions. I will address these two claims in order.

[84] It is not disputed that the minutes (meaning the transcripts) of the hearings before the second Inquiry Committee, and thus Justice Girouard's testimony, were not translated (affidavit of Norman Sabourin, at paragraphs 10 and 18; AB, Vol. 11, tab 82, at pages B-6520 and B-6522). It appears that the minutes of the first Inquiry Committee contain more than 4 000 pages, while those of the second Inquiry Committee contain approximately 2 300 pages. However, the second Inquiry Committee's decision on the preliminary motions and its final report, as well as Justice Girouard's submissions regarding that report, were translated and distributed to all of the Council members.

[85] It should be noted that, in Justice Girouard's submissions to the Council, he referred at length to the transcripts of the second Inquiry Committee; all of those quotes were translated because they were an integral part of his submissions. However, no translation was provided of the pages of those transcripts to which Justice Girouard referred only in the footnotes of his submissions. The same is true of the Report of the second Inquiry Committee: the Committee's summary of the testimony was obviously translated, but the excerpts on which it relied and to which it referred in the numerous footnotes were not translated.

[86] In his affidavit, Norman Sabourin, the Council's Executive Director, testified that [TRANSLATION] "it was open to any member of the Council to request the translation of additional excerpts" (certified tribunal record, at paragraph 33; AB, Vol. 11, tab 82, at page B-6524). However, the specific mechanism for obtaining such a translation is unclear; in particular, it is unclear whether a translation will be provided each time a member requests it or whether the request must be sent to the Council, and the Council will make the final decision on the appropriate response to that request. What is clear is that a translation was requested and obtained of approximately 10 pages of the minutes referred to in Justice Girouard's submissions before the Council and of the decision not to admit an examination of Justice Girouard's nasal septum into evidence (Justice Girouard's submissions, at paragraph 190; AB, Vol. 14, tab 95, at page B-9171).

[87] Justice Girouard adopts the opinion of the Council's dissenting judges that all of the Council members had to have access to the same information during their

deliberations so that they could consider the Inquiry Committee's recommendations using their own judgment. Chief Justice Smith, Associate Chief Justice O'Neil and Chief Justice Bell stated the following in this regard:

> …. That record included a French language transcript of the oral evidence before the Inquiry Committee. That transcript was provided to all members of the Council deliberating in this matter. The Report of the Inquiry Committee itself dated 6 November 2017 is replete with references to the transcript of proceedings before it in May 2017. The transcript is therefore relied upon extensively by the Inquiry Committee and forms part of the record. To the same effect, counsel for Justice Girouard relied upon and made frequent references to the transcript of proceedings before the Inquiry Committee. If Council is held to respect the principle that "he who decides must hear," then surely, he who decides on the strength of a written record, which includes a transcript, must be able to read the transcript.
>
> *Dissent* [February 20, 2018], at paragraph 3; AB, Vol. 9, tab 75, at page B-6193.

[88] In my humble opinion, that argument is based on a misunderstanding of the respective roles of the inquiry committee and the Council. The Act expressly provides for the Council's ability to constitute an inquiry committee and to make by-laws respecting the conduct of its inquiries and investigations (Act, at subsection 63(4) and paragraph 61(3)(c)). That is precisely what the Council did in the 2015 By-laws (sections 5–8) by delegating to an inquiry committee the task of hearing the evidence, determining the facts and reporting on those facts to the Council. It is clear that it is for the inquiry committee to hear the evidence, determine the facts and report on the facts to the Council.

[89] It would be contrary to the logic of that two-step procedure to argue that the Council must then re-examine all of the facts gathered by the inquiry committee. If that were the case, the Council would essentially be repeating the exercise entrusted to the inquiry committee, and there would be no reason for the inquiry committee to exist. Instead, the Council's role is to make its own recommendation to the Minister in light of the facts as found by the inquiry committee, its recommendation as well as the submissions of the judge in question. This two-step procedure was clearly described in the Council's Report on the conduct of Justice Déziel:

> As noted in *Re Matlow*, the Canadian Judicial Council (Council), when reviewing the report of an Inquiry Committee, is not acting as an appellate tribunal. The process contemplated is a seamless one in which the Inquiry Committee plays a critical role. The

> purpose of an Inquiry Committee is to investigate the complaint made, hear the relevant evidence, make the necessary findings of fact and produce a report documenting the findings made and conclusions reached. The report normally considers whether a recommendation should be made for removal from office. The Inquiry Committee Report is meant to assist and guide the Council in its deliberations. The members of an Inquiry Committee are the ones who hear the evidence from the witnesses testifying before it, and therefore have the chance to observe those witnesses, determine what evidence to accept or reject and to evaluate the weight to be given to that evidence. For this reason, considerable weight is accorded to the findings of the Inquiry Committee.
>
> The existing legislative framework, detailed below, contemplates that the Council will consider the recommendations of an Inquiry Committee afresh, applying its independent judgement to the facts. The Council, however, ought not to interfere with fact findings or inferences made by an Inquiry Committee without good reason. The mandate of the Council at this stage of the proceedings is to consider the Inquiry Committee Report and send its conclusions to the Minister of Justice for Canada. The Council may, in exercising the jurisdiction conferred on it under s. 65(2) of the *Judges Act*, recommend that Justice Déziel be removed from office. While the Council should give serious consideration to the recommendations of an Inquiry Committee on the subject of sanction, the Council is not bound by those recommendations.
>
> *Report of the Canadian Judicial Council to the Minister of Justice*, concerning the Honourable Michel Déziel, December 2, 2015 [at paragraphs 5 and 6].
>
> See also: *Report of the CJC to the Minister of Justice*, concerning the Honourable Theodore Matlow, December 3, 2008.

[90] It is well established that the requirements of procedural fairness vary according to the requirements set out by Parliament itself and the procedural choices an administrative agency may make, particularly when the statute itself recognizes the agency's ability to make its own procedures. It is true that how important a decision is to the affected person must also be taken into account. But, ultimately, what is most important is that administrative decisions are made "using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, at paragraph 22. See also: *Therrien*, at paragraphs 87–89; *Moreau-Bérubé*, at paragraph 81.

[91] In this case, I find that the appellant was given a fair and open procedure and was able to make all of his arguments during the second inquiry. At the risk of repeating myself, the Council was not required to reread the entire transcript to arrive at its own determination of the facts as found by the Inquiry Committee. That was not its role. Its role was instead, as it states at paragraph 21 of its Report [*Report to Minister*, February 20, 2018], to form its own judgment as to the recommendation that must be made to the Minister taking into account both the report of the Inquiry Committee and the submissions of the judge.

[92] Counsel for the appellant argued that the Council could not form an informed opinion as to their client's credibility without being able to read the transcripts of the Inquiry Committee. Once again, that was not the Council's role. Of course, the Council could refer all or part of the matter back to the Inquiry Committee for clarification or a supplementary inquiry. Justice Girouard would have had to draw the Council's attention to errors the Inquiry Committee allegedly committed in its assessment of the facts, primarily on the basis of the excerpts from the minutes. Justice Girouard availed himself of that opportunity on several occasions in his submissions, and the portions of the testimony that he reproduced in support of his arguments were translated. If there were others, it was for him to refer to them explicitly.

[93] In short, I am of the view that all of the Council members had access to the same record before making their decision, that is, the Report of the second Inquiry Committee and Justice Girouard's written submissions. It may have been wiser to have translated all of the excerpts of the minutes to which the Report or Justice Girouard's submissions refer in the footnotes. Perhaps it would even be desirable for all chief justices to have a working knowledge of both official languages. However, the ideal model, or its evocation, cannot suffice as a basis for concluding that the process that was actually followed was unfair. Given the role of the Council under the Act and the 2015 By-laws, a role that neither Justice Girouard nor his counsel could ignore, the burden was on Justice Girouard and his counsel to establish that the Inquiry Committee erred in its credibility assessment; to do so, they could not reasonably expect the Council members to reread all 2 300 pages of the minutes of the second Inquiry Committee (and perhaps

even the 4 000 pages of the minutes of the first Inquiry Committee), or the many pages to which the second Inquiry Committee referred in support of its summary of the evidence, without any indication of the relevance of such an exercise.

[94] In the event that I am wrong about this, and even assuming that all of the minutes should have been translated, the appellant has not demonstrated to us that he suffered any prejudice in this regard. Before both the Federal Court and this Court, counsel for the appellant were unable to provide us with any examples of an error that the second Inquiry Committee allegedly committed in its assessment of the facts or of Justice Girouard's credibility and that could have been corrected upon reading the testimony. At the hearing of this appeal, that question was explicitly presented to counsel for Justice Girouard. They simply reiterated that they were entitled to expect the entire record to be translated because the Council is a federal body. I will return shortly to the Council's language obligations under the Canadian Constitution and the *Official Languages Act*. For the purposes of procedural fairness, however, I consider such a response to be insufficient to warrant this Court's intervention for the purpose of sanctioning a breach of procedural fairness.

[95] I am well aware of the line of decisions according to which any breach of the principles of procedural fairness, particularly of the right to be heard, must result in the incorrect decision being set aside, without regard to the effect the violation might have had on the decision: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at page 660, (1985), 24 D.L.R. (4th) 44, at paragraph 23; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, (1993), 101 D.L.R. (4th) 494, at paragraphs 38–53. However, an exception must be made when the error committed by the administrative agency is not determinative and the result would have inevitably been the same if the violation had not occurred: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, (1994), 115 Nfld. & P.E.I.R. 334, at paragraphs 52–55. Many decisions of this Court are to the same effect: see, in particular, *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 F.C. 317, at paragraph 33; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Cha v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FCA 126,

[2007] 1 F.C.R. 409; *Stevens v. Conservative Party of Canada*, 2005 FCA 383, [2006] 2 F.C.R. 315.

[96] In this case, there is no doubt in my mind that the appellant had every possible opportunity to argue his point of view. Justice Girouard was heard during an eight-day hearing before the second Inquiry Committee, filed a number of applications for judicial review, made submissions before both the Inquiry Committee and the Council and therefore had every opportunity to present his version of the facts. When asked how Justice Girouard's testimony could have led to the Council members re-examining the second Inquiry Committee's findings of fact or of credibility, counsel were unable to provide even one example in support of their claims. It is therefore not a question here of speculating on the impact that a particular untranslated portion of the testimony might have had on the outcome of the dispute. Instead, what Justice Girouard is asking us to do is to assume that if the Council members had read his testimony, they might have set aside findings made by the Inquiry Committee, without even providing us with any indication or explanation in this regard. Under the circumstances, and considering that this case has already required considerable resources over a nearly eight-year period, it seems to me that the Federal Court did not err by refusing, in the exercise of its discretion, to set aside the Council's decision.

[97] Lastly, the appellant's argument that his right to be heard was not respected because he was not informed of the concerns of the minority of the Council regarding the fact that the entire record was not translated, must also be rejected. The *audi alteram partem* rule is a judicial creation that has developed over the centuries essentially to give parties the opportunity to respond to the evidence presented against them. For example, it is from this perspective that the Supreme Court found, in *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105, (1980), 110 D.L.R. (3d) 311, that the members of an administrative tribunal cannot hear new evidence in the absence of the parties.

[98] However, the rule is less strict when dealing with questions of law, as the Supreme Court noted in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990]

1 S.C.R. 282, (1990), 68 D.L.R. (4th) 524 (*Consolidated-Bathurst*). In that case, the right to be heard does not require a court (much less an administrative tribunal) to allow the parties to argue their point of view each time a legal argument to which the parties did not allude in their arguments arises in the deliberations:

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, ***de Smith's Judicial Review of Administrative Action*** [4th ed. 1980], at p. 158. It is true that on factual matters the parties must be given a "fair opportunity … for correcting or contradicting any relevant statement prejudicial to their view" …. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very existence is the specialized knowledge and expertise which they are expected to apply.
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> *Consolidated Bathurst*, at page 339.

[99] It is true that courts, and this Court in particular, often invite parties to make additional submissions on questions of law that were not addressed by the parties or even anticipated during the hearing. This is the case, for instance, when such a question could be determinative to the outcome of the dispute or raises new questions of fact, or in cases where the Court finds that the parties could advantageously assist the Court and contribute to its consideration. Procedural fairness will generally be best served by allowing the parties to address any issue where the outcome could be unfavourable to them. However, ultimately, the question of whether the right to be heard requires additional submissions must be assessed on a case-by-case basis.

[100] In this case, the Federal Court did not err in finding that the Council was not required to hear Justice Girouard on the translation issue. First, Justice Girouard simply adopted the position taken by the minority judges of the Council, and there is nothing before me to suggest that he could have added to the debate and brought new elements to the attention of the Council members that they had not considered. Second, and more fundamentally, breaches of procedural fairness of which a party became aware following the decision of an administrative agency must be raised before the

reviewing court and not before the administrative agency itself: see *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4th) 260, 1993 CarswellOnt 872 (Ont. Gen. Div.) revd on other grounds by the Court of Appeal for Ontario ((1995), 23 O.R. (3d) 431, 995 CarswellOnt 502), leave to appeal [to S.C.C.] refused ((1995), 195 N.R. 399). Lastly, I would add that Justice Girouard suffered no prejudice as a result of not being informed of the opinion of the minority judges of the Council and being unable to take a position in this regard, in light of the conclusion I have reached not only regarding the need to translate the minutes but also with respect to the entire record.

E. *Were the appellant's language rights respected?*

[101] The appellant recognizes that section 133 of the C.A., 1867, sections 14 and 19 of the Charter and sections 14 to 16 of the *Official Languages Act* do not apply to the Council because it is not a court within the meaning of those provisions. In any event, Justice Girouard was given the opportunity to argue his case and testify in the official language of his choice, and those provisions were therefore respected. The appellant also acknowledges that he cannot avail himself of section 20 of the Charter and section 22 of the *Official Languages Act* because the language rights guaranteed by those statutes in the delivery of public services do not apply here.

[102] The only argument the appellant put forward before us is based on subsection 16(1) of the Charter, under which French and English "have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." According to Justice Girouard, this Court should recognize that this provision confers substantive rights and can fill the gaps of the other provisions guaranteeing language rights in the Charter.

[103] In my view, this argument is erroneous, and, moreover, the appellant did not cite any decisions in support of his claim. Subsection 16(1) of the Charter is a provision that is declaratory or interpretive in nature, and it is not for this Court to change the state of the law on this issue. In any event, the equality of status and equal rights and privileges for both official languages enshrined in that provision have been completely respected,

and the appellant's right to communicate with the second Inquiry Committee and the Council in the official language of his choice was in no way fettered. What the appellant is claiming is the right to be understood by the decision-maker in the language of his choice. As the Supreme Court noted in *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, at page 580, (1986), 27 D.L.R. (4th) 406 and *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at pages 500–501, (1986), 27 D.L.R. (4th) 321, this right does not fall within the ambit of section 16 of the Charter but rather within the procedural safeguards. Contrary to the arguments of counsel for the appellant, this aspect of the aforementioned judgments was not rejected by the Supreme Court at paragraph 41 of *R. v. Beaulac*, [1999] 1 S.C.R. 768, (1999), 173 D.L.R. (4th) 193. It is one thing to say that language rights must be interpreted "purposively, in a manner consistent with the preservation and development of official language communities in Canada" (at paragraph 25); it is another to use subsection 16(1) to add rights and fill what could be perceived as gaps in the range of the rights protected at sections 16 to 23 of the Charter.

[104] For these reasons, I agree with the Federal Court that the appellant's language rights were not violated.

F. *Are section 60, paragraph 61(3)(c) and sections 63 to 66 of the Act and the by-laws enacted under the authority of paragraph 61(3)(c) of the Act constitutionally valid?*

[105] Justice Girouard argues, as he did before the Federal Court, that the inquiry process concerning superior court judges is related to the administration of justice and therefore falls under provincial jurisdiction pursuant to subsection 92(14) of the C.A., 1867. Consequently, the provisions of the Act that deal with the management of complaints against superior court judges, the determination of their admissibility, the constitution of a body responsible for handling those complaints, the conduct of the inquiries and the preparation of the resulting report are purportedly *ultra vires* Parliament's legislative jurisdiction. He consequently is seeking to have the following provisions declared unconstitutional: section 60, paragraph 61(3)(*c*), and sections 63 to

66 of the Act, subsections 1.1(2) and 5(1) of the 2002 By-laws, subsections 2(1), 3(1), 3(2), 3(3), section 4 and subsection 5(1) of the 2015 By-laws, and sections 3.1, 3.2 and 3.3 of the Handbook of Practice.

[106] This argument was unequivocally rejected by the Federal Court, and I entirely agree with Justice Rouleau's reasons that led to that finding. There is no doubt in my mind that Part II of the Act and its by-laws constitute the implementation of the power to remove superior court judges that subsection 99(1) of the C.A., 1867 assigns to federal authorities. It would be completely illogical for those authorities to be given the power to remove superior court judges, but not the power to establish the inquiry process leading up to it that is required in order to respect judicial independence and its corollary, security of tenure. If Justice Girouard's argument were accepted, a province could completely neutralize the power of the Governor General, on address of the Senate and House of Commons, to remove a judge for misconduct by simply not providing an investigatory mechanism. Such a result would be untenable, and any interpretation of the constitutional text giving rise to such a result must be rejected.

[107] The provisions of the Constitution must be read as a consistent whole, and each provision must be interpreted in light of the others. This means, *inter alia*, that the scope of subsection 92(14) of the C.A., 1867 must be determined on the basis of the other related powers found in other provisions, namely in sections 96 to 100, and of the structure of government that those provisions are intended to implement. The Supreme Court has had many occasions to reiterate this principle, notably in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31:

> First, particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole. Thus s. 92(14) does not operate in isolation. Its ambit must be determined, not only by reference to its bare wording, but with respect to other powers conferred by the Constitution. In this case, this requires us to consider s. 96 of the *Constitution Act, 1867*.
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> Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that "flow by necessary implication from those terms" …. As this Court has recently stated, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are

> intended to interact with one another must inform our interpretation, understanding, and application of the text"…. [Emphasis in original.]

[108] In stipulating that the Governor General appoints judges of the superior courts and has the authority to remove them (on address of the Senate and House of Commons) and that Parliament fixes and provides their salaries, the C.A., 1867 clearly ousts provincial jurisdiction on any matters relating to these issues. It goes without saying that a purposive reading of sections 96 to 100 must lead us to conclude that the inquiry process prior to a removal must also fall within the authority of Parliament.

[109] In closing, I would add that the constitutionality of the provisions under attack by Justice Girouard is not being challenged by the third party. When asked about this at the hearing, counsel for the Attorney General of Quebec stated that he was in agreement with the position put forward by the Attorney General of Canada on this issue. Although this is not a determinative element and the courts are clearly not bound by this common approach, it is nevertheless an indicator that must be considered in the examination of the constitutionality of a legislative provision: see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paragraph 72, citing *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, at pages 19–20, 44 D.L.R. (4th) 193.

V. Conclusion

[110] For all of the foregoing reasons, I would dismiss the appeal, without costs.

GLEASON J.A.: I agree.

LOCKE J.A.: I agree.